Maranda E. Fritz
MARANDA E. FRITZ, P.C.
521 Fifth Avenue
New York, New York 10175
Telephone: 646.584.8231
Email: maranda@fritzpc.com

UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

ALPINE SECURITIES CORPORATION,

For Review of Adverse Action Taken By

THE DEPOSITORY TRUST AND CLEARING COMPANY

ALPINE'S MOTION FOR AN EMERGENCY INTERIM STAY AND OTHER APPROPRIATE COMMISSION RELIEF

***** EXPEDITED CONSIDERATION REQUESTED UNDER RULE 401(d)(3) *****

OS Received 04/30/2024

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

BACKGROUND 4

A. Alpine Securities Corporation 4

B. The Minimum Excess Net Capital Requirements 4

C. Alpine Considers its Options and Decides to Engage Only in Self-Clearing 5

D. Unable to Get An Answer Regarding Self-Clearing, Alpine Obtains Additional Capital to Meet the Higher $10 Million ENC Requirement 6

E. Alpine Incorrectly Underreported its Capital 7

F. DTCC Commences Its Cease to Act Proceeding on November 9, 2023 – Then Waited Months to Engage in Any Further Action 9

G. The Hearing 10

H. The Decision of the DTCC Board Members 11

ARGUMENT 15

A. Alpine Will Suffer Irreparable Harm Absent a Stay 15

B. There is no Harm to Others from Issuance of a Stay and the Public Interest Favors It 15

C. Alpine is Likely to Succeed on its Argument That DTCC Failed to Establish a Proper Basis for its Cease to Act Determination 16

D. DTCC Failed to Establish a Proper Basis for a Cease to Act Determination 17

1. DTCC Failed to Establish That It Properly Determined That Alpine is Subject to a $10 Million ENC Requirement 18

2. DTCC Failed to Demonstrate That Alpine Did Not Meet its ENC Requirement 19

3. DTCC Failed to Demonstrate That Alpine Engaged in Material Misrepresentations or That Those Alleged Misrepresentations Prevented DTCC From Being Able to Assess the Risk Posed by Alpine 21

OS Received 04/30/2024

4. Alpine's Reporting Did Not Prevent NSCC From Being Able to Assess the Risk Presented by Alpine and the Cease to Act Determination Was Not Necessary to Protect DTCC 23

5. The Errors Served to Underreport – not Overstate -- its Capital, Were Promptly Resolved and Do Not Support the Cease to Act Determination 24

E. DTCC'S Structure and Operations Violated Principles of Fairness and Constitutional Mandates 24

CONCLUSION 27

OS Received 04/30/2024

TABLE OF AUTHORITIES

Cases

Alpine Securities Corporation v. Financial Industry Regulatory Authority,
2023 WL 4703307 25

FCC v. Fox Tel. Stations Inc.,
597 U.S. 239 (2012)....................26

Financial Oversight & Management Bd. For Puerto Rico v. Aurelius,
140 S.Ct. 1649 (2020)....................25

Oklahoma v. United States,
62 F.4th 221 (6th Cir. 2023) 26

Paz Sec. Inc. v. SEC,
494 F.3d 1059 (D.C.Cir. 2007)....................17

Todd & Co. v. Sec. & Exch. Com.,
557 F.2d 1008 (3d Cir. 1977)....................25

United States v. Ackerman,
831 F.3d 1292 (10th Cir. 2016) 25

Administrative Decisions

ABN Amro Clearing Chicago LLC,
Exchange Act Release No. 80993, 2017 SEC LEXIS 1859 (June 20, 2017)....................16

Lek Securities Corporation,
DTCC Decision (March 10, 2022)....................1, 24

Lek Securities Corporation,
SEC Release No. 95014 (May 31, 2022)....................3, 15, 20, 24

Michael Earl McCune,
SEC Release No. 77921, 2016 WL 2997935 (May 25, 2016)....................15

