BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

William Joseph Kielczewski

For Review of Disciplinary Action

Taken by

FINRA

File No. 3-20636

FINRA'S OPPOSITION TO REQUEST TO ORDER SUPPLEMENTAL BRIEFING

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I. INTRODUCTION

Applicant William Joseph Kielczewski appealed the National Adjudicatory Council's ("NAC") decision against him to the Commission in October 2021. Since then, the parties have thoroughly briefed the issues on appeal to the Commission, with Kielczewski filing his final brief in March 2022. Now, 17 months later, Kielczewski asks the Commission to order supplemental briefing to address purported "new precedent from the D.C. Circuit Court of Appeals and to raise Constitutional challenges to the underlying FINRA proceeding." The Commission, however, should reject Kielczewski's request for additional briefing because such briefing would not significantly aid the Commission's decisional process, and Kielczewski has forfeited these arguments by not raising them below.

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II. BACKGROUND

This case is a straightforward disciplinary matter. For more than two years while Kielczewski was associated with FINRA member firm, The Huntington Investment Company ("Huntington"), he participated in five private securities transactions with five Huntington customers who invested over $10 million in a hedge fund that Kielczewski created and co-owned. Kielczewski did not dispute that he participated in these transactions and failed to provide Huntington with prior written notice of the transactions and his role in them, in violation of NASD and FINRA rules. Rather than disclosing to Huntington his participation in these transactions, Kielczewski repeatedly assured the firm in email correspondence, on compliance attestations, and on five securities registration filings that he was only a "passive" investor in the fund who spent little to no time on its business. These assurances, however, were demonstrably false.

Consistent with these facts, the NAC found Kielczewski liable for (1) engaging in private securities transactions; (2) making false statements to Huntington; and (3) willfully causing Huntington to file a misleading securities registration form and four misleading registration form amendments. And in accordance with FINRA's Sanction Guidelines and the seriousness of Kielczewski's misconduct, the NAC suspended Kielczewski for 18 months, fined him $50,000, and required him to requalify as a general securities representative.

These issues, along with procedural arguments related to a denied motion to compel and whether FINRA staff impeded Kielczewski's development of a record because of Huntington's withheld documents and assertions of privilege, were fully briefed to the Commission.

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III. ARGUMENT

A. Additional Briefing Is Unnecessary for the Commission to Decide this Straightforward Disciplinary Matter

When deciding whether to order additional briefing, the Commission "may . . . consider any matter that it deems material, whether or not raised by the parties . . . . where the Commission believes that such briefing would significantly aid the decisional process." Commission's Rules of Practice, Rule 421(b), 17 C.F.R. § 201.421(b). Kielczewski has not demonstrated that the new issues that he seeks to raise are material and that additional briefing would significantly aid the Commission's decisional process. *See id.*

The facts and the legal arguments in this disciplinary case are not complex or novel, and none of the arguments made by Kielczewski in his request supports the need for supplemental briefing. Kielczewski conceded before the NAC that he participated in $10 million in undisclosed private securities transactions in violation of FINRA and NASD rules. Kielczewski also violated FINRA rules by making false statements to Huntington on compliance forms related to his involvement in the private securities transactions and provided misleading information on his Uniform Application for Securities Industry Registration or Transfer ("Form U4") and four Form U4 amendments. The Commission regularly considers applications for review involving similar misconduct based only on routine briefing. Kielczewski's arguments in support of the request for additional briefing are essentially an attempt to raise constitutional arguments that he failed to raise before the NAC. Moreover, the materiality and import of these arguments are undermined when the Commission already has rejected in other cases the constitutional arguments that Kielczewski now seeks to make for the first time. *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

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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 (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)).

The Commission should deny Kielczewski's request for additional briefing.

B. Kielczewski Forfeited His Constitutional Arguments

Kielczewski failed to exhaust the new claims he seeks to make that FINRA's disciplinary process violates the Appointments Clause, and, to that end, that FINRA's procedures fail to provide constitutional due process, a right to a jury trial, and violate his Fifth Amendment rights by failing to argue these claims before FINRA. Thus, Kielczewski has forfeited these arguments before the Commission and should not be permitted to raise and brief them now. *See Newport Coast*, 2020 SEC LEXIS 911, at *38.

As the Commission has held, "imposing an exhaustion requirement promotes the efficient resolution of disciplinary disputes between [Self-Regulatory Organizations] and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations." *Id.* at *39. It also "promotes the development of a record

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in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review." *Blair Edward Olson*, Exchange Act Release No. 93216, 2021 SEC LEXIS 2978, at *11 (Sept. 30, 2021). In addition to promoting the development of a record in proceedings before an SRO, administrative exhaustion requirements "also provides SROs with the opportunity to correct their own errors prior to review by the Commission." *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621 (2d Cir. 2004).

