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 RESPONSE TO MANTEI'S SUPPLEMENTAL BRIEF

Michael Garawski
Senior Vice President and Director,
Appellate Group

Gary Dernelle
Associate General Counsel

Megan Rauch
Associate General Counsel

FINRA
1700 K Street, NW
Washington, DC 20006
(202) 728-8863
megan.rauch@finra.org
nac.casefilings@finra.org

December 13, 2024

OS Received 12/13/2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL DECISIONS **PAGE(S)**

OS Received 12/13/2024

COMMISSION DECISIONS

UNITED STATES CONSTITUTION

FEDERAL STATUTES

FEDERAL REGISTER

FINRA BY-LAWS, RULES, AND WEBSITE

MSRB RULES

MISCELLANEOUS:

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 RESPONSE TO MANTEI'S SUPPLEMENTAL BRIEF

I. INTRODUCTION

For many decades, the courts and the Securities and Exchange Commission ("Commission") have affirmed the securities industry's system of self-regulation and rebuffed attempts to impose on private self-regulators, such as FINRA, constitutional requirements that are reserved for officers or agents of the federal government. The arguments that Ricky Alan Mantei raises in his supplemental brief do not justify overturning these longstanding precedents. Indeed, examination of these precedents confirms that FINRA is private and not part of the federal government, that its hearing officers thus are not subject to the Constitution's appointment requirements, and that FINRA is not a state actor subject to the Fifth or Seventh Amendments. Given the failure of Mantei's constitutional arguments, and Mantei's forfeiture of any claim that FINRA's disciplinary process was unconstitutional by failing to raise these

OS Received 12/13/2024

arguments before FINRA, the Commission should deny Mantei's request to vacate FINRA's final disciplinary action against him.

II. BACKGROUND

Self-regulation in the securities industry is nearly as old as the nation itself. *See Alpine Sec. Corp. v. FINRA*, No. 23-5129, 2024 U.S. App. LEXIS 29728, at *5 (D.C. Cir. Nov. 22, 2024); *Kim v. FINRA*, 698 F. Supp 3d. 147, 162 (D.D.C. 2023), *appeal docketed*, No. 23-7136 (D.C. Cir. Oct. 19, 2023); *SEC Concept Release Concerning Self-Regulation*, 69 Fed. Reg. 71256, 71257 (Dec. 8, 2004) (S7-40-04). When Congress adopted the Securities Exchange Act of 1934 ("Exchange Act"), it kept the "traditional process of self-regulation" of the securities industry. *United States v. Solomon*, 509 F.2d 863, 869 (2d Cir. 1975). The Exchange Act, as amended, thus supplements the Commission's regulation of the securities industry with a system of "cooperative self-regulation." *United States v. NASD*, 422 U.S. 694, 700 n.6 (1975). Under this statutory scheme, private self-regulatory organizations exercise a primary supervisory role over the securities industry, subject to the Exchange Act's requirements and the Commission's close supervision. 15 U.S.C. §§ 78o-3, 78s; *Saad v. SEC*, 873 F.3d 297, 299-300 (D.C. Cir. 2017).

FINRA is currently the only registered national securities association, and it exercises regulatory authority over member broker-dealers and associated persons that conduct business in the national securities markets. *Alpine*, 2024 U.S. App. LEXIS 29728, at *10. FINRA was formed in 2007 when two "private actors," the National Association of Securities Dealers ("NASD"), FINRA's predecessor, and NYSE Regulation, Inc. ("NYSE"), combined their regulatory and enforcement functions into a single SRO. *Order Approving Proposed Rule Change To Amend the By-Laws of NASD To Implement Governance and Related Changes To*

OS Received 12/13/2024

Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc., Exchange Act Release No. 56145, 72 Fed. Reg. 42169 (Aug. 1, 2007) (SR-NASD-2007-023).

