

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C.**

In the Matter of the Application of

Silver Leaf Partners, LLC

For Review of Disciplinary Action

Taken by

FINRA

File No. 3-19896

**FINRA'S OPPOSITION TO MOTIONS FOR STAY AND ADDITIONAL EVIDENCE**

Alan Lawhead  
Senior Vice President – Appellate Group

Jennifer Brooks  
Associate General Counsel

Michael M. Smith  
Associate General Counsel

FINRA  
1735 K Street, NW  
Washington, DC 20006  
(202) 728-8177  
michael.smith@finra.org  
nac.casefilings@finra.org

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**FINRA’S OPPOSITION TO MOTION FOR STAY AND ADDITIONAL EVIDENCE**

Applicant Silver Leaf Partners, LLC, filed a Motion for Stay and Additional Evidence asking the Commission to (1) stay its review of this proceeding indefinitely, (2) order a review of FINRA’s “business and enforcement practices,” (3) order FINRA to amend its disclosure about this disciplinary proceeding on the Central Registration Depository (“CRD<sup>®</sup>”), and (4) “reserve a process for damages and restitution related thereto.” The Commission should deny Silver Leaf’s motion in its entirety. The Commission should deny Silver Leaf’s motion for a stay because Silver Leaf failed to make a “strong showing” that the denial of a stay “would substantially prejudice” its case, and therefore Silver Leaf failed to satisfy the standard for a stay under SEC Rule of Practice 161. The Commission should deny the remainder of Silver Leaf’s motion because it cannot grant the relief Silver Leaf seeks. The Commission repeatedly has held that, in the context of a disciplinary proceeding review, it does not have authority beyond that specified in Sections 19(d) and (e) of the Securities Exchange Act of 1934 (the “Exchange Act”). The

Commission therefore cannot order a sweeping review of FINRA’s “business and enforcement practices,” it cannot order FINRA to amend its CRD<sup>®</sup> disclosure about this disciplinary proceeding, and it cannot “reserve a process for damages and restitution related thereto.” Accordingly, the Commission should deny Silver Leaf’s motion in its entirety.

## **I. BACKGROUND**

In June 2020, FINRA’s National Adjudicatory Council (“NAC”) issued a decision in which it found that Silver Leaf violated FINRA and NASD rules by (a) paying almost \$3 million in transaction-based compensation to an unregistered person and several nonmember entities and (b) failing to reasonably supervise its business. *See* RP 6579.<sup>1</sup> For paying transaction-based compensation to an unregistered person and nonmember entities, the NAC fined Silver Leaf \$50,000. RP 6610-11. For failing to reasonably supervise its business, the NAC fined Silver Leaf \$50,000, ordered the firm to retain an independent consultant to review its policies and procedures, and suspended the firm from engaging in its “Corporate Advisory” line of business until it certifies its implementation of the independent consultant’s recommendations. RP 6611-14.<sup>2</sup> In July 2020, FINRA filed a Uniform Disciplinary Action Reporting Form (“Form U6”) reporting the NAC’s findings to CRD<sup>®</sup>.<sup>3</sup> *See* Attachment C to Silver Leaf’s Motion. Later that month, Silver Leaf filed its application for review. RP 6617. Briefing on the merits of Silver Leaf’s application was completed in November 2020.

On August 31, 2023, Silver Leaf moved to stay indefinitely the Commission’s review of the NAC’s decision based on an order entered in an unrelated matter pending in federal court,

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<sup>1</sup> “RP” refers to the page in the certified record FINRA filed with the Commission.

<sup>2</sup> Under FINRA Rule 9370, the sanctions the NAC imposed are stayed while Silver Leaf’s appeal to the Commission is pending.

<sup>3</sup> Information about disciplinary actions is reported to CRD<sup>®</sup> via Form U6. *See Eric David Wanger*, Exchange Act Release No. 79008, 2016 SEC LEXIS 3770, at \*4 (Sept. 30, 2016).

