BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Alpine Securities Corporation

For Review of

FINRA Disciplinary Action

File No. 3-_____

FINRA'S BRIEF IN OPPOSITION TO THE MOTION FOR AN EMERGENCY STAY

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April 8, 2022

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FINRA'S BRIEF IN OPPOSITION TO THE MOTION FOR AN EMERGENCY STAY

I. INTRODUCTION

Alpine Securities Corporation ("Alpine") seeks an emergency stay of its April 7, 2022 suspension, which a FINRA Hearing Panel imposed in an order entered in an expedited proceeding under FINRA Rule 9552. The FINRA Hearing Panel found that Alpine's October 7, 2021 audit report was "materially inaccurate" because it overstated the firm's net capital. In particular, the firm excluded its liability for a judgment from net capital by offsetting that liability with an $11 million credit that was not allowable under Exchange Act Rule 15c3-1. Hearing Panel Decision ("HP Dec.," attached as Exhibit A) at 11-14, 12. The Hearing Panel analyzed the net capital rule, considered Alpine's explanation for why it added the $11 million credit, and concluded that Alpine's reasoning would allow broker-dealers to "artificially add value to its net capital" by improperly excluding liabilities. HP Dec. at 14. In its order, the

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Hearing Panel suspended Alpine until such time as it provides an audited report that accurately states its net capital, as FINRA first requested nearly nine months ago under FINRA Rule 4140.

FINRA has agreed to allow Alpine to engage only in unsolicited liquidating transactions of customers' securities that are currently held at Alpine, including unsolicited liquidating transactions of securities for customers of Scottsdale Capital Advisors Corp. ("Scottsdale") that are currently custodied at Alpine, and it does not oppose the Commission entering an order to that effect while any appeal of FINRA's action is pending before the Commission.

FINRA nevertheless opposes Alpine's request for an emergency stay because the firm has not met its burden of demonstrating that a stay is appropriate. Alpine has not met its burden of showing that the several factors considered by the Commission when evaluating a stay motion have been established. Indeed, rather than addressing any of these factors, Alpine merely requests that the Commission "immediately issue a stay" of its suspension while the Commission considers an application for review that the firm has yet to file. Because Alpine has not demonstrated the need for an emergency stay before such time that Alpine files an application for review, and the parties have fully briefed a motion to stay FINRA's action, the Commission should deny Alpine's motion.[1]

II. DISCUSSION

"[T]he imposition of a stay is an extraordinary and drastic remedy," and the moving party has the burden of establishing that a stay is appropriate. *William Timpinaro*, Exchange Act

[1] FINRA reserves the right to brief the merits of any further requests by Alpine to stay its suspension, once Alpine has filed an application for review of FINRA's action with the Commission. *See* Commission Rule of Practice 401(d)(1) (requiring that a stay motion "be made by any person aggrieved thereby *at the time an application for review is filed* in accordance with [Rule 420] or thereafter.") (emphasis added).

Release No. 29927, 1991 SEC LEXIS 2544, at *6 (Nov. 12, 1991). In balancing the harms that would result from the grant or denial of a stay, the Commission generally considers four factors: (1) a strong likelihood that the movant will prevail on the merits; (2) whether the movant will suffer irreparable harm without a stay; (3) whether there would be substantial harm to other parties if a stay were granted; and (4) whether the issuance of a stay would serve the public interest. *John Montelbano*, Exchange Act Release No. 45107, 2001 SEC LEXIS 2490, at *12 & n.17 (Nov. 27, 2001). While the Commission will base a stay decision on the balancing of all four factors, the first two factors are the most critical. *Se. Invs., N.C., Inc.*, Exchange Act Release No. 86097, 2019 SEC LEXIS 1370, *4-5 (Jun. 12, 2019); *Bruce Zipper*, Exchange Act Release No. 82158, 2017 SEC LEXIS 3706, at *19 (Nov. 27, 2017) (stating that the D.C. Circuit has suggested that a movant cannot obtain a stay unless he shows both a likelihood of success and irreparable harm).

Alpine's motion does not address the standard for a stay, let alone make a showing that the applicable factors weigh in favor of a stay. These omissions in Alpine's stay motion, including that Alpine does not identify why it is likely to succeed in its appeal or identify any serious legal question on the merits of FINRA's action, are reason enough to deny the motion.[2]

In addition, while Alpine asserts that an emergency stay is warranted, it does not assert, and has failed to demonstrate, that a critical factor weighs in its favor—a showing that it will suffer irreparable harm absent a stay. *See Zipper*, 2017 SEC LEXIS 3706, at *19. Alpine states only that the suspension will cause "significant damage" to the firm and its customers because it

[2] *See Dreamfunded Marketplace, LLC*, Exchange Act Release 93566, 2021 SEC LEXIS 3421, at *7 (Nov. 12, 2021) (Order Denying Stay) ("Applicants do not describe how those assertions relate to any of the four stay factors, nor do Applicants explain why any of these assertions entitle them to a stay of the expulsions and bars FINRA imposed.").

will be unable to execute trades, including customer sell orders. Motion to Stay (attached as Exhibit B) at 2. FINRA, however, has agreed to permit Alpine to engage in unsolicited liquidating transactions of customers' securities that are currently held at Alpine, including unsolicited liquidating transactions of securities for customers of Scottsdale that are currently custodied at Alpine. This would allow Alpine's and Scottsdale's customers to exit their positions while Alpine completes the audited report, and Alpine offers no facts to support that denying its stay request would cause irreparable harm in light of this permission.[3]