FINRA is a private, not-for-profit Delaware corporation. *Scottsdale Cap. Advisors Corp. v. FINRA*, 844 F.3d 414, 417-18 (4th Cir. 2016); Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc. (July 15, 2010), https://www.finra.org/rules-guidance/rulebooks/corporate-organization/restated-certificate-incorporation-financial. FINRA is financed primarily through member fees and does not receive any funding from the federal government. *Alpine*, 2024 U.S. App. LEXIS 29728, at *63 n.75; FINRA By-Laws, Art. VI, § 1. FINRA's board comprises 22 members, who are selected by either the FINRA board or FINRA members; no FINRA board member is appointed by the Commission or any other government entity. *See Kim*, 698 F. Supp 3d. at 157; FINRA By-Laws, Art. VII, §§ 4, 10, 13.

FINRA adopts its own rules, which are subject to Commission review, approval, and modification. *See* 15 U.S.C. §§ 78s(b)-(c); *Turbeville v. FINRA*, 874 F.3d 1268, 1270 (11th Cir. 2017). FINRA enforces these rules, and the Exchange Act and the rules and regulations thereunder, through internal proceedings that FINRA may initiate to discipline FINRA members and associated persons.[1] *See* 15 U.S.C. § 78o-3(b)(7); *Turbeville*, 874 F.3d at 1271.

FINRA's Commission-approved rules establish a "multi-layered hearing and appeals process" that governs its disciplinary proceedings. *Turbeville*, 874 F.3d at 1271; *see also* FINRA

[1] Similarly, the Municipal Securities Rulemaking Board ("MSRB") adopts its own rules related to the municipal securities industry, which are subject to Commission review, approval, and modification. 15 U.S.C. §§ 78o-4(b)(2), 78s(b)-(c). The Exchange Act requires that FINRA enforce MSRB rules through disciplinary proceedings that FINRA may initiate against its members and their associated persons. 15 U.S.C. §§ 78o-3(b)(7), 78s(g)(1)(B).

OS Received 12/13/2024

Rule 9000 Series. After FINRA alleges misconduct by a member or associated person in a complaint, a FINRA hearing panel conducts an evidentiary hearing to decide whether the firm or individual engaged in the misconduct alleged, and if so, whether to impose sanctions. *See generally* FINRA Rule 9200 Series. A party to a FINRA disciplinary proceeding may appeal the hearing panel's findings and sanctions to the National Adjudicatory Council ("NAC"), FINRA's appellate adjudicator. *See* FINRA Rule 9311(a). The NAC's decision generally is FINRA's final disciplinary action. *See* FINRA Rule 9349(c).

A respondent disciplined by final FINRA action may, as a matter of right, apply to the Commission for a de novo review of the NAC's decision. 15 U.S.C. § 78s(d)(2). A party aggrieved by a Commission order upholding FINRA imposed sanctions may seek judicial review in a federal court of appeals. *See* 15 U.S.C. § 78y(a)(1).

III. ARGUMENT

A. FINRA Is a Private Entity Not Subject to the Constitution

FINRA is a private self-regulatory organization and registered national securities association, not part of the government or state actor subject to the requirements of either Article II or Article III of the Constitution. Mantei fails to address controlling precedent governing when a private entity may be subject to constitutional requirements, conflates constitutional principles, and misinterprets Supreme Court jurisprudence. Because Mantei has not met the exacting criteria necessary to establish that FINRA, a private entity, is in fact part of the government for constitutional purposes or is otherwise engaged in state action triggering constitutional requirements, Mantei's constitutional arguments fail.

1. The Constitution's Appointment Requirements Do Not Apply to FINRA

Mantei argues that the FINRA hearing officers who presided over his disciplinary hearing are effectively government officers who were not properly appointed in accordance with Article II of the Constitution. Mantei Request for Supp. Br. at 6-8, Supp. Br. at 8. This argument is without merit because constitutional appointment requirements do not apply to employees of a privately-owned, self-regulatory organization such as FINRA.

The Appointments Clause applies only to "Officers of the United States" holding principal offices "established by Law." U.S. Const. art. II, § 2, cl. 2. Constitutional appointment requirements therefore apply only to "'Officers of the United States,' *a class of government officials*" employed by the federal government. *Lucia v. SEC*, 585 U.S. 237, 241 (2018) (emphasis added).

