UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EGAN-JONES RATING COMPANY and SEAN EGAN Plaintiffs,	:	12-cv-00920 (ABJ)
v.	:	
UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.	:	

MOTION TO DISMISS COMPLAINT

For the reasons stated in its memorandum of law, Defendant United States Securities and Exchange Commission moves this Court to dismiss the Complaint with prejudice on the grounds that this Court lacks subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and that the Complaint fails to state

a claim for which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

Dated: August 17, 2012
Washington, D.C.

Respectfully submitted,

RICHARD M. HUMES
Associate General Counsel
D.C. Bar # 271627

SAMUEL M. FORSTEIN
Assistant General Counsel
D.C. Bar # 961912

/s/
CHRISTOPHER M. BRUCKMANN
Senior Counsel
D.C. Bar # 491136
Attorneys for Defendant
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9612
Telephone: (202) 551-5104 (Bruckmann)
Facsimile: (202) 772-9263
bruckmannc@sec.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EGAN-JONES RATING COMPANY and SEAN EGAN Plaintiffs, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.	:	12-cv-00920 (ABJ)

MEMORANDUM OF LAW IN SUPPORT OF THE SEC'S MOTION TO DISMISS THE COMPLAINT

RICHARD M. HUMES
Associate General Counsel

SAMUEL M. FORSTEIN
Assistant General Counsel

CHRISTOPHER M. BRUCKMANN
Senior Counsel

Attorneys for Defendant
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9612
Telephone: (202) 551-5104
Facsimile: (202) 772-9263

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Court Cases **Page**

* Indicates authorities on which the SEC chiefly relies.

Federal Court Cases **Page**

Federal Court Cases **Page**

SEC Proceedings **Page**

SEC Proceedings **Page**

Federal Statutes **Page**

Federal Statutes **Page**

Federal Rules **Page**

SEC Rules of Practice **Page**

SEC Rules of Practice **Page**

PRELIMINARY STATEMENT

Plaintiffs' Complaint is an improper attempt to mount an interlocutory judicial challenge to an ongoing Securities and Exchange Commission administrative proceeding. It should be dismissed because the Court lacks jurisdiction to hear the matter and because the Complaint fails to state a claim.

The Securities and Exchange Commission is the federal agency that is primarily responsible for regulating the nation's capital markets. Members of one class of entities that impacts those markets, credit rating agencies, can choose to become registered with the SEC as Nationally Recognized Statistical Rating Organizations ("NRSROs").[1] NRSROs evaluate the creditworthiness of various financial products that are traded in the securities markets and the entities that issue those products. Plaintiff Egan-Jones is an NRSRO; plaintiff Sean Egan is its principal.[2]

The SEC's Division of Enforcement is actively prosecuting an administrative proceeding against Egan and Egan-Jones. In the order instituting that proceeding, the Division of Enforcement alleges, among other things, that Plaintiffs violated the federal securities laws by making willful and material misrepresentations in an application to register with the SEC to rate certain securities. Among the relief sought are cease-and-desist orders and civil penalties. That proceeding is currently in the discovery phase, and a hearing before an SEC Administrative Law Judge

[1] Complaint ¶ 100; 15 U.S.C. § 78c(a)(61).

[2] Complaint ¶¶ 10, 11, 14.

("ALJ") is scheduled to commence on November 13, 2012. Plaintiffs have asserted as affirmative defenses in that proceeding essentially the same allegations they rely upon in asking this Court to enjoin the SEC from conducting the proceeding and to "remove" the proceeding to federal court.

This Court lacks jurisdiction over the Complaint because no statute—including the Administrative Procedure Act[3] ("APA")—waives the SEC's sovereign immunity to permit interlocutory challenges to SEC administrative proceedings in district courts. Indeed, Congress has prescribed a specific statutory review provision for challenging SEC orders entered in its administrative proceedings: Section 25(a) of the Securities Exchange Act,[4] which provides that a person aggrieved by a final order entered in an SEC administrative proceeding may file a petition for review with a court of appeals. Where Congress has provided such special statutory review provisions, the Supreme Court and the Court of Appeals for the District of Columbia Circuit have repeatedly rejected attempts, such as Plaintiffs' here, to have district courts enjoin ongoing or anticipated administrative proceedings.[5]

---

[3] 5 U.S.C. § 701 *et. seq.*

[4] 18 U.S.C. § 78y(a).

[5] *See, e.g., FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 243 (1980); *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 732 (D.C. Cir. 2003).

Nor can Plaintiffs establish that their claims fall within that narrow exception, recognized by the Supreme Court in *Free Enterprise Fund v. PCAOB,*[6] to the rule that litigants must ordinarily seek review of a final agency action in a court of appeals. There, the Court reiterated that "[g]enerally, when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive."[7] It found, however, that immediate review may be available where, among other things, the issues are "wholly collateral" to provisions for reviewing an agency's orders and, in the absence of such immediate review, the respondent will have no opportunity for meaningful review.[8] Egan and Egan-Jones cannot meet that test because the affirmative defenses to the administrative proceeding that they seek to litigate in this Court are not wholly collateral to the statutory review scheme provided in Section 25(a), and they can obtain meaningful judicial review of any final SEC order in a court of appeals.

Even assuming the Court finds it has jurisdiction, it should not grant the requested injunctive or declaratory relief—or "remove" the administrative proceeding to this Court—as Plaintiffs have an adequate remedy at law and will not suffer irreparable harm in the absence of immediate relief.

---

[6] 130 S. Ct. 3138 (2010).

[7] *Id.* at 3150 (quoting *Whitney Nat'l Bank v. Bank of New Orleans Trust Co.*, 379 U.S. 411, 420 (1965)).

[8] 130 S. Ct. at 3150 (citations and quotations omitted).