Moreover, Alpine holds the key to ending its suspension by providing the audited report—which FINRA first requested nearly nine months ago. HP Dec. at 5. The Commission consistently has held that where an applicant has the power to end its suspension, there is no irreparable harm. In *Keith Patrick Sequeira*, the Commission rejected the respondent's argument that a suspension caused irreparable harm where he could "terminate that suspension at any time by paying the [arbitration award] or otherwise establishing a valid defense to it." Exchange Act Release No. 85231, 2019 SEC LEXIS 286, at *31 (Mar. 1, 2019) (rejecting the applicant's challenges to his suspension under FINRA Rule 9554), *aff'd*, 816 F. App'x 703 (3d Cir. 2020); *see also Gregory Evan Goldstein*, Exchange Act Release No. 68904, 2013 SEC LEXIS 552, at *22 (Feb. 11, 2013) (Order Denying Stay) (rejecting applicant's claim that he would suffer irreparable harm without a stay of his bar where applicant "could end the suspension—and asserted harm—any time . . . by complying with FINRA's requests").

Here, Alpine can end its suspension by providing an audited report that accurately calculates it net capital. HP Dec. at 14. FINRA initially requested this report on July 23, 2021.

[3] For these same reasons, the firm has not shown that the potential for harm to others or the public interest weigh in favor of granting stay, and Alpine makes no effort to argue that it has satisfied these factors. *See Dreamfunded Marketplace*, 2021 SEC LEXIS 3421, at *7.

HP Dec. at 5. In September and October 2021, FINRA served Alpine with notice that the firm would be suspended under FINRA Rule 9552 if it failed to produce an audited report accurately calculating the firm's net capital. HP Dec. at 6, 9. Accordingly, Alpine has been on notice for more than six months that it could avoid a suspension by providing an audited report that accurately states its net capital. HP Dec. at 6, 9, 14; FINRA Rule 9552(f). Alpine cannot now claim that the Hearing Panel's order for it to submit such a report is an unfair surprise, nor can it avoid its own responsibility for its present suspension. S*ee* Motion to Stay at 2; *Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995) ("Participants in the securities industry must take responsibility for compliance with regulatory requirements."); *cf. Sequiera*, 2019 SEC LEXIS 286, at *31 (explaining that the respondent's inability to associate with a FINRA member was the "natural and foreseeable consequence" of the suspension he had the power to end). Because Alpine may end its suspension by submitting the audited report FINRA first requested more than nine months ago, the Commission should find that the firm has not established irreparable harm. *Sequiera*, 2019 SEC LEXIS 286, at *31.

III. CONCLUSION

Alpine has not met its burden to demonstrate irreparable harm. Alpine has failed to show that it will prevail on the merits of any appeal, and it has not shown that a stay would serve the public interest. FINRA has agreed that Alpine is allowed only to engage in unsolicited liquidating transactions of customers' securities that are currently held at Alpine, including unsolicited liquidating transactions of securities for customers of Scottsdale that are currently custodied at Alpine. The Commission otherwise should deny Alpine's request for an emergency stay. *See Zipper*, 2017 SEC LEXIS 3706, at *19.

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Respectfully submitted,

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April 8, 2022

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CERTIFICATE OF COMPLIANCE

I, Ashley Martin, certify that:

(1) FINRA's Brief in Opposition to The Motion for An Emergency Stay complies with SEC Rule of Practice 151(e) because it omits or redacts any sensitive personal information; and

(2) FINRA's Brief in Opposition to The Motion for An Emergency Stay complies with the limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 1,624 words.

Respectfully submitted,

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Dated: April 8, 2022

CERTIFICATE OF SERVICE

I, Ashley Martin, certify that on this 8th day of April 2022, I caused a copy of the foregoing Brief in Opposition to the Emergency Motion for a Stay to be filed through the Commission's electronic filing system and served by email, effecting service on:

Vanessa A. Countryman
Acting Secretary
Securities and Exchange Commission
Secretarys-Office@sec.gov

On this date, I also caused a copy of the opposition to be served by email on:

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Exhibit A

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. ALPINE SECURITIES CORPORATION (CRD No. 14952), Respondent.	Expedited Proceeding No. FPI210010 STAR No. 20210729963 Hearing Officer–RES **EXPEDITED HEARING PANEL DECISION** April 7, 2022

Alpine Securities Corporation failed to file a materially accurate audit report as requested under FINRA Rule 4140. For this violation, Alpine is suspended from FINRA membership until the firm files a materially accurate audit report. Alpine is also assessed costs.

Appearances

For Complainant: Loyd Gattis, Esq., Michelle Galloway, Esq., Michael P. Manning, Esq., Jennifer L. Crawford, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For Respondent: Maranda E. Fritz, Esq., Maranda E. Fritz, P.C.

DECISION

I. Introduction

On September 14, 2021, FINRA issued a Notice of Suspension ("Notice") to Respondent Alpine Securities Corporation ("Alpine") for the firm's alleged failure to submit a materially accurate audit report under FINRA Rule 4140.[1] That Rule provides in pertinent part that FINRA may at any time, due to concerns about the accuracy or integrity of a member firm's financial statements, books and records, direct the firm to cause an audit of its accounts to be made by an

[1] Joint Exhibit ("JX-") 7. The Notice was revised and restated in a letter from FINRA to Alpine dated October 28, 2021. JX-12.

