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August 15, 2024

VIA ELECTRONIC FILING (EFAP)
Ms. Vanessa Countryman
Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, D.C. 20549

Re: In the Matter of the Application of Ricky Alan Mantei, Admin. Proc. File No. 3-21516

Dear Ms. Countryman:

We represent Rick Mantei ("Petitioner") in the above-referenced action. Petitioner's Appeal from the decision of the National Adjudicatory Counsel (NAC) is fully briefed and pending before the Commission and waiting for our request for argument. Petitioner respectfully requests permission to supplement his briefing pursuant to SEC Rule of Practice 421(b) to introduce new authorities in support of his Appeal. The Commission has not decided the Appeal and we write specifically to address recent precedent from the United States Supreme Court that we believe will significantly aid the Commission's decisional process.

This letter constitutes both Petitioner's application for leave and his initial additional submission.

The United States Supreme Court's decision in SEC v. Jarkesy, No. 22-859, 2024 U.S. LEXIS 2847 (June 27, 2024) supports the arguments made by Petitioner in his opening and reply briefs that the proceedings conducted by FINRA

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below were unconstitutional and warrant vacatur of the May 30, 2023 Order issued by the NAC.[1]

Petitioner argued in his opening Appeal Brief submitted on October 27, 2023, that "the FINRA proceeding [] was unconstitutional because the FINRA hearing officers acted with executive authority without being properly appointed officers" (Appeal Brief at 35-36). Petitioner emphasized this argument in his Reply Brief submitted on January 8, 2024 (Reply Brief at 24-30). In his Reply Brief section titled "The FINRA Forum is Unconstitutional," Petitioner argued inter alia that "FINRA hearing officers are subject to the Appointments Clause but are not appointed by a government body in compliance with that Clause" which renders their appointment unconstitutional (Appeal Reply Brief at 28) and argued that the forum deprived him of due process (Reply Brief at 29). Petitioner relied upon Lucia v. SEC, 585 U.S. 237, 251 (2018) and stated that "SEC ALJs are officers of the United States who must be appointed in accordance with the Appointments Clause."

The Jarkesy Decision

Under current law, the SEC has two venues for pursuing civil penalties against those it charges with wrongdoing: federal court, which provides the full procedural protections of civil litigation, and internal adjudication with "relaxed" evidentiary and discovery rules, followed by limited judicial review. In Jarkesy, internal adjudication was applied, and a $300,000 penalty was assessed following a finding of securities fraud. Jarkesy challenged this decision, arguing inter alia, that it violated his Seventh Amendment rights.

On June 27, 2024, the Supreme Court ruled that the SEC violated Jarkesy's Seventh Amendment right to a jury trial by adjudicating the enforcement

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[1] SEC Rule of Practice 421(b) allows for briefing of issues "at any time prior to issuance of [the Commission's] decision". 17 C.F.R. § 201.421(b). "[A]n applicant need not identify every contention or argument in an application for review appealing an SRO decision." In the Matter of John Vincent Ballard, Release No. 77452 (Mar. 25, 2016). SEC Rule of Practice 421(b) permits supplemental arguments if briefing on those matters would significantly aid in the decisional process. The Commission has generally relied on this provision in granting applications by parties seeking supplemental briefing under the authority of this provision. See In re Springsteen-Abbott, Release No. 82378 (Dec. 21, 2017) (granting application by party for supplemental briefing); In re Acosta, Release No. 87509 (Nov. 12, 2019) (treating application for expedited hearing as request for supplemental briefing and granting it).

matter in-house. The Jarkesy Court held that when the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles that defendant to a jury trial. The Court found that the SEC's procedures violated Seventh Amendment protections because the SEC's antifraud provisions replicate common law fraud.

