U.S. SECURITIES AND EXCHANGE COMMISSION

FINRA DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	
v.	:	Admin. Proc. File No. 3-21516
RICKY ALAN MANTEI (CRD No. 1098981)	:	**ORAL ARGUMENT REQUESTED**
	:	
Respondent.		

APPEAL REPLY BRIEF OF RESPONDENT RICK MANTEI

PADUANO & WEINTRAUB LLP
1251 Avenue of the Americas
Ninth Floor
New York, New York 10020
(212) 785-9100

Attorneys for Respondent
Rick Mantei

OS Received 01/08/2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OS Received 01/08/2024

OS Received 01/08/2024

Other Authorities

OS Received 01/08/2024

Respondent Rick Mantei respectfully submits this Reply Brief in further support of his appeal from the FINRA National Adjudicatory Council ("NAC") Decision dated May 30, 2023. ("Decision") (R. 4358-89)

PRELIMINARY STATEMENT

DOE's opposition is more notable for what it concedes than for any legal argument that Respondent must address. DOE concedes that Respondent **did not commit prearranged trading**. (DOE Br. 37) Similarly, DOES not dispute **any** of the following facts – instead dismissing them – as "irrelevant" to the NAC's Decision:

- Respondent did not execute or negotiate any of the trades at issue (DOE Br. 41);
- Sam Palermo, the only trader Respondent spoke to on the audiotapes, did not execute the trades at issue (DOE Br. 30, 32);
- Respondent did not speak to any of the other traders on the desk (DOE Br. 3)
- Respondent had no supervisory authority over Palermo or any other trader (DOE Br. 31-32, 37);
- DOE did not specifically show how the trades were accomplished (DOE Br. 31, 32);
- Respondent had no intention to manipulate the market (DOE Br. 31);
- Respondent caused no harm to the market or any investor (DOE Br. 41);
- Respondent did not have a particular customer lined up to purchase the products if JPT bought them back. (DOE Br 29 & n.12)

We submit that these factual and legal concessions are extraordinary and prove that DOE forced the Hearing Panel and NAC into holdings that are unsupportable by rules, law, and industry practice.

In his opening Appeal brief, Respondent complained that DOE did not want to – or was not able to – connect the dots from Respondent to the actions charged – violations of his firm's bond cross-trade policy and its prohibition against pre-arranged trading. DOE's brief now makes clear that DOE **cannot, in fact, connect those dots**. As DOE has finally admitted: "Of course, FINRA did not find Mantei liable for 'committing' prearranged trading." (DOE Br. 37) With this pronouncement, DOE attempts to wave away the charges it brought in the Complaint and the necessity of actually proving those charges. For DOE and the NAC – remarkably – it is enough that Respondent had **conversations** that it deems had nefarious intentions (by extrapolation). By that logic, it is simply not necessary to tie Respondent to the actual trades that are at issue:

> That Mantei **did not know** or **deal with** the counterparties, **did not have access** to the firm's trading system, and **did not have formal authority** over the firm's bond desk does not negate the fact that Mantei devised the plan to use prohibited prearranged trades to conceal customer-to-customer transactions that otherwise would have been subjected to J.P. Turner's cross trade procedures.

(R. 4375)

Moreover, DOE's Complaint against Respondent was radically different than what DOE now admits the case is. The Complaint pleaded clearly:

> 47. By his conduct in **engaging in the Wells Fargo R66 SCD Trades and the Citibank FN6 SCD Trades** and by submitting, or causing to be submitted, order tickets to JPT that failed to reflect Mantei's directions to [Palermo], identify those transactions as cross-trades, or provide the information required by JPT's procedures for cross-trades, **Mantei** circumvented JPT's supervisory procedures and **contravened JPT's prohibition against prearranged trading.**
>
> 48. **As a result of the foregoing conduct**, Mantei violated FINRA Rule 2010.

(R. 15 (emphasis added); see R.16 (same allegation as to the Fresno HE2 Bond Trades)) DOE did not simply charge unethical conversations in the Complaint. On the contrary, the Complaint charged that Respondent personally **engaged in prearranged trading** and **by that conduct** violated Rule 2010. This mid-game change in the theory of liability should be rejected pursuant to the SEC's recent ruling in In re Scottsdale Capital Advisors Corporation, et al., Admin. Proc. No. 3-18612, 2021 SEC LEXIS 2789 at *22-24 (Sept. 17, 2021), because it deprived Respondent of fair notice and hindered his ability to counter the new theory.

DOE loves the tapes of telephone conversations between Respondent and trader Sam Palermo, despite the fact that neither Respondent nor Palermo made any of the trades at issue or directed any firm trader to execute them. (R. 3151-52, 4375-76, R. 3607-14) DOE simply dismisses these facts. Nonetheless, DOE rests its entire case on the Respondent's profane, curious, and usually comical rants on the tapes:

> This case is unique in that the violative conduct – a scheme to use prearranged trading to disguise cross trades and thereby circumvent firm policies – is described by Applicant Ricky Alan Mantei in his own words in recorded conversations.

(DOE Br. 1) In the same vein, the Decision states:

> The audiotapes show that Mantei directed Palermo to find counterparties to buy and temporarily hold the SCDs coupled with the promise that he would buy them back. That Palermo himself did not execute the trades or that Mantei did not speak to the other traders on the J.P. Turner bond desk does not negate Mantei's liability. . . . Who ultimately executed the transactions is irrelevant to our finding of liability.

(R. 4375-4376 & n.18)

DOE does not explain why the openly available firm tapes are a "secret" or why the fact that other traders executed the trades, and firm management approved the trades, this "does

OS Received 01/08/2024

not negate" its theory of a "scheme" between Palermo and Mantei. DOE now boils the case down to something it can prove – conversations. But DOE does not cite **any** caselaw to support liability based on conversations that are not tied to facts, nor does DOE address the cases Respondent cited against such a proposition or his cases concerning aiding and abetting. This speculation is simply not a basis on which to suspend or fine Respondent and ruin him. DOE failed to prove the actual charges it brought and accordingly the NAC Decision should be reversed on this basis alone.

Other than changing the theory of the merits of the case, DOE largely parrots the NAC's Decision and repeats its flaws. Like the NAC, DOE mischaracterizes – and does not address – Respondent's point that FINRA has no jurisdiction over the two structured CD ("SCD") transactions as an argument about whether the facts are actionable under FINRA 2010. DOE merely dismisses the unfairness of its own delays in bringing the action, with the loss of evidence that Respondent might have used, by relying again on the tapes as evidence "'unaffected by any purported delay.'" (DOE Br. 37)(citing Decision, R. 4380) DOE, like the NAC, clings to one man's "interpretation" of the firm's bond cross-trade policy that cannot be reconciled with the plain language of the policy itself, and supports the Hearing Panel's decision excluding expert testimony on the meaning of the policy.