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independent public accountant.[2] FINRA issued the Notice because it had concerns about the accuracy of Alpine's computation of net capital. The Notice informed Alpine that (1) under FINRA Rule 9552, the firm's membership with FINRA would be suspended unless it submitted a materially accurate audit report in accordance with the requirements of a July 23, 2021 FINRA Rule 4140 request, and (2) under FINRA Rule 9552, a timely written request for a hearing filed with the Office of Hearing Officers would stay the effectiveness of the suspension.[3] On November 1, 2021, Alpine timely filed a Request for Hearing under FINRA Rules 9552 and 9559.[4]

On January 25-27, 2022, the Department of Enforcement and Alpine participated in a videoconference hearing before a FINRA Hearing Panel. After carefully considering the hearing testimony, the hearing exhibits, and the parties' pre-hearing and hearing briefs, the Hearing Panel finds, as explained below, that Alpine violated FINRA Rule 4140 because it failed to file a materially accurate audit report as requested by FINRA. Based on this finding, the Hearing Panel suspends Alpine from FINRA membership until Alpine files an audit report accurately calculating the firm's net capital.

II. Findings of Fact

A. The Net Capital Rule

FINRA's Notice and Alpine's Request for Hearing present this question: Was Alpine's computation of net capital, as set forth in the firm's audit report, materially inaccurate?

Under the net capital rule, promulgated by the Securities and Exchange Commission ("SEC") as Exchange Act Rule 15c3-1, broker-dealers are required to maintain, at all times, a minimum amount of net capital.[5] The net capital standard in Rule 15c3-1 is a net liquid assets test. This standard is designed to allow a broker-dealer the flexibility to engage in activities that are part of conducting a securities business (e.g., taking securities into inventory) but in a manner that places the firm in the position of holding more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities (e.g., money owed to customers, counterparties and creditors). For example, Rule 15c3-1 allows securities positions to count as allowable net capital, subject to standardized or model-based deductions ("haircuts"). The net capital rule, however, does not permit most unsecured receivables to count as allowable net capital. This aspect of the net capital rule severely limits the ability of broker-dealers to engage in activities that generate unsecured receivables (e.g., lending money without obtaining collateral). The rule also does not

[2] FINRA Rule 4140(a).

[3] JX-7, at 1-2. Alpine is a member of FINRA. JX-1. FINRA sent the Notice to Alpine by overnight courier, and the Notice was properly delivered. JX-8; JX-9; *see* FINRA Rule 9134(a)(3) ("Service by courier may be accomplished by sending the papers through a courier service that generates a written confirmation of receipt or of attempts at delivery."). Alpine was properly served with the Notice. Stipulations ("Stip.") ¶ 12.

[4] Stip. ¶ 24.

[5] Rule 15c3-1 under the Securities Exchange Act of 1934, 17 C.F.R. § 240.15c3-1.

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permit fixed assets or other illiquid assets to count as allowable net capital, which creates disincentives for broker-dealers to own real estate and other fixed assets that cannot be readily converted into cash.[6]

B. The Judgment

In 2019, the United States District Court for the Southern District of New York entered a judgment for $12 million against Alpine in favor of the SEC ("Judgment").[7] The United States Court of Appeals for the Second Circuit affirmed the Judgment, and the United States Supreme Court denied Alpine's petition for a writ of certiorari. At the time of the hearing in this proceeding, the unpaid amount of the Judgment was $4 million.[8] The Judgment arose from Alpine's business practices and consisted of civil penalties against the firm for 2,720 violations of its statutory obligation to file suspicious activity reports, otherwise known as "SARs."[9]

C. Alpine's Net Capital Computation

Alpine did not accrue the liability represented by the Judgment on its Statement of Financial Condition.[10] In an email sent to FINRA on April 13, 2021, Alpine stated, "By virtue of the assignment and transfer of the liability, and consistent with the relevant net cap provisions, Alpine will not be accruing the liability."[11] The claimed assignment of the liability was effected through an Agreement for Assumption of Liability ("Assumption Agreement") by which SC Advisors, LLC ("SCA"), a company related to Alpine, agreed to pay all liability arising from the Judgment.[12] The SEC did not agree that it would look to SCA to pay the Judgment, or release Alpine from the liability.[13]

Alpine also did not subtract the amount of the Judgment from its net capital computation.[14] FINRA's Department of Risk Monitoring was concerned that this non-subtraction overstated the firm's net capital.[15] Indeed, Alpine produced a table titled "Net Capital

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[6] *Financial Responsibility Rules for Broker-Dealers*, 78 Fed. Reg. 51824, 51849 (Aug. 21, 2013), 78 FR 51824, at *51849.

[7] Stip. ¶ 2.

[8] Hearing Transcript ("Tr.") 472.

[9] *SEC v. Alpine Sec. Corp.*, 413 F. Supp. 3d 235, 237 (S.D.N.Y. 2019), *aff'd*, 982 F.3d 68 (2d Cir. 2020).

[10] Tr. 56, 527.

[11] JX-14, at 3.

[12] JX-13, at 2; Tr. 514.

[13] Tr. 60-61, 242, 627.

[14] Tr. 327.