Scattered Corp.,
52 S.E.C. 1314 (Apr. 28, 1997) 15

Rules and Statutes

15 U.S.C. 78s 17

17 CFR § 240.15c3-1 9

OS Received 04/30/2024

PRELIMINARY STATEMENT

Pursuant to SEC Rule of Practice 401(d)(3), Alpine Securities Corporation ("Alpine"), through counsel of record, moves on an expedited basis for a stay of the Determination to Cease to Act for Alpine Securities (the "Determination") made by the National Securities Clearing Corporation ("NSCC") and The Depository Trust Company ("DTC") affirmed by a Hearing Panel of the Depository Trust & Clearing Corporation ("DTCC")[1] in a decision entered on April 25, 2024 (the "Decision"). Under DTCC rules, that Decision of the members of DTCC's board became immediately effective without further review.[2] Alpine requests ***expedited consideration*** of this motion because implementation of the Decision will ***prevent Alpine from conducting its clearing business and executing trades for its customers and will force the closure of the firm.*** Alpine and its customers will unquestionably suffer irreparable harm unless a stay is granted pending Alpine's appeal from the Decision.

Also clear is that "no other person will suffer substantial harm as a result of the stay": Alpine is in full compliance with DTCC's higher $10 million ENC requirement and DTCC has continued to clear trades for Alpine through the five months since the initial Notice of Determination of Intent to Cease to Act. Alpine has been and remains in compliance with DTCC's elevated ENC requirements and so, by DTCC's own definition, does not present any risk that would support the "draconian" sanction of a cease to act determination.[3] Consideration of the public interest also weighs heavily in favor of issuance of a stay, since Alpine is one of the few

[1] The proceeding against Alpine was pursued on behalf of NSCC and DTC and conducted by their parent corporation, DTCC. The rules of DTC and NSCC are largely identical, the Board of DTCC also serves as the Board of the subsidiaries and management overlaps. In this brief, the entities are referred to collectively as "DTCC."

[2] On April 26, 2024, DTCC's counsel agreed that DTCC would not cease to act until on or after May 26, 2024.

[3] DTCC Decision in the Matter of Lek Securities Corporation dated March 10, 2022 (hereinafter "DTCC Lek Decision") at 12-13.

OS Received 04/30/2024

firms that continues to clear sales of microcap stock, a segment of the market that facilitates financing for emerging and start-up companies. It benefits Alpine customers and those who trade in the market generally to preserve what liquidity remains in the microcap market.

Alpine also raises "serious legal questions on the merits" and has a strong likelihood of succeeding on this appeal from DTCC's Decision confirming the cease to act determination. The evidence at the DTCC proceeding established that Alpine in fact ***obtained the capital to meet DTCC's new capital requirements and maintained that capital at all times since October 26, 2023 with the exception of a shortfall of approximately $177,000 that was promptly remedied***. And while DTCC claimed that Alpine engaged in misstatements in its communications regarding its net capital, the evidence at the hearing established that Alpine did not overstate but actually *underreported* the excess net capital that it had obtained precisely to meet ENC's new capital requirements. All accounting issues were resolved within a matter of days, Alpine's estimated net capital reporting reflected capital of $10,101,389 and Alpine's FOCUS report accurately stated that it had greater than $10 million as of October 31, 2023. Most importantly, none of those events changed the character of the funds that had been properly received and *designated in writing as capital on October 25, 2023.*

The Decision of the Panel literally ignored those critical facts and instead adopted DTCC's unsupported narrative that Alpine lacked the capital and that it engaged in intentional misstatements. Those factual errors were combined with the Panel's refusal even to acknowledge the standard that applies when DTCC pursues its harshest sanction of ceasing to act: that its action was "necessary" for the protection of DTCC or its participants. DTCC bluntly contended that Alpine should be terminated as a *punitive* measure and the Decision accepts the view that DTCC is permitted, in "its discretion," to eject a member where DTCC constructs an argument that a firm

OS Received 04/30/2024

has provided inaccurate information. In the end, DTCC did not even argue, and the Decision did not purport to find, that termination was "necessary" to protect DTCC.[4]

And there was in fact *no risk* to DTCC occasioned by Alpine's trades: Alpine received and maintained the capital to satisfy ENC's requirements and failed only to properly report it while it addressed a question raised by its accountants. That question was then answered, and the answer made clear that the funds received by Alpine were, at all relevant times, capital of the firm.