DOE's brief supports the decision to punish Respondent for contesting the Complaint vigorously, calling it "lack of remorse" (DOE Br. 47), which is offensive and calls into question the fairness of the entire hearing process. Instead of Respondent exercising his right to demand due process in proceedings threatening his career and livelihood, DOE persists in the fundamentally unfair position that proceeding to trial shows a failure to accept responsibility. DOE does not challenge the Decision's fundamental disregard of well-settled law. SEC v. First City Financial Corp., 890 F.2d 1215, 1228 (D.C. Cir. 1989) ("lack of remorse" is relevant for penalty consideration only when defendant has previously violated court orders); SEC v. Johnson, 03 Civ. 177 (JFK), 2006 U.S. Dist. LEXIS 50307 at *17-18 (S.D.N.Y July 21, 2006).

Finally, despite what DOE calls "longstanding precedents" (DOE Br. 43), the better cases indicate that the FINRA forum is unconstitutional. The Decision should be revisited and reversed for this reason alone.

DOE's stretch of FINRA Rule 2010 to punish Respondent's internal conversations – not the trading charged – is a bridge too far. It may not be disputed that there is no violation of any substantive securities law, rule, or regulation here. There is no harm to the market or customers here. And Respondent never received notice or warning from his firm regarding any event or transaction. But DOE now contends that it does not even have to prove that Respondent breached his firm's trading policies as it charged in the Complaint. The Decision should be reversed, and the penalties vacated.

CRITICAL BACKGROUND FACTS ESTABLISHED AND NOT ESTABLISHED

Undisputed Facts Ignored by the Decision

DOE does nothing to dispute the facts that negate liability here. First and foremost, that Respondent did not execute or approve any of the transactions at issue and he did not have the authority to execute or approve any of those trades. (JX-5, R. 3589-90; JX-9 through JX-16, R. 3599-24; R. 2440, 2826, 4375, 4376 n.18, 4382 n.26, 4383 n.28) In addition:

a. Respondent had no access to the trading system at his firm, J.P. Turner ("JPT") (R. 4375)

b. Respondent had no authority over the bond desk or Palermo (R. 2365, 2802-2803, 4375, 4382 n.26)

c. Respondent did not speak to and did not know the names of the counterparty firms or traders (R. 1150, 1680, 2147, 2545)

OS Received 01/08/2024

d. Respondent did not speak to the other traders on the desk (R. 4375-76)

e. Palermo executed none of the relevant trades (R. 4376 n.18, 4382 n.26, 4383 n.28)

f. JPT trader Paul Raymundo executed six of the relevant trades (JX-5, R. 3589-90; JX-9 through JX-11, R. 3599-07; JX-15 through JX-16, R. 3619-24) DOE produced no evidence concerning who executed the other three trades

g. there is no evidence that Respondent ever spoke to or dealt with Raymundo or gave him "direction" of any type;

h. DOE proved no harm to the market or to customers (R. 4383, 4386)

i. Respondent had no intent to manipulate the mkt (R. 4383)

j. Respondent did not personally benefit from the transactions (R. 4386)

k. At the time JPT sold the products to the market, Respondent had no customer identified to whom he would sell the products if JPT bought them back (R. 2284-86, 2559, 4366 n.9, 4374)

l. Respondent did not know or set a price, date, or time as to when a trade would be made for an alleged "cross trade" to be started or concluded (R. 2289-2290)

m. the SCDs and bond at issue were sold out to the market by JPT for days and were thus at risk for respectively 13, seven, and two days (JX-5, R. 3589-90; JX-9 through JX-17, R. 3599-24; R. 6, 8, 9, 2009, 2390, 2441, 2443-44, 2951-52, 2955-56, 3965)

n. Because each of the subject trades went out to the market, JPT had no assurance that the counterparties would sell the products back to it or at any particular time or price and thus the trades could not, by JPT's written definition, be considered "cross trades" (CX-27, R. 3329, 3402; RX-40, R. 3497, 3500, R. 2441, 2511)

<u>The Transactions Charged</u>

DOE applied the JPT policies to two sets of SCD transactions and one set of municipal bond trades (R. 8-11) to charge Respondent alone:

OS Received 01/08/2024

A. Wells Fargo Market-Linked Certificate of Deposit (the "Wells Fargo SCD") consisting of the following trades:

October 1, 2014: Sell 96,000 to the street
October 7, 2014: Buy 30,000 from the street
October 14, 2014: Buy 66,000 from the street

B. Fresno California Municipal Bond (the "Fresno Bond") consisting of the following trades:

December 22, 2014: Sell 30,000 to the street
December 26, 2014: Buy 10,000 from the street
December 26, 2014: Buy 10,000 from the street
December 29, 2014: Buy 10,000 from the street

C. Citibank Market-Linked CD (the "Citi SCD") consisting of the following trades:

February 25, 2015: Sell 40,000 to the street
February 26, 2015: Buy 40,000 from the street

(R. 10, 12, 13)

JPT's Bond Cross-Trade and Prearranged Trading Policies

The JPT Bond Cross Trade policy states:

> A **cross-trade** occurs when an office sells a **bond** for **one** of its clients and purchases the bond for **another** of its clients. **These trades are executed internally by the firm and never reach the market**.

(JX-19, R. 3631; emphasis added). The Prearranged Trading Policy states:

> An offer to sell coupled with an offer to buy back at the same or a higher price, or the reverse, is a **prearranged trade** and is prohibited. Options or written agreements such as repurchase agreements are not included in this prohibition.

(CX-27, R. 3402; emphasis added).

OS Received 01/08/2024

ARGUMENT

DOE was required to prove its charges by a preponderance of the evidence. In re Scottsdale Capital Advisors Corporation, et al., Admin. Proc. No. 3-18612, 2021 SEC LEXIS 2789 at *18 (Sept. 17, 2021). DOE failed to do so.

POINT I

STRUCTURED CDs ARE NOT SECURITIES AND FINRA HAS NO JURISDICTION OVER THEM

Two of the transactions at issue here involved SCDs, which are neither bonds nor securities. (CX-42, R. 3473; R. 2939-2940, 3500) As such, FINRA has no jurisdiction over those two transactions.[1] The NAC declines to address this issue in the Decision, instead ruling on a different point – whether the facts here violate FINRA 2010 – which misses the point, because if FINRA has no jurisdiction over SCD transactions, FINRA should not be present, regardless what FINRA Rule is at issue. Put another way, if FINRA has no jurisdiction over SCDs, it can make any rule as broad as it wants, but that rule will not govern SCDs.

