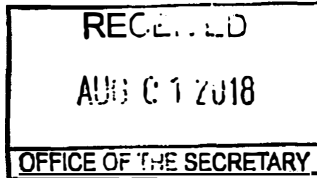


August 1, 2018

Via Courier



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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 Mr. Fields:

On July 31, 2018, counsel for FINRA filed a letter requesting that the Commission strike John J. Hurry's reply brief in support of his motion to stay sanctions because, FINRA argues, such a reply is not authorized by the Commission's Rules of Practice. A plain reading of the Commission's Rules of Practice shows that FINRA's argument is incorrect and that its request should be denied.

Commission Rule of Practice 401 provides, in relevant part, that "[a] request for a stay shall be made by written motion, filed pursuant to Rule 154, and served on all parties pursuant to Rule 150." 17 C.F.R. § 201.401. Commission Rule of Practice 154 governs motions filed with the Commission, and applies "to motions and related filings except where another rule *expressly governs*." *Id.* § 201.154 (emphasis added). Under Commission Rule of Practice 154(b), "[b]riefs in opposition to a motion shall be filed within five days after service of the motion," and "[r]eply briefs shall be filed within three days after service of the opposition." *Id.* § 201.154(b).

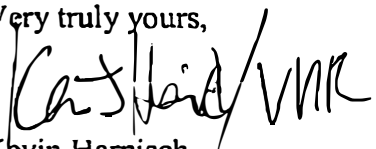
Commission Rule of Practice 401(d)(3), which applies to the expedited consideration of a motion to stay the action of a self-regulatory organization, expressly limits the amount of time to file an opposition brief. *Id.* § 201.401(d)(3). Under Rule 401(d)(3), FINRA is required to file an opposition brief within two days of service of a motion to stay, as opposed to the five days generally provided by Rule 154(b). *Id.*; *see also id.* § 201.154(b). However, Rule 401 is entirely silent with respect to reply briefs. *See* 17 C.F.R. § 201.401. Thus, Rule 401(d)(3) does not "*expressly govern*" the filing of a reply brief in support of a motion to stay sanctions; rather, the default rule in Rule 154 concerning the timing of a reply brief in support of *any* motion applies. *Id.* § 201.154. As such, Mr. Hurry was well within his rights to file a reply to FINRA's opposition brief within three days of service of that brief.

FINRA contends that Rule 401(d)(3)'s silence on the topic of reply briefs operates as a bar. FINRA is mistaken. First, Rule 154 supplies the default rule authorizing reply briefs in support of

motions to stay. *See id.* When the Commission wishes to prohibit reply briefs, it *expressly* so provides in the Rules of Practice. *See id.* § 201.233(a)(3)(i)(A) (“Any party opposing the motion may submit an opposition within five days after service of the motion. No reply shall be permitted.”). In other words, the Commission knows how to bar reply briefs, and it elected not to do so in Rule 401(d)(3). *See mPhase Techs., Inc.*, Exchange Act Release No. 74187, 2015 WL 412910, at *9 (Feb. 2, 2015) (“It is a widely accepted principle of construction that, where a statute or regulation includes particular language in one section but omits it in another, the disparate inclusion or exclusion was intentional and purposeful.”). Second, FINRA’s interpretation of Rule 401 improperly reads Rule 401(d)(3) in isolation, without regard for Rule 401(a), which expressly incorporates Rule 154. The only relevant mention of opposition briefs in Rule 401 appears in Rule 401(d)(3), which applies only to the expedited consideration of stays. *See* 17 C.F.R. § 201.401. By FINRA’s logic, unless a motion to stay is filed under Rule 401(d)(3), FINRA would generally have no right to file an opposition to a motion to stay. This cannot be the case, and we are confident that FINRA would agree. Third, FINRA conspicuously fails to cite even *a single case* in support of its atextual interpretation of Rule 401. Indeed, if the Commission were to adopt FINRA’s position, it would create an unintended disparity in treatment between motions to stay FINRA sanctions and motions to stay Commission sanctions, with reply briefs permitted only on the latter motions. *See, e.g., Dennis J. Malouf*, Exchange Act Release No. 78739, 2016 WL 4537671, at *2 n.11 (Aug. 31, 2016) (discussing petitioner’s reply brief); *Mohammed Riad*, Exchange Act Release No. 78272, 2016 WL 3648316, at *1 n.6 (July 8, 2016) (same). Finally, FINRA fails to explain how the consideration of Mr. Hurry’s reply brief, which already is before the Commission, would in any way slow the proceedings, much less conflict with the Commission’s commitment to expedite the proceedings “consistent with [its] other responsibilities.” 17 C.F.R. § 201.401(d)(3).o

For the foregoing reasons, we respectfully ask the Commission to deny FINRA’s request to strike Mr. Hurry’s reply brief. Strictly in the alternative, we respectfully request leave to file a reply brief and ask that the Commission accept the reply brief filed on July 30, 2018.

Very truly yours,



Kevin Harnisch

KJH

cc: Jante C. Turner
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August 1, 2018
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