BACKGROUND

As one of the principal focuses of the Complaint is Plaintiffs' contention that the administrative forum in which their affirmative defenses will be addressed lacks "critical procedural safeguards available in [the] judicial system,"[9] we outline the processes governing SEC administrative proceedings and the key filings to date in that administrative proceeding.[10]

A. Administrative Proceedings Before the SEC

The SEC's Rules of Practice set forth the procedures governing its administrative proceedings.[11] In every proceeding, the SEC issues an order instituting proceedings setting forth the relevant factual allegations and alleged legal violations, as well as the relief sought, so that respondents are on notice of the charges against them and potential sanctions.[12] Respondents in SEC

---

[9] Complaint ¶ 9.

[10] The Court may consider the administrative proceeding filings and the SEC Rules of Practice because when "ruling upon a motion to dismiss for failure to state a claim, a court may . . . consider . . . matters about which the Court may take judicial notice." *Redding v. District of Columbia*, 828 F. Supp. 2d 272, 278 (D.D.C. 2011) (Jackson, J.) (citations and quotations omitted). The Court may take notice of public documents such as agency rulings whose existence "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." F.R.E. 201(b)(2). *See also Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1260 n.2 (11th Cir. 2006) (courts can take judicial notice of SEC documents on a motion to dismiss); *Vance v. Chao*, 496 F. Supp. 2d 182, 184 n.1 (D.D.C. 2007) (ruling that "The Court make take judicial notice of public documents, such as court records, without converting a motion to dismiss into a motion for summary judgment.").

[11] *See* 17 C.F.R. § 201.100 *et seq*.

[12] 17 C.F.R. § 201.200.

administrative proceedings file an Answer in which they may assert affirmative defenses.[13] If respondents contest the charges, the matter is assigned to an ALJ for an initial decision.[14]

The SEC's Rules of Practice provide for substantial discovery, including, among other things, that the Division of Enforcement must make available to any party the documents (other than privileged documents) obtained in the investigation leading to Enforcement's recommendation to institute the proceedings.[15] In addition, a respondent may request the issuance of both document and testimony subpoenas to obtain additional information.[16]

The SEC's rules permit a wide variety of motions practice,[17] including motions for a more definite statement of the allegations[18] and motions seeking summary disposition that can be used if there are legal issues that can be resolved without a hearing.[19] Motions may be supported by briefs and declarations.[20] During the course of administrative proceedings and hearings, both the ALJs and

---

[13] 17 C.F.R. § 201.220.

[14] 17 C.F.R. § 201.360(b)(2).

[15] 17 C.F.R. § 201.230.

[16] 17 C.F.R. § 201.232.

[17] 17 C.F.R. § 201.111(h); 17 C.F.R. § 201.154.

[18] 17 C.F.R. § 201.220(d).

[19] 17 C.F.R. § 201.250.

[20] 17 C.F.R. § 201.154.

the Commission routinely rule on a wide variety of legal issues, including affirmative defenses raising claims of bias,[21] First Amendment issues,[22] equal protection violations,[23] retroactive application of statutory provisions,[24] and allegations of due process violations.[25]

When there is a need for an evidentiary hearing, it proceeds in a manner not dissimilar from a bench trial in federal court. And although the SEC has not adopted the Federal Rules of Evidence, its Rules of Practice provide that the ALJ "shall exclude all evidence that is irrelevant, immaterial or unduly repetitious."[26]

---

[21] *See, e.g., In the Matter of Steven Altman, Esq.*, 99 S.E.C. Docket 2744 (Nov. 10, 2010), 2010 SEC LEXIS 3762 at *35 n.33; *In the Matter of Thomas C. Bridge, et al*, 96 S.E.C. Docket 2485 (May 13, 2009), 2009 SEC LEXIS 3367 at *75 n.77.

[22] *See, e.g.*, *In the Matter of C. James Padgett et al*, 52 S.E.C. 1257 (Mar. 20, 1997), 1997 SEC LEXIS 634 at *24.

[23] *See, e.g., In the Matter of Indigenous Global Development Corp.* (Jan. 12, 2007), 2007 SEC LEXIS 47 at *10; *In the Matter of Koss Securities Corp. et al*, (Dec. 12, 1973), 1973 SEC LEXIS 3493 at *34.

[24] *See, e.g., In the Matter of Castle Securities Corp. and Michael T. Studer*, (Jan. 23, 2004), 2004 SEC LEXIS 154 at *24-25 (ALJ refused to impose one form of sanction because it would be impermissibly retroactive); *In the Matter of Laurie Jones Canady*, 54 S.E.C. 65, 87 (Apr. 5, 1999), 1999 SEC LEXIS 669 (Opinion of the Commission rejecting argument that a sanction was an impermissible retroactive application of a statute).

[25] *See, e.g.*, *In the Matter of Gregory M. Dearlove, CPA*, 92 S.E.C. Docket 1427, (Jan. 31, 2008), 2008 SEC LEXIS 223 at *123-24; *In the Matter of Lexington Resources, Inc. et al*, (Jun. 5, 2009), 2009 SEC LEXIS 2057 at *6-*8; *In the Matter of Gregory O. Trautman*, 98 S.E.C. Docket 175 (Dec. 15, 2009), 2009 SEC LEXIS 4173 at *69 n.69.

[26] 17 C.F.R. § 201.320.

Protective orders are also available to protect sensitive or confidential information.[27]

Respondents have an opportunity to cross examine all of Enforcement's witnesses and to present their own evidence and submit briefs at the conclusion of the administrative proceeding.[28] Following a hearing, the ALJ issues an initial decision setting forth findings of fact and conclusions of law, and any party may seek *de novo* review of that decision by the five SEC Commissioners (the "Commission").[29] The Commission may also order review of an initial decision on its own initiative.[30]

Review by the Commission is not dissimilar from appellate review of a district court judgment, as the parties file briefs setting forth their arguments and the Commission may hear oral argument.[31] If review is sought, no penalty may be imposed until after the Commission reviews the initial decision.

---

[27] 17 C.F.R. § 201.190.

[28] 17 C.F.R. § 201.340.