The Court held that the "right to trial by jury is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and should be scrutinized with the utmost care." Jarkesy, at *3 (quoting Dimick v. Schiedt, 293 U. S. 474, 486). The Seventh Amendment protects the right of trial by jury and the right itself is not limited to the "common-law forms of action recognized" when the Constitution was ratified. Curtis v. Loether, 415 U. S. 189, 193 (1974). Instead, it "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." Parsons v. Bedford, 28 U.S. (3 Peters) 433, 447 (1830). This includes claims that are legal in nature. Id. "To determine whether a suit is legal in nature, courts must consider whether the cause of action resembles common law causes of action, and whether the remedy is the sort that was traditionally obtained in a court of law." Id. The Court emphasized that "of these factors, the remedy is the most important." Id. In Jarkesy, the Court explained that for the alleged fraud, the "SEC seeks civil penalties, a form of monetary relief." Id. The Court defines relief as legal in nature "when it is designed to punish or deter the wrongdoer rather than solely to 'restore the status quo.'" Id. (quoting Tull v. United States, 481 U.S. 412, 422 (1987)). Analyzing the amendment's text and historical context, the Court found that such claims are inherently "legal in nature," akin to common law actions that historically required a jury trial, and prohibited the SEC from using internal adjudication for such cases. Jarkesy, at *3.

Using a rationale consistent with that articulated in Jarkesy, the United States Court of Appeals for the D.C. Circuit called into question the constitutionality of FINRA's disciplinary system. In Alpine Securities Corp. v. FINRA, 2023 WL 4703307 (D.C. Cir. July 5, 2023), the D.C. Circuit enjoined the expulsion of a member firm where the ALJs hearing the subject case "'exercised significant authority' because they had 'discretion' to exercise an 'important' government function—'enforc[ing] the nation's securities laws'" and because those ALJs appeared to have been improperly appointed. Id. at *5. In Alpine, the court issued an injunction preventing FINRA from expelling Alpine while Alpine's case that the FINRA officers were improperly appointed was pending. In Alpine, the D.C. Circuit held that FINRA's hearing officers wield significantly more than "ministerial or advisory" executive power, and that "It would be odd if the Constitution prohibits Congress from vesting significant executive power in an unappointed and unremovable government administrator but allows Congress to vest such power in an unappointed and unremovable private hearing officer." Alpine, at *8-9. The concurrence in Alpine observed that FINRA's hearing officers are actually "near carbon copies of [the SEC's] ALJs and, as a result, "seem[] to exercise the executive authority of the United States." Id. at *9. (Walker, J., concurring)

The Alpine court relied on Lucia, supra, in granting Alpine an injunction, holding that ALJs "'exercised significant authority' because they had 'discretion' to exercise an 'important' government function—'enforc[ing] the nation's securities laws.'" Alpine, at *5 (quoting Lucia, supra, at 2049, 2051, 2053). The Lucia court concluded that the "the SEC 'adopts [ALJs'] credibility findings absent overwhelming evidence to the contrary.'" See also Department of Transportation v. Association of American Railroads, 575 U.S. 43, 57 (2015) (Alito, J., concurring) ("There is good reason to think that those who have not sworn an oath cannot exercise significant authority of the United States."). Oral argument was held in Alpine on February 8, 2024, and the case is sub judice.

The Proceedings Below

FINRA's case against Petitioner centers on allegations related to his alleged involvement in "prearranged" trades at J.P. Turner & Company, where he was branch manager. According to findings by the FINRA hearing panel and adopted by the NAC, Petitioner violated the general catch-all provisions contained in FINRA Rule 2010 and MSRB Rule G-17 by "orchestrating" transactions involving structured certificates of deposit (SCDs) that circumvented the firm's policies against prearranged trading and cross trades even though it was undisputed that Petitioner did not act as a trader or financial advisor and was not client-facing. Specifically, the FINRA alleged that Mantei engaged in misconduct by directing three sets of transactions involving SCDs and a Fresno municipal bond. In these transactions, a customer from the Lexington branch sold a financial instrument to J.P. Turner, who then sold it to another broker-dealer. Subsequently, the broker-dealer sold it back to J.P. Turner at a slightly higher price, which, according to the NAC, included a "hidden charge" for holding the position temporarily. Mantei then directed the sale of these repurchased positions to other customers of J.P. Turner (NAC at 4). There is no evidence in the record regarding a "hidden charge" and the NAC identified no party that engaged in fraudulent acts or omissions regarding prices, fees or "hidden charge[s]". The NAC made no suggestion as to what it meant by a "hidden charge" and cited nothing in the record to support this finding.