*Alpine Securities Corp. v. Financial Industry Regulatory Authority*, No. 23-5129, 2023 U.S. App. LEXIS 16987 (D.C. Cir. July 5, 2023), *motion for reh'g en banc denied*, No. 23-5129, 2023 U.S. App. LEXIS 22093 (Aug. 22, 2023). In *Alpine*, FINRA brought an expedited proceeding against Alpine due to alleged violations of a preexisting cease-and-desist order. 2023 U.S. App. LEXIS 16987, at \*2. In response, Alpine filed an emergency motion seeking an injunction pending appeal to block its potential expulsion from FINRA. *Id.* Alpine alleged that FINRA's enforcement action violated the United States Constitution. *Id.* at \*3. After an interlocutory appeal from the denial of an injunction by the district court, a divided motions panel of the D.C. Circuit Court of Appeals granted Alpine's emergency injunctive motion pending appeal. *Id.* Significantly, however, the motions panel did not decide the constitutional issues alleged by Alpine. *See id.* at \*3. Rather, the panel's per curiam order addresses only an emergency injunction, not the merits, which will be addressed after further briefing and argument. *See id.* at \*3-10. Thus, the interim injunction pending appeal in *Alpine* is preliminary and is not precedential. *See, e.g., In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011) (explaining that unpublished orders or opinions do not have binding precedential effect and "do not constrain a panel of the court from reaching a contrary conclusion in a published opinion after full consideration of the issue").

In addition to seeking a stay of the Commission's review of this disciplinary proceeding, Silver Leaf asks the Commission to "[u]ndertake the process of securing additional evidence to determine the fairness, sufficiency, and constitutionality of FINRA's business and enforcement practices," order FINRA to amend its CRD<sup>®</sup> disclosure about the disciplinary proceeding "to a

more generic disclosure pending the outcome of the Alpine matter and these proceedings,”<sup>4</sup> and “reserve a process for damages and restitution related thereto[.]”<sup>5</sup> Silver Leaf’s Motion at 4-5.

## II. ARGUMENT

The Commission should deny Silver Leaf’s motion in its entirety because (1) Silver Leaf has not shown good cause for a stay of indefinite duration, (2) the Commission does not have authority in this proceeding to order a review of FINRA’s “business and enforcement practices” or to “reserve a process for damages and restitution,” and (3) the Commission does not have jurisdiction to review information disclosed in CRD<sup>®</sup> about this disciplinary proceeding.

### A. Silver Leaf Has Not Shown Good Cause for an Indefinite Stay

Silver Leaf’s motion for a stay is governed by SEC Rule of Practice 161. *See John Roger Faherty*, Exchange Act Release No. 41454, 1999 SEC LEXIS 1067, at \*1-2 (May 26, 1999) (stating that an applicant’s request “for an indefinite postponement of this review proceeding” was governed by Rule of Practice 161 rather than Rule of Practice 401). Under SEC Rule of Practice 161, the Commission may stay a review proceeding for “good cause.” *Id.* at \*2. In considering such a request, the Commission “should adhere to a policy strongly disfavoring” delays “except where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case.” SEC Rule of Practice 161(b), 17 C.F.R. § 201.161(b). The Commission also must consider the length of the proceeding to date, the

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<sup>4</sup> Silver Leaf states in its motion that it is seeking an order requiring FINRA to amend its “Form BD Disclosure.” Silver Leaf’s Motion at 4. It appears from Silver Leaf’s motion that Silver Leaf is seeking an order requiring FINRA to amend the Form U6, which reported the NAC’s findings to CRD<sup>®</sup>. *See* Attachment C to Silver Leaf’s Motion.

<sup>5</sup> Silver Leaf also asks the Commission to “[r]ule in favor of Silver Leaf in these proceedings and terminate them forthwith.” Silver Leaf’s Motion at 5. This request is at odds with the firm’s request for an indefinite stay of this proceeding. In any event, the Commission should not rule in Silver Leaf’s favor for the reasons stated in FINRA’s Brief in Opposition to the Application for Review.

number of postponements, adjournments or extensions already granted, the stage of the proceedings at the time of the request, and any other matters as justice may require. *Id.* A stay of proceedings may not exceed 21 days unless the Commission finds that a longer period is necessary. SEC Rule of Practice 161(c)(1), 17 C.F.R. § 201.161(c)(1).

Silver Leaf has not made the required “strong showing” that it will be prejudiced if the Commission does not stay this review proceeding. Indeed, Silver Leaf has not shown that it will be prejudiced in any way if its motion is denied. Instead, Silver Leaf baldly asserts that this proceeding should be stayed due to the purported “likelihood” that the court in *Alpine* will find that FINRA’s “adjudicatory process and structure” is unconstitutional.<sup>6</sup> Silver Leaf Motion at 2. This is not sufficient to justify any stay of this review proceeding, much less a stay of indefinite duration. *Cf. Jon Edelman*, 52 S.E.C. 789, 790 (1996) (“The public interest demands prompt enforcement of the securities laws, even while other government proceedings are under way. Accordingly, indefinite stays for the purposes of pursuing other relief are inappropriate.”).

