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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Edward Beyn

For Review of Disciplinary Action Taken by

FINRA

File No. 3-19007

FINRA'S MOTION TO STRIKE OR FILE A SURREPLY IN OPPOSITION TO THE APPLICATION FOR REVIEW

FINRA respectfully requests that the Commission strike Applicant Edward Beyn's Reply Brief dated July 29, 2019 because it raises numerous new arguments for the first time, which should have been included in Beyn's opening brief. Consequently, FINRA has not had an opportunity to respond to these arguments.

Alternatively, FINRA respectfully requests that, if the Commission accepts Beyn's Reply Brief, it grant FINRA leave to file the attached surreply in opposition to the application for review. The surreply is limited to the arguments Beyn raises for the first time in his Reply Brief.

Respectfully submitted,

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August 13, 2019

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

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In the Matter of the Application of

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For Review of Disciplinary Action Taken by

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FINRA'S SURREPLY IN OPPOSITION TO THE APPLICATION FOR REVIEW

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In his reply brief, Edward Beyn raises several arguments for the first time in this appeal, including that FINRA is a state actor, that relevant evidence was improperly excluded at the hearing, and several other procedural arguments.[1] Beyn's arguments have no merit.[2]

A. FINRA Is Not A State Actor

Much of Beyn's reply brief is dedicated to arguing that, despite abundant case law to the contrary, FINRA is a state actor and, accordingly, constitutional protections apply in FINRA disciplinary proceedings. (Reply Br. at 9-10, 15-19.) The Commission has held repeatedly,

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[1] "R. at __" refers to the page number in the certified record. "Reply Br. __" refers to Beyn's reply brief in support of his application for review dated July 29, 2019.

[2] Beyn argues that Rule 26 of the Federal Rules of Civil Procedure should have been followed in this case and claims that "FINRA has violated Rule 26 multiple times in this case and continues to violate it today." (Reply Br. at 19-21.) Beyn is mistaken. FINRA Rule Series 9200 governs FINRA disciplinary proceedings, including discovery matters, and the Federal Rules of Civil Procedure do not apply. *Cf. Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 SEC LEXIS 1926, at *20 n.24 (Aug. 25, 2006) (explaining that the Federal Rules of Civil Procedure do not apply in administrative proceedings).

however, that FINRA is not a state actor. *See, e.g.*, *Timothy P. Pedregon*, Exchange Act Release No. 61791, 2010 SEC LEXIS 1164, at *19 n.19 (Mar. 26, 2010) (explaining that "[i]t is well established that the requirements of constitutional due process do not apply to FINRA because FINRA is not a state actor."); *Mark H. Love*, 57 S.E.C. 315, 322 n.13 (2004) (stating that the Commission has "held that [FINRA's predecessor] NASD proceedings are not state actions and thus not subject to constitutional requirements"); *William J. Gallagher*, 56 S.E.C. 163, 168 n.10 (2003) (noting that "many courts and this Commission have determined that self-regulatory organizations such as the NASD are not subject to . . . constitutional limitations applicable to government agencies"). Federal courts have also held that FINRA is not a state actor. *See, e.g.*, *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (explaining that "[i]t has been found, repeatedly, that the NASD itself is not a government functionary"); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 699 n.5 (3d Cir. 1979) (concluding that NASD is not a state agency).

Beyn suggests that because FINRA somehow acted in concert with the Commission in discovering his misconduct, it is a state actor. Specifically, Beyn alleges that FINRA's disciplinary proceedings arose out of a Commission investigation of his employing firm, Craig Scott Capital, LLC ("CSC"), and thus, "the SEC and FINRA were involved in the look at CSC together." (Reply Br. at 10.) Beyn cites no support in the record for this claim because none exists. To the contrary, a FINRA examiner testified that the case against Beyn arose out of a May 2014 FINRA cycle examination of CSC. (R. at 4213-14, 4222, 4865-66.)

Even if Beyn's claim were true, however, he has not even come close to proving the close coordination between FINRA and the Commission that would result in FINRA's action being attributable to the Commission. The Commission has held that "proving that status would

require evidence of a high degree of integration between FINRA and the government, such as indications that FINRA sought information from [a respondent] at the direction or behest of" the Commission. *Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 SEC LEXIS 3980, at *23 (Sept. 29, 2015). Moreover, the Commission has held that "general collaboration or cooperation" between FINRA and a government agency is insufficient to establish the degree of interdependence required to give rise to state action by FINRA. *See Michael Sassano*, Exchange Act Release No. 58632, 2008 SEC LEXIS 2947, at *35 (Sept. 24, 2008); *see also Desidero v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) (explaining that there is a "sufficiently close nexus" between a government agency and private actions where "it can be said that the [government agency] is responsible for the specific conduct" at issue). Beyn has not met this burden here; nor can he. There is nothing in the record that suggests any collaboration or cooperation between FINRA and the Commission in bringing this case against Beyn, much less the high degree of interdependence necessary for FINRA's disciplinary action to be viewed as a state action.