[29] 17 C.F.R. § 201.410; 17 C.F.R. § 201.360(d); *In the Matter of Gary M. Kornman et al*, (Feb. 13, 2009), 2009 SEC LEXIS 367 at *36 n. 44 (opinion of the Commission stating that its "review . . . of the proceeding is de novo").

[30] 17 C.F.R. § 201.360(d).

[31] 17 C.F.R. § 201.450; 17 C.F.R. § 201.451.

If a respondent is dissatisfied with the Commission's final order, Exchange Act Section 25(a)[32] provides the statutory review proceeding for seeking judicial review of SEC orders and vests exclusive jurisdiction with the courts of appeals:

> (1) A person aggrieved by a final order of the Commission entered pursuant to this title may obtain review of the order in the United States Court of Appeals . . . by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.
>
> * * *
>
> (3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or set aside the order in whole or in part.[33]

Additionally, when a respondent seeks review of a final Commission order in the court of appeals, any penalty may be stayed during the pendency of the appeal.[34]

B. The Pending Administrative Proceeding Against Egan and Egan-Jones.

On December 21, 2007, the SEC approved Egan-Jones' application to be registered with the SEC as an NRSRO to rate the creditworthiness of certain issuers of financial products: financial institutions, insurance companies and corporate issuers. On July 14, 2008, Egan-Jones filed with the SEC an application for registration as an NRSRO for issuers of asset-backed and government

---

[32] 15 U.S.C. § 78y(a).

[33] *Id.*

[34] 17 C.F.R. § 201.401(c).

securities.[35] In that application, which Egan signed and certified as accurate, Egan-Jones stated that it had been issuing credit ratings on these issuers since 1995 and had more than 200 such outstanding ratings. On December 4, 2008, the SEC approved that application.

On April 24, 2012, the SEC issued an Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15E(d) and 21C of the Securities Exchange Act of 1934 ("OIP"), alleging that Egan and Egan-Jones violated the federal securities laws because Egan-Jones' July 14, 2008 application to the SEC to rate the creditworthiness of additional categories of issuers contained materially false and misleading information.[36] One of the principal allegations of the OIP is that Egan-Jones' statement in its July 14, 2008 application that it had 200 outstanding ratings on such products and had been continuously issuing ratings on these products since 1995 was false. The OIP alleges that in fact Egan-Jones had not issued any such ratings in a "readily accessible manner"[37] as required by Exchange Act Section 3(a)(61).[38] The OIP further alleges that Egan-Jones violated the federal securities laws and rules by 1) falsely stating in submissions to

---

[35] 15 U.S.C. § 78o-7(a)(1)(B)(vii) requires credit rating agencies to separately register as NRSROs for each category of issuers listed in §78c(a)(62).

[36] Complaint ¶ 1; OIP, 2012 SEC LEXIS 1283 at *2-*5.

[37] OIP, 2012 SEC LEXIS 1283 at *2-*3.

[38] 15 U.S.C. § 78c(a)(61). As the OIP alleges, "an applicant seeking to become registered as an NRSRO for a class of ratings was required to have issued credit ratings in that category on the Internet or through another readily accessible means for at least three years prior to its application." OIP, 2012 SEC LEXIS 1283 at *3-*4.

the SEC that it was unaware whether its clients held long or short positions in particular securities, 2) failing to maintain required books and records, and 3) failing to enforce conflict of interest policies.[39] The OIP also alleges that Egan violated the federal securities laws and rules by knowingly providing substantial assistance to Egan-Jones and causing Egan-Jones' violations.[40] The OIP also states that the proceedings should determine what, if any, remedial sanctions should be imposed if Egan and Egan-Jones are found to have violated the federal securities laws, including civil penalties and orders to cease-and-desist from committing securities law violations.

On June 1, 2012, Egan and Egan-Jones filed an Answer to the OIP, denying most of the allegations and asserting twenty-nine affirmative defenses.[41] These defenses largely mirror the allegations of the Complaint. Although the Division of Enforcement moved to strike many of Egan and Egan-Jones' defenses, the ALJ has struck only seven defenses.[42] Among the defenses being litigated before the the ALJ are:

---

[39] OIP, 2012 SEC LEXIS 1283 at *3-*4.

[40] OIP, 2012 SEC LEXIS 1283 at *4-*5.

[41] *See In the Matter of Egan Jones Ratings Co. and Sean Egan*, AP File No. 3-14856, AP Ruling No. 712 (Jul. 13, 2012), 2012 SEC LEXIS 2204 at *1.

[42] The ALJ has required Egan and Egan-Jones to provide a more definite statement of ten of the affirmative defenses. *See In the Matter of Egan Jones Ratings Co. and Sean Egan*, AP File No. 3-14856, AP Ruling No. 716 (Aug. 8, 2012), 2012 SEC LEXIS 2498 at *7-*14. The Division of Enforcement may then move again to strike those defenses. *Id.* at *1-*2.

- due process violations (affirmative defenses 8, 14, 15, 16, 17, & 18)
- equal protection violations (affirmative defenses 14, 15, 16, 17, & 18)
- bias (affirmative defenses 9, 14, 15, 16, 17, & 18)
- First Amendment violations (affirmative defenses 10, 11, 14, 15, 16, 17, & 18)
- improper retroactive application of Dodd-Frank[43] (affirmative defenses 20 & 26).[44]

To gather evidence regarding these defenses, Egan and Egan-Jones have requested that the ALJ issue subpoenas for 50 categories of documents and testimony by at least 11 witnesses. The evidentiary hearing is currently scheduled to commence on November 13, 2012.

C. Plaintiffs' Complaint Against the SEC.

The thrust of Plaintiffs' Complaint appears to be that because they have a different business model than other companies that offer credit ratings, a business model they believe is superior,[45] the SEC is biased against them and in favor of the companies that have a different business model.[46] Specifically, Egan-Jones contends that its model is superior because it is paid by its subscribers whereas other NRSROs are paid by the financial product issuers that they evaluate. They

---

[43] "Dodd-Frank" means the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203; 124 Stat. 1376.