In contrast, disregarding the exhaustion requirement fosters disorderly appellate review and inefficiency. "Were SRO members . . . free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised." *Id.* It is therefore "clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review." *Newport Coast*, 2020 SEC LEXIS 911, at *39-40. "Proper exhaustion of administrative remedies demands compliance with an agency's deadlines and other critical procedural rules governing the presentation of arguments and objection[s] at the time appropriate under its practice because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* at *40.

The record shows that Kielczewski failed to raise his Appointments Clause and related arguments that he now seeks to raise at any point before FINRA. To be sure, the policy reasons supporting the exhaustion doctrine apply with equal force here.

Kielczewski argues that he is not prevented from making these arguments now because he was not required to identify every argument "in an application for review" when appealing the NAC's decision. (Kielczewski's August 15, 2023 Letter to Commission at 3.) An applicant's failure to recite all his arguments when he first appealed to the Commission, however, is

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markedly different than a failure to raise an argument *at all* when defending a matter before a FINRA Hearing Panel and the NAC. The Commission has explained that "unawareness of the availability of the claim does not excuse the failure to exhaust it, even assuming for sake of argument . . . that an intervening change in the law might constitute a reasonable ground to excuse the failure to exhaust." *Id.* at *41. Nothing prevented Kielczewski from bringing these constitutional claims before now.

Because Kielczewski failed to exhaust his claim that FINRA's process violates the Appointments Clause, his constitutional claims are forfeited and not properly before the Commission. *See Robert Marcus Lane*, Exchange Act Release No. 98124, 2023 SEC LEXIS 2017, at *2 n.7 (Aug. 14, 2023) (order denying motion for reconsideration) ("Nor do we address Lane's filing to the extent that he seeks to raise new arguments for our overturning FINRA's decision that he did not raise in his original appeal."); *Richard G. Cody*, Exchange Act Release No. 65235, 2011 SEC LEXIS 3041, at *7 & n.8 (Aug. 31, 2011) (declining to consider new claims in motion for reconsideration); *see Canady v. SEC*, 230 F.3d 362, 362-63 (D.C. Cir. 2000) (upholding Commission's conclusion that respondent "waived [a] defense by failing to argue it"); Commission Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (providing that, "except as otherwise determined by the Commission in its discretion, any argument raised for the first time in a reply brief shall be deemed to have been waived"); *cf. Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) ("[A]rguments not raised to the district court are waived on appeal [and] even arguments that have been raised may still be waived on appeal if they are underdeveloped, conclusory, or unsupported by law."). The Commission should deny Kielczewski's request for supplemental briefing because Kielczewski failed to exhaust these new claims.

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C. A Federal Court's Granting of an Interim Injunction in an Unrelated Case Is Not Precedent

Kielczewski argues that the unpublished, per curiam order by a motions panel of the D.C. Circuit Court of Appeals in *Alpine Securities Corp. v. Financial Industry Regulatory Authority*, No. 23-5129, 2023 U.S. App. LEXIS 16987 (D.C. Cir. July 5, 2023), *petition for reh'g en banc filed*, No. 1:23-cv-01506-BAH (July 19, 2023), an unrelated FINRA disciplinary case, is "new precedent" that justifies additional briefing here.[1] Kielczewski is incorrect and overstates the relevance of a temporary order entered in an unrelated matter.

In *Alpine*, FINRA brought an expedited enforcement action to expel Alpine from FINRA membership 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 expulsion from FINRA. *Id.* A motions panel of the D.C. Circuit Court of Appeals granted Alpine's emergency injunctive motion, finding that Alpine met the requirements for an injunction 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 "new precedent." *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

[1] FINRA's petition for rehearing en banc before the D.C. Circuit Court of Appeals to reconsider the motion panel's per curiam order is fully briefed by the parties and remains pending as of the date of this filing.

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consideration of the issue"). The *Alpine* order is immaterial to, and has no effect on, the disciplinary case against Kielczewski, and its entry does not warrant additional briefing in Kielczewski's appeal.

IV. CONCLUSION

The parties already have thoroughly briefed the issues on appeal, and Kielczewski has forfeited any new arguments by not raising them below. The Commission should deny Kielczewski's request for supplemental briefing because any additional briefing would not significantly aid the Commission's decisional process.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jennifer Brooks, 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).

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Dated: August 22, 2023

CERTIFICATE OF SERVICE

I, Jennifer Brooks, certify that on this 22nd day of August 2023, caused a copy of the foregoing Opposition to Request to Order Supplemental Briefing, In the Matter of the Application of William Joseph Kielczewski, Administrative Proceeding File No. 3-20636, to be served through the SEC's eFAP system on:

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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:

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