B. The Results of FINRA's Cycle Exam Are Not Relevant and the Hearing Officer Properly Excluded the Cycle Exam Exit Letters From Evidence

Beyn argues that "it is important to note" that CSC's FINRA cycle exams, which he claims included a review of trading in CSC's largest accounts, did not result in deficiency letters or disciplinary actions. (Reply Br. at 7-8.) Beyn further argues that the cycle exam letters were excluded from evidence in error. (Reply Br. at 8-9.) Beyn's suggestion that the results of FINRA's cycle exams are relevant to proving that he did not excessively trade or churn customer accounts is utterly baseless. Moreover, the Hearing Officer properly excluded the cycle exam letters from evidence because they were irrelevant.

FINRA Rule 9263(a) provides that "[t]he Hearing Officer shall receive relevant evidence, and may exclude all evidence that it irrelevant, immaterial, unduly repetitious, or unduly

prejudicial." A hearing officer's evidentiary decisions are reviewed for abuse of discretion. *See Robert J. Prager*, 58 S.E.C. 634, 664 (2005).

The Hearing Officer properly excluded the cycle exam exit letters because the letters are irrelevant. It is well-settled that "[a] regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation." *William H. Gerhauser, Sr.*, 53 S.E.C. 933, 940 (1998). Accordingly, the fact that FINRA did not discover Beyn's excessive trading and churning in certain of its cycle exams has no effect on its ability to bring this claim against Beyn.

Moreover, it is well-established that Beyn cannot shift his responsibility for properly trading customer accounts to FINRA. *See ACAP Fin., Inc.*, Exchange Act Release No. 70046, 2013 SEC LEXIS 2156, at *66 n.135 (July 26, 2013) (stating that "[w]e have repeatedly held that a broker-dealer cannot shift its responsibility for compliance with applicable requirements to regulatory authorities") (quoting *Apex Fin. Corp.*, 47 S.E.C. 265, 267 (1980)); *aff'd*, 783 F. 3d 764 (10th Cir. 2015). The Commission has held repeatedly that "[p]articipants in the securities industry must take responsibility for compliance with regulatory requirements and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements" and cannot shift responsibility for compliance to FINRA. *Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995).[3]

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[3] In a similar vein, Beyn suggests that because, to his knowledge, the firm's chief compliance officers were not charged with any violation, his own violations are somehow excused or mitigated. (Reply Br. at 7.) Specifically, Beyn claims the compliance officers "should also be a party to this action and I see their absence as a further indication that the proper people are not being held accountable for their actions or roles here." (Reply Br. at 22.)

First, it is well-established that "FINRA has broad prosecutorial discretion in deciding against whom charges should be brought and what those charges should be." *Wedbush Sec. Inc.*,

[Footnote continued on next page]

C. There Is No Right To Counsel In FINRA Proceedings

Beyn argues that because he lacked funds to hire counsel, he should have been given additional time and assistance from FINRA to prepare for the hearing. (Reply Br. at 7, 10-12.) First, it is well established that, while respondents in disciplinary proceedings are permitted to be represented by counsel, "there is no constitutional or statutory right to representation of counsel in administrative proceedings, such as NASD proceedings." *Citadel Sec. Corp.*, 54 S.E.C. 502, 508 (2004). Moreover, Beyn's argument here appears to be a variation of his argument concerning the Hearing Officer's denial of his motion to stay the hearing. FINRA addresses this argument in Section IV.E.2 of FINRA's July 3, 2019 Brief in Opposition of the Application for Review.

D. The Hearing Officer Properly Denied Beyn's Motion to Sever

Beyn also argues that the Hearing Officer erred in denying his motion to sever the claims against him from the claims against CSC and its principals. (Reply Br. at 12.) Beyn's argument has no merit. FINRA Rule 9214(a) provides that the Chief Hearing Officer may consolidate two or more disciplinary proceedings "where the subject complaints involve common questions of law or fact." The rule directs the Chief Hearing Officer to consider: "(1) whether the same or similar evidence reasonably would be expected to be offered at each of the hearings; (2) whether

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[cont'd]

Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *59 (Aug. 12, 2016), *aff'd*, 719 F. App'x 724 (9th Cir. 2018). Moreover, to the extent Beyn is arguing that the compliance officers are responsible for his violations, the Commission has repeatedly held that a registered representative cannot shift responsibility for his actions to a supervisor. *See, e.g.*, *Allen Holeman*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *27 (July 31, 2019) (rejecting argument that applicant's violation was a compliance officer's responsibility); *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *24 (Mar. 31, 2016) (stating that the Commission has "held that associated persons are responsible for their own compliance and cannot shift that responsibility to a supervisor"), *aff'd sub nom. Harris v. SEC*, 712 F. App'x 46 (2d Cir. 2017).

the proposed consolidation would conserve the time and resources of the Parties; and (3) whether any unfair prejudice would be suffered by one or more Parties as a result of the consolidation." FINRA Rule 9214(d) provides for consideration of the same factors when considering severance of the claims.