Mantei has not established that FINRA is part of the "Government itself" for constitutional purposes. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995). Under the strict framework established in *Lebron*, a corporation is considered "part of the Government" for constitutional purposes when the government "create[d] [the] corporation" for "governmental objectives" and "retains for itself permanent authority to appoint a majority of the directors of that corporation." *Id*. at 397, 400. FINRA, however, does not possess any of those unique, governmental characteristics: the government did not create FINRA; it does not appoint a single member of FINRA's board; and it does not fund or otherwise control it.[2] *See Kim*, 698 F. Supp.

[2] The Supreme Court has highlighted the stark differences between FINRA and other "*private* self-regulatory organizations in the securities industry[,] such as the New York Stock Exchange," on one hand, and "Government-created, Government-appointed" entities like the PCAOB and Amtrak, on the other. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S.

[Footnote Continued on Next Page]

OS Received 12/13/2024

at 157-58, 162; *Scottsdale Cap. Advisors Corp. v. FINRA*, 678 F. Supp. 3d 88, 103 (D.D.C. 2023).

Mantei does not acknowledge, let alone overcome, *Lebron*'s "insuperable hurdle." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 439-40 (5th Cir. 2024) ("*Lebron* is the governing test to determine whether an entity is private or public and, under that test, the Authority is a private entity not subject to Article II's Appointments Clause.".). Instead, drawing on a one-judge concurring opinion to an unpublished, and now superseded, decision of a split D.C. Circuit motions panel, *Alpine Sec. Corp. v. FINRA*, No. 23-5129, 2023 U.S. App. LEXIS 16987, at *6-7 (D.C. Cir. July 5, 2023) (Walker, J., concurring), and the Supreme Court's decision in *Lucia* from which that concurrence drew its conclusions, Mantei claims that FINRA, and by extension its hearing officers, is part of the government for Article II purposes.[3] Supp.

[Cont'd]

477, 484-85 (2010) (emphasis added). As the Court recognized, only the latter are "'part of the Government' for constitutional purposes." *Id*. at 486 (quoting *Lebron*, 513 U.S. at 397).

[3] On November 22, 2024, a panel of the D.C. Circuit issued an opinion in *Alpine* that supersedes the decision of the motions panel to which Mantei cites. *See Alpine*, 2024 U.S. App. LEXIS 29728. In its opinion, the D.C. Circuit reversed, in a limited way, a district court's denial of a preliminary injunction, and it instructed the district court on remand to enjoin FINRA, during the pendency of the litigation, from expelling the plaintiff until after the Commission has reviewed the merits of any expulsion order that may be issued in an expedited proceeding, or until the time for the plaintiff to seek Commission review has elapsed. *Id.* at *32, 50. The court held, as a "preliminary" matter on a "limited record," that the plaintiff was "likely to succeed" in establishing that the private nondelegation doctrine prevents FINRA from expelling the plaintiff "with no opportunity for SEC review," but it rejected the plaintiff's broader attempt to halt the expedited proceeding. *See id*. at *4-5. The D.C. Circuit stressed that its "opinion is narrow" and "limited to expedited expulsion proceedings," which "function[] differently" from "many" other FINRA proceedings that are "unlikely to violate the Constitution because [Commission] review can take place after FINRA's sanctions take effect." *Id.* at *21, 31, 33.

In distinct contrast to *Alpine*, Mantei's application for review concerns a final disciplinary proceeding that resulted in sanctions—two suspensions, a fine, and an order that he requalify—that never became effective and are stayed while the Commission reviews the merits

[Footnote Continued on Next Page]

OS Received 12/13/2024

Br. at 2. FINRA hearing officers, however, are employees of FINRA, a private entity, and they are thus readily distinguishable from the Commission administrative law judges in *Lucia,* which were unquestionably federal government personnel.[4] *See* 585 U.S. at 244 ("The sole question here is whether the Commission's ALJs are 'Officers of the United States' or simply employees of the Federal Government."). Thus, *Lebron*—rather than *Lucia*—supplies the appropriate standard for the evaluation of Mantei's Article II claims.[5] *See Nat'l Horsemen's*, 107 F.4th at 439.