[15] Tr. 62-63. All departments and offices of FINRA are referred to in this Hearing Panel Decision as "FINRA."

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Treatment" showing the firm had added $6 million to net capital in a line item designated as "15c3-1(c)(2)(i)(F) Third Party Assignment Treatment."[16]

Section (F) of Rule 15c3-1(c)(2)(i) (hereafter "Section F") pertains to certain liabilities that must be subtracted in a broker-dealer's computation of net capital. That provision requires a broker-dealer to subtract from net worth a liability or expense for which a third party has assumed the responsibility, unless the broker-dealer can show that the third-party assignee has adequate resources independent of the firm to pay the liability or expense. Alpine's view was that, if a third party has adequate resources, the broker-dealer should not subtract the liability.[17] The "Net Capital Treatment" table, however, did not explain how Section (F) would permit a $6-million addition to net capital.[18]

On April 13, 2021, FINRA emailed a letter asking Alpine to cite the basis in Generally Accepted Accounting Principles ("GAAP") and regulatory authority for the firm's determination that the Assumption Agreement eliminated its obligation to record the liability represented by the Judgment in its computation of net worth and net capital.[19] Alpine responded by emailing a document titled "GAAP Analysis: Treatment of Assignment of Liability to Third Party Contract."[20] While this document accrued a liability for the Judgment, it also recorded the Assumption Agreement as an asset in an equal amount.[21] FINRA emailed a letter stating Alpine "[h]as failed to adequately demonstrate that there is an allowable asset which might offset the effect of the liability in reducing net capital under Rule 15c3-1."[22] The firm responded by reevaluating its net capital computation and treating the Assumption Agreement as a non-allowable asset, meaning the claimed value of the Agreement could not be counted in determining net capital.[23]

On May 6, 2021, Alpine emailed FINRA an analysis of its accounting treatment of the Judgment and the Assumption Agreement.[24] In this analysis, Alpine partially accrued the Judgment, but only in the amount of $6 million (50 percent of the Judgment) because the firm was still pursuing its appellate remedies.[25] In the net capital part of the analysis, the firm included the claimed $6 million value of the Assumption Agreement in a $7,253,497 line item

[16] JX-17, at 3. Alpine added only $6 million of the $12 million Judgment because the firm's management thought there was a substantial likelihood the Second Circuit would overturn the Judgment on appeal.

[17] Tr. 458.

[18] Tr. 66-67.

[19] Tr. 109.

[20] Respondent's Exhibit ("RX-") 10; Tr. 519.

[21] RX-10, at 3.

[22] JX-16, at 2.

[23] Tr. 129-30.

[24] JX-17; Tr. 134-35.

[25] JX-17, at 2-3; Tr. 137, 445-46.

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for non-allowable assets.[26] In a line item designated as "15c3-1(c)(2)(i)(F) Third Party Assignment Treatment," Alpine added $6 million back into the net capital computation.[27] FINRA emailed the firm asking for (1) the analysis it had used to determine that $6 million was the appropriate amount to accrue for the Judgment, and (2) any opinion provided by its auditing firm about the accounting of the Judgment and the Assumption Agreement.[28] Alpine's Chief Executive Officer replied to FINRA stating, "Regarding a written comment from the auditor, I haven't received this yet but will discuss this with them next week."[29]

D. FINRA's Request for an Audit Report

On July 23, 2021, FINRA issued to Alpine a FINRA Rule 4140 request for an audit report.[30] This request sought an audit of Alpine's Statement of Financial Condition and computation of net capital under Rule 15c3-1 with associated disclosures, to be produced within 15 business days.[31] FINRA made the request because the staff had earlier asked the firm to provide an audit opinion about its net capital, and it had failed to do so.[32] In particular, FINRA staff was interested in learning Alpine's basis for the application of Section (F).[33] The FINRA Rule 4140 request stated that the firm continued to account for the Judgment "in a way that FINRA staff believes materially overstates its net capital and raises concerns about the accuracy of the firm's financial statements."[34] The gist of FINRA's disagreement with Alpine was that the firm had made a capital addition to its net capital computation, while Section (F) requires subtraction.[35]

On August 16, 2021, Alpine's auditing firm ("Auditing Firm") provided an Independent Accountant's Report on Applying Agreed Upon Procedures in connection with the Judgment and Alpine's net capital computation.[36] In this report, the Auditing Firm found that Alpine should

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[26] JX-17, at 3; Tr. 147.

[27] JX-17, at 3.

[28] JX-2, at 5; Tr. 150-51, 522, 524.

[29] JX-2, at 4.

[30] Stip. ¶ 3; JX-2; Tr. 68, 133, 222. FINRA Rule 4140 provides in pertinent part that FINRA may direct a member firm to cause an audit of its accounts to be made by an independent public accountant:

> FINRA may at any time, due to concerns regarding the accuracy or integrity of a member's financial statements, books and records . . . direct any member to cause an audit to be made by an independent public accountant of its accounts . . . Such audit or examination . . . shall be made in accordance with such requirements as FINRA may prescribe.

[31] Stip. ¶ 4; Tr. 163, 223-24.

[32] Tr. 68-69.

[33] Tr. 254-55.

[34] JX-2, at 1; Tr. 225.

[35] Tr. 226.

[36] RX-2; Tr. 180-81, 451-52, 523-24, 561-62.