FINRA can try to make Rule 2010 very broad, but it cannot enlarge its own jurisdiction, which is limited to a member's business that involves securities or investment banking. See Goldman Sachs & Co. v. City of Reno, 747 F.3d 733, 741 (9th Cir. 2014); UBS Fin. Servs., Inc. v. Carilion Clinic, 706 F.3d 319, 326 (4th Cir. 2013); Morgan Keegan & Co. v. Silverman, 706 F.3d 562, 566 (4th Cir. 2013).

DOE does not address **any** of Respondent's cases on this critical jurisdiction issue.[2]

---

[1] DOE states – incorrectly – that Respondent "does not dispute that FINRA had jurisdiction to bring this disciplinary action against him." (DOE Br. 23 n.10) Respondent has always maintained that FINRA had no jurisdiction whatever over SCDs, which are bank products and not securities.

[2] In addition, none of DOE's cited Rule 2010 cases (DOE Br. 23-24) involved a bank product.

OS Received 01/08/2024

Instead, clinging to Rule 2010 as an instrument of virtually unlimited power to regulate brokers, DOE blithely dismisses the argument: "the fact that Mantei's unethical conduct involved a banking product rather than a securities product is incidental and irrelevant." (DOE Br. 23) This logic puts the cart before the horse. FINRA must have jurisdiction before its rules can govern and its jurisdiction cannot be created or enlarged by its own rules.

POINT II

IT WAS ERROR NOT TO DISMISS THE CASE IN LIGHT OF DOE'S UNJUSTIFIED DELAYS IN BRINGING THE CASE

The transactions at issue here occurred in late 2014 and early 2015, but DOE delayed until August 1, 2019 to file its Complaint against Respondent. The parties agree that In re Hayden, Exch. Act Release No. 42772, 2000 SEC LEXIS 946 (May 11, 2000) sets out the time periods that should be reviewed to judge the fairness of the proceedings: the time between the Complaint and i) the initial instance of alleged misconduct; ii) the last instance of alleged misconduct; iii) the regulator's notice of the misconduct; and iv) the beginning of the regulator's investigation. (DOE Br. 34, citing In re Hayden) In this case, DOE filed its Complaint:

i) **4 years and 10 months** from the first instance of alleged misconduct;

ii) **4 years and 5 months** from the last instance of alleged misconduct;

iii) **4 years and 3 months** from DOE's first notice of alleged misconduct;

iv) **4 years and 3 months** from the start of DOE's investigation. (DOE Br. 35)

Even using DOE's math as to the In re Hayden time periods, DOE admits that one of the time periods in this case – the period from the start of DOE's investigation to its bringing the Complaint (4 years and 3 months)– is **longer** than it was in In re Hayden (3 years and 6 months) (DOE Br. 35), where the SEC held that **without any consideration of prejudice or harm** to

Hayden, the Exchange's delays were "**inherently** unfair" to him. Id. at *6, *4 (emphasis added). In addition, DOE waited to file the Complaint: 3 years beyond the end of the investigation and more than 3 years after taking Respondent's On the Record testimony. (R. 4379-80) These delays were inherently prejudicial and that should end the analysis.

For years, DOE had thousands of documents, hundreds of tapes, and numerous witnesses, plus the ability to get more of all of those, while Respondent had no idea where DOE's investigation was going and no access to the resources that could have assisted his defense. Respondent gave evidence of the actual prejudice that DOE's delays caused him – Respondent lost access to witnesses who could not be reached by a FINRA 8210 request – for example, Sam Palermo was out of the business by August 2018, two years before the hearing. While DOE had had access to numerous critical witnesses years earlier – e.g., counterparties on the trades at issue – that it simply chose not to talk to or request documents from (R. 1819-20), Respondent had no such access.[3] Respondent was not able to review hundreds of other taped conversations not curated by JPT or DOE as well as emails from JPT's managers concerning the WSPs. But in response to Respondent's argument that he could have confirmed that he did not commit prearranged trading, DOE states: "Of course, FINRA did not find Mantei liable for 'committing' prearranged trading." (DOE Br. 37) As noted above, that is quite a revelation because "committing" prearranged trading was charged in the Complaint. (R. 14, 15)

For the first time, DOE latches onto the unsupported and uncited dicta in the Decision (R. 4379) that DOE reviewed "25,000 transactions" over a five-year period as a reason

[3] DOE blames Respondent for not asking DOE for a Rule 8210 request for counterparties to the trades at issue. (DOE Br. 38 n.21) But it is undisputed that Respondent had no idea who the counterparties were – the firms or the individual traders – until the hearing. (R. 1738-39)

OS Received 01/08/2024

for the delay. (DOE Br. 36) However, that figure was not discussed, much less proffered, as justification by DOE at trial. Recognizing this, DOE has the integrity not to cite the Record for the assertion; rather sneakily, however, it adds the fact that it examined Respondent on July 7, 2016 for the proposition generally. (DOE Br. 36) Indeed, Investigator Hegeman gave no reason for DOE's years-long delay. Finally, DOE's argument here may suggest that its trial or appellate attorneys had access to and reviewed documents and materials that were not produced to Respondent, in clear violation of multiple discovery Orders.

DOE also deflects the prejudice caused by its delays by parroting the Decision: "the NAC decided this case almost entirely on undisputed facts comprised of recorded telephone conversations and trading records confirming that the trades were executed in accordance with Mantei's instructions on the audiotapes," "'evidence undisputed and unaffected by any purported delay.'" (DOE Br. 37, quoting Decision R. 4380) First of all, the Decision's reliance on the trading records as showing that the trades were "executed in accordance with Mantei's instructions" is simply false. First, as Respondent has emphatically noted, there is no evidence that he spoke to anyone other than Palermo, no evidence that he spoke to anyone else on the trading desk, no evidence that Palermo executed any of the trades in question and no evidence that Respondent ever spoke to a counterparty on any of the transactions in question. (R. 3151-52, 2133, 2147, 1150, 3962) Thus, it is by no means "undisputed" that Respondent gave "instructions" to the trading desk. Second, the Decision's logic that DOE had the definitive – and only relevant – evidence is absurd. JPTurner selected certain tapes to produce to DOE and then DOE – over many years – cherry-picked the tapes and trading records it liked the best. Respondent might well have found dispositive evidence of his utter innocence in other trading records and on other tapes, records showing who actually executed the trades. Of course, none of that matters to DOE because in its self-serving logic, all it needed was the taped conversations it had: Palermo's testimony "would have made no difference to the NAC's findings of liability." (DOE Br. 38)

DOE's repetitive refrain that the tapes alone support liability is used to breezily dismiss all arguments by Respondent, e.g., that DOE's key witness, Ed Woll, Chief Compliance Officer of JPTurner, could not recall and was wrong on key points concerning who made the trades:

> That the FINRA investigator could not recall who sat on the J.P. Turner bond desk or incorrectly testified that Palermo entered most of the relevant trades **does not in any way affect the NAC's findings that Mantei, through his conversations with Palermo**, directed prearranged trading with counterparties in order to circumvent his firm's cross trade procedures.