As alleged by the DOE, and found the by the hearing panel and the NAC, Mantei circumvented JPT's procedures on three occasions:

(a) In September 2014, in connection with the cross-trade of a Wells Fargo SCD with CUSIP 949748R66 (the "Wells Fargo R66 SCD");

- Mantei faced pressure from a customer that was not his client but who was dissatisfied with the declining value of their $96,000 investment in the SCD. (NAC at 4). Despite not obtaining approval from J.P. Turner's compliance officer, Mantei directed efforts to sell the SCD at a price near 90 to appease the customer and potentially avoid regulatory reporting. Id. He instructed a trader colleague, Palermo, to find a buyer willing to purchase the SCD at this inflated price. When Palermo could not secure a "legitimate" bid. Although he was not a trader and never dealt with any traders outside of his own firm, Mantei arranged for a cross trade with another firm, Firm A, whereby the SCD was sold for 90 and then repurchased incrementally at slightly higher prices, over a period of 14 days. Id. at *6-8. These actions were executed to meet Mantei's objective of maintaining customer satisfaction and avoiding formal complaints, and without notice to his firm's compliance department. Id. at *9.

(b) In December 2014, in connection with the cross-trade of a municipal bond with CUSIP 35814HE2 (the "Fresno HE2 Bond");

- NAC found that Mantei instructed Palermo to sell a J.P. Turner customer's $30,000 face amount Fresno HE2 Bond with the intention of repurchasing it later in the week. Id. at *9. Mantei directed Palermo not to sell the bond to the open market but to find a counterparty willing to cooperate with a "favor" trade, where the bond would be sold at an inflated price of 97.11. Id. at *10. Despite Palermo's initial concern about J.P. Turner's cross trade policy, Mantei insisted on executing the trade through a cooperative counterparty to secure a higher sale price. Days later, J.P. Turner bought back the bond at 97.36 and immediately resold it to three different unnamed J.P. Turner customers at 99.96. Id. at

*10. (No evidence in the record was adduced regarding mark-ups and the NAC cited to nothing for this conclusion).

(c) In February 2015, in connection with the cross-trade of a Citibank SCD with a CUSIP of 172986FN6 (the "Citibank FN6 SCD"):

- The NAC found that Mantei instructed Palermo to sell a J.P. Turner customer's $40,000 face amount Citibank FN6 SCD with a plan to repurchase it shortly thereafter. Id. at *10. Mantei asked Palermo to find a counterparty willing to temporarily hold the bonds, stating they would repurchase the bonds the following day. Id. at *11. Despite Palermo's reminder to avoid marking the trade as a cross, Mantei ensured the order ticket did not indicate this. Id. at *11. Later that day, J.P. Turner purchased the bonds from a customer at 90.45 and immediately sold them to Firm C at 93.00. Id. at *11. The following day, J.P. Turner repurchased the bonds from Firm C in two transactions at 93.15 and subsequently sold them to a J.P. Turner customer at 95.50, resulting in a total markup that exceeded J.P. Turner's internal limit for cross trades. Id. at *12 (No evidence was adduced regarding mark-ups and the NAC cited to nothing for this finding).

The NAC's Opinion lacks citation to evidence for most of its findings and takes great liberties with the evidence when it does bother to cite to the record.

In Mantei's case, fraud, unethical conduct, dishonesty, deceit and manipulation were core to the charges underlying FINRA's case and the NAC's Opinion, no matter how inconsistent, concocted, manufactured and undocumented. The NAC made this clear: "MSRB Rule G-17 encompasses both an antifraud prohibition and a duty to deal fairly." (NAC at 18). Due to the broad, amorphous allegations against him, and the clear fact that DOE alleged fraud and sought monetary penalties, the precedent set by Jarkesy must be applied to the case against Mantei.