Rather than address the strict framework established by *Lebron*, Mantei asserts that the Supreme Court's more recent decision in *SEC v. Jarkesy* "bolster[s]" his argument that FINRA's proceeding was unconstitutional because of FINRA's alleged violation of the Appointments Clause. 144 S. Ct. 2117 (2024); Mantei Reply to Request for Supp. Br. at 3; *see* also Supp. Br. at 8. But *Jarkesy* did not address, let alone change, the test for determining whether a private company, like FINRA, is part of the government itself for constitutional purposes, and Mantei is

---

[Cont'd]

of FINRA's action. *See* FINRA Rule 9370(a). *Alpine* casts no doubt on the constitutionality of the Exchange Act's review scheme when the Commission has the opportunity to "'conduct[] its own review' of any final decision or sanction" imposed by FINRA and "approve, disapprove, or modify FINRA's actions." *See Alpine*, 2024 U.S. App. LEXIS 29728, at *20-21. Accordingly, the *Alpine* opinion is not relevant to Mantei's appeal.

[4] Mantei claims that FINRA hearing officers exercise "significant executive power." Supp Br. at 2. The list of activities that Mantei equates with the exercise of government power refers simply to the powers that FINRA Hearing Officers possess to regulate FINRA's internal disciplinary proceedings. Supp. Br. at 9. "They are not an authority bestowed by the federal government." *Alpine,* 2024 U.S. App. LEXIS 29728, at *28.

[5] The D.C. Circuit's November 22, 2024 opinion found that Alpine did not establish irreparable harm stemming from an alleged violation of the Appointments Clause, and it did not express any view on the merits of the applicability of Article II appointment requirements to FINRA's employees. *See Alpine*, 2024 U.S. App. LEXIS 29728, at *47-48.

OS Received 12/13/2024

unable to cite any case—either before or after *Jarkesy*—in which a court has determined that FINRA hearing officers are subject to constitutional appointment requirements. Mantei thus has provided no basis to depart from settled judicial consensus rejecting constitutional claims against FINRA because FINRA is not part of the government.[6] *See, e.g.*, *D.L. Cromwell Invs., Inc. v. NASD*, 279 F.3d 155, 162 (2d Cir. 2002) ("It has been found, repeatedly, that [FINRA's predecessor] NASD itself is not a government functionary."); *Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *43-44 (Apr. 3, 2020) ("Because FINRA is not 'part of Government itself' for constitutional purposes, FINRA employees cannot be 'officers *of the United States*' for purposes of the Appointments Clause.") (emphasis in the original).

In sum, FINRA hearing officers are not subject to the Constitution's appointment requirements. Mantei's challenges to FINRA and its hearing officers under Article II of the Constitution thus fail.

2. FINRA's Disciplinary Proceeding Against Mantei Does Not Implicate Article III or Trigger the Seventh Amendment

Mantei also contends that the results of FINRA's disciplinary proceeding against him must be vacated because he was denied "his right to a jury trial" under the Seventh Amendment. Supp. Br. at 2. This argument fails for several reasons.

---

[6] Contrary to Mantei's claims, Mantei Reply Br. at 22 n.8, the state-action doctrine has no relevance to the applicability of the Constitution's structural provisions, like the appointment requirements of Article II. *See Lebron*, 513 U.S. at 378 (explaining that whether the "private action" of a "private entity" can "be deemed that of the state" for purposes of adjudicating individual constitutional rights is a separate question than whether an entity is part of the "Government itself"); *Kim*, 698 F. Supp. 3d at 163-164 & n.12 ("[T]he state action theory does not apply to Plaintiff's Article II Appointments Clause or removal power claims."). And as discussed below, *infra* part III.A.2, FINRA does not engage in state action when it disciplines its members and persons associated with its members.