(DOE Br. 38)(emphasis added) Once again DOE argues that **no evidence** could have defeated Respondent's liability because he **spoke** to Palermo. But that premise is utterly faulty, and DOE's delays deprived Respondent of key evidentiary material, severely prejudicing his ability to defend himself.

POINT III

RESPONDENT DID NOT VIOLATE JPT'S WSPs

The JPT Cross Trade Bond Policy defines cross trade:

> A cross-trade occurs when an office sells a ***bond*** for one of its clients and purchases the bond for another of its clients. **These trades are executed *internally* by the firm and never reach the *market*.**

(JX-19, R. 3631, 3633; emphases added) Respondent was entitled to have that policy enforced according to its plain language, as a matter of law and as a matter of simple fairness. As such, it did not apply to SCDs – which are not bonds – nor did it apply to trades that were not executed internally and went out to the market, as the undisputed facts reflect happened here. Respondent

OS Received 01/08/2024

provided ample authority that unambiguous language should be followed as written; extrinsic evidence – the "totality of the evidence" (R. 4374, DOE Br. 28) including things like Woll's testimony contrary to the plain language – should be reviewed **only** where the language is unclear. (Resp. Br. 23-24) Without citation to any legal authority, DOE rejects that case law because the JPT policy is "not a 'statute,' 'rule,' or contract." (DOE Br. 30 n.14) That is a distinction without a difference and a fascinating concession, particularly as DOE has pursued Respondent relentlessly for nearly nine years because DOE on another day determined that JPT's rules were important enough to ground this entire enforcement action and seek Respondent's suspension. DOE (and the NAC) cannot have it both ways. Respondent did not violate the JPT Cross Trade Bond Policy "'in substance'" or at all. (DOE Br. 28, R. 4374)

Only speculation can connect Respondent's conversations with Palermo to the charged transactions/trades – speculation that Respondent talked to the traders on the bond desk and could – and did – order them to execute the subject transactions; speculation that Palermo spoke to the bond desk; speculation that Respondent spoke to the counterparties; and speculation that somehow Respondent executed the subject transactions himself. DOE presented no evidence of any of these points. But liability cannot be based on speculation; it must be based on evidence in the record. <u>In re David B. Tysk</u>, Exch. Act Release No. 91268, 2021 SEC LEXIS 534, *21 (March 5, 2021)[4]

[4] DOE's response to the <u>Tysk</u> decision is to immediately retreat back to the audiotapes: "There is no 'speculation' that Mantei directed or instructed Palermo to enter into prearranged trades to evade the firm's cross trade policy. His own recorded words conclusively demonstrate that he did." (DOE Br. 32 n.15) DOE simply ignores the huge gap in the facts between the audiotapes and the transactions charged.

OS Received 01/08/2024

Using the phrasing of DOE's bracingly honest admission – "Of course, FINRA did not find Mantei liable for 'committing' prearranged trading." (DOE Br. 27) DOE never connected the dots factually from Respondent to prearranged trading and violation of JPT's rule, and the Decision holds that it does not have to. (R. 4375-76) In any event, given DOE's admission that Respondent did not commit prearranged trading, it cannot now argue that Respondent violated JPT's prearranged trading policy or that he violated either FINRA Rule 2010 or MSRB Rule G-17.

POINT IV

COUNT II FOR VIOLATION OF MSRB G-17 SHOULD BE DISMISSED

With respect to the alleged violation of MSRB Rule G-17 based on JPT's transactions in Fresno municipal bonds, Respondent has already noted DOE's utter failure of proof. [5] DOE describes its case as follows: "Mantei directed sham, prearranged trades involving the Fresno H2 Bond for the purpose of circumventing J.P. Turner's cross trade policy." (DOE Br. 26)

To the extent DOE relies on anything other than the audiotapes, it is pure speculation: "The audiotapes reflect the scheme Mantei wanted to implement, and the trade records reflect that the transactions happened the way he directed. **Thus, it can be inferred that Palermo**

[5] DOE offered tape recorded calls between Respondent and Palermo, but presented **no evidence** that Palermo or **any** JPT trader spoke to the counterparty involved. (CX-2, R. 3151-52) There is no evidence that anyone from JPT, much less Respondent, reached any sort of agreement with the counterparty – the critical element of a prearranged trade. Further, DOE presented **no evidence** that Palermo executed any of the Fresno bond transactions. (JX-11 through JX-14, R. 3607-14) There was no evidence that Respondent or Palermo spoke to the JPT bond desk about the Fresno bond. (CX-2, R. 3151-52) There was no evidence that either Mantei or Palermo spoke to Paul Raymundo, the JPT trader who sold the Fresno bond shares to the street. (Id.)

or another trader spoke to a counterparty." (DOE Br. 27)(emphasis added) This is **precisely** what Tysk does not allow.

POINT V

THE DECISION CANNOT BE SUPPORTED BY THE TAPES ALONE; THIS NEW POST HOC THEORY OF LIABILITY MUST BE REJECTED

Neither the Decision nor DOE connects the dots to tie Respondent to the trades at issue here, which were alleged to be prearranged trades in the Complaint. (R. 14, 15) It is now clear that the trading itself and JPT's actual policies do not concern DOE or the NAC: "Of course, FINRA did not find Mantei liable for 'committing' prearranged trading." (DOE Br. 37) Nothing but the audiotapes matter to the NAC:

> That Mantei did not know or deal with the counterparties, did not have access to the firm's trading system, and did not have formal authority over the firm's bond desk does not negate the fact that Mantei **devised the plan** to use prohibited prearranged trades to conceal customer-to-customer transactions that otherwise would have been subjected to J.P. Turner's cross trade procedures.
>
> * * * * * *
>
> Mantei claims there is no evidence that he "directed" or "instructed" the J.P.Turner bond desk to make the relevant trades. Mantei is incorrect. **The audiotapes show that Mantei directed Palermo** to find counterparties to buy and temporarily hold the SCDs coupled with the promise that he would buy them back.

(R. 4375)(emphasis added) As DOE notes, the "NAC noted that Mantei's **liability was premised on his words on the audiotapes** directing Palermo to find counterparties to buy instruments coupled with the promise that he would buy them back." (DOE Br. 19)(emphasis added) DOE calls this a "simple case. Mantei's **liability is premised almost entirely on his own words in audiotaped conversations** he had with Palermo directing him to find counterparties willing to buy instruments coupled with the promise that Mantei would buy them back at a higher price for the purpose of avoiding the firm's cross trade policy." (DOE Br. 20)(emphasis added) Under the Decision, it is only the tapes that count, and they are sufficient to sanction Respondent for "unethical" conduct under FINRA Rule 2010. DOE offers **no** legal authority of any kind to support liability here based exclusively on Respondent's internal conversations.