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have accrued the full $12 million (not $6 million) for the liability represented by the Judgment.[37] (FINRA had insisted that the accrual should have been $12 million.[38]) Alpine amended its Statement of Financial Condition to reflect the Auditing Firm's conclusion.[39] As for the firm's net capital, the Auditing Firm concurred with the computation proposed by Alpine:

> Related to the Net Capital Computation, we obtained the computation prepared by management that reflects the proposed impact of both the liability and indemnification asset to net capital. We note that management has evaluated the ability SCA has to pay on the indemnification asset and has determined that they do have adequate resources independent of Alpine Securities Corporation to pay on the indemnification asset as payments are required. . . . We concur with the treatment of the Net Capital Computation proposed by management.[40]

E. FINRA's Notice of Suspension

Alpine failed to provide the audit report that FINRA requested by the extended deadline of September 10, 2021.[41] FINRA served the Notice notifying the firm of its imminent suspension.[42] The Notice rested on the firm's failure to provide a report, information, and material as directed in FINRA's request for an audit report.[43] The Notice stated the suspension would take effect on October 8, 2021 unless Alpine produced the audit report on or before that date.[44]

F. Alpine's Audit Report

Alpine produced an audit report on October 7, 2021.[45] The audit report contained an audit of Alpine's Statement of Financial Condition and net capital computation with associated footnote disclosures.[46] Alpine accrued the Judgment as a liability in its Statement of Financial

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[37] RX-2, at 2; Tr. 183, 455, 565-66.

[38] Tr. 526, 528, 566.

[39] Tr. 455-56.

[40] RX-2, at 2; *accord* Tr. 185, 460, 572-73.

[41] Stip. ¶ 8; Tr. 75. The Auditing Firm's Report on Applying Agreed Upon Procedures did not apply auditing standards and thus could not qualify as an audit report.

[42] Stip. ¶ 9; Tr. 75; JX-7.

[43] Stip. ¶ 9.

[44] JX-7. FINRA issued the Notice under FINRA Rule 9552, which provides in pertinent part that FINRA may issue a Notice of Suspension if a member firm "fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to FINRA By-Laws or FINRA rules." FINRA Rule 9552(a).

[45] Stip. ¶ 13; Tr. 76, 200; JX-10.

[46] Stip. ¶ 13.

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Condition, subtracting $11 million from its net worth.[47] But the firm offset the negative effect of the Judgment by adding an $11 million "Indemnification Asset," referring to the Assumption Agreement, which increased net worth by $11 million.[48]

In Alpine's net capital computation, the firm subtracted $11,904,155 in "non-allowable assets," including the $11 million claimed value of the Assumption Agreement.[49] But Alpine added the $11 million attributed to the Assumption Agreement back into net capital under a line item designated as "Other allowable credits."[50] Thus, in the audit report, Alpine added the Assumption Agreement back into the net capital computation.[51]

The audit report also contained these highlights:

- The audit report stated, "In our [the Auditing Firm's] opinion, the financial statements present fairly, in all material respects, the financial position of Alpine Securities Corporation at June 30, 2021 in conformity with accounting principles generally accepted in the United States of America."[52]

- The audit report stated, "In our opinion, the computation of net capital is fairly stated, in all material respects, in relation to the financial statements as a whole."[53]

- The audit report stated, "Alpine has accrued the entire amount of the judgment as a liability for GAAP purposes but has not applied the judgment amount against its net capital calculations because it has obtained an indemnification of the liability from a third party."[54]

On reviewing the audit report, FINRA staff was concerned about Alpine's $11 million addition for "other allowable credits" in the firm's net capital computation.[55] FINRA staff

[47] JX-10, at 7; Tr. 230, 304-05, 341, 401-02. The unpaid amount of the Judgment was $11 million as of the effective date of the audit report.

[48] JX-10, at 7.

[49] JX-10, at 17.

[50] Tr. 229.

[51] Tr. 610.

[52] JX-10, at 5; Tr. 588.

[53] JX-10, at 6; Tr. 590.

[54] JX-10, at 15.

[55] Tr. 231.

determined there was no basis for this addition.[56] The staff concluded that Alpine's computation of net capital was not made in compliance with the net capital rule.[57]

G. The Auditing Firm's Audit Documentation

On October 20, 2021, FINRA requested that Alpine provide (1) the formal basis used by the Auditing Firm to add the $11 million credit to the computation of net capital, (2) all audit documentation provided by the Auditing Firm in the substantiation of its audit opinion, and (3) a statement addressing whether SCA had paid, or reimbursed to Alpine, any amount of the Judgment.[58] The Auditing Firm provided the audit documentation within the timeframe set by FINRA.[59] The audit documentation included a memo written by the Auditing Firm to its audit files summarizing the Judgment, the legal liability, and the accounting for the Assumption Agreement.[60] FINRA staff found nothing in this audit memo that explained why there would be an $11 million addition to the net capital computation.[61] The audit documentation also included a net capital rule testing document showing the results of the Auditing Firm's testing of Alpine's controls in the net capital computation.[62] According to this document, adding the claimed value of the Assumption Agreement was based on the presumption that the Assumption Agreement was a legally binding amount that would be received from SCA as payments were required by the SEC.[63] Yet in the audit memo, the Auditing Firm stated the liability represented by the Judgment would not be transferred to SCA until the SEC agreed.[64]

FINRA staff found nothing in the audit documentation that explained how Section (F) permitted an addition to the net capital computation.[65] FINRA staff found the Auditing Firm did not determine whether Section (F) applied.[66] Instead, the Auditing Firm assumed Section (F) applied and conducted its analysis based on that assumption.[67] FINRA did not find the audit documentation to be a sufficient basis for the $11 million added credit to net capital.[68]

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[56] Tr. 330.