[44] *In the Matter of Egan Jones Ratings Co. and Sean Egan*, AP File No. 3-14856, AP Ruling No. 712 (Jul. 13, 2012), 2012 SEC LEXIS 2204 at *10. Included among these are some of the defenses for which a more definite statement is required.

[45] Complaint ¶¶ 2-3.

[46] Complaint ¶¶ 7, 8, 58, 94, 162, 170, 175, 177, 178, 184, 186, and 196.

believe that the SEC proceeding was instituted because of this alleged bias, and in violation of their due process, equal protection, First Amendment and other rights.[47] They also allege that the SEC is impermissibly attempting to impose civil penalty provisions of the Dodd-Frank Act retroactively.[48] As relief, they primarily seek to "remove" the administrative proceeding to this Court,[49] because they contend the SEC's administrative processes lack adequate safeguards for them to present their affirmative defenses. They also seek, among other relief, a permanent injunction barring the SEC from prosecuting the administrative proceeding and a declaration that the civil penalty provisions of Dodd-Frank may not be applied to them retroactively.[50]

ARGUMENT

I) The Court Should Dismiss the Complaint Because Neither the APA nor the Federal Securities Laws Permit Interlocutory Challenges to SEC Orders in District Courts.

A) Plaintiffs have not identified any waiver of sovereign immunity that would apply to this action.

The United States "as sovereign, is immune from suit save as it consents to be sued."[51] Consent to being sued is a requirement for federal subject matter

---

[47] Complaint ¶¶ 8, 9, 176, 187.

[48] Complaint ¶¶ 164 and 181.

[49] Complaint ¶ 9.

[50] Complaint at pp. 64-65.

[51] *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

jurisdiction over a claim against federal agencies, including the SEC.[52] An agency may be sued only in those limited circumstances where there has been an express congressional waiver of sovereign immunity, and then only in the specific manner that Congress has provided.[53] Therefore, the "conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."[54]

Plaintiffs—who bear the burden of demonstrating subject matter jurisdiction[55]—do not provide any valid basis for the Court to exercise jurisdiction here. Although they recite a medley of statutes in the Complaint,[56] none of these provisions—5 U.S.C. § 702 or 28 U.S.C. §§ 1331, 1337 & 1346—supports jurisdiction in the present circumstances.

---

[52] *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Banks v. Office of the Senate Sergeant-At-Arms & Doorkeeper of the U.S. Senate*, 471 F.3d 1341, 1348 (D.C. Cir. 2006).

[53] *United States v. Dalm*, 494 U.S. 596, 608 (1990).

[54] *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981); *see also Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003) ("[a] waiver of sovereign immunity must be unequivocally expressed in the statutory text and strictly construed, in terms of its scope, in favor of the sovereign." (quoting *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999))) (internal quotations omitted).

[55] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002).

[56] Complaint ¶ 13.

B) Plaintiffs may not rely on the APA because the waiver of sovereign immunity in 5 U.S.C. § 702 is constrained by other limitations on judicial review.

Egan and Egan-Jones cite APA Section 702[57] as a basis for this Court to exercise jurisdiction over their claims. APA Section 702 provides an expressly limited waiver of sovereign immunity:

> [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . *Nothing herein (1) affects other limitations on judicial review* or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground . . . . [58]

As this Court recently noted, because Section 702 specifically preserves existing limits on judicial review, it does not waive sovereign immunity when other restrictions on review exist:

> The APA does provide a limited waiver of sovereign immunity for final agency action in claims seeking relief other than money damages. *Id.* § 702. However, the APA does not provide a basis for jurisdiction in this case because plaintiff has failed to identify the existence of any final agency action. . . . Moreover, the APA only permits review of agency action "for which there is no other adequate remedy in a court[.]" *Id.* § 704.[59]

Two such restrictions prevent Plaintiffs from proceeding in district court at this time: APA Section 703 and Exchange Act Section 25(a) limit review to petitions to the courts of appeals, and APA Section 704 limits review to final agency orders for

---

[57] 5 U.S.C. § 702.

[58] *Id.* (emphasis supplied).

[59] *Stone v. Dep't. of Treas.*, (D.D.C. May 9, 2012), 2012 U.S. Dist. LEXIS 64727 at *8-*9 (Jackson, J.).

which there is no adequate remedy. Consequently, this Court should dismiss this action for lack of jurisdiction under APA Section 702 or, alternatively, for failure to state a clam under the APA.[60]

1) 5 U.S.C. § 703 limits this Court's jurisdiction by requiring persons aggrieved by an SEC Order to seek review in the courts of appeals.

Egan and Egan-Jones cannot bring their claims in this Court under the APA because the APA and Section 25(a) together establish that the courts of appeals have exclusive jurisdiction to review SEC administrative proceedings. Specifically, APA Section 703 states that "the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute."[61] Here, Exchange Act Section 25(a)[62] provides the special statutory review proceeding prescribed in APA Section 703 for seeking judicial review of SEC orders and vests exclusive jurisdiction with the courts of appeals.

---

[60] The D.C. Circuit has treated plaintiffs' failures to meet APA requirements as alternatively resulting in (a) a lack of subject matter jurisdiction or (b) a failure to state a claim. *See Sierra Club & Valley Watch, Inc. v. Jackson*, 648 F.3d 848 (D.C. Cir. 2011); *see also Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011); *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 731 (D.C. Cir. 2003); *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007). The Supreme Court has long taken the view that—when a special statutory review provision directs review to the courts of appeals—whether a district court can hear a suit seeking to enjoin an agency from proceeding with an administrative proceeding is a *jurisdictional* question. *See Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 207 (1994). The SEC contends that dismissal is proper under both Rule 12(b)(1) and 12(b)(6).

[61] 5 U.S.C. § 703 (emphasis supplied).

[62] 15 U.S.C. § 78y(a).