Contrary to the NAC's view of the case, the Complaint clearly charged that Respondent **engaged** in prearranged trading and thereby violated his firm's WSP prohibiting prearranged trading and FINRA Rule 2010:

> 47. By his conduct **in engaging in the Wells Fargo R66 SCD Trades and the Citibank FN6 SCD Trades** and by submitting, or causing to be submitted, order tickets to JPT that failed to reflect Mantei's directions to SP, identify those transactions as cross-trades, or provide the information required by JPT's procedures for cross-trades, Mantei circumvented JPT's supervisory procedures and **contravened JPT's prohibition against prearranged trading**.
>
> 48. **As a result of the foregoing conduct**, Mantei violated FINRA Rule 2010.

(R. 14)(emphasis added) That was the charge against which Respondent defended. DOE and NAC cannot change the case midstream. <u>In re Scottsdale Capital Advisors</u>, 2021 SEC LEXIS 2789 at *22-24 (reversing NAC's findings and sanctions which were based on new theory of the case).

In <u>In re Scottsdale Capital Advisors</u>, DOE charged violations of Section 5 of the Securities Act of 1933 and FINRA 2010 against a firm and its owner, its president, and its chief compliance officer, for selling unregistered securities. The only charge in DOE's complaint against the owner, John Hurry, was that he violated FINRA Rule 2010 by "being a necessary participant and substantial factor" in sales of unregistered securities transactions "in contravention of Section 5." 2021 SEC LEXIS 2789 at *16, *20. At the hearing, DOE pursued that theory of liability, but neither witness testimony nor documentary evidence showed that Hurry was involved in the Section 5 transactions. Id. at *21-22. So, in a context very similar to this case, the NAC simply changed the theory of liability and found that Hurry's conduct was "unethical" under Rule 2010, **regardless of the earlier charge.** Id. at *22. On appeal to the SEC, DOE conceded that Hurry's conduct "was not a direct violation of Section 5." Id. at *19. The SEC flatly rejected this change of theory as fundamentally unfair to Hurry:

> But this theory of Hurry's Rule 2010 liability – untethered from any alleged violation of Section 5 – was first articulated in the NAC's decision. Under the circumstances, Hurry was deprived of a fair opportunity to rebut the theory under which he was held liable, including through the development of the factual record during the hearing.

Id. at *22-23. The SEC reversed the NAC decision on liability and sanctions, holding that "the NAC's theory of liability was fundamentally different than the one that FINRA pursued throughout its proceedings, and [ ] it was unfair for the NAC to impose liability on him under the circumstances." Id. at *19-20. Significantly, the SEC held: "Nowhere in the Complaint did FINRA suggest that Harry's conduct independently violated Rule 2010 separate from a Section 5 violation." Id. at *20-21.

In this case, DOE's Complaint and prosecution at the hearing were based on alleged violations of Respondent's firm's WSPs by engaging in/committing in prearranged trading. As in In re Scottsdale Capital Advisors, the NAC Decision detached Respondent's liability from actual prearranged trading and violation of the prearranged trading prohibition, and, relying almost exclusively on the taped conversations, found "unethical" conduct violating Rule 2010. This requires reversal.

In response to Respondent's argument that "discussing," "devising" and "directing" plans, without proof of committing the alleged conduct, was at best aiding and abetting, DOE fails

OS Received 01/08/2024

to address **any** of Respondent's case law. (DOE Br. 33-34) Instead, with conclusory logic, DOE simply declares: "Mantei is liable for *his own* unethical and dishonest conduct as he himself described in recorded conversations. It was not necessary to show that Palermo or any other trader spoke to the counterparties to find Mantei liable for his unethical conduct as alleged." (DOE Br. 33-34)(italics in original)

The aiding and abetting cases Respondent cited (Resp. Br. 31-33) make several points – none of which is addressed by DOE. First, "devising a plan" is not sufficient for principal liability. Second, aiding and abetting requires a principal violation, not present here. Third, prosecuting Respondent for aiding and abetting, a charge not found in the Complaint, is fundamentally unfair. (Resp. Br. 32-33)

The new "just tapes" theory and holding must be reversed.

POINT VI

IT WAS ERROR TO PRECLUDE RESPONDENT'S EXPERT FROM TESTIFYING ABOUT PREARRANGED TRADING

The NAC denied Respondent's Motion to Introduce Additional Evidence (R. 4039-59) to remedy the Hearing Officer's error in excluding **all** of Respondent's expert's testimony and report on prearranged trading (R. 4313-14), despite the fact that it was material to the case and despite the fact that the Hearing Panel allowed DOE's fact witness, CCO Woll – who did not draft the policy (R. 1056) – to testify expansively on that topic as if he were an expert. Respondent's expert, James Reilly, would have testified that based on his years of experience in compliance and training, "there was no prohibited prearranged trading in this case because, in short, there was no intent to manipulate the market and no harm to the market or any investor." (R. 4051, 4052) Further, after listening to the taped calls in the case, Reilly concluded that Respondent "as a retail financial advisor not executing or negotiating either side of a trade, could not be adjudged to have executed a pre-arranged trade." (R. 4059)

DOE argues, nonsensically, that Woll's testimony on the **prearranged trading** policy was relevant because Woll "drafted the firm's **bond cross trade** policy." (DOE Br. 40)(emphasis added) One has little to do with the other in terms of interpretation of its meaning. DOE further argues that the Hearing Officer properly excluded Respondent's expert on prearranged trading because he would "'tell the Panel how it should ultimately conclude.'" (DOE Br. 40, quoting R. 940) But that was just as true of Woll's testimony, which was allowed in abundance.

Not surprisingly, DOE also argues that the expert's potential testimony that Respondent did not commit prearranged trading was "**not relevant** or helpful to the determinations of liability in this case." (DOE Br. 41)(emphasis added) As the Decision and DOE repeat often, nothing matters but the tapes: "the findings that Mantei acted unethically are premised on his own words directing Palermo to locate counterparties to buy instruments coupled with an offer to buy them back in an effort to circumvent his firm's cross trade policy." (Id.) But the issue of committing prearranged trading is paramount here; it was a huge part of the case until the NAC's Decision. Neither NAC nor DOE wants anything to do with it now.

