



August 15, 2023

By eFAP: www.sec.gov/eFAP

Vanessa Countryman, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

**Re: In the Matter of the Application of William J. Kielczewski
Admin. Proc. File No. 3-20636 For Review of Disciplinary Action Taken by FINRA**

Dear Ms. Countryman:

We represent Mr. Kielczewski in the above referenced action. Mr. Kielczewski's appeal from a disciplinary action taken by FINRA is currently pending before the SEC. The most recent action by the Commission was to extend its time to issue a decision to September 24, 2023.

Mr. Kielczewski requests permission to supplement his submission based on new precedent from D.C. Circuit Court of Appeals and to raise Constitutional challenges to the underlying FINRA proceeding. SEC Rule of Practice 421(b) permits supplemental arguments, whether or not raised by the parties, if briefing on those matters would significantly aid in the decisional process. While the Commission has generally relied on this provision in ordering supplemental briefing *sua sponte*, it has considered, and granted, applications by the parties seeking supplemental briefing under the authority of this provision. See *In re Springsteen-Abbott*, Release No. 82378 (Dec. 21, 2017) (granting application by party for supplemental briefing); *In re Acosta*, Release No. 87509 (Nov. 12, 2019) (treating application for expedited hearing as request for supplemental briefing and granting it). This practice is consistent with the Commission's rule that "an applicant need not identify every contention or argument in an application for review appealing an SRO decision." *In the Matter of John Vincent Ballard*, Release No. 77452 (Mar. 25, 2016).

A recent ruling from the D.C. Circuit Court of Appeals suggests that the process used by FINRA to discipline Mr. Kielczewski violates the Appointments Clause and the separation of powers requirement of the U.S. Constitution. Additionally, FINRA's disciplinary process does not provide for due process or a jury trial, in violation of the Fifth and Seventh Amendments. Accordingly, in for these reasons, in addition to those raised in Mr. Kielczewski's initial briefing, the action by the FINRA panel should be vacated.

1. FINRA's disciplinary process violates the Appointments Clause and the separation of powers requirement of the U.S. Constitution.

On July 5, 2023, the D.C. Circuit Court of Appeals issued a ruling in *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, No. 23-5129, 2023 WL 4703307, at *1 (D.C. Cir. July 5, 2023), granting Alpine's emergency motion to enjoin FINRA from continuing its enforcement proceeding. In concurrence, Judge Walker explained that Alpine would likely succeed on the merits of its challenge to FINRA's disciplinary action because FINRA hearing officers are not appointed by a government body under the Appointments Clause and are not removable by the executive in violation of the Constitution's separation of powers requirement. *Alpine Sec. Corp.*, 2023 WL 4703307, at *2. Relying on the Supreme Court's ruling in *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018), Judge Walker noted that "FINRA's hearing officers are near carbon copies of those ALJs" and that "if the ALJs in *Lucia* exercised 'significant' executive power, then FINRA hearing officers probably do too." *Id.* at, *2-3; *see also Nat'l Ass'n of Sec. Dealers*, 431 F.3d at 806 ("The statutory scheme governing NASD actions parallels the Commission's internal adjudicative structures.")

FINRA's disciplinary scheme relies on an unconstitutional structure. *See Lucia*, 138 S. Ct. at 2051 (determining a near identical structure used by the SEC was unconstitutional). As such, Mr. Kielczewski has been subject to an illegitimate proceeding by an illegitimate decision maker and the disciplinary action taken against him by FINRA should be vacated or, at a minimum, stayed pending resolution in *Alpine*. It is respectfully requested that Mr. Kielczewski and FINRA be permitted to brief this issue.

2. FINRA's procedures fail to provide due process and deny individual's the right to a jury trial.

In addition, if FINRA is ultimately found to be exercising executive powers in disciplinary proceedings,¹ FINRA may also be bound by Due Process and the Seventh Amendment right to a jury trial. *See NB ex rel. Peacock v. D.C.*, 794 F.3d 31, 42 (D.C. Cir. 2015); (a private actor acting as an agent of the state is restrained by the Due Process Clause); *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 459 (5th Cir. 2022) (Seventh Amendment rights attached to administrative hearing).

¹ While courts prior to *Alpine* generally did not find FINRA to "exercise[] significant executive power," *id.* at *2 (Walker, concurring), the argument that it does finds broad support in other areas of administrative law. "The requisite nexus [for state action] generally exists when a private party acts as an agent of the government in relevant respects." *NB ex rel. Peacock v. D.C.*, 794 F.3d 31, 43 (D.C. Cir. 2015); *see also Nat'l Ass'n of Sec. Dealers v. S.E.C.*, 431 F.3d 803, 804-807 (D.C. Cir. 2005) (the NASD is a "quasi-governmental agency" with "quasi-governmental authority to adjudicate actions against members" and quasi-governmental power to discipline its members"). If it is performing the role of a state actor in disciplinary proceedings, FINRA should comply with the restraints of the Constitution. *See Peacock*, 794 F.3d at 42 (a private actor acting as an agent of the state is restrained by the Due Process Clause).

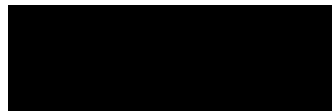
If FINRA is found to be exercising executive authority in disciplinary proceedings, that would implicate Mr. Kielczewski's rights under the Fifth and Seventh Amendments to the Constitution, in addition to the Appointments Clause.² Accordingly, Mr. Kielczewski would also request supplemental briefing to address these issues.

3. Mr. Kielczewski is not barred from raising arguments at this juncture.

The Commission has not yet decided Mr. Kielczewski's appeal and has adjourned the date for decision until September 24, 2023. As noted above, SEC Rule of Practice 421(b) allows for briefing of issues not initially raised by the parties "at any time prior to issuance of [the Commission's] decision". 17 C.F.R. § 201.421(b). And, as previously noted, "an applicant need not identify every contention or argument in an application for review appealing an SRO decision." *In the Matter of John Vincent Ballard*, Release No. 77452 (Mar. 25, 2016).

The challenges raised by Mr. Kielczewski go to the validity of FINRA's process and its fundamental fairness and should be considered by the SEC. The questions presented are of the highest importance to Mr. Kielczewski, FINRA and the SEC. Allowing for supplemental briefing will cause no prejudice to any party or to the Commission.

Because the SEC Rules of Practice permit supplemental briefings and because of the importance of the issues raised, it is respectfully requested that the Commission direct the parties to submit supplemental briefs addressing the constitutionality of the FINRA proceeding for the reasons raised above.



² The procedural due process flaws in the FINRA proceeding, including requiring Mr. Kielczewski to proceed on an incomplete record by allowing his employer to withhold exculpatory documents showing its actual knowledge of his business interests, are detailed in Mr. Kielczewski's initial briefing.

CERTIFICATE OF SERVICE

I, Andrew St. Laurent, do hereby swear and affirm that on August 15, 2023 I caused the attached August 15, 2023 Motion for Supplemental Briefing to be sent to the Office of General Counsel, FINRA, 1735 K Street, NW, Washington, DC 20006 by sending it via email to Jennifer Brooks, FINRA's designated agent, at jennifer.brooks@finra.org and nac.casefilings@finra.org.

So sworn,



Andrew St. Laurent

Dated: August 15, 2023