[57] Tr. 346.

[58] Stip. ¶ 15; JX-11, at 1; Tr. 263, 591-92.

[59] Stip. ¶ 18; Tr. 593, 688.

[60] JX-22; Tr. 233.

[61] Tr. 235.

[62] JX-25; Tr. 237.

[63] JX-25, at 2-3; Tr. 238-39.

[64] JX-22, at 7; Tr. 242.

[65] Tr. 81, 243.

[66] Tr. 290.

[67] Tr. 296.

[68] Tr. 80.

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H. FINRA's Rejection of the Audit Report

FINRA staff concluded that Alpine's net capital was materially inaccurate.[69] On October 28, 2021, FINRA sent Alpine a revised and restated Notice of Suspension.[70] Relying on FINRA By-Laws governing materially inaccurate reports, FINRA rejected Alpine's audit report and deemed it not to have been filed.[71] The revised Notice stated FINRA staff had determined that the audit report was materially inaccurate because of the $11 million added credit to net capital, which resulted in a material overstatement of the firm's net capital position.[72] The revised Notice stated Alpine would be suspended unless the firm submitted

> a corrected audited financial report that (i) corrects the inaccurate net capital addback in the firm's computation of net capital, and (ii) includes the reissuance of the auditor's opinion on the financial report inclusive of the revised computation of net capital.[73]

Alpine did not submit a corrected audit report.[74] Instead, by letter dated November 1, 2021, Alpine made a timely request for a hearing.[75]

III. Conclusions of Law

A. The Relevant Part of the Net Capital Rule

The net capital rule provides for the addition and subtraction of certain specified credits and debits in the computation of net capital. Thus, Rule 15c3-1(c)(2)(i) provides the following definition of net capital:

> (2) The term net capital shall be deemed to mean the net worth of a broker or dealer, adjusted by:
>
> . . . (A) Adding unrealized profits (or deducting losses) in the accounts of the broker or dealer; . . .

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[69] Tr. 82, 247-48.

[70] Stip. ¶ 19; JX-12.

[71] Stip. ¶ 19; Tr. 83. Section 4 of Schedule A of FINRA By-Laws provides in pertinent part that "[a]ny report . . . containing material inaccuracies or filed incompletely shall be deemed not to have been filed until a corrected copy of the report has been resubmitted." FINRA By-Laws, Schedule A, § 4(g)(2).

[72] Stip. ¶ 20; JX-12, at 1; Tr. 354-55.

[73] JX-12, at 1; Tr. 84-85.

[74] Stip. ¶ 23.

[75] Stip. ¶ 24; RX-14.

(B)(1) In determining net worth, all long and all short positions in listed options shall be marked to their market value and all short securities and commodities positions shall be marked to their market value.

. . . .

(C) Adding to net worth the lesser of any deferred tax liability; . . .

(D) Adding, in the case of future income tax benefits arising as a result of unrealized losses, the amount of such benefits not to exceed the amount of income tax liabilities accrued on the books and records of the broker or dealer; . . .

(E) Adding to net worth any actual tax liability related to income accrued which is directly related to an asset otherwise deducted pursuant to this section.

(F) Subtracting from net worth any liability or expense relating to the business of the broker or dealer for which a third party has assumed the responsibility, unless the broker or dealer can demonstrate that the third party has adequate resources independent of the broker or dealer to pay the liability or expense.[76]

B. Alpine's Net Capital Computation

The audit report calculated Alpine's net capital as follows:

Total ownership equity from statement of financial condition	$14,962,364
Deduct ownership equity not allowable for net capital	0
Total Ownership Equity Qualified for Net Capital	14,962,364
Deductions and/or charges	
Total non-allowable assets from Statement of Financial Condition	(11,904,155)
Add:	
Other allowable credits	11,000,000
Net capital before haircuts on securities positions	14,058,209

[76] Exchange Act Rule 15c3-1(c)(2)(i)(F), 17 C.F.R. § 240.15c3-1(c)(2)(i)(F).

Haircuts on securities (computed, where applicable, pursuant to 15c3-1(f))	0
Trading and investment securities stocks and warrants	
Net Capital	$14,058,209[77]

C. Discussion

For six reasons, Alpine's computation of its net capital was materially inaccurate. These reasons are discussed below.

1. Alpine Added the Claimed Value of the Assumption Agreement, Which Is a Non-Allowable Asset

In Alpine's net capital computation, the firm subtracted the claimed value of the Assumption Agreement, designating it as a non-allowable asset. Alpine acknowledged the Assumption Agreement was a non-allowable asset for net capital purposes.[78] The Assumption Agreement was not allowable because it was an unsecured receivable. But in the next line following the subtraction of the Assumption Agreement as a non-allowable asset, Alpine added the same non-allowable asset *back* as an "allowable credit[]."[79] It makes no sense to add a non-allowable asset as an "allowable credit." The net capital rule does not allow for such an anomaly.