POINT VII

THE DECISION SHOULD BE VACATED BECAUSE THE FINRA FORUM IS UNCONSTITUTIONAL

The FINRA proceeding below was unconstitutional because the FINRA hearing officers acted with executive authority absent proper appointment as officers of the executive branch. Respondent cited Alpine Securities Corp. v. FINRA, 2023 WL 4703307 (D.C. Cir. July

OS Received 01/08/2024

5, 2023) in his opening brief. In that case the District of Columbia Circuit enjoined FINRA from expelling Alpine, a registered securities broker, pending resolution of Alpine's argument that the FINRA officers in its case were not properly appointed. The D.C. Circuit found that Alpine was likely to prevail on the merits of its argument.

DOE first argues that the decision in Alpine is non-precedential because the decision is merely a motions-panel order granting an injunction and the reasoning of the Order is set forth only in the concurrence. (DOE Br. 42) However, the placement of Alpine's reasoning in the concurrence does not diminish the per curium Order's significance. In Alpine, a three-judge panel of the District of Columbia Circuit unanimously concluded that appellant Alpine had "satisfied the stringent requirements for an injunction pending appeal" (id. 1), including the likelihood that Alpine would prevail on the merits of its argument that FINRA hearing officers impermissibly wield executive power that may be exercised only by the President and officers under his supervision.[6] See also James Fallows Tierney & Benjamin P. Edwards, *FINRA Faces Uphill Battle in Case Challenging Its Enforcement Authority*, CLS Blue Sky Blog (Aug. 1, 2023), https://clsbluesky.law.columbia.edu/2023/08/01/finra-faces-uphill-battle-in-case-challenging-its-

[6] The Alpine opinion is persuasive authority from the District of Columbia Circuit. Indeed, in Kim v. FINRA, 2023 WL 6538544 (D.D.C. Oct. 6, 2023) — a decision DOE cites — the federal district court stated: "Plaintiff argues that the Alpine order, although not binding, should guide the court's decision. **Agreed**." Id. at *1 (emphasis added). In Kim, the district court ultimately departed from Alpine and declined to enjoin a FINRA enforcement proceeding, in large part because the Alpine enforcement proceeding was expedited, whereas Kim's enforcement hearing and potential sanctions were "many months—and potentially up to a year—away." Id. Of course, Respondent's situation is much more akin to Alpine than it is to Kim. Respondent's FINRA enforcement proceeding is not potentially up to one year in the future, as in Kim. Rather, Respondent's proceeding has already occurred.

OS Received 01/08/2024

enforcement-authority/ (noting Alpine's "genuine skepticism about FINRA's constitutional status").[7]

DOE next argues that multiple courts have already rejected the contention that FINRA hearing officers have been selected in violation of the Appointments Clause. However, analysis of Alpine reveals that it, rather than prior decisions, is correct. Significantly, DOE undertakes no such analysis.

In the United States, the President alone is vested with the "executive Power." U.S. Const. art. II, § 1. The Constitution also places limits on those who exercise such Power on behalf of the President. Anyone who wields significant executive Power must be an officer of the United States. Buckley v. Valeo, 424 U.S. 1, 126 (1976). Such officers must be appointed by an appropriate government body under the Appointments Clause (U.S. Const. art. II, § 2, cl. 2) and must generally be removable by the President or an officer subordinate to the president. See Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

In Lucia, the Supreme Court held that SEC ALJs exercise significant authority because they have discretion to enforce an important government function — enforcing the federal securities laws. Id. at 2049, 2051, 2053. SEC ALJs can, *inter alia*, demand testimony, rule on motions, regulate the conduct of hearings, decide the admissibility of evidence, and enforce compliance with discovery orders. Id. at 2053. Accordingly, SEC ALJs are officers of the United States who must be appointed in accordance with the Appointments Clause. Id. at 2049.

[7] DOE's citation to Alliance for Fair Board Recruitment v. SEC, 85 F.4th 226 (5th Cir. 2023) (DOE Br. 42) is misplaced. As the Fifth Circuit itself noted, whereas Alpine involved a FINRA enforcement proceeding, Alliance involved neither FINRA nor an enforcement proceeding. Id. at 241 n.6.

As the concurrence observed in Alpine, "FINRA's hearing officers are near carbon copies" of SEC ALJs. 2023 WL 4703307 at *2. Like SEC ALJs, FINRA hearing officers enforce the federal securities laws and can, *inter alia*, demand testimony, rule on motions, regulate the conduct of hearings, decide the admissibility of evidence, and enforce compliance with discovery orders. 2023 WL 4703307 at *2. Decisions by FINRA hearing officers are final unless either party appeals to the NAC or, subsequently, to the SEC, or if the SEC steps in *sua sponte*. The SEC may modify, affirm, or set aside a sanction. See 15 U.S.C. §§ 78s(e)(1)(A)-(B).

The authority of the SEC to review decisions by FINRA hearing officers does not negate the exercise of significant executive Power by FINRA. To the contrary, the SEC also can review the decisions of SEC ALJs, and in Lucia the Supreme Court still held that ALJs are officers subject to the requirements of the Appointments Clause. See 138 S. Ct. at 2054. In short, as the concurrence concluded in Alpine, "if the ALJs in Lucia exercised 'significant' executive power, then FINRA hearing officers probably do too." 2023 WL 4703307 at *3.[8]

[8] FINRA's status as a not-for-profit Delaware corporation does not alter this conclusion. As the concurrence underscored in Alpine, FINRA's private status is merely nominal, insofar as FINRA's enforcement activities are controlled by the federal government. The Securities Exchange Act requires FINRA to enforce federal securities laws and SEC regulations, FINRA's own rules are generally vetted by the SEC before they take effect, the SEC can modify FINRA's rules at any time, and the SEC may remove FINRA's directors and officers if they fail to enforce government standards. See 15 U.S.C. §§ 78s(g)(12), 78s(b)(1), 78s(h)(4). The concurrence summarized in Alpine: "From start to finish, FINRA hearing officers execute government laws subject to a government plan, with little to no room for private control." 2023 WL 4703307 at *3. This is significant, because the Supreme Court has explained that it treats a nominally private entity as a state actor when it is controlled by an agency of the State, when it has been delegated a public function by the State, when it is entwined with governmental policies, or when the government is entwined with its management or control. See, e.g., Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 296 (2001). FINRA, a nominally private entity, should be treated as a state actor by virtue of its placement in several of the foregoing categories.

OS Received 01/08/2024

For the reasons set forth above, FINRA hearing officers are subject to the Appointments Clause, but are not appointed by a government body in compliance with that Clause. This renders their appointment constitutionally infirm and requires reversal of the Decision.