Finally, Alpine has also raised a series of issues arising from the plainly deficient procedures employed by DTCC to deprive a firm of access to the markets. Its ability to terminate a firm's membership and force its closure *prior to any plenary review by the delegating agency*, and based on its "discretion," controverts the private non-delegation doctrine. Its use of its own Board to adjudicate decisions made by its management and fellow Board members deprives a respondent of a neutral arbiter and violates fundamental notions of fairness and due process. Its enforcement actions, which flow from governmental power bestowed by Congress on the SEC and then delegated by the SEC to DTCC, constitute state action and its officers, including its hearing panelists, should be but are not appointed in accordance with the separation of powers and the rights afforded to citizens under the Constitution. The Panel concluded only that Alpine's arguments were "not within the scope of this Hearing Panel's authority and will not be addressed."[5]

---

[4] DTCC also failed even to argue, much less demonstrate, that Alpine lacks the "necessary capital and liquidity to meet its margin requirements" – the circumstance that the Commission found supported a cease to act determination in the only prior proceeding in which DTCC sought to terminate a participant. *In re Lek Securities Corporation*, SEC Rel. No. 95014 at 12 (May 31, 2022), available at https://www.sec.gov/files/litigation/opinions/2022/34-95014.pdf (hereinafter "SEC Lek Decision").

[5] Decision at 7.

OS Received 04/30/2024

BACKGROUND

A. Alpine Securities Corporation

Alpine is a more than thirty-year-old registered broker dealer and clearing firm and a member of NSCC and DTC since 1995. Throughout its history, Alpine operated both as a clearing firm for introducing brokers including its affiliated firm, Scottdale Capital Advisors, and also maintained and serviced its own customers.[6]

Alpine has never failed to satisfy a margin call or deposit requirement from DTCC.[7]

B. The Minimum Excess Net Capital Requirements

The underlying DTCC cease to act proceeding arose in the context of implementation of a new ENC rule that dramatically increased, by 100%, the amount of ENC that firms are required to maintain from $500,000 to $1 million for a self-clearing firm and from $5 million to $10 million for a firm that clears for others.

In advance of the effective date of the new rule, DTCC sent various communications to the industry which described the applicable level of the ENC requirements in terms of a firm's *activity*, *i.e.*, whether it engaged in self-clearing or cleared for others.[8] In its July Notice to Members, for example, DTCC told firms that the ENC requirement would depend on "whether the firm is self-clearing or clears for others." DTCC explained the rationale for the difference in the required levels of ENC, emphasizing that a firm that is clearing for others presents greater risk than a firm that clears only for its own customers.[9]

---

[6] Tr. 62:24-63:22 (Leibrock).

[7] Tr. 176:7-15 (Leibrock).

[8] DTCC Ex. 31; DTCC 27.

[9] DTCC Ex. 27 at 2 ("The enhanced capital requirements…depend on whether a member self-clears or clears for others.")

OS Received 04/30/2024

C. Alpine Considers its Options and Decides to Engage Only in Self-Clearing

In the months leading up to the effective date of the new rule, Alpine's ownership and management discussed at length the options available to the firm. Alpine received commitments from its ownership that funds would be available to satisfy the ENC requirement, sought from FINRA approval for a $7 million subordinated loan and communicated its actions to DTCC.[10]

In addition, after internal discussions, Alpine communicated to DTCC that it was evaluating the option of engaging only in self-clearing.[11] Through a series of subsequent communications, Alpine's management tried again and again to get a response or guidance from DTCC on that point. Not until more than three weeks later on October 19, 2023, did DTCC (in a footnote) acknowledge Alpine's September statements regarding self-clearing.[12] In that footnote, however, DTCC did not even advise that a "process" would be necessary for Alpine to be treated as a self-clearing firm. Instead of discussing with Alpine its decision to engage only in self-clearing, DTCC reiterated its demands for $10 million and indicated that if Alpine failed to satisfy its demands it "[would] have breached its membership requirements and NSCC [would] take action in accordance with its Rules."[13] Continuing to try to get a response from DTCC, Alpine on

[10] On August 7, 2023, for example, Alpine responded to DTCC's letter of July 31, 2023, reminding DTCC that Alpine "has received assurances that ownership has the ability to provide additional capital and has been assured that, if that capital is necessary to remain in operation, it will be provided." Alpine also emphasized to DTCC that "over the course of more than a decade," whenever Alpine required funds it had received the needed capital. DTCC Ex. 11 at 1

[11] DTCC Ex. 12; Maratea Second Aff. at ¶ 5; Hurry Second Aff. at ¶ 5.