Because FINRA could not identify any actual wrongdoing by Mantei, and because it waited some four and one-half years before filing its complaint against Mantei – well after the statute of limitations had run on any securities fraud claims – [2] it charged Mantei with violations of the "catch all" provisions of FINRA Rule 2010 and MSRB Rule G-17. The Rules give FINRA's DOE the power to try a case before FINRA's handpicked Panel on whatever FINRA's DOE thinks may be inappropriate, without identifying specific violations of law. The NAC acknowledged this in its decision and found specifically that Mantei had no role in placing any trades[3], that Mantei had never communicated in any fashion with (a) three of the four in-house traders who actually made the trades,[4] and (b) never communicated with any of the counterparties and had no dealings with any of those parties.[5]

The FINRA hearing panel imposed on Mantei concurrent 30 business-day suspensions and a collective $15,000 fine. However, on appeal the NAC increased the sanctions by imposing two consecutive three-month suspensions along with the combined $15,000 fine (NAC at 31). The NAC gave no reasoning for its increased sanctions, which results in statutory disqualification for Mr. Mantei, who is 70 years old. The NAC's decision, blithely free of citations to the record and absent of reasoning, bars Mantei from the securities industry and deprives him of his livelihood. The extraordinarily harsh result amplifies the injury Mantei suffered by being deprived of his right to trial by jury and his access to the courts and their protections.

Conclusion

The enforcement action against Mantei is "legal in nature". The Court in Jarkesy made it clear that the SEC sought a claim "legal in nature" mainly because the SEC sought civil penalties, which are a form of monetary relief. Jarkesy, at *3. The Rule 2010 and G-17 claims against Mantei are "legal in nature" because the relief sought by DOE was a financial penalty coupled with the even harsher equitable remedy of license revocation.

FINRA penalties are aimed at punishment, as is attested by the NAC's completely random act in making the sanctions assessed against Mantei run

[2] The statute of limitations for an SEC Rule 10b-5 claim is five years from the allege violation or two years from the date the violation was discovered, whichever is later. See 28 U.S.C. § 1658(b) (providing that Section 10(b) and Rule 10b-5 private securities fraud actions "may be brought not later than the earlier of (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation").
[3] NAC at 25, n. 28.
[4] NAC at 17.
[5] NAC at 17-18.

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consecutively and doing so without citation to sound precedent, guidelines, or reasoning. The emphasis on punishment rather than on compensation is at the core of the punishment found in the FINRA Sanction Guidelines. Stating that sanctions "should be more than a cost of doing business... [and] may necessitate the imposition of sanctions in excess of the upper sanctions guideline" proves this (FINRA Sanctions Guidelines p. 2). In fact, FINRA goes as far as to recommend that in some circumstances adjudicators should "<u>exceed</u> the recommended range of the guidelines" for no particular reason (<u>Id</u>) (emphasis added). That in fact is what occurred here. Because FINRA enforcement guidelines are clearly directed at punishing the registered representative, the remedy is "legal in nature" and falls within the rule established by <u>Jarkesy</u>.

FINRA's processes deprived Petitioner of his fundamental rights to due process because of the appointment of an in-house Panel (all unsworn officers that Petitioner had no input in selecting), the random replacement of Hearing Office Chairs that DOE did not favor, the empaneling of the NAC without say or participation by Petitioner, and the overall unavailability of trial by jury. Under its extended grants of authority from Congress, FINRA has exercised executive authority in disciplinary proceedings, and contravened Petitioner's rights under the Fifth and Seventh Amendments to the Constitution. The challenges raised by Petitioner go to the validity of FINRA's processes and their fundamental fairness.

In light of <u>Jarkesy</u>, the decision of the NAC should be vacated and the DOE's complaint filed before an administrative panel dismissed.

Petitioner reiterates his request for oral argument of his appeal.

Thank you for your courtesies.

[redacted]

cc: All Counsel (VIA Electronic Mail)

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