In *City of Tacoma v. Taxpayers of Tacoma*,[63] the Supreme Court addressed how a nearly identical review provision in the Federal Power Act precluded a suit in district court attacking a Federal Power Commission order.[64] The Supreme Court found that the district court lacked jurisdiction to hear the case because Congress had set forth the exclusive means for reviewing a Federal Power Commission order:

> This statute is written in simple words of plain meaning and leaves no room to doubt the congressional purpose and intent. It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. . . . [The statute] prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders.[65]

---

[63] 357 U.S. 320 (1958).

[64] In 1958, Section 313(b) of the Federal Power Act read in relevant part:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located . . . by filing in such court, within 60 days after the order of [the] Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court *shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part*.

357 U.S. at 335 (1958) (emphasis by Supreme Court).

[65] 357 U.S. at 335-36 (citations omitted).

The Court continued, explaining that because the statute specified that review would be in the courts of appeals, no other court had jurisdiction to hear a challenge to a Federal Power Commission order:

> It thereby necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review. Hence, upon judicial review of the Commission's order, all objections to the order . . . must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have "exclusive jurisdiction" to review such orders.[66]

Similarly, the D.C. Circuit has held that the provision at issue here, Exchange Act Section 25(a), deprives district courts of jurisdiction to hear actions seeking to declare SEC orders void, writing in *Nassar & Co. v. SEC* that:

> § 25(a) of the Securities Exchange Act provides for review of Commission orders in the Court of Appeals. Since that section also provides that such relief is exclusive, § 25(a)(3), and [the plaintiff] has not shown it to be inadequate in any way, the district court was correct in dismissing the declaratory action for lack of subject matter jurisdiction.[67]

As the federal securities laws provide for judicial review of SEC administrative proceedings in a court of appeals, Egan and Egan-Jones cannot seek relief in this Court.

---

[66] 357 U.S. at 336 (citations and notes omitted).

[67] 566 F.2d 790, 792 n. 3 (D.C. Cir. 1977); *but see Sierra Club & Valley Watch, Inc. v. Jackson*, 648 F.3d at 853-54 (failure to satisfy APA requirements results in failure to state a claim, not a lack of jurisdiction); *see also Thunder Basin*, 510 U.S. at 207 (finding district court lacked jurisdiction to hear suit seeking to enjoin agency proceeding).

2) 5 U.S.C. § 704 prevents Plaintiffs from seeking review of the order instituting the administrative proceeding because it is not a final agency action and they have an adequate remedy.

Not only does the APA define the courts in which litigants can challenge SEC orders, it also defines what orders they may challenge. Under APA Section 704, a court may only review "final agency action."[68] Whether an agency order is "final" turns on whether the order (1) "mark[s] the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature," and (2) is a decision "by which rights or obligations have been determined, or from which legal consequences will flow."[69] Plaintiffs must also show they have no other adequate remedy.

Egan and Egan-Jones' complaint acknowledges that there is no final agency action for this Court to review.[70] Indeed, Plaintiffs could not argue otherwise: the Supreme Court has foreclosed any argument that the SEC's order instituting the administrative proceeding is a final agency action.

In *FTC v. Standard Oil Co. of Cal.*,[71] the Court ruled unanimously that an agency's decision to institute administrative proceedings is not a "final" action warranting judicial review. The FTC's administrative complaint in *Standard Oil*—

---

[68] 5 U.S.C. § 704.

[69] *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks and citations omitted).

[70] Complaint ¶ 182.

[71] 449 U.S. 232 (1980).

like the SEC's order here—served "only to initiate the proceedings" and had "no legal force or practical effect" on the respondent until the matter was adjudicated before an ALJ and a final agency decision is entered.[72] As recognized in *Standard Oil*, prematurely reviewing interlocutory agency actions is "likely to interfere with the proper functioning of [an] agency."[73] It also creates a "burden for the courts," as it "denies the agency an opportunity to correct its own mistakes and to apply its expertise . . . [and] leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary."[74] In reaching this conclusion, the Supreme Court specifically rejected the argument that the expense and disruption associated with being a respondent in an administrative proceeding justified immediate judicial review.[75] The Court explained that these burdens are no different from the "disruptions that accompany any major litigation."[76] According to the Court, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" warranting immediate judicial review.[77]

---

[72] 449 U.S. at 242-43.

[73] *Id.* at 242.

[74] *Id.* at 242.

[75] *Id.* at 242-43.

[76] *Id.*

[77] *Id.* (quotations omitted).

Like the FTC in *Standard Oil*, the SEC's only decision has been to initiate an administrative proceeding. And like the order in *Standard Oil,* the SEC's order only "represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings."[78] The SEC has not issued a final decision regarding any of the affirmative defenses that Egan and Egan-Jones have asserted in the administrative proceeding. At this point, the Division of Enforcement bears the burden of showing that its allegations are meritorious and responding to the affirmative defenses.[79] Should either the ALJ or the Commission find that Plaintiffs did not violate the federal securities laws as the Division of Enforcement has asserted in the OIP, or that Plaintiffs' affirmative defenses preclude the imposition of any sanction, Plaintiffs will have no need for any judicial review. On the other hand, if the SEC ultimately enters an order finding that Egan and Egan-Jones violated the federal securities laws and imposing a sanction, that order would be "final" under the APA and subject to review by a court of appeals.[80] Egan and Egan-Jones must wait for any such order before seeking judicial review. As the D.C. Circuit stated in *Reliable Automatic Sprinkler Co. v. CPSC*:

> The interest in postponing review is powerful when the agency position is tentative. Judicial review at that stage improperly intrudes into the agency's decisionmaking process. It also squanders judicial resources

[78] 449 U.S. at 241.

[79] 17 C.F.R. §§ 201.300, 201.301.

[80] *See* 15 U.S.C. § 78y(a).

> since the challenging party still enjoys an opportunity to convince the agency to change its mind.[81]

That logic holds here. Additionally, Plaintiffs cannot establish that they have no other adequate remedy because, as discussed above, if they are aggrieved by a final SEC order, they may seek review in a court of appeals under Exchange Act Section 25(a).

C) The other jurisdictional provisions Plaintiffs cite do not waive sovereign immunity.