[12] The Decision relies on a finding that a DTCC representative, on October 5, 2023, told Alpine that a "process" was required to become self-clearing. The Panel did not acknowledge the extensive evidence, discussed at length in Alpine's post-hearing brief, that Mr. Leibrock's claim was contrary to his prior testimony and relevant documentation. Alpine Post-Hearing Submission at 13-15.

[13] DTCC Ex. 14.

OS Received 04/30/2024

October 19, 2023 confirmed that it would engage only in self-clearing and again pressed DTCC for answers.[14]

Given the communications to the industry from DTCC, and the fact that Alpine had been engaged in self-clearing for decades, the firm considered engaging only in self-clearing to be a viable option and communicated for a month with DTCC to try to get DTCC's position on the issue in order to make a final decision.[15] As of October 27, 2023, and for the last approximately six months, Alpine has in fact limited its business to self-clearing but has still not received a response from DTCC regarding application of the lower $5 million ENC requirement.[16]

D. Unable to Get An Answer Regarding Self-Clearing, Alpine Obtains Additional Capital to Meet the Higher $10 Million ENC Requirement

Because DTCC refused to acknowledge that Alpine was self-clearing, but continued at high volume to make demands that Alpine obtain and hold $10 million, and to prevent adverse action against the firm, ownership transferred $6.4 million to Alpine on October 25, 2023 with the ***written notation that it was in fact capital*** paid to the firm.[17] Those funds were delivered to the firm, unrestricted, denoted as "capital," and thereafter constituted the firm's capital.

The evidence on this issue came from incontrovertible documents and from the testimony of John Hurry, the representative of ownership who directed the transfer of the funds to Alpine. The transfer documentation confirms that a total of $6.4 million was transferred to Alpine,

---

[14] In an email to DTCC, Ray Maratea indicated that Alpine's business model could not "support or justify operation as a clearing firm with $10 million ENC" and that Alpine was willing to "cease conducting any correspondent clearing." DTCC Ex. 45 at 2.

[15] Tr. 484:3-485:18 (Maratea).

[16] *Id.*

[17] DTCC Ex. 19 at 1 (reflecting a $6.4 million transfer titled "Capital Paid Under Protest"); Cosman 2nd Aff. ¶¶ 1-6. As Mr. Hurry explained, the words "under protest" referred to Alpine's continuing effort to have DTCC confirm that its ENC requirement was $5 million. Tr. 305:4-306:21 (Hurry).

OS Received 04/30/2024

designated as paid in capital.[18] That undisputed evidence was amply supported by Mr. Hurry's own testimony that he provided the funds precisely because they were required by DTCC, that the funds were provided *as capital*, that he is fully familiar with the implications of that designation, and that he knew and intended at all times that the funds were capital.[19] That testimony was further supported by the accountant, Mr. Cosman, who understood from both the documents and discussions at the time that the funds were capital and designated it as capital on the estimated capital computation for October 26, 2023.[20]

There is also no dispute those funds never left Alpine's account; they were and still are, held by Alpine.[21]

E. Alpine Incorrectly Underreported its Capital

The issues with DTCC arose because, rather than relying on the firm's FOCUS reports, DTCC looked at daily estimated net capital calculations that necessarily vary dependent on Alpine's expenses and any unresolved accounting issues. And during the two-week period following the compliance date of the new ENC requirements, Alpine encountered an accounting issues that resulted in underreporting of its capital. First, during the week of October 26, 2023, Alpine's accounting included an overreporting of expense that, in turn, led to a reported shortfall in its ENC of approximately $177,000 – an issue that was noted by Michael Leibrock at DTCC and promptly resolved by Alpine.[22]

---

[18] *Id.*

[19] Tr. 286:2-23 (Hurry).

[20] Tr. 516:25-518:14 (Cosman); Cosman Aff. at ¶¶ 4-5.

[21] Cosman Aff. at ¶ 10; Alpine Ex. 9.