2. Section (F) Does Not Apply to the Judgment

Section (F) does not apply to the liability represented by the Judgment. If a liability is accrued on the balance sheet, there is no need for the broker-dealer to subtract that liability under Section (F). The accrued liability has already been subtracted. In Alpine's case, the firm accrued the Judgment to reduce net worth on the Statement of Financial Condition. Section (F) does not apply because the Judgment has already been subtracted. That Alpine found it necessary to add the Judgment as an "allowable credit"—with no warrant in the language of Rule 15c3-1—demonstrates that the situation at hand is not one Section (F) was intended to address.

3. Section (F) Does Not Countenance the Addition of Liabilities

Even if Section (F) were to apply, it does not countenance the addition of liabilities in the computation of net capital. There are two parts to Section (F). The first part requires that the broker-dealer subtract from net worth any liability relating to the firm's business for which a third party has assumed the responsibility. The second part, which is an exception to the first

[77] JX-10, at 17 (emphasis added).

[78] Tr. 421.

[79] Alpine's net capital computation did not make clear whether the "allowable credit" was the Assumption Agreement or the Judgment. Because the claimed value of the Assumption Agreement and the Judgment was the same ($11 million), and because neither could properly be added to the net capital computation, this Discussion treats the two accounting items interchangeably.

part, allows the broker-dealer to forgo subtraction if it can show the third party has adequate resources independent of the firm to pay the liability. But if this condition is met, the broker-dealer *need not subtract the liability.* There is nothing in the exception in Section (F) that says the broker-dealer can *add* the liability.[80] This would lead to an improper form of double counting: first, when the liability is not subtracted; and second, when the liability is added.[81]

Section (F) does not use the word "add." This lacuna is notable because Rule 15c3-1 uses "adding" in Sections (A), (C), (D), and (E).[82] If the SEC had intended to allow broker-dealers to add third-party liabilities to their net capital computations, it would have said so.

4. Alpine's Addition of the Judgment Is Inconsistent With the Net Capital Rule as a Whole

In the 2013 release adopting Section (F), the SEC provided guidance concerning the proper computation of net capital. In this release, the SEC stated that Rule 15c3-1 is designed to place a broker-dealer in the position of holding at all times more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities.[83] But in the case of Alpine, the Assumption Agreement was not a highly liquid asset. If Alpine encountered financial stress, the firm could not readily transfer the Assumption Agreement to a third party for money to cover its liabilities and protect its customers. In addition, Rule 15c3-1 does not permit most unsecured receivables to count as allowable capital.[84] But that is what the Assumption Agreement was—an unsecured receivable. To find that the Assumption Agreement (or the Judgment) counts as allowable capital would be inconsistent with Rule 15c3-1 and would put customers at risk in the event Alpine experienced financial stress.

5. Alpine's Addition of the Judgment Is Inconsistent With the SEC's Third-Party Expense Letter and NASD Notice to Members 03-63

In 2003, the SEC issued a letter to NASD Regulation, Inc. (now FINRA) and the New York Stock Exchange, Inc. to provide guidance concerning the application of the financial responsibility rules when a third-party agrees to assume responsibility for payment of one or

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[80] For example, the exception could have read, ". . . unless the broker or dealer can demonstrate that the third party has adequate resources independent of the broker or dealer to pay the liability or expense, *in which event the broker or dealer adds the liability to net worth.*"

[81] The Hearing Panel need not make a determination whether SCA had adequate resources independent of Alpine to pay the Judgment. In its Pre-Hearing Brief, Enforcement argued there were three reasons why Alpine's reliance on Section (F) was not well founded. SCA's financial resources was not one of them. In addition, in the hearing Enforcement stated in its opening statement, "This is not a case about . . . whether Alpine's affiliate has the financial wherewithal to pay Alpine's SEC judgment . . . ." Tr. 25. Alpine could reasonably infer from these words that it was unnecessary to present evidence of SCA's financial wherewithal.

[82] 17 C.F.R. § 240.15c3-1(c)(2)(i)(A), (C), (D), (E).

[83] 78 Fed. Reg. at 51849.

[84] *Id*.

more of a broker-dealer's liabilities.[85] This has come to be known as the "third-party expense letter." In this letter, the SEC stated that if a third party has agreed to assume responsibility for a liability relating to the business of a broker-dealer, the liability will still be considered a liability of the broker-dealer for net capital purposes unless the creditor of the liability has agreed in writing that the broker-dealer is not directly or indirectly liable to the creditor.[86] In the case of Alpine, the SEC did not agree in writing that Alpine was not directly or indirectly liable to the SEC for the Judgment.[87] In the third-party expense letter, the SEC also stated that the third-party liability will be considered a liability of the broker-dealer unless the liability is not a liability of the firm under GAAP.[88] In the case of Alpine, the Judgment was a liability of Alpine under GAAP.[89]

These conditions for not subtracting third-party liabilities remain valid guidance for FINRA member firms computing their net capital. In 2003, NASD Notice to Members 03-63 adopted and incorporated elements of the third-party expense letter, including the requirement for the creditor's agreement in writing and that the liability is not a liability of the broker-dealer under GAAP.[90] In the SEC's 2013 release adopting Section (F), it stated it was not directing SEC staff to withdraw the third-party expense letter.[91] Similarly, in the 2015 decision *Dep't of Enforcement v. Forest*, the National Adjudicatory Council applied NASD Notice to Members 03-63 to find that a broker-dealer's attempt to shift a liability to its parent company was ineffective for net capital purposes.[92]

6. Alpine Does Not Provide a Persuasive Reason for Adding the Judgment

Alpine's explanation for why it added the $11 million credit to the net capital computation does not make sense. Alpine's chief accountant testified that Section (F) supported the added credit because "[w]hen you subtract a liability, it's a double negative which turns into a positive."[93] Thus, "we subtracted a negative $11 million."[94] But under this interpretation of Section (F), the exception in the second part would be superfluous. A broker-dealer could simply subtract its third-party liabilities as "double negatives," turning them into "positives." Indeed, the

[85] Complainant's Exhibit ("CX-") 9, at 9.