A second, interrelated constitutional defect requires reversal here. FINRA hearing officers are shielded from removal by at least four separate layers of protection. First, hearing officers are located in FINRA's Office of Hearing Officers, which reports directly to FINRA's Chief Executive Officer. Only FINRA's CEO can terminate a hearing officer. FINRA, *Office of Hearing Officers*, https://www.finra.org/rules-guidance/adjudication-decisions/office-hearing-officers-oho/about. Second, any officer of FINRA may be removed only by majority vote of FINRA's Board of Directors, or by written consent of all of the Directors. FINRA, *Resignation and Removal of Officers*, Sec. 7.5(b), https://www.finra.org/rules-guidance/rulebooks/corporate-organization/resignation-and-removal-officers-0. Third, FINRA directors are not appointed by the SEC and are shielded from removal by the SEC except for limited cause. See 15 U.S.C. § 78s(h)(4)). Absent such intervention by the SEC, a majority vote of FINRA's board is required to remove a director. Kim, supra, 2023 WL 6538544, at *4. In short, neither FINRA's directors nor its officers are removable by the President. D. Burton, Heritage Foundation, Backgrounder No. 3181, *Reforming FINRA* at 5 (Feb. 1, 2017), https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf. Fourth, the Supreme Court has assumed that SEC Commissioners cannot be removed by the President at will. See Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477, 487 (2010). In Free Enterprise Fund, the Court concluded that multiple layers of removal protection for members of the PCAOB likely infringed on the President's "ability to execute the laws . . . by holding his subordinates accountable for their conduct." Id. at 496. See also Alpine, 2023 WL 4703307 at *3 (citing Free Enterprise Fund);

Joseph McLaughlin, *Is FINRA Constitutional?*, 43 Sec. Reg. & Law Rep. 681 (Mar. 28, 2011), https://fedsoc.org/fedsoc-review/is-finra-constitutional ("There is no question but that FINRA, even more so than the PCAOB, exercises investigative and prosecutorial functions. . . . There is also no question but that such functions are clearly within the 'executive Power.'").

Subsequently, the Fifth Circuit relied on Free Enterprise Fund in Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), and held that the SEC's double layer of for-cause removal protection for ALJs was unconstitutional. Id. at 463. The Fifth Circuit explained: "SEC ALJs perform substantial executive functions. The President therefore must have sufficient control over the performance of their functions, and, by implication, he must be able to choose who holds the positions. Two layers of for-cause protection impede that control; Supreme Court precedent forbids such impediment." Id. The Fifth Circuit's analysis of SEC ALJs in Jarkesy is equally applicable to FINRA hearing officers who, as noted above, are virtually identical to ALJs. Overall, the multiple layers of removal protection for FINRA hearing officers presents an independent basis for concluding that Respondent's FINRA enforcement proceeding was unconstitutional.

The Supreme Court granted *certiorari* in Jarkesy, and a decision is expected by June 2024. Jarkesy presents three separate constitutional questions. One—discussed above—is whether the SEC's structure violates the rule from Free Enterprise Fund that Congress cannot impose two levels of removal protection between ALJs and the President. A second question is whether in-house adjudication by the SEC that imposes a civil penalty for fraud liability violates the Seventh Amendment right to a jury trial. A third question is whether Congress violated the non-delegation doctrine by providing the SEC with no intelligible principle for deciding whether to pursue in-house enforcement before an ALJ or instead in federal district court.[9]

POINT VIII

IT WAS AN ABUSE OF DISCRETION FOR THE NAC TO INCREASE THE SANCTIONS AND TO RUN THE SUSPENSIONS CONSECUTIVELY

It was an abuse of discretion for the NAC to increase the suspension sanction on Respondent from 30 days to two three-month suspensions and further error to run the suspensions consecutively on the basis that Rule 2010 and MSRB G-17 "involve different rules and raise separate" regulatory concerns. (R. 4388) Both the Decision and DOE repeat many times that the violative conduct is "directing Palermo" with respect to all three transactions – they make no distinction between the products when describing the plan Respondent purportedly "devised." DOE expressly states that the "scheme" pertained to "secured certificates of deposit **and** bonds." (DOE Br. 1)(emphasis added) Indeed, DOE argues, and the Decision holds, that SCDs and bonds should be considered the same for purposes of the case. (R. 4362, 4371, 4374, DOE Br. 1, 2, 5, 6,

[9] The Fifth Circuit answered all three questions in Jarkesy the affirmative. The Supreme Court is widely expected to agree with the Fifth Circuit on at least one of the foregoing issues and hold that the SEC's system of in-house enforcement before ALJs is unconstitutional. See, e.g., Christopher J. Walker, Note & Comment, *The Remedy in SEC v. Jarkesy*, YALE J. ON REG. ONLINE (Nov. 27, 2023), https://www.yalejreg.com/nc/the-remedy-in-sec-v-jarkesy/ ("[I]t's quite possible that Jarkesy will succeed on at least one of them."); Andrew Chung & John Kruzel, *US Supreme Court Signals It Could Limit SEC In-House Enforcement*, REUTERS (Nov. 29, 2023), https://www.reuters.com/markets/us/us-supreme-court-weighs-legality-sec-in-house-enforcement-2023-11-29/. Such an outcome carries "enormous potential consequences" for agencies beyond the SEC. See Vinson & Elkins, *Supreme Court Oral Argument in Jarkesy Laser-Focused on Seventh Amendment Trial Right in Agency Civil Penalty Enforcement Actions* (Nov. 30, 2023), https://www.velaw.com/insights/supreme-court-oral-argument-in-jarkesy-laser-focused-on-seventh-amendment-trial-right-in-agency-civil-penalty-enforcement-actions/. Other agencies potentially impacted by the Supreme Court's expected decision in Jarkesy obviously include FINRA and its enforcement arm.

OS Received 01/08/2024

18, 23, 26, 29) Thus, by DOE's own logic, the misconduct was entirely of one kind. In fact, DOE argues that the Sanction Guidelines allow aggregation of "similar violations" where they resulted from a "single systemic problem." (DOE Br. 51) This cuts entirely against the notion that separate concerns make consecutive suspensions appropriate here. It also makes DOE's contention that "the underlying violations are different, involve different products, and raise separate public interest concerns" (DOE Br. 52) utterly disingenuous.

Throughout the entire case, DOE lumped the three transactions and the two Rules together. (R. 5-17) The two Rules are similar – each is the catchall rule for its regulatory organization. FINRA Rule 2010 requires members to "observe high standards of commercial honor and just and equitable principles of trade" and MSRB Rule G-17 requires brokers to "deal fairly with all persons and not engage in any deceptive, dishonest or unfair practice." The Complaint employs almost identical language to its charges under Count 1 for FINRA 2010 violation and Count 2 for violation of MSRB Rule G-17. [10]

DOE cites only one case to justify the NAC's consecutive suspensions, <u>In re Michael Frederick Siegel</u>, Exch. Act Release No. 58737, 2008 SEC LEXIS 2459 (Oct. 6, 2008) (DOE Br. 52), and that case actually supports Respondent's position. In that case, Siegel was found liable for two totally different securities violations: NASD Rule 3040 for engaging in private securities transactions without giving prior written notice to his firm and NASD Rule 2310 for

[10] Paragraphs 47 and 51 in Counts 1 and 2 of the Complaint use identical language with respect to the SCD transactions under FINRA Rule 2010 and the Fresno Bond transaction under MSRB Rule G-17: "By his conduct in engaging in the [SCD or bond] Trades and by submitting, or causing to be submitted, order tickets to JPT that failed to reflect Mantei's directions to SP, identifying those transactions as cross-trades, or provide the information required by JPT's procedures for cross-trades, Mantei circumvented JPT's supervisory procedures and contravened JPT's prohibition against prearranged trading." (R. 14, 15)

making unsuitable recommendations to two sets of customers. 2008 SEC LEXIS 2459 at *20, *31-32. The SEC approved two six-month consecutive suspensions specifically because "selling away and suitability violations involve different kinds of misconduct and raise separate and serious regulatory concerns." Id. at *45. One violation involved his actions vis a vis his firm; the second violation was a sales practice violation. That is clearly not the case here, where Respondent purportedly devised the same "scheme" concerning prearranged trading for all three transactions.

With respect to the Decision's "aggravating factors" under the FINRA Sanction Guidelines, DOE tracks the Decision. Thus, despite the fact that Respondent had his telephone discussions with Palermo on lines he knew were taped, DOE argues that Mantei did not mark the orders as cross trades in order to deceive JPT. (DOE Br. 45-46) But these trades were **not** cross trades and Respondent had no reason to falsely mark them as such.

Despite the fact that the entire case involved only **three** transactions and nine total trades, DOE embraces NAC's concept that "size and character of the transactions themselves – which involved thousands of dollars – were not insignificant." (DOE Br. 46) Yet for purposes of excusing its delays in bringing the case, DOE itself whines about the "more than 25,000 transactions during the relevant period" (DOE Br. 36) it presumably reviewed. It is absurd to argue that three of 25,000 transactions add up to a "pattern" of misconduct. And almost any trade can be said to involve "thousands of dollars." That alone cannot make three transactions into a "pattern."

DOE praises the NAC's reversal of the hearing panel to hold that there was no evidence that Respondent personally benefited from any of the transactions as "an appropriate de novo review" in a "reasoned decision." (DOE Br. 50) Yet it finds no conflict in the NAC's finding that Respondent put customers at risk by his actions with its finding of "**lack of actual customer**

harm." (DOE Br. 46-47)(emphasis added) This makes no sense.

DOE continues to attempt to punish Respondent for his "lack of remorse" in continuing to press his arguments against liability and sanctions throughout the case. With respect to Respondent's insistence on fair procedures and a zealous defense, DOE argues that FINRA disciplinary adjudicators are "explicitly instructed to consider the failure to accept responsibility in determining appropriate sanctions for all violations." (DOE Br. 49) In considering SEC requests for injunctions, the federal courts review the likelihood of future violations considering several factors similar to the FINRA Sanction Guidelines, including the defendant's recognition of the wrongful nature of his conduct. Nevertheless, those same courts have warned against punishing a defendant's zealous defense: "where litigants do not publicly acknowledge the wrongfulness of their conduct due to a decision to contest SEC enforcement, such actions should not prejudice those litigants since a full and vigorous defense is a right under our system of justice." SEC v. Yun, 148 F. Supp.2d 1287, 1294 (M.D. Fla. 2001)(quotations omitted)(denying injunction), aff'd in part and vacated in part on other grounds, 2003 U.S. App. LEXIS 7155 (11th Cir. 2003). Similarly, in SEC v. Happ, 295 F. Supp.2d 189 (D. Mass. 2003), the court emphasized: "with respect to whether [defendant] has recognized the wrongfulness of his conduct, [defendant's] behavior throughout trial has been consistent with setting forth a vigorous defense. **He is not to be penalized for this**." 295 F.Supp.2d at 197 (emphasis added)(citing SEC v. Yun), aff'd, 392 F.3d 12 (1st Cir. 2004). Cf. SEC v. City of Miami, Case No. 13-22600-CIV-ALTANAGO/O'Sullivan, 2016 U.S. Dist. LEXIS 205155 (S.D. Fla. Dec. 5, 2016) (quoting SEC v. Yun; denying injunction). Punishing Respondent for his legal and factual defenses here is a fundamental deprivation of his rights.

OS Received 01/08/2024

Finally, the sanctions imposed – six month suspension and $15,000 fine – are far too harsh. See In re Ravid Gold, FINRA Letter of Acceptance, Waiver, and Consent No. 2020068391501 (Oct. 3, 2023) (sanctions of 30-day suspension and $5,000 fine for 30 admittedly intentional pre-arranged trades over the course of five days).

CONCLUSION

For the reasons set forth above and in Respondent's opening brief, the Decision should be reversed in all respects, the sanctions vacated, and the Complaint dismissed. Respondent respectfully requests oral argument of this appeal.

Dated: New York, New York
January 8, 2024

Respectfully submitted,

PADUANO & WEINTRAUB LLP

By: [redacted]
Anthony Paduano
Katherine B. Harrison
1251 Avenue of the Americas
New York, New York 10020
(212) 785-9100
ap@pwlawyers.com
kh@pwlawyers.com

Attorneys for Respondent
Rick Mantei

<u>CERTIFICATION OF COMPLIANCE WITH WORD LIMIT</u>

I hereby certify that the word count of this Appeal Reply Brief complies with the word limits of Rule 17 C.F.R. § 201.450(c) and the SEC Order dated December 20, 2023 allowing Respondent's Appeal Reply Brief to contain no more than 9,000 words, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. According to the word-processing system (Microsoft Word) used to prepare this Appeal Reply Brief, the total word count for all printed text exclusive of the material omitted under 17 C.F.R. § 201.450(c) is 8967 words.

By: [redacted]
Katherine B. Harrison

CERTIFICATE OF SERVICE

I certify that on January 8, 2024, I served a copy of the foregoing via email on:

Alan Lawhead, Esq.
Senior Vice President and
Director – Appellate Group

Andrew Love, Esq.
Associate General Counsel

Megan H. Rauch, Esq.
Associate General Counsel

Celia Passaro, Esq.
Associate General Counsel

FINRA
1735 K Street, NW
Washington, D.C. 20006
megan.rauch@finra.org
nac.casefilings@finra.org

By: [redacted]
Katherine B. Harrison