Under 28 U.S.C. § 1331, district courts have jurisdiction over claims "arising under" the Constitution, laws, or treaties of the United States. Likewise, 28 U.S.C. § 1337 grants district courts jurisdiction over claims "arising under" federal statutes pertaining to commerce and trade.[82] Neither provision waives sovereign immunity to permit suits against federal agencies.[83]

Egan and Egan-Jones' reliance on 28 U.S.C. 1346 is similarly misplaced. Section 1346 contains both the Federal Tort Claims Act ("FTCA"), 28 U.S.C.

---

[81] 324 F.3d 726, 731 (D.C. Cir. 2003) (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986)).

[82] *See, e.g., Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 n.7 (1983) ("we have not distinguished between the 'arising under' standards of §1337 and §1331").

[83] *See, e.g., Benvenuti v. Dep't of Def.*, 587 F. Supp. 348, 352 (D.D.C. 1984) ("None of the statutes cited by plaintiff—the general federal question provision, 28 U.S.C. § 1331, and the All Writs and Declaratory Judgment Acts, 28 U.S.C. §§ 1651, 2201–02—nor the constitution itself—operate as such waivers.") (citations omitted).

1346(b), and the Little Tucker Act, 1346(a)(2). Both the FTCA[84] and the Little Tucker Act[85] waive sovereign immunity for claims seeking "money damages" from the United States. Because Egan and Egan-Jones seek only declaratory and injunctive relief, those provisions are inapplicable.

II) Plaintiffs Cannot Meet the Supreme Court's Stringent Test for Obtaining Review of Non-final Agency Actions.

Even if Plaintiffs contend that they do not need to meet the requirements of the APA because they are raising constitutional claims and for those they can rely on the Supreme Court's decision in *Free Enterprise v. PCAOB*,[86] they still cannot establish jurisdiction because they do not meet the *Free Enterprise / Thunder Basin* test. In *Free Enterprise*, the Supreme Court reaffirmed the principle it established in *Thunder Basin* that district courts typically lack jurisdiction to hear challenges to pending or anticipated agency administrative proceedings when—as here—the judicial review provisions relevant to the subject matter direct review to a court of appeals: "Generally, when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be

---

[84] *See Kosak v. United States*, 465 U.S. 848, 852 n.7 (1984) ("[FTCA] permits recovery only of money damages") (internal quotation marks omitted).

[85] *See Van Drasek v. Lehman*, 762 F.2d 1065, 1068-69 (D.C. Cir. 1985) ("For reasons not germane to this appeal, the Supreme Court has limited the scope of the Tucker Act to claims for money . . . Since [plaintiff] made no claim for money damages, the jurisdiction of the district court could not have been based on the Tucker Act") (citations omitted).

[86] 130 S. Ct. 3138 (2010) (citations and quotations omitted).

exclusive."[87] The narrow exception the Supreme Court set forth in *Thunder Basin* and *Free Enterprise* is an extraordinarily difficult one to satisfy. The Court recognized that district courts may have jurisdiction:

> "1. if a finding of preclusion could foreclose all meaningful judicial review;
> 2. if the suit is wholly collateral to a statute's review provisions; and
> 3. if the claims are outside the agency's expertise."[88]

The allegations of the plaintiffs in *Free Enterprise* differ greatly from the present case and demonstrate the hurdle which Egan and Egan-Jones must overcome to obtain immediate review. The core question in *Free Enterprise* was whether the statute establishing the Public Company Accounting Oversight Board ("PCAOB") violated the Constitution by unduly restricting the President's power to remove PCAOB members who are charged with enforcing laws.[89] This question arose not as part of an affirmative defense in a PCAOB proceeding, or in response to particular PCAOB regulation, but as part of a facial challenge to the entire existence of the PCAOB, which the *Free Enterprise* plaintiffs sought to have dismantled.[90]

---

[87] 130 S. Ct. at 3150 (citations and quotations omitted).

[88] *Id.* at 3150 (quoting *Thunder Basin*, 510 U.S. at 212-213) (numbering supplied).

[89] *Id.* at 3147.

[90] *Id.* at 3149.

The *Free Enterprise* plaintiffs did not complain about any agency action.[91] Indeed, it was precisely because there was no agency action, or even a legitimate prospect of one, that the Supreme Court found that there could be no meaningful judicial review. The Supreme Court did not require the *Free Enterprise* plaintiffs to arbitrarily challenge a rule or incur a sanction to create an agency action from which they could then seek review.[92] The Court found such a requirement would be "odd" and not result in meaningful judicial review.[93] For essentially the same reason, the Court found that the claims in *Free Enterprise* were wholly collateral to Section 25(a)'s review provisions.[94]

The Court also found that the issues in *Free Enterprise* were outside the agency's expertise, as there was no evidence that the SEC had previously addressed these constitutional claims, and the statutory provisions that the SEC does routinely address were not at all implicated in that case.[95] Moreover, the SEC was powerless to grant the relief the *Free Enterprise* plaintiffs sought: dismantling the PCAOB.

---

[91] 130 S.Ct. at 3150.

[92] *Id.* at 3150-3151.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 3151.

Accordingly, the Court determined that the *Free Enterprise* plaintiffs met the test for seeking immediate judicial relief.[96] As the structural, facial legal issues in *Free Enterprise* stand in stark contrast to the fact-bound affirmative defenses asserted by Plaintiffs here, Egan and Egan-Jones cannot meet any of these requirements.

A) Egan and Egan-Jones can obtain meaningful judicial review in a court of appeals.

As noted, the *Free Enterprise* plaintiffs sought to challenge the existence of the PCAOB, not any particular ruling it had issued.[97] The Supreme Court found that there was no meaningful judicial review available because the statutory scheme dictated that plaintiffs could only obtain judicial review by challenging a random rule proposal unrelated to their claim.[98] And even then, neither the PCAOB nor the SEC on review had the power to dismantle the PCAOB—the relief sought by those plaintiffs. In contrast, Plaintiffs are actively litigating their claims before the ALJ in the administrative proceeding, and they may get the result they want—dismissal of the charges against them—from either the ALJ or the Commission on its review. Even if the administrative proceeding results in a decision adverse to Egan and Egan-Jones, they can challenge the result in a court of appeals, where all their claims, including "statutory and constitutional claims . . .