[22] Transcript at 549:8-23 (Cosman). While Alpine promptly remedied that shortfall, its audit confirmed that it over-expensed certain items and therefore, in reality, did not have a shortfall in the first place. Alpine Ex. 10 at 24 (showing $177,446 adjustment to unaudited net capital computation).

OS Received 04/30/2024

A further issue arose on November 2, 2023 when DTCC sent a communication to Alpine demanding *inter alia* a written resolution by close of business on November 3, 2023.[23] John Hurry was, at that point, both severely injured[24] and exceedingly frustrated by Alpine's inability to get an acknowledgement from DTCC that Alpine was self-clearing and subject only to the lower ENC requirement. Mr. Hurry emphasized in his testimony that DTCC's request was also peculiar because he had not previously been asked for that kind of document, notwithstanding multiple capital infusions.[25] As a result, he provided a resolution stating that $1.6 million of the capital was authorized [26] to underscore his belief that only $5 million was required.

Because of DTCC's insistence on obtaining a resolution, and after receiving the resolution on November 2, 2023, Alpine accountants felt they needed further confirmation concerning Alpine's net capital calculations. In the meantime, and although there was plainly no evidence of any associated liability, accountants categorized the remaining funds as "Other Liability" pending clarification.[27]

---

[23] DTCC Ex. 20.

[24] Mr. Hurry had been in a serious accident on October 21, 2023 and underwent surgery the next day. Tr. 290:8-18 (Hurry).

[25] Tr. 295:2-24 (Hurry).

[26] That the resolution was prepared on or about November 2, 2023 – and not before – was clear from the testimony. *See*, DTCC Ex. 20 (DTCC's letter dated November 2, 2023, wherein DTCC requested "a corporate resolution documenting the intended use of the $6.4MM"); Tr. 295:2-24 (Hurry testified that he only did the resolution because it had been requested, that he considered it a formality, and that they were often done after the fact); DTCC Ex. 20 (Alpine's response on November 3rd to the November 2nd request, attaching the $1.6 million resolution); Tr. 530:21-23, 534:18-24 (Cosman indicated that he lowered his calculation of excess net capital when he received the resolution); DTCC Ex. 47 at 32-35 (the first time that Cosman lowered the excess net capital was in his calculation for net capital on November 3, 2023).

[27] Tr. 539:25-540:7 (Cosman).

OS Received 04/30/2024

To resolve the confusion, and even though the funds had already been authorized in writing and a written resolution is not necessary for the funds to be considered ENC, ownership provided a further resolution that confirmed that all of the funds were capital *effective October 26, 2023*.[28]

Neither the written resolutions nor Mr. Cosman's estimated ENC reports altered the incontrovertible fact that the funds were received as and remained capital of the firm at all times. Those funds, under the plain rules and regulations of FINRA, constituted capital of the firm and could not be withdrawn.[29]

F. DTCC Commences Its Cease to Act Proceeding on November 9, 2023 Based on an Incorrect Belief That a Further Resolution was Required – Then Waited Months to Engage in Any Further Action

On the heels of the compliance date, and even while Mr. Leibrock was advising Alpine to remedy a deficiency, Mr. Cuddihy of DTCC quickly moved forward with a cease to act proceeding to terminate Alpine's membership. According to the witnesses, the process began on or about October 26, 2023 when Alpine reported a shortfall of $177,000.[30] That process continued with approvals by DTCC's board on November 7, 2023 and delivery of the Notice of Determination of Intent to Cease to Act (the "Notice") on November 9, 2023.

Not until more than two months after the issuance of the November Notice, on or about January 19, 2023, did DTCC take any action in relation to the Notice. On that date, it advised Alpine that a conference had been scheduled with the members of DTCC's Board who would serve

---

[28] Alpine Ex. 20.

[29] The rules relating to calculation of net capital and limits of withdrawal of capital are contained in Exchange Act Rule 15c3-1. No portion of that rule contains any requirement of a resolution.

[30] The Decision ignores this clear testimony from Mr. Cuddihy and insists that the cease to act process did not begin until November 7, 2023. Decision at 17, n. 27. In fact. Mr. Cuddihy testified that he was moving against Alpine as soon as Alpine showed the deficiency of $177,000. Tr. 245:9-20 (Cuddihy).

