IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLATFORM REAL ESTATE INC., Plaintiff, -against- SECURITIES AND EXCHANGE COMMISSION, Defendant.	No. 19-CV-2575 (LAP)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT
SECURITIES AND EXCHANGE COMMISSION'S MOTION TO DISMISS

The Commission moved to dismiss this action on October 4, 2019. Without requesting an extension, Platform missed its October 14, 2019, deadline to respond and instead—without explanation or leave—filed an over-length response more than three months late. *See* Fed. R. Civ. Proc. 27(a)(3)(A) ("The response *must be filed* within 10 days after service of the motion unless the court shortens or extends the time.") (emphasis added); Individual Practice of Judge Loretta A. Preska 1.E (extensions must be requested at least 48 hours prior to the scheduled deadline). At minimum, the Court should consider disregarding Platform's untimely opposition. *See Dekom v. New York*, 2013 U.S. Dist. LEXIS 85360, at *19 n.11 (E.D.N.Y. June 18, 2013). Even if the Court considers Platform's late submission, Platform's delay confirms the absence of jurisdiction. To establish Article III standing and ripeness, Platform must show that it is subject to an agency action that will cause an "actual or imminent" injury and that it would suffer hardship if the Court withholds its consideration, Mot. at 8 and 11-14, but its unwillingness to meet deadlines in its own action demonstrates the absence of any imminent injury or hardship.

Platform's response barely mentions jurisdiction, let alone demonstrates that this Court may hear this case, as Platform spends the bulk of its opposition relitigating a different case in a different court, *SEC v. Feng*, No. 17-56522 (9th Cir.), which Platform never even mentioned in its complaint. And Platform's opposition still fails to identify any cause of action against the Commission or explain how the allegations in the complaint satisfy the elements of any claim. *See* Mot. at 17-18.

1. Platform confuses issue preclusion and claim preclusion, but acknowledges that all of the elements of issue preclusion—*i.e.* collateral estoppel—are met.

Platform effectively concedes that it seeks an opinion on issues that the Central District of California and Ninth Circuit Court of Appeals previously decided against Platform's founder, incorporator—and now lawyer—Hui Feng. Platform admits that "the owner of Platform is the same as the defendant in the prior SEC enforcement case and the legal issue involved is the same broker registration issue." Opp. at 26. That admission forecloses any argument that Feng and Platform are not in privity for collateral estoppel purposes. *See* Mot. 15. Thus, even if this Court had subject matter jurisdiction—which it does not (Mot. 7-14)—Platform has conceded that it is collaterally estopped from relying on its sole legal argument. *See Interoceanica Corp. v. Sound Pilots*, 107 F.3d 86, 91 (2d Cir. 1997) (explaining that "[c]ollateral estoppel operates as issue preclusion," where a previous court decided the legal issue "on the merits") (internal quotation marks omitted). That alone is fatal to its complaint. *See Satterfield v. Pfizer, Inc.*, 2005 U.S. Dist. LEXIS 14923, at *35-37 (S.D.N.Y. July 13, 2005) (dismissing plaintiff's claims that were based on an argument plaintiff had a "full and fair opportunity to litigate" against the defendant in a previous matter).

Platform misunderstands the Commission's argument and responds that its claims are not barred by claim preclusion. *See* Opp. 25-27. The Commission did not argue claim preclusion, but rather *issue preclusion*, which is a distinct doctrine that, "'in order to effectuate the public policy in favor of minimizing redundant litigation . . . bars the relitigation of issues actually adjudicated, and

essential to the judgment, in a prior litigation between the same parties."' Wright & Miller, 18 Fed. Prac. & Proc. Juris. § 4402 (3d ed.) (discussing the distinction between claim preclusion and issue preclusion) (quoting *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535–536 (5th Cir. 1978)). Platform offers no reason its claims should not be dismissed as collaterally estopped based on issue preclusion. Instead it expressly casts its current suit as an opportunity to right perceived wrongs in *SEC v. Feng*; but that is exactly the sort of forum shopping that the collateral estoppel doctrine is designed to prevent. *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 140 (2015) ("Allowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring.").

2. Platform misconstrues the cases explaining the requirements of Article III standing.

Platform's opposition reinforces that its alleged harm is speculative—it argues that, without the declaratory judgment it seeks, "the SEC *could* … decide to enforce the … law against Platform" and that "*if* Platform loses the case," it could be ordered to pay disgorgement and penalties. Opp. 21 (emphases added). Platform's alleged "injury in fact" is exactly the sort of speculative injury dependent on contingent future events that ordinarily does not give rise to Article III standing. *See* Mot. 8-10 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013) and others).

Conversely, Platform cites no case in which a court found the required "injury in fact" based on the speculative threat of a regulatory enforcement action that did not implicate the plaintiff's constitutional rights. Opp. at 19-20. In *Massachusetts v. EPA*, 549 US 497 (2007), the challenged government action had already commenced. In *Bennett v. Spear*, 520 U.S. 154 (1997), plaintiffs were challenging a recently-issued agency opinion and their standing arose from an express, broad

statutory right to bring claims under the Endangered Species Act. In *Tweed-New Haven Airport Authority v. Tong*, 930 F.3d 65, 70 (2d Cir. 2019), the plaintiff had standing to challenge a newly-enacted state statute, the entire purpose of which was to "directly target[]" the plaintiff airport by preventing it from extending its runway. Platform, unlike the plaintiff in *Tweed*, is not challenging a new regulation, but instead seeks to overturn the Commission's decades-long interpretation of a statute the Commission is tasked with administering, simply because Platform believes it might someday be sued for violating that statute. If the remote threat of regulatory enforcement was sufficient to confer standing, every administrative agency with enforcement powers would be subject to lawsuits seeking protective advisory opinions. It is well-established that such suits are unfit for judicial decision. *See* Mot. 11-14.