First, Mantei does not even attempt to establish that FINRA's disciplinary action is one of the "few limited circumstances," *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019), in which a private entity's conduct is "fairly attributable to" the government and thus state action subject to constitutional requirements, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Because there is no state action present here, Mantei's Seventh Amendment claim must be rejected. *See Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) (rejecting a Seventh Amendment claim because the "requisite state action" was absent); *Kim*, 698 F. Supp 3d at 154 (holding that constitutional challenges to FINRA disciplinary proceeding were unlikely to succeed on the merits based on absence of state action).

Second, even if Mantei could establish that FINRA is a state actor subject to constitutional restrictions, Mantei waived his right to any Article III constitutional protections. While the right to a jury can only be waived knowingly and voluntarily, Supp. Br. at 16, FINRA members and associated persons of FINRA members have *voluntarily* agreed to participate in FINRA proceedings, and they thus relinquish any right they might have to a jury trial in federal court. *See CFTC v. Schor*, 478 U.S. 833, 848 (1986) (finding that Article III and jury-trial rights are "subject to waiver, just as are other personal constitutional rights").

Finally, Mantei is wrong to assert that *Jarkesy* compels the Commission to vacate FINRA's disciplinary action against him because he "was not afforded his right to a jury trial." Supp. Br. at 2. *Jarkesy* has no bearing on FINRA or this disciplinary proceeding. The Supreme Court in *Jarkesy* made clear that the issues it confronted concerned "the basic concept of separation of powers that flows from the scheme of a tripartite government" and the ability of Congress to "withdraw from judicial cognizance" a matter that was the subject of a "suit at common law" at the time of the Founding under the Seventh Amendment. *Jarkesy*, 144 S. Ct. at

2134. Mantei does not explain how the separation-of-powers principles regarding the exercise of the "judicial Power of the United States," U.S. Const. art. III §1, apply to FINRA, a private entity.

Moreover, FINRA's disciplinary action against Mantei is not a "suit at common law" that arguably must be tried before a jury in an Article III court. *See Daniel Turov*, 51 S.E.C. 235, 238 (1992) (holding that a self-regulatory organization disciplinary proceeding is not a suit at common law for purposes of the Seventh Amendment and "[t]he guarantees pertaining to trials by jury . . . are therefore inapposite"). The "hallmark that [the Supreme Court] ha[s] looked to in determining if a suit concerns private rights is whether it 'is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'" *Jarkesy*, 144 S. Ct. at 2132 (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011)) (internal quotation marks omitted). The self-regulatory mechanisms of the securities industry, which has involved private investigation and adjudication of broker conduct since the 1790s, has never been "the stuff of the traditional actions at common law." *Id.* at 2133-34. Rather, they have been "the stuff of" private self-regulation of the securities industry pursuant to privately developed and implemented procedures—a system that Congress embraced in the 1930s with the passage of the Exchange Act and has reaffirmed numerous times since.[7]

---

[7] "High standards of commercial honor and just and equitable principles of trade" is an expression of an ideal that predates federal regulation of the securities markets. 1 Charles H. Meyer, *The Law of Stock Brokers and Stock Exchanges* 107 (1931). The Exchange Act mandates that the securities industry's private, self-regulatory organizations ("SROs") adopt rules designed to "promote just and equitable principles of trade." *See* 15 U.S.C. §§ 78f(b)(5), 78o-3(b)(6), 78o-4(b)(2)(C). "To comply with the provision, SROs . . . have adopted broadly worded 'J&E rules' – general rules that require [their] members to abide by just and equitable principles of trade." *All. for Fair Bd. Recruitment v. SEC*, No. 21-60626, 2024 U.S. App. LEXIS 31475, at *37 (5th Cir. Dec. 11, 2024). FINRA Rule 2010 and MSRB Rule G-17, the rules that FINRA found Mantei violated here, are two such "J&E rules." *See In re NASD*, 19 S.E.C. 424,

[Footnote Continued on Next Page]

Mantei argues that the *Alpine* concurrence somehow "extends" the implications of *Jarkesy* to FINRA because of the "sheer power" exercised by FINRA hearing officers. Supp. Br. at 8. This is meritless. Mantei's argument is based on a single judge's concurrence in a now-superseded, unpublished decision of a split D.C. Circuit motions panel. And the more recent D.C. Circuit decision in *Alpine* deals with different constitutional issues than the ones at issue in *Jarkesy*. *See Alpine*, 2024 U.S. App. LEXIS 29728, at *17 n.2 (explaining that *Jarkesy* "does not affect our resolution of this interlocutory appeal"). *Alpine* addressed arguments concerning the private non-delegation doctrine, not ones concerning the Seventh Amendment or rights to Article III protections.