OS Received 04/30/2024

as the putative hearing panel. That conference occurred on January 26, 2023 and a hearing was tentatively set for March.[31]

G. The Hearing

The hearing took place over two days before three members of the integrated Board of DTCC, NSCC and DTC. DTCC presented to its Board as witnesses two members of its management. The only other witnesses at the proceeding were John Hurry, Alpine's Chief Executive Officer Ray Maratea, and Alpine's accountant, James Cosman. The evidence at the hearing established that Alpine received the additional infusion of $6.4 million on October 25, 2023, that those funds were designated as capital in the transfer documentation, and that Mr. Hurry when he provided those funds did so to ensure that the firm would meet the $10 million ENC requirement and with the intent that they would be capital of the firm.[32] The evidence established also that the firm's accountant, James Cosman, was involved in the discussions concerning that capital infusion, understood that the funds were being provided as capital, and included those amounts in his calculations of the firm's ENC.[33]

The evidence also established that, as of the firm's receipt of a limited resolution from ownership on November 2, 2023 referring only to $1.6 million, Alpine needed to obtain clarification that all funds were in fact capital. Only one person could provide that clarification: John Hurry. And so the firm sought additional information from Mr. Hurry. In the meantime, the accountant took a conservative approach of not including the capital in ENC until he obtained further information. The clarification was quickly obtained by Alpine: the funds were and had at

[31] At no time since the issuance of the Notice has DTCC sought to in any way limit or condition Alpine's trading activity and the firm has continued its operations during the last five months.

[32] DTCC Ex. 19 at 1 (reflecting a $6.4 million transfer titled "Capital Paid Under Protest"); Tr. 294:2-14; 297:13-24 (Hurry).

[33] Tr. 516:25-518:14 (Cosman).

OS Received 04/30/2024

all times been capital and properly included in ENC. As of the reporting on November 10, 2023, the accountant again included the funds in net capital and Alpine's FOCUS report reflected a total ENC of $10,456,711 as of October 31, 2023.

In the meantime, and while the further resolution was being obtained from ownership, DTCC issued its Notice of Determination of Intent to Cease to Act on November 9, 2023.

H. The Decision of the DTCC Board Members

On April 25, 2024, selected members of the Board of DTCC issued a decision that accepted, almost in its entirety, the contentions made by counsel for DTCC and failed even to acknowledge, much less address, the clear documentary and testimonial evidence adduced by Alpine establishing that it received and maintained the requisite capital but underreported it. From the outset, the Decision ignored its own statement of the relevant issues. While the Decision, for some reason, stated that the "sole question to be decided" is whether "NSCC acted consistently with its Rules in making the Determination,"[34] the Panel had previously advised the litigants that there were four questions to be decided:

> Without indicating its view on any issue, the Hearing Panel believes the following issues are to be presented for consideration and decision by the Hearing Panel:
>
> 1. Under the applicable Rules of DTC and/or NSCC, what excess net capital ("ENC") requirement applied to Alpine on the days indicated in the November 9 Notice?
> 2. Did Alpine meet the ENC requirements as set forth in and required by the Rules of DTC and/or NSCC on the days indicated in the November 9 Notice?
> 3. Did Alpine knowingly provide misleading and/or inaccurate information regarding its financial condition to DTCC?
> 4. Was the sanction on Alpine communicated to Alpine in the November 9 Notice properly imposed under the applicable Rules of DTC and/or NSCC?[35]

---

[34] Decision at 1.

[35] Decision by DTCC Hearing Panel dated February 9, 2023.

OS Received 04/30/2024

On the critical issue of the amount of *capital* held by Alpine, the Decision ignores the undisputed facts that demonstrate that Alpine received the capital infusion of $6.4 million on October 25, 2023 to meet the ENC requirements, that the funds were designated in writing as capital at the time of the transfer, and that the funds ***remained capital at all times after their receipt***. The Decision combines that deliberate disregard of the salient facts with a combination of factual errors, unsupported contentions and a striking failure to consider the legal and analytical points raised by Alpine. By way of example,

- The Decision states that Alpine took "no concrete steps [to comply with the new ENC requirements] until literally a few days before the Compliance Date."[36] There was abundant testