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August 27, 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 Petitioner Rick Mantei in the above-referenced action and write further to his August 13, 2024 application pursuant to SEC Rule of Practice 421(b), requesting supplemental briefing to present additional authorities in support of his Appeal. 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.

SEC Rule of Practice 421(b) permits briefing of issues "at any time prior to issuance of [the Commission's] decision." 17 C.F.R. § 201.421(b). The rule also allows for supplemental arguments if they would significantly aid in the decisional process. The Commission has routinely utilized this provision to grant applications for supplemental briefing. See In re Springsteen-Abbott, Release No. 82378 (Dec. 21, 2017) (granting application for supplemental briefing); In re Acosta, Release No. 87509 (Nov. 12, 2019) (treating application for expedited hearing as a request for supplemental briefing and granting it).

The Commission has routinely granted applications for supplemental briefing pursuant to Rule 421(b). See 17 C.F.R. § 201.421(b) ("The Commission may at any time prior to issuance of its decision raise or consider any matter that it

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deems material, whether or not raised by the parties."). Cf., e.g., 2021 SEC LEXIS 3374, *3 (granting a supplemental briefing); 2020 SEC LEXIS 5178, *1 (allowing for a supplemental briefing because "[a]lthough briefing has been completed, neither party has addressed whether Bryant's appeal should be dismissed as untimely."); 2019 SEC LEXIS 329, *1; 2020 SEC LEXIS 3312, *8 ("Although the parties' jurisdictional briefs include some argument on the merits. . . we believe that additional briefing would 'significantly aid [our] decisional process.'"); 2020 SEC LEXIS 2919, *1.

Rule 421(b) provides:

The Commission may at any time prior to issuance of its decision raise or consider any matter that it deems material, whether or not raised by the parties. Notice to the parties and an opportunity for supplemental briefing with respect to issues not briefed by the parties shall be given where the Commission believes that such briefing would significantly aid the decisional process.

Commission Rule of Practice 421(b)

Rule 421(b) underscores that the Commission has the discretion to consider any material matter, regardless of whether it has been raised by the parties. See 1995 SEC LEXIS 1505, *49 ("Revised Rule 421(b) states that the Commission will provide an opportunity for supplemental briefing with respect to issues *not raised by the parties* when the Commission believes such briefing would significantly aid the decisional process.")(emphasis supplied).

FINRA's Opposition

On August 22, 2024, FINRA filed an Opposition to Petitioner's Request to Order Supplemental Briefing ("Opposition"). FINRA's Opposition centers on two main points: (1) Mantei's alleged failure to "exhaust" his Seventh Amendment claim, and (2) whether the supplemental briefing will aid the Commission. The Opposition does not dispute that the recent precedent from the United States Supreme Court and other authorities Petitioner has cited are relevant.

FINRA's Opposition asserts, inaccurately, that Mantei raised these violations of his constitutional rights for the first time. However, Mantei had previously presented similar arguments in his appeal papers. Petitioner argued in his opening Appeal Brief submitted on October 27, 2023, that "the FINRA

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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."

Further, the introduction of, and reliance upon, new authority from the United States Supreme Court can hardly be criticized as injecting "new" arguments. The new precedent established by Jarkesy only serves to bolster Mantei's existing arguments.

FINRA starts its Opposition with a grossly deceptive assertion, without citation to the record, when it states that "Mantei sold" structured products (Opp. at 2), when no such finding was ever made as to Mantei who was not a broker or trader on any trade.

The Opposition proceeds to baselessly assert that the NAC imposed its enhanced sanctions in accordance with "FINRA's Sanction Guidelines." (Opp. at 3) However, the NAC did not base its increased sanctions on any references to the Guidelines and cited no facts or evidence in the record to support its decision.

As detailed in Mantei's submission, the United States Supreme Court's decision in SEC v. Jarkesy, No. 22-859, 2024 U.S. LEXIS 2847 (June 27, 2024), supports Petitioner's arguments that the FINRA proceedings were unconstitutional and justify vacating the NAC's Order. Mantei's submission does not seek to introduce new arguments but rather seeks to update the Commission on new legal authorities.

FINRA argues that Mantei was required to go through the futile process of "exhausting" his Seventh Amendment arguments to the DOE itself and then FINRA's Hearing Panel. (Opp. at 4) No law is cited to support this desperate and contrived argument of wastefulness.

That argument is also misplaced. Mantei seeks to supplement his briefing under Rule 421(b), which does not require the exhaustion of claims nor the

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prior presentation of arguments. Rule 421(b) is designed to allow the introduction of new arguments or authorities, regardless of whether they were previously raised. The rule explicitly states that the Commission may consider matters “whether or not raised by the parties,” and it does not mandate the exhaustion of claims. Further, “[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).

FINRA has not identified any law suggesting that a claim must be exhausted for the Commission to grant supplemental briefing under Rule 421(b). The cases cited by FINRA are inapplicable because they do not address the use of Rule 421(b) for supplemental briefing. Most important, FINRA simply ignores that Mantei did, in fact, raise a Seventh Amendment claim in his Reply Brief to the Commission (Reply Brief at 24).

Finally, it is well established that the right to a jury trial cannot be waived without the explicit consent of the parties. See Baylis v. Travellers' Ins. Co., 113 U.S. 316, 321 (1885) (“[t]he right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing.”); Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937) (there is no presumption of acquiescence in the loss of fundamental rights); Crespin v. Ryan, 46 F.4th 803, 809 (9th Cir. 2022) (“a defendant cannot voluntarily and intelligently waive a constitutional right of which he is unaware.”). Therefore, Mantei has not waived any Seventh Amendment argument.

Supplemental Briefing Will Aid the Commission

Remarkably, FINRA would have the Commission ignore recent developments in relevant law, including from the Supreme Court. Supplemental briefing undoubtedly will assist the Commission, including on the issue of the constitutionality of the FINRA proceedings. As outlined in Mantei’s submission, the Supreme Court’s reasoning in Jarkesy addresses Mantei’s arguments that the FINRA proceedings were unconstitutional. There can be little doubt that supplemental briefing is relevant to Mantei’s existing arguments and contributes to the Commission’s evaluation.

FINRA’s Opposition inaccurately claims that “Mantei’s previous constitutional arguments, made only before the Commission, were limited to the Appointments Clause. . . [n]ow Mantei seeks permission to brief the issue that FINRA’s proceeding was unconstitutional because it violates the Seventh

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Amendment.” (Opp. at 7) FINRA’s assertion is inapposite. Rule 421(b) allows for the supplementation of a party’s existing arguments and the introduction of new authorities. Mantei’s proposed supplemental briefing is intended to reinforce his argument that the FINRA proceedings are unconstitutional. Simply put, Jarkesy and Alpine Securities Corp. v. FINRA, 2023 WL 4703307 (D.C. Cir. July 5, 2023), neither of which are addressed on the merits by FINRA, support the arguments advanced by Mantei and should be considered by the Commission.

Conclusion

In light of Jarkesy, the decision of the NAC should be vacated and the DOE’s complaint filed before an administrative panel dismissed.

Thank you for your courtesies.

Yours sincerely,



Anthony Paduano

cc: All Counsel (VIA Electronic Mail)