On June 1, 2016, the Hearing Officer granted Enforcement's motion to consolidate Beyn's case with another case against CSC and its principals. (R. at 1145-48.) On December 4, 2016, Beyn moved to sever his case from CSC and its principals. (R. at 1305-62.) On December 14, 2016, the Hearing Officer denied Beyn's motion. (R. at 1385-88.)

The Hearing Officer properly consolidated the cases here and denied Beyn's motion to sever. The case against CSC and its principals was partially based on Beyn's excessive trading and churning of accounts, and their failures to supervise Beyn's trading. Accordingly, the cases involved both common issues of law and fact. FINRA often holds disciplinary proceedings with multiple respondents, particularly where the claims involve violations by a registered representative and related failures to supervise by the firm and its supervisors. *See Carlton Wade Fleming, Jr.*, 52 S.E.C. 409, 412-13 (1995) (rejecting a claim that registered representative's case should have been severed from that against a branch manager and principal).

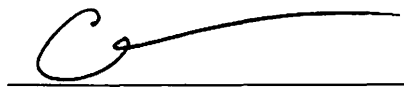
Beyn claims, without support, that "there was no way to differentiate between my actions and those of the principals or management." (Reply Br. at 12.) There is nothing in the record, however, that indicates that the Hearing Panel was unable to differentiate between Beyn's actions and the actions of the other respondents or that the findings of violation by Beyn were based on anything other than the evidence presented. *See Donner Corp. Int'l.*, Exchange Act Release No. 55313, 2007 SEC LEXIS 334, at *69-70 (Feb. 20, 2007) (rejecting argument that a motion to sever should have been granted where there were common issues of law and fact and

the Commission found that "NASD judged each Applicant solely on the record evidence pertaining to that Applicant").[4]

E. Conclusion

The Commission should reject the new arguments advanced by Beyn in his reply brief because they have no merit, and deny Beyn's application for review.

Respectfully submitted,



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August 13, 2019

[4] Finally, we correct two misstatement of the record by Beyn. First, Beyn claims that when activity letters and affidavits of support sent to customers were not returned signed by CSC customers, their accounts were restricted from trading. (Reply Br. at 8.) The record reflects, however, that the firm did not start restricting accounts that did not return signed letters or affidavits until very late in the relevant time period. Gentile, the chief compliance officer who recommended imposing the restrictions, testified that the firm did not begin doing so until sometime during the period from November 2014 to January 2015. (R. at 4638-39.)

Second, Beyn complains that the notes taken by a FINRA examiner who interviewed Beyn's customers during FINRA's investigation were not produced. (Reply Br. at 22.) Beyn is mistaken. The record reflects that the notes were produced to Beyn and the other respondents. (R. at 4267-69.)

CERTIFICATE OF SERVICE

I, Celia L. Passaro, certify that on this 13th day of August 2019, I caused a copy of the foregoing FINRA's Motion to Strike or File a Surreply Brief and FINRA's Surreply in Opposition to the Application for Review, In the Matter of Edward Beyn, Administrative Proceeding File No. 3-19007, to be served by messenger and facsimile on:

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Fax: (202) 772-9324

and via FedEx and electronic mail on:

Edward Beyn
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Dix Hills, NY [redacted]
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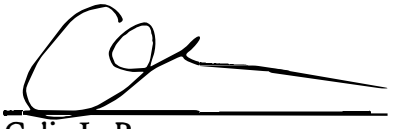
Service was made on the Commission by messenger and on the Applicant by overnight delivery service due to the distance between FINRA's offices and the Applicant.



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VIA MESSENGER AND FACSIMILE

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RE: In the Matter of the Application for Review of Edward Beyn
Administrative Proceeding No. 3-19007

Dear Ms. Countryman:

Enclosed please find the original and three (3) copies of FINRA's Motion to Strike or File a Surreply Brief and FINRA's Surreply Brief in Opposition to the Application for Review in the above-captioned matter.

Please contact me at (202) 728-8985 if you have any questions.

Sincerely,

Celia L. Passaro

Enclosures

cc: Edward Beyn (via FedEx and Email)