---

[96] 130 S. Ct. at 3150.

[97] *Id.*

[98] *Id.*

can be meaningfully addressed."[99] Thus, unlike *Free Enterprise*, this case does not implicate the "serious constitutional question that would arise if an agency statute were construed to preclude all judicial review."[100]

B) Egan and Egan-Jones' claims are not "wholly collateral" to the review provisions embodied in Section 25(a).

Egan and Egan-Jones' claims are not "wholly collateral" to the statutory review provisions, but rather inescapably intertwined with an agency administrative proceeding that is fully embedded within the statutory review scheme. When the Supreme Court used the term "wholly collateral," it did not mean collateral to a particular agency ruling or potential ruling but, rather, "wholly collateral to a statute's review provisions."[101] Thus, Plaintiffs would have to establish that their retroactivity, due process, or other defenses to the charges in the administrative proceeding are collateral to the statutes governing review of the SEC's eventual order regarding those same charges. Contrary to Plaintiffs' position, the SEC's resolution of asserted affirmative defenses to potential securities law violations in an administrative proceeding is not collateral to the statutory review scheme for final SEC orders; it is integral to that scheme.

---

[99] *Thunder Basin*, 510 U.S. at 215.

[100] *Id.* at 215 n.10 (citations and quotations omitted); *see also FCC v. ITT World Communications Inc.*, 466 U.S. 463, 468 (1984) (holding that district court lacked subject matter jurisdiction because the plaintiffs "may not evade [special statutory review] provisions by requesting the District Court to enjoin action that is the outcome of the agency's order").

[101] *Free Enterprise*, 130 S. Ct. at 3150 (quotations omitted).

Importantly, Plaintiffs concede that SEC administrative proceedings typically afford due process,[102] but argue that they are lacking "in this unique set of circumstances."[103] But, as noted, the SEC has routinely been required to adjudicate similar affirmative defenses, and courts of appeals have had no difficulty in reviewing the SEC's decisions on such defenses in the context of review of the SEC's final orders under Section 25(a). If this Court found Egan and Egan-Jones' claims to be "wholly collateral," then any time respondents in administrative proceedings contend that the agency is biased or is violating their due process rights—defenses often asserted in administrative proceedings—they would be able to do an end-run around the special statutory review provisions and file a claim in district court. Indeed, to artificially extract from the administrative proceeding the resolution of affirmative defenses that are inexorably intertwined with the entire administrative proceeding defeats the policy underlying permitting agencies to develop their own record and rulings.

We are aware of only one decision where a district court found, in applying the *Thunder Basin* exception, that it could hear an equal protection challenge to an SEC administrative proceeding. There, now-convicted felon Rajat Gupta convinced a court in the Southern District of New York to find jurisdiction to determine whether the SEC had improperly used its new authority under Dodd-Frank to bring an insider-trading action against him as an administrative proceeding after suing

[102] Complaint ¶¶ 175-176.

[103] Complaint ¶ 176.

related defendants in federal court.[104] As Gupta's action against the SEC was ultimately settled, the Second Circuit did not have an opportunity to address whether the district court's finding of jurisdiction was correct. Since then, however, the Second Circuit has issued a ruling in *Altman v. SEC*[105] that implicitly rejects the *Gupta* rationale and is consistent with the reasoning of the Supreme Court in *City of Tacoma*. In *Altman*, when an SEC administrative proceeding resulted in an order permanently barring attorney Steven Altman from appearing before the SEC due to his ethical violations, Altman brought an action in district court to enjoin the SEC order, arguing, among other things, that the SEC proceeding violated his due process rights.[106] The district court dismissed the case for lack of subject matter jurisdiction because it found that Section 25(a) provides for review of SEC orders exclusively in the courts of appeals.[107] The district court also rejected Altman's argument that his case fell within the *Thunder Basin* exception, finding that:

> as the Exchange Act explicitly provides for it, Altman's claim could be meaningfully addressed in the Court of Appeals. [And] as Altman's challenge is not to the SEC's existence, but is instead to the constitutional ability of the SEC to sanction attorneys practicing before it . . ., the claim is not wholly collateral to the Exchange Act's review provisions.[108]

---

[104] *Gupta v. SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011).

[105] *Altman v.* SEC, ___ F.3d ___, 2012 U.S. App. LEXIS 11909 (2d. Cir 2012).

[106] *Altman v. SEC*, 768 F. Supp. 2d 554, 558 (S.D.N.Y. 2011).

[107] *Id.* at 558.

[108] *Id.* at 560 (citations and quotations omitted).

The Second Circuit affirmed, holding that Section 25(a) "generally preclude[s] *de novo* review in the district courts, requiring litigants to bring challenges 'in the Court of Appeals or not at all.'"[109] Further, the court found the district court's holding that "none of the factors in *Thunder Basin / Free Enterprise* militated in favor of district court jurisdiction" to be "well-reasoned."[110]

C) Determining whether a person has violated the securities laws and what sanction should result is within the SEC's expertise.

The issues Egan and Egan-Jones raise are within the SEC's expertise, and thus this case is easily distinguishable from *Free Enterprise*, where the plaintiffs argued that the statute establishing the PCAOB violated constitutional principles of separation of powers and the Appointments Clause.[111] As the SEC lacked the power to declare the PCAOB unconstitutional, the SEC could not grant the relief sought. Further, the SEC had no special expertise on those issues.

In the administrative proceeding, the SEC (through the ALJ and/or the Commission itself) has the power to provide relief to Egan and Egan-Jones if their defenses have merit or if the Division of Enforcement fails to establish the violations it has alleged. The SEC has the authority to 1) dismiss these proceedings, 2) grant summary disposition in Egan and Egan-Jones' favor, 3) determine that they committed no violations, 4) determine that no civil penalties

---

[109] *Altman v.* SEC, ___ F.3d ___, 2012 U.S. App. LEXIS 11909 at *4 (quoting *City of Tacoma*, 357 U.S. at 336).

