

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**

In the Matter of the Application of

Ricky Alan Mantei

For Review of Disciplinary Action

Taken by

FINRA

File No. 3-21516

FINRA’S OPPOSITION TO REQUEST TO ORDER SUPPLEMENTAL BRIEFING

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I. INTRODUCTION

Applicant Ricky Alan Mantei appealed the National Adjudicatory Council’s (“NAC”) decision against him to the Commission in June 2023. Since then, the parties have thoroughly briefed the issues on appeal to the Commission, with Mantei filing his final brief in January 2024. Mantei now asks the Commission to order supplemental briefing to “introduce new authorities” related to the Seventh Amendment purportedly in support of his application for review. Mantei, however, failed to exhaust his new claim that FINRA’s action violates the Seventh Amendment by failing to raise it before FINRA. The Commission therefore should reject Mantei’s request for supplemental briefing because Mantei forfeited the arguments by not raising them below.

II. BACKGROUND

This case is about a registered representative who violated his firm's written supervisory procedures. Mantei's firm, J.P. Turner & Company ("J.P. Turner"), prohibited prearranged trading and provided safeguards and requirements for cross trades. Mantei violated these procedures by directing prearranged trading for three sets of transactions involving two structured certificates of deposit and one municipal bond. The relevant trading for each set of transactions followed the same pattern: a customer from Mantei's branch office sold the financial instrument to J.P. Turner, which in turn sold it to another broker-dealer in a prearranged trade. Later, that broker-dealer sold it back to J.P. Turner at a price slightly above what it had paid for the position. In each instance, Mantei sold the repurchased positions to other J.P. Turner customers. By inserting intervening counterparties, Mantei evaded J.P. Turner's cross trade procedures, which were designed to protect customers.

Enforcement filed a two-cause complaint against Mantei. RP 5-16¹. The first cause of action alleged that Mantei circumvented J.P. Turner's written supervisory procedures related to cross trades and contravened J.P. Turner's prohibition against prearranged trading with respect to the two sets of transactions involving structured certificates of deposit, in violation of FINRA Rule 2010. RP 14. The second cause of action alleged that Mantei circumvented J.P. Turner's written supervisory procedures related to cross trades and contravened J.P. Turner's prohibition against prearranged trading with respect to the municipal bond transactions, in willful violation of MSRB Rule G-17. RP 14-15. In his answer, Mantei asserted 12 affirmative defenses, none of which raised constitutional issues or, specifically, the Seventh Amendment. RP 51-53. After a five-day hearing, a FINRA Hearing Panel issued its decision finding Mantei engaged in the

¹ "RP __" refers to the page numbers in the certified record filed with the Commission.

misconduct as alleged. The Hearing Panel imposed on Mantei two concurrent 30-business day-suspensions in all capacities and fined him \$15,000. RP 3945-85

Mantei appealed the decision in its entirety to FINRA's National Adjudicatory Council ("NAC"), and Enforcement cross-appealed with respect to sanctions. RP 3987-97. Mantei did not raise any constitutional arguments in his notice of appeal nor make any Seventh Amendment argument before the NAC. RP 3987-94. Mantei made three passing references before the NAC to "due process" unrelated to the constitutionality of FINRA's proceeding.² After considering the record and arguments set forth by the parties, the NAC found Mantei liable as alleged. RP 4358-89. In accordance with FINRA's Sanction Guidelines and the seriousness of Mantei's misconduct, the NAC imposed two consecutive three-month suspensions in all capacities, fined him \$15,000, and required him to requalify as a general securities representative. RP 4388.

This appeal to the Commission followed. Again, Mantei did not raise any constitutional arguments in his notice of appeal. RP 4395-96. In his opening brief, Mantei for the first time claimed that FINRA disciplined him through an unconstitutional process that violated the

² Mantei's references to "due process" on appeal to the NAC were vague and not made in support of any argument about constitutionality of FINRA's proceeding or violations of the Seventh Amendment. Specifically, in his opening brief, Mantei argued that FINRA's proceeding violated the "'fundamental principle governing all SRO disciplinary proceedings' – 'fairness,'" quoting *In re Hayden*, Exchange Act Release No. 42772, 2000 SEC LEXIS 946, at *24 (May 11, 2000). RP 4124. In the same citation, Mantei referred also to *In re Farhang*, Exchange Act Release No. 83494, 2018 SEC LEXIS 1491, at *24 (June 21, 2018), with a parenthetical that read: "recognizing that 'the due process clause' of the Constitution 'insure[s] the fundamental fairness of the administrative hearing.'" RP 4124. In his opening brief and opposition to the cross appeal, Mantei argued that it was unfair to hold him responsible for an interpretation of his firm's procedures that allegedly was contrary to its terms and cited *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996). RP 4143-44, 4198. In same citation, Mantei referred also to *Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993), with a parenthetical that read: "(holding that '[a] vague rule denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions')." RP 4143-44, 4198. Finally, in his reply brief to the NAC, Mantei generally asserted without citation, "[c]ontrary to any notion of the rule of law or due process, DOE now seeks to punish Mantei for appealing the Decision." RP 4234.

Appointments Clause, relying solely on a concurrence from a motions-panel order granting an injunction in *Alpine Securities Corporation v. FINRA*. Opening Br. at 35-36 (citing *Alpine v. FINRA*, No. 23-5129, 2023 U.S. App. LEXIS 16987, at *6-7 (D.C. Cir. July 5, 2023) (Walker, J., concurring)). FINRA responded in its opposition, explaining that neither Mantei’s reliance on the *Alpine* concurrence, nor that opinion’s citation to the Supreme Court’s decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), supports overturning longstanding precedent that FINRA is not a state actor, and the Appointments Clause does not apply to FINRA. Opp. Br. at 42-43. In his reply, Mantei argued that FINRA’s forum deprived him of due process because of FINRA’s violation of the Appointments Clause. Reply Br. at 29.

Mantei now requests supplemental briefing to introduce *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024) in a belated effort to argue that the Seventh Amendment applies to FINRA’s disciplinary proceeding against him.

III. ARGUMENT

A. Mantei Failed to Exhaust His Seventh Amendment Claim

Mantei failed to exhaust his new claim that FINRA’s disciplinary process violates the Seventh Amendment. Thus, Mantei has forfeited this argument before the Commission and should not be permitted to raise and brief it now. *See Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *38 (Apr. 3, 2020); *see also Eric S. Smith*, Exchange Act Release No. 100762, 2024 SEC LEXIS 1974, at *25 n.39-40 (Aug. 19, 2024).

As the Commission has held, “imposing an exhaustion requirement promotes the efficient resolution of disciplinary disputes between [Self-Regulatory Organizations] and their members.” *Newport Coast*, 2020 SEC LEXIS 911, at *39. The exhaustion requirement “promotes the development of a record in a forum particularly suited to create it, upon which the Commission

and, subsequently, the courts can more effectively conduct their review.” *Blair Edwards Olson*, Exchange Act Release No. 93216, 2021 SEC LEXIS 2978, at *11 (Sept. 30, 2021). It “also provides SROs with the opportunity to correct their own errors prior to review by the Commission.” *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621 (2d Cir. 2004). Understanding that the “self-regulatory function of SROs could be compromised” if SRO members were “free to bring their SRO grievances before the SEC without first exhausting SRO remedies,” the Commission has emphasized it is “clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review.” *See Newport Coast*, 2020 SEC LEXIS 911, at *39-40.

Here, the record establishes that Mantei failed to raise his Seventh Amendment claim at any point before FINRA. Mantei did not mention the Seventh Amendment or trial by jury before the Hearing Panel, in his notice of appeal or briefs to the NAC, or at oral argument before the NAC. Mantei made three vague references to “due process” before FINRA. These references, however, and were not made in support of any argument about constitutionality of FINRA’s proceeding or violations of the Seventh Amendment.

Nothing prevented Mantei from bringing his Seventh Amendment claim before now. *See id.* at *41 (explaining that “unawareness of the availability of the claim does not excuse the failure to exhaust it, even assuming for sake of argument . . . that an intervening change in the law might constitute a reasonable ground to excuse the failure to exhaust.”). Thus, the fact that *SEC v. Jarkesy* was issued after the parties completed briefing before the Commission is not dispositive. *See id.*

Because Mantei failed to exhaust his claim that FINRA’s process violates the Seventh Amendment, his claim is forfeited. *See id.* at 40 (declining to consider applicant’s Appointments