Other relevant factors also weigh against staying this proceeding: Silver Leaf’s application for review has been pending for three years, and the parties have fully briefed the issues on appeal. Because Silver Leaf has not shown that it will be prejudiced if this proceeding

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<sup>6</sup> The Commission already has rejected in other cases arguments that FINRA’s disciplinary process is unconstitutional. *See, e.g., Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at \*43 (Apr. 3, 2020) (“[T]he Appointments Clause does not apply to FINRA; accordingly, the manner in which FINRA hires its staff, hearing officers, and NAC members cannot violate the Appointments Clause.”); *Behnam Halali*, Exchange Act Release No. 79722, 2017 SEC LEXIS 31, at \*11-12 (Jan. 3, 2017) (“[M]ost of the provisions of the Fifth Amendment, in which the self-incrimination clause is imbedded, are incapable of violation by anyone except government in the narrowest sense. And it has been found, repeatedly, that FINRA itself is not a government functionary.”); *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at \*41 n. 56 (May 27, 2011) (“FINRA is a private actor, and accordingly is not bound by governmental constitutional and common law due process requirements.” (*citing Desiderio v. NASD*, 2 F. Supp. 2d 516, 519 (S.D.N.Y. 1998), *aff’d*, 191 F.3d 198 (2d Cir. 1999) (rejecting plaintiff’s claim that NASD violated her rights under the Fifth and Seventh Amendments because NASD was a private actor, not a state actor)).

is not stayed, and the other relevant factors weigh against a stay, the Commission should deny Silver Leaf's motion to stay this proceeding pending resolution of the *Alpine* case.

**B. The Commission Does Not Have Authority in This Proceeding to Order a Review of FINRA or to “Reserve a Process for Damages and Restitution”**

The Commission does not have authority in this review proceeding to order a review of FINRA's “business and enforcement practices” or to “reserve a process for damages and restitution.” The Commission's authority to review FINRA's disciplinary actions is governed by Exchange Act Sections 19(d) and (e). *See* 15 U.S.C. § 78s(d)-(e). Section 19(e) governs the remedies the Commission may order in a proceeding to review a disciplinary sanction imposed by FINRA. Under Section 19(e), the Commission may affirm or modify the sanction FINRA imposed or remand the matter to FINRA for further proceedings. 15 U.S.C. § 78s(e). The Commission repeatedly has held that it lacks authority to order any other remedy in a review proceeding. *See, e.g., Blackbook Cap., Inc.*, Exchange Act Release No. 97027, 2023 SEC LEXIS 524, at \*10-11 (Mar. 2, 2023) (stating that the Commission could not enjoin FINRA or order FINRA to pay damages), *Sky Cap. LLC*, Exchange Act Release No. 55828, 2007 SEC LEXIS 1179, at \*9 n.11 (May 30, 2007) (stating that the Commission could not order FINRA to pay damages or “reassign regulatory oversight” of the applicant to another self-regulatory organization”). Indeed, the Commission has rejected previous requests for the same types of relief Silver Leaf seeks here. In *J.W. Korth & Co., LP*, the Commission denied the applicant's request that it order a “broad review of FINRA's enforcement program” because doing so was “beyond the scope of [the Commission's] authority in a proceeding to review FINRA disciplinary action pursuant to Exchange Act Section 19(e).” Exchange Act Release No. 94581, 2022 SEC LEXIS 852, at \*34 (Apr. 1, 2022). Similarly, in *John Joseph Plunkett*, the Commission rejected the applicant's request for monetary damages because awarding damages

was “beyond the scope of [the Commission’s] authority” under Section 19(e). Exchange Act Release No. 73124, 2014 SEC LEXIS 3396, at \*23 (Sept. 16, 2014). The same reasoning applies here. The Commission therefore should deny Silver Leaf’s request for a review of FINRA’s “business and enforcement practices” and its request to “reserve a process for damages and restitution.”