[110] *Id.* at *5-*6.

[111] 130 S. Ct. at 3146-47.

are appropriate for any violations they may have committed, and/or 5) determine that only those statutory sanctions existing before Dodd-Frank's enactment should be applied to conduct occurring before that law was passed. Significantly, Egan and Egan-Jones are asserting before the ALJ the affirmative defenses they seek to litigate here.[112] Further, the Commission and its ALJs have previously ruled on whether statutes may be applied retroactively in administrative proceedings,[113] including numerous cases where SEC ALJs have refused to retroactively apply provisions of Dodd-Frank.[114] And, as noted, the SEC has been required to adjudicate the types of affirmative defenses Plaintiffs seek to raise here. *See Thunder Basin* (an agency's prior rulings showed its expertise on the issue).[115]

* * *

In sum, Egan and Egan-Jones fail each part of the *Free Enterprise* test. They also have an adequate remedy: seeking judicial review of any final SEC order in a

---

[112] *In the Matter of Egan Jones Ratings Co. and Sean Egan*, AP File No. 3-14856, AP Ruling No. 712 (Jul. 13, 2012), 2012 SEC LEXIS 2204 at *10.

[113] *See, e.g., In the Matter of Castle Securities Corp. and Michael T. Studer*, (Jan. 23, 2004), 2004 SEC LEXIS 154, at *24-25 (ALJ refused to impose one form of sanction for violations of federal securities laws because it would be impermissibly retroactive); *In the Matter of Laurie Jones Canady*, 54 S.E.C. 65, 87 (1999) (Opinion of the Commission rejecting argument that a sanction was an impermissible retroactive application of a statute).

[114] *See, e.g. In the Matter of Donald L. Koch and Koch Asset Mgmt. LLC*, (May 24, 2012), 2012 SEC LEXIS 1645, at *48 n. 29 (imposing sanction authorized by Dodd-Frank would be impermissibly retroactive); *In the Matter of John D. Friedrich*, (Apr. 6, 2012), 2012 SEC LEXIS 1136, at *8-12 (imposing some sanctions authorized by Dodd-Frank, but denying others as impermissibly retroactive).

[115] 510 U.S. at 214 n.17, n.18.

court of appeals. As a result, they cannot evade the statutory review provisions and obtain relief from this Court.

III) Plaintiffs cannot state a claim for injunctive or declaratory relief because they have an adequate remedy at law and cannot show irreparable harm.

Even if the Court has jurisdiction, it should still dismiss the Complaint under Rule 12(b)(6) for failing to state a claim for injunctive or declaratory relief. "The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies."[116] Here, Egan and Egan-Jones have not alleged facts that, if established, would satisfy the basic and necessary elements of a claim for injunctive relief.[117]

First, Egan and Egan-Jones are not entitled to injunctive relief because they have an adequate remedy at law. As discussed above, they have raised in the administrative proceeding all the defenses they seek to raise here; if they are aggrieved by a final order in the administrative proceeding, they may seek review in a court of appeals. The Supreme Court has noted that "[i]t is a basic doctrine of equity jurisprudence that courts of equity should not act when the moving party has

---

[116] *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quotations omitted).

[117] This memorandum does not address whether any of Egan and Egan-Jones' substantive allegations regarding retroactivity or constitutional issues fail to state a claim. As Egan and Egan-Jones could raise these claims in the administrative proceeding where the Commission is the ultimate decision maker, the brief does not take a position on those potential claims. This memorandum should not be misconstrued by any of the parties to the administrative proceeding as taking any position on the legal or factual merits of any of the claims or defenses asserted in that administrative proceeding.

an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[118]

Second, Egan and Egan-Jones have not alleged facts demonstrating irreparable harm. The only injuries Egan and Egan-Jones allege are negative publicity and litigation costs. As noted, it is well established that the "expense and annoyance" of litigation does not constitute irreparable injury.[119] Similarly, adverse publicity "may be an unfortunate consequence of an enforcement action, but such publicity does not warrant the issuance of an injunction against such proceedings."[120]

Third, plaintiffs have not pointed to any law that permits litigants to "remove" federal agency proceedings to federal court, as Plaintiffs wish to do here.[121] When parties seek to remove a state court case to federal court, they file a notice of removal with both the federal court and state court under 28 U.S.C. § 1446. This halts the state proceeding and moves it to federal court. But removal of federal agency proceedings to federal court is not an existing form of relief. Because no law authorizes this Court to hear a "removed" agency proceeding, the Court should dismiss this portion of the Complaint.

---

[118] *Morales v. TWA*, 504 U.S. 374, 381 (1992).

[119] *Standard Oil*, 449 U.S. at 244.

[120] *First Jersey Sec., Inc. v. SEC*, 553 F. Supp. 205, 212 (D.N.J. 1982).

[121] Complaint ¶ 9.

Finally, Plaintiffs are not entitled to declaratory relief because the Declaratory Judgment Act "merely creates a remedy in cases otherwise within the Court's jurisdiction"[122] and, as we have discussed, the Court has no jurisdiction here.

[122] *Smirnov v. Clinton*, 806 F. Supp. 2d 1, 11 (D.D.C. 2011) (Jackson, J.).

CONCLUSION

For the reasons stated, the SEC respectfully requests that the Court dismiss the Complaint.

Dated: August 17, 2012
Washington, D.C.

Respectfully submitted,

RICHARD M. HUMES
Associate General Counsel
D.C. Bar # 271627

SAMUEL M. FORSTEIN
Assistant General Counsel
D.C. Bar # 961912

/s/
CHRISTOPHER M. BRUCKMANN
Senior Counsel
D.C. Bar # 491136

Attorneys for Defendant
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9612
Telephone: (202) 551-5104 (Bruckmann)
Facsimile: (202) 772-9263
bruckmannc@sec.gov