3. Platform's complaint does not state a claim for relief under the Administrative Procedure Act.

Platform's assertion (Opp. 22-25) that it has standing to pursue declaratory relief under the Administrative Procedure Act is irrelevant because Platform's complaint does not assert a claim under that Act.[1] Section 702 of the Act provides that "[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." 5 U.S.C. § 702 (emphasis added). Section 704 clarifies that "*[a]gency action* made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review." *Id.* § 704 (emphases added). Accordingly, all of the cases Platform cites in which the plaintiff had standing to pursue a claim under the APA involved an agency action.[2] Platform, on the other hand, does not purport to challenge any action taken by the

[1] Platform does not contest that the Declaratory Judgment Act alone does not provide a cause of action. *See* Mot. 17.

[2] See Opp. 23 (citing *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388 (1987) (challenge to Comptroller of the Currency's approval of banks' discount brokerage services); *Ass'n of Data Processing Serv. Orgs., Inc. v.*

Commission, and therefore the APA does not provide a basis for review. *Hearst Radio v. FCC*, 167 F.2d 225, 227 (D.C. Cir. 1948) ("Broad as is the judicial review provided by the [APA], it covers only those activities included within the statutory definition of 'agency action.'").

Because there is no APA claim at issue in this case, the requirements of standing to pursue such a claim are irrelevant. Platform's assertion that "the standard for standing under APA is more generous than that under Article III" (Opp. 23), however, warrants correction. The case on which Platform relies instead stands for the proposition that standing to challenge an agency action under § 702 requires *both* that the plaintiff have been "injured in fact"—*i.e.* have standing under Article III—and "the *additional* requirement that the interest sought to be protected by the complainant be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395-96 (1987) (emphasis added) (internal quotation marks omitted).

4. Platform may be required to register as a broker even if it also acts as an underwriter, and therefore its new, unpleaded assertion that it was acting as an underwriter is legally irrelevant.

Platform spends the bulk of its response arguing that it is not required to register as a broker-dealer under Section 15(a)(1) because it intends to act as an underwriter. Resp. at 4-16. But Platform did not allege that it was acting as an underwriter in its complaint, and it may not amend its complaint in a memorandum in opposition to a motion to dismiss. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (declining to address merits of claim that "does not appear anywhere in the amended complaint and did not enter the case until [the plaintiff] mentioned it for the first time in her opposition memoranda to the motion to dismiss"); *Keaton v. Ponte*, 2017 U.S.

Camp, 397 U. S. 150 (1970) (challenge to Comptroller's ruling that allowed national banks to offer competing data processing services); *Investment Co. Inst. v. Camp*, 401 U. S. 617 (1971) (challenge to Comptroller's ruling allowing national banks to go into the business of operating mutual investment funds); *Shaughnessy v. Pedreiro*, 349, U.S. 48, 51 (1955) (challenge to deportation order)).

Dist. LEXIS 124303, at *39 (S.D.N.Y. Aug. 4, 2017) ("Plaintiff is not permitted to interpose new factual allegations and a new legal theory in his opposition to Defendants' motion to dismiss."). Nor does that argument cure the many defects in Platform's complaint.

In any event, Platform is incorrect. Underwriters and broker-dealers are not mutually exclusive categories—persons who act as underwriters can and frequently do also qualify as brokers or dealers who must register under Section 15(a). *Chris-Craft Indus. v. Piper Aircraft Corp.*, 480 F.2d 341, 369 (2d Cir. 1973) (explaining that a party was both the underwriter and dealer-manager for the exchange offer at issue); *United States v. Wolfson*, 405 F.2d 779, 782 (2d Cir. 1968) ("In short, the brokers provided outlets for the stock of issuers and thus were underwriters."). In general, "[a]s an underwriter and dealer, a securities firm buys and sells securities on its own account" and thus "assumes all risks of loss," whereas "[a]s a broker, the firm typically buys and sells securities as an agent for the customer." *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1530 n.14 (11th Cir. 1991).[3] Many entities do both. *Id.* Even if Platform intends to act as an underwriter it is not relieved of the obligation to register as a broker to the extent it also meets the broker criteria that are used by the Commission and courts. *See* Mot. at 2-3. Indeed, Platform's status as an underwriter would trigger other obligations that Platform must meet to avoid running afoul of the securities laws. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 276-77 (2007) ("[T]he SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage.") (citing numerous statutory

[3] *See also In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 180-81 (2d Cir. 2011) (explaining that the term "underwriter" must be "interpreted broadly" and "read in relation to the underwriting function that it is intended to capture," and that, in defining "underwriter," Congress intended "'to include as underwriters all persons who might operate as conduits for securities being placed into the hands of the investing public'") (quoting 2 Thomas Lee Hazen, Law of Securities Regulation § 4.27[1] (6th ed. 2011)).

provisions). This Court should not attempt to opine in an advisory capacity on Platform's legal obligations under the securities laws based on nothing but Mr. Feng's conjectural assertions.

CONCLUSION

For the reasons set forth above and in the Commission's motion to dismiss, the Court should dismiss the complaint with prejudice under Rule 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim.

Dated: February 10, 2020

Respectfully submitted,

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