**C. The Commission Lacks Jurisdiction to Review FINRA’s Disclosures In CRD<sup>®</sup> About this Disciplinary Proceeding**

The Commission does not have jurisdiction to consider Silver Leaf’s request for an order directing FINRA to amend its disclosure in CRD<sup>®</sup> about this disciplinary proceeding. Section 19(d) of the Exchange Act authorizes the Commission to review FINRA actions that: (i) impose a final disciplinary sanction on a FINRA member or an associated person; (ii) deny membership or participation to the applicant; (iii) prohibit or limit access to services offered by FINRA; or (iv) bar a person from becoming associated with a member. 15 U.S.C. § 78s(d). FINRA’s CRD<sup>®</sup> disclosure regarding this disciplinary proceeding does not fall within any of these bases of jurisdiction. FINRA’s CRD<sup>®</sup> disclosure did not impose a final disciplinary sanction on Silver Leaf, did not deny Silver Leaf membership or participation, did not prohibit or limit Silver Leaf’s access to any service offered by FINRA, and did not bar any person from becoming associated with a FINRA member. *See, e.g., Blackbook Cap.*, 2023 SEC LEXIS 524, at \*5 (stating that FINRA’s disclosure of its disciplinary proceeding against the applicant was not reviewable because it was “a predictable consequence of FINRA’s action” and did not constitute an independent sanction); *Sandeep Varma*, Exchange Act Release No. 98102, 2023 SEC LEXIS 2132, at \*4 (Aug. 10, 2023) (“[W]e have long held that challenges to information maintained by FINRA in the CRD or BrokerCheck do not provide a basis for our review under Section



19(d).”).<sup>7</sup> The Commission therefore should deny for lack of jurisdiction Silver Leaf’s request for an order directing FINRA to amend its CRD<sup>®</sup> disclosure about this disciplinary proceeding.

#### IV. CONCLUSION

Silver Leaf has failed to demonstrate good cause for an indefinite stay of this review proceeding, and the Commission cannot order the other relief Silver Leaf seeks in its motion.

The Commission therefore should deny Silver Leaf’s Motion for Stay and Additional Evidence.

Respectfully submitted,

/s/ Michael M. Smith

Michael M. Smith  
Associate General Counsel  
FINRA  
1735 K Street, NW  
Washington, DC 20006  
(202) 728-8177  
michael.smith@finra.org  
nac.casefilings@finra.org

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<sup>7</sup> See also *Jonathan Edward Graham*, Exchange Act Release No. 89237, 2020 SEC LEXIS 3464, at \*6 (dismissing an application for review seeking expungement of information from CRD<sup>®</sup> because the Commission “lack[s] jurisdiction where Congress has not expressly authorized it”) (July 7, 2020); *Blair Edwards Olsen*, Exchange Act Release No. 93216, 2021 SEC LEXIS 2978, at \*15-16 (Sept. 30, 2021) (finding that the Commission lacked statutory authority “to consider the accuracy of Olsen’s BrokerCheck report”); *Wanger*, 2016 SEC LEXIS 3770, at \*12-17 (finding that an application for review that challenged a disclosure on BrokerCheck did not meet any of the bases for review under Section 19(d)).

**CERTIFICATE OF COMPLIANCE**

I, Michael M. Smith, certify that I have complied with the Commission's Rules of Practice by filing an opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

/s/ Michael M. Smith

Michael M. Smith  
Associate General Counsel  
FINRA  
1735 K Street, NW  
Washington, DC 20006  
(202) 728-8177  
michael.smith@finra.org  
nac.casefilings@finra.org

Dated: September 8, 2023

**CERTIFICATE OF SERVICE**

I, Michael M. Smith, certify that on this 8th day of September 2023, I caused a copy of the foregoing Opposition to Motion for Stay and Additional Evidence, *In the Matter of the Application of Silver Leaf Partners, LLC*, Administrative Proceeding File No. 3-19896, to be served through the SEC's eFAP system on:

Vanessa A. Countryman  
The Office of the Secretary  
U.S. Securities and Exchange Commission  
100 F St., NE  
Room 10915  
Washington, DC 20549-1090

I further certify that, on this date, I caused copy of FINRA's opposition in the foregoing matter to be served by electronic service on:

M. Fyzul Khan, Esq.  
Silver Leaf Partners, LLC  
3 Columbus Circle, Floor 15  
New York, NY 10019  
fkhan@silverleafpartners.com

Respectfully submitted,

/s/ Michael M. Smith

Michael M. Smith  
Associate General Counsel  
FINRA  
1735 K Street, NW  
Washington, DC 20006  
(202) 728-8177  
michael.smith@finra.org  
nac.casefilings@finra.org