[86] CX-9, at 10.

[87] Tr. 60-61, 242.

[88] CX-9, at 10-11.

[89] JX-10, at 7; Tr. 230, 304-05, 341, 401-02.

[90] NASD Notice to Members 03-63 (Oct. 2003), 2003 NASD LEXIS 76, at *8 (Oct. 28, 2003).

[91] 78 Fed. Reg. 51824, 51851.

[92] *Dep't of Enforcement v. Forest*, No. 2009016159102, 2015 FINRA Discip. LEXIS 20, at *16 (NAC July 28, 2015) ("iTrade's attempt to shift its liability to its parent was ineffective").

[93] Tr. 493-94.

[94] Tr. 495.

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broker-dealer could artificially add value to its net capital simply by subtracting all its "negative" liabilities.

D. Conclusion

For the above reasons, the Hearing Panel concludes that the audit report submitted by Alpine on October 7, 2021 was materially inaccurate. Alpine's failure to file an accurate audit report violated FINRA Rule 4140.[95] Alpine is subject to suspension for its violation.

IV. Order

Respondent Alpine Securities Corporation is suspended from FINRA membership for failure to file a materially accurate audit report, in violation of FINRA Rule 4140. The suspension will take effect upon the issuance of this Decision and will remain effective until Alpine files an audit report accurately calculating the firm's net capital in compliance with Exchange Act Rule 15c3-1. If Alpine files such a report, it may apply to Enforcement for termination of the suspension.

Alpine is ordered to pay hearing costs of $6,431.79, consisting of a $750 administration fee and $5,681.79 for the cost of the transcript. The costs shall be due on a date established by FINRA.

Richard E. Simpson
Hearing Officer
For the Hearing Panel

Copies to:

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[95] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.

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Exhibit B

SECURITIES AND EXCHANGE COMMISSION

Department of Enforcement, Complainant, v. Alpine Securities Corporation (CRD No. 14952), Respondent.	Expedited Proceeding No. FPI210010 Star No. 20210729963

ALPINE SECURITIES CORPORATION'S
***EMERGENCY MOTION* FOR A STAY OF FINRA SUSPENSION**

Today, April 7, 2022, Alpine received an Expedited Hearing Panel Decision ("Decision") in a proceeding that has been ongoing since last fall. The Decision addresses Alpine's inclusion in its net capital computation of an entry *excluding* from net capital a liability that was indemnified and guaranteed by a third party. As reflected in the Decision, Alpine had that computation reviewed by its auditors twice, once through Agreed Upon Procedures pertaining to the specific net capital issue and again in connection with the audit that was then ordered by FINRA. The Decision disagrees with the computation and auditor's conclusions and orders that Alpine file an audit report with a corrected net capital computation. *See* Decision at 14 attached.

Alpine is now in the process of revising its net capital computation which will involve the reporting of a liability of $1 million owed to the SEC and will be providing to FINRA, and reporting as of today, that revised net capital figure. As was confirmed during the hearing, the particular net capital item did not effect Alpine's compliance with net capital requirements; even excluding the entry at issue, Alpine has always maintained net capital that is many multiples of its net capital requirement.

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Further, the revision of the net capital computation called for by the Decision does not result in a net cap deficiency. In fact, after the revision, Alpine's ***excess net capital*** will be $3,857.420.00.

Although Alpine is revising its net capital computation immediately in accordance with the Decision, the Decision also failed to provide for any period within which Alpine could revise that net capital computation without being subjected to a suspension. Instead, the Decision states that the suspension is *immediately effective* absent a stay from the Securities and Exchange Commission, and it states that Alpine obtain an audit report relating to that net capital calculation and then seek and obtain from FINRA a termination of the suspension. Alpine has conferred with its auditors who will begin that review immediately but their review could take a week or more.

The suspension of Alpine's operations will obviously cause significant damage not only to the firm but also its customers who will seek to execute trades. It places Alpine in a position of not being able to execute customer sell orders. And it does so even though Alpine is immediately restating its net capital, is moving as quickly as possible to have that calculation reviewed by the auditors, and does not have any net capital deficiency.

Alpine therefore asks that the SEC *immediately issue a stay* of the suspension pending review of the decision by the Commission with the condition and understanding that Alpine is restating its net capital in accordance with the Decision and will be timely filing its Notice of Appeal. In the alternative, Alpine asks that the Commission stay the suspension for a period of 30 days to permit Alpine to obtain the audit report and to seek and obtain a termination of the suspension, or that the Commission order that Alpine may continue to execute sell orders for its customers.

CONCLUSION

For the foregoing reasons, Respondent requests that the Commission issue a stay of the suspension.

Dated: April 7, 2022

Respectfully submitted,

/s/ Maranda Fritz