Clause argument that it never raised before FINRA); *Robert Marcus Lane*, Exchange Act Release No. 98124, 2023 SEC LEXIS 2017, at *2 n.7 (Aug. 14, 2023) (order denying motion for reconsideration) (“Nor do we address Lane’s filing to the extent that he seeks to raise new arguments for our overturning FINRA’s decision that he did not raise in his original appeal.”); *Richard G. Cody*, Exchange Act Release No. 65235, 2011 SEC LEXIS 3041, at *7 & n.8 (Aug. 31, 2011) (declining to consider new claims in motion for reconsideration); *see also Canady v. SEC*, 230 F.3d 362, 362-63 (D.C. Cir. 2000) (upholding Commission’s conclusion that respondent “waived [a] defense by failing to argue it”); Commission Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (providing that, “except as otherwise determined by the Commission in its discretion, any argument raised for the first time in a reply brief shall be deemed to have been waived”); *cf. Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (“[A]rguments not raised to the district court are waived on appeal [and] even arguments that have been raised may still be waived on appeal if they are underdeveloped, conclusory, or unsupported by law.”).

B. Supplemental Briefing Will Not Aid the Commission

When deciding whether to order supplemental briefing, the Commission “may . . . consider any matter that it deems material, whether or not raised by the parties . . . where the Commission believes that such briefing would significantly aid the decisional process.” Commission’s Rules of Practice, Rule 421(b), 17 C.F.R. § 201.421(b). Mantei has not demonstrated that supplemental briefing would significantly aid the Commission’s decisional process.

As an initial matter, Mantei’s failure to raise his Seventh Amendment claim before FINRA is sufficient reason to not permit supplemental briefing now. *See Newport Coast*, 2020 SEC LEXIS 911, at *40 (“[Applicant’s] failure to raise its Appointments Clause argument before

FINRA is reason enough for us to reject it now.”); *Laurie Jones Canady*, 54 S.E.C. 65, 89(1999), *aff’d*, 230 F.3d 362, 362-63 (D.C. Cir. 2000) (upholding Commission’s conclusion that respondent “waived [a] defense by failing to argue it”); *Stephen Russell Boadt*, 51 S.E.C. 683, 685 (1993) (“We are therefore not required to consider this objection because he failed to present it to the District Committee.”).

Mantei’s request for supplemental briefing is an attempt to make a *different* constitutional argument before the Commission. To persuade the Commission to grant his request, Mantei asserts that *SEC v. Jarkesy* supports his previous argument before the Commission that the FINRA proceeding was unconstitutional. But Mantei’s previous constitutional arguments, made only before the Commission, were limited to the Appointments Clause. Mantei raised, and the parties briefed, his argument that the FINRA proceeding was unconstitutional because FINRA hearing officers acted with executive authority without being properly appointed. Now Mantei seeks permission to brief the issue that FINRA’s proceeding was unconstitutional because it violates the Seventh Amendment. Other than the umbrella of constitutionality, his Appointments Clause argument and Seventh Amendment argument are inapposite. The parties’ briefing about the Appointments Clause should not beget additional briefing on a completely separate constitutional issue that was never raised in the FINRA proceeding.

Because additional briefing would not significantly aid the Commission’s decisional process, the Commission should deny Mantei’s request for supplemental briefing.³

³ Mantei’s request to order supplemental briefing includes both the request and “his initial additional submission.” Because Mantei’s additional submission is not properly before the Commission, FINRA does not respond to his arguments on the merits therein. FINRA reserves the right to do so if the Commission, in its discretion, orders the parties to file additional briefing.

IV. CONCLUSION

Mantei has forfeited any new arguments related to the Seventh Amendment by not raising them below. The Commission therefore should deny Mantei's request for supplemental briefing.

Respectfully submitted,

/s/ Megan Rauch

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August 22, 2024

CERTIFICATE OF COMPLIANCE

I, Megan Rauch, certify that I have complied with the Commission's Rules of Practice by filing an opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

/s/ Megan Rauch

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Dated: August 22, 2024

CERTIFICATE OF SERVICE

I, Megan Rauch, certify that on this 22nd day of August 2024, caused a copy of the foregoing Opposition to Request to Order Supplemental Briefing, In the Matter of the Application of Ricky Alan Mantei, Administrative Proceeding File No. 3-21516, to be served through the SEC's eFAP system on:

Vanessa A. Countryman
The Office of the Secretary
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I further certify that, on this date, I caused copy of FINRA's opposition in the foregoing matter to be served by electronic service on:

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Respectfully submitted,

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