[Cont'd]

436 (1945) ("In requiring observance of 'high standards of commercial honor and just and equitable principles of trade,' the rule . . . implements the requirements of [the Exchange Act]."); *J.W. Korth & Co., LP*, Exchange Act Release No. 94581, 2022 SEC LEXIS 852, at *28 (Apr. 1, 2022) ("MSRB Rule G-17 . . . promote[s] just and equitable principles of trade . . . .").

J&E rules do *not* reflect a legal standard but instead promote ethical standards beyond those provided by law. *See All. for Fair Bd. Recruitment*, 2024 U.S. App. LEXIS 31475, at *37 ("The J&E provision has an easily discernible purpose: It requires [SROs] to promote ethical behavior."); *In re NASD*, 19 S.E.C. at 480 ("The 'just and equitable principles of trade' . . . referred to in the NASD rule are not standards of law or rules of legal conduct. They are standards of ethics and honor."); *Wheat, First Sec., Inc.*, 56 S.E.C. 894, 918 (2003) ("Our order approving the adoption of Rule G-17 described it as an 'omnibus fair practice rule' meant to 'establish the general standard for conduct of a municipal securities business.'"). Disciplining FINRA members and their associated persons for violating the ethical norms of the securities industry, a quintessentially self-regulatory action, is not "the stuff of" a suit at common law requiring a jury trial in an Article III court. *See Jarkesy*, 144 S. Ct. at 2132; *see also All. for Fair Bd. Recruitment*, 2024 U.S. App. LEXIS 31475, at *36-37 ("Congress supplemented the rules contained in the [Exchange] Act with the J&E provision, which requires [SROs] to *self-regulate* 'methods of doing business which, while technically outside the area of definite illegality, are nevertheless unfair both to customer and to decent competitor.'") (emphasis added); *Walck v. Am. Stock Exch., Inc.*, 687 F.2d 778, 786 (3d Cir. 1982) ("self-regulation" establishes and enforces "'ethical standards beyond those any law can establish'").

In sum, FINRA is not a state actor and FINRA disciplinary proceedings are not suits at common law, so Mantei's arguments related to Article III and the Seventh Amendment do not apply to FINRA.[8]

3. FINRA Disciplinary Proceedings Do Not Implicate the Due Process Clause, But FINRA Nevertheless Provided Mantei Fair Procedure

Mantei loosely asserts that FINRA "conducted hearings that did not afford due process." Supp. Br. at 1. To the extent that Mantei asserts that FINRA's disciplinary proceeding violated the Fifth Amendment's Due Process Clause, his claim similarly fails.

At the outset, any argument relying on the Due Process Clause fails for the same threshold reasons as his Appointments Clause and Seventh Amendment claims—the Constitution does not apply to FINRA, a private entity, and FINRA's disciplinary proceeding against Mantei does not meet any of the criteria for treating private conduct as state action. *See Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010) ("Epstein cannot bring a constitutional due process claim against the NASD, because the NASD is a private actor, not a state actor.") (alterations omitted).

But even if the Fifth Amendment did apply, Mantei was afforded due process in the FINRA disciplinary proceeding at issue. The disciplinary action against Mantei, as governed by the Exchange Act and FINRA rules, provides a fair disciplinary process. *See Jones v. SEC*, 115

---

[8] Because a FINRA disciplinary action is not in the nature of a suit at common law, Mantei provides no justification for his assertion that a sanction imposed by way of such action, including monetary sanctions that are payable to FINRA, not to the United States Treasury, *Alpine*, 2024 U.S. App. LEXIS 29728, at *27, should be heard in an Article III court and not by the Commission under the statutory review scheme provided under Section 19(e) of the Exchange Act, 15 U.S.C. §78s(e). *Cf. Jarkesy,* 144 S. Ct. at 2132 (finding "no involvement by an Article III court in the initial adjudication is necessary" when a common law claim is not present); *Harold T. White*, 3 S.E.C. 466, 533 (1938) (finding that a Commission proceeding that may result in suspension or expulsion of a member or officer of national securities exchange is "analogous to a proceeding for the revocation of a license and is neither a criminal action nor a suit at law").

