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October 22, 2020

VIA ELECTRONIC MAIL

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE Room 10915
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**RE: SCOTTSDALE CAPITAL ADVISORS CORPORATION, JOHN J.
HURRY, TIMOTHY B. DIBLASI, AND D. MICHAEL CRUZ
ADMINISTRATIVE PROCEEDING FILE NO. 3-18612**

Dear Ms. Countryman:

Enclosed is FINRA's Opposition to Applicants' Motion for Leave to Submit Supplemental Authority for the above-referenced matter. Please contact me at 202-728-8317 if you have any questions.

Very truly yours,

/s/ Jante Turner

Jante Turner

Vanessa Countryman

October 22, 2020

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Enclosures

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**

In the Matter of the Application of

Scottsdale Capital Advisors Corporation, John J. Hurry, Timothy B. DiBlasi,
and D. Michael Cruz

For Review of Disciplinary Action Taken by

FINRA

Administrative Proceeding File No. 3-18612

**FINRA'S OPPOSITION TO APPLICANTS'
MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL AUTHORITY**

Alan Lawhead
Vice President and
Director – Appellate Group

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FINRA – Office of General Counsel
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October 22, 2020

**BEFORE THE
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MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL AUTHORITY**

Scottsdale Capital Advisors Corporation, John J. Hurry, and D. Michael Cruz (collectively, the “Applicants”) request that the Commission take official notice of *Executive Order 13924 of May 19, 2020: Regulatory Relief to Support Economic Recovery*, 85 Fed. Reg. 31353-56 (May 22, 2020) (the “Executive Order”) and Paul J. Ray’s Memorandum for the Deputy Secretaries of Executive Departments and Agencies concerning the Implementation of Section 6 of the Executive Order (the “Ray Memorandum”).¹ The Commission should deny the Applicants’ request.

Rule 323 of the Commission’s Rules of Practice states that the Commission may take “[o]fficial notice . . . of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body.” 17 C.F.R. § 201.323 (2020). The Executive Order and Ray Memorandum do not meet these standards for

¹ Applicant, Timothy B. DiBlasi, is not included in the motion.

two reasons. First, the Executive Order and Ray Memorandum do not present any material fact or new legal authority related to this appeal. Second, the Executive Order and Ray Memorandum do not apply because FINRA is not an administrative agency, a part of the federal government, or a state actor. For these reasons, the Commission should deny the Applicants' request and disregard the arguments concerning the Executive Order and Ray Memorandum in their brief.

A. The Executive Order and Ray Memorandum Do Not Contain Any Material Fact or New Legal Authority Related to This Appeal

The Commission should deny the Applicants' request for official notice, and disregard the Applicants' arguments about the Executive Order and Ray Memorandum, because the order and memorandum do not contain evidentiary facts or new legal authority that are material to this appeal. The 300 Series of the Commission's Rules of Practice, which includes the rule governing the Commission's official notice of material facts, Commission Rule of Practice 323, is about evidence.

But the Executive Order and Ray Memorandum are not evidence. The Executive Order and Ray Memorandum contain no facts that apply to this appeal and are not related to any relevant facts in this appeal. Nor are they new legal authority that applies to this applicant for review. To the contrary, as the Ray Memorandum emphasizes, the Executive Order and Ray Memorandum provide a "list of best practices" for administrative agencies to consider. *Ray Memorandum* at 1. The Commission should reject the Applicants' attempts to short-circuit the precise standards for the admission of material evidence and binding legal authority and deny the Applicants' request to take official notice of the Executive Order and Ray Memorandum.

B. The Executive Order and Ray Memorandum Do Not Apply to FINRA Because FINRA Is Not an Administrative Agency, Part of the Federal Government, or a State Actor

The Executive Order and Ray Memorandum also do not apply here because FINRA is not an administrative agency, a part of the federal government, or a state actor. The Executive Order and Ray Memorandum specify their applicability to “heads of all agencies,” “administrative enforcement,” and “administrative adjudicators.” *Executive Order 13924 of May 19, 2020: Regulatory Relief to Support Economic Recovery*, 85 Fed. Reg. at 31355; *see Ray Memorandum* at 1, 2. FINRA falls into none of these categories.

FINRA is not an administrative agency. *See Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) (“[FINRA] is a private actor, not a state actor. It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any [FINRA] board or committee.”). FINRA is not a part of the federal government. *See Manuel P. Asensio*, Exchange Act Release No. 62645, 2010 SEC LEXIS 2521, at *6-7 (Aug. 4, 2010) (rejecting argument that FINRA exercises federal executive power). FINRA is not a state actor. *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *37 n.52 (Mar. 15, 2016) (holding that FINRA is not a state actor), *aff’d*, 672 F. App’x 865 (10th Cir. 2016).

FINRA is a self-regulatory organization to which the Executive Order and Ray Memorandum does not apply. *See D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (“It has been found, repeatedly, that [FINRA] itself is not a government functionary.”); *see also Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *42-43 (April 3, 2020) (holding that the Appointments Clause does not apply to FINRA); *Martin Lee Eng*, 55 S.E.C. 91, 95 (2001) (rejecting applicant’s argument that FINRA violated the First Amendment). The Commission therefore should deny the Applicants’ motion

for official notice and reject their misplaced attempts to apply the Executive Order and Ray Memorandum to this appeal.

* * *

The Commission should deny the Applicants' request that it take official notice of the Executive Order and Ray Memorandum because the order and memorandum do not meet the standards of Commission Rule of Practice 323. The Executive Order and Ray Memorandum do not contain any material fact or new legal authority related to this appeal. The Executive Order and Ray Memorandum also do not apply because FINRA is not an administrative agency, a part of the federal government, or a state actor.

Respectfully Submitted,

/s/ Jante Turner

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October 22, 2020

CERTIFICATE OF SERVICE

I, Jante Turner, certify that on October 22, 2020, I caused a copy FINRA's Opposition to Applicants' Motion for Leave to Submit Supplemental Authority, Administrative Proceeding File No. 3-18612, to be served via electronic mail on:

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Respectfully Submitted,

/s/ Jante Turner

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