F.3d 1173, 1182 (4th Cir. 1997) (the SEC's "'pervasive oversight authority' over [FINRA's] disciplinary proceedings . . . ensure[s] that they are conducted fairly."). Pursuant to the Exchange Act, FINRA is required to provide a "fair" procedure for disciplining members and their associated persons by, among other things, filing specific charges, notifying a respondent of those charges, and giving him an opportunity to defend himself. 15 U.S.C. §§ 78o-3(b)(8), (h)(1). FINRA's disciplinary proceeding against Mantei was conducted in accordance with FINRA's Commission-approved Code of Procedure and fully complies with "[t]he fundamental requirement of due process" to allow an "opportunity to be heard 'at a meaningful time and in a meaningful matter.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Cody v. SEC*, 693 F.3d 251, 257-58 (1st Cir. 2012) (rejecting due-process challenge to FINRA procedures); *Scottsdale*, 844 F.3d at 422-23 (holding that statutory challenge to FINRA's disciplinary proceedings "'can be meaningfully reviewed'" through the Exchange Act "'structure consistent with due process'") (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 207, 218 (1994)). The record firmly establishes that Mantei was given the opportunity to defend himself against the specific charges brought against him in accordance with the requirements of the Exchange Act.[9]

To the extent Mantei asserts that FINRA Rule 2010, one of the two rules on which the FINRA disciplinary action against him was based, is impermissibly "vague" on "due process" grounds, Supp. Br. at 1, 2, 14, he is mistaken. Mantei had adequate notice of the conduct that FINRA alleged to be violative, and as the courts and the Commission have previously held,

[9] Under the auspices of a due process argument, Mantei raises several arguments addressing the merits of FINRA's action. Supp. Br. at 5, 18. Briefing on the merits concluded in January 2024, and Mantei forfeited any new arguments concerning the merits by failing to raise them before the Commission until now. *See* 17 C.F.R. §201.450(b); *cf. Newport Coast*, 2020 SEC LEXIS 911, at *45 (deeming applicant's argument raised for the first time in its reply brief is waived).

FINRA Rule 2010 "is sufficiently specific and provides an adequate standard of compliance" to deny Mantei his void-for-vagueness claim.[10] *See Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (finding a predecessor to FINRA Rule 2010 sufficiently specific as to withstand a constitutional vagueness challenge); *Benjamin Werne*r, 44 S.E.C. 622, 625 (1971) (rejecting arguments that "in the absence of a finding of unlawful or illegal conduct the action of the NASD [for a violation of a FINRA Rule 2010 predecessor] . . . is void for vagueness" and "violates applicant's right to due process under the Fifth and Fourteenth Amendments").[11]

Accordingly, Mantei's various due process arguments lack merit.

B. Mantei Failed to Properly Exhaust His Constitutional Claims Before FINRA

Mantei failed to exhaust his claims that FINRA's disciplinary process was unconstitutional, so he has forfeited these arguments before the Commission.[12]

The record establishes that Mantei failed to raise any meaningful constitutional claim at any point before FINRA. Mantei only made three vague references to "due process" before

---

[10] As noted above, *supra* footnote 1, FINRA is required to enforce MSRB rules through internal proceedings that FINRA initiates to discipline FINRA members and associated persons. As with FINRA rules, a respondent disciplined by final FINRA action for a violation of MSRB rules may seek the Commission's de novo review of FINRA's action, and thereafter, may seek judicial review in a federal court of appeals of a Commission final order. *See* 15 U.S.C. §§ 78s(d)(2), 78y(a)(1). For the same reasons that Mantei's constitutional challenges fail with respect to FINRA's enforcement of FINRA Rule 2010, these challenges likewise fail with respect to FINRA's enforcement of MSRB Rule G-17.

[11] Decades of jurisprudence have established that FINRA Rule 2010 prohibits unethical conduct that may not violate a specific rule, involve customers, or involve securities transactions, and that its scope covers conduct in the context of Mantei's business that reflects on his ability to comply with the regulatory requirements of the securities industry. *See, e.g.*, *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *16-17 (Mar. 29, 2016).

[12] Pursuant to the Commission's order for supplemental briefing, however, FINRA addresses the merits of Mantei's constitutional arguments herein.

FINRA. RP 4124, 4143-44, 4198, 4234; *see* FINRA Opp. to Request for Supp. Br. at 3. n.3. These references, however, lacked "substance" and were not made in support of any argument about the constitutionality of FINRA's proceeding. *See Springsteen-Abbott v. SEC*, 989 F.3d 4, 8 (D.C. Cir. 2020) (holding that the petitioner waived her due process argument by failing to raise the "*substance*" of her argument before the Commission) (emphasis in the original); *see also N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way.").

Nothing prevented Mantei from bringing his constitutional claims before now. *See Newport Coast*, 2020 SEC LEXIS 911, 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."); *see also Malouf v. SEC*, 933 F. 3d 1248, 1257-58 (10th Cir. 2019) ("[Petitioner] cannot avoid the exhaustion requirement based on an intervening change in the law" when he could have invoked the same argument raised in cases decided after the conclusion of his administrative case). As indicated previously, these claims have been litigated many times before, and there has been no intervening change in the law. *See supra* part II.A.

Because Mantei failed to exhaust his claim that FINRA's process violated the Constitution, his constitutional claims are forfeited. *See Canady v. SEC*, 230 F.3d 362, 362-63 (D.C. Cir. 2000); *Springsteen-Abbott*, 989 F.3d at 8; *Newport Coast*, 2020 SEC LEXIS 911, at *40.

IV. CONCLUSION

FINRA is a private entity that is not subject to the Constitution. Because FINRA is neither part of the government nor a state actor, Mantei's constitutional challenges to FINRA's

OS Received 12/13/2024

disciplinary proceeding fail. Regardless, Mantei has forfeited any argument related to the constitutionality of FINRA's disciplinary proceeding against him by not raising it before FINRA. Accordingly, and consistent with the FINRA's arguments on the merits, the Commission should affirm the NAC's decision in all respects and dismiss the application for review.

Respectfully submitted,

/s/ Megan Rauch

Megan Rauch
Associate General Counsel
FINRA
1700 K Street, NW
Washington, DC 20006
(202) 728-8863
megan.rauch@finra.org
nac.casefilings@finra.org

December 13, 2024

CERTIFICATE OF COMPLIANCE

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

I, Megan Rauch, further certify that this brief complies with the Commission's Order Granting Motion To Submit Supplemental Briefing dated October 18, 2024, which permits FINRA to file a response brief not to exceed 5,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 4,990 words.

/s/ Megan Rauch

Megan Rauch
Associate General Counsel
FINRA
1700 K Street, NW
Washington, DC 20006
(202) 728-8863
megan.rauch@finra.org
nac.casefilings@finra.org

Dated: December 13, 2024

CERTIFICATE OF SERVICE

I, Megan Rauch, certify that on this 13th day of December 2024, caused a copy of the foregoing FINRA's Response to Mantei's Supplemental Brief, 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
U.S. Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, DC 20549-1090

I further certify that, on this date, I caused a copy of FINRA's brief in the foregoing matter to be served by electronic service on:

Anthony Paduano
Katherine B. Harrison
Paduano & Weintraub LLP
1251 Avenue of the Americas, Ninth Floor
New York, New York 10020
(212)785-9100
ap@pwlawyers.com
kh@pwlawyers.com

Respectfully submitted,

/s/ Megan Rauch
Megan Rauch
Associate General Counsel
FINRA
1700 K Street, NW
Washington, DC 20006
(202) 728-8083
megan.rauch@finra.org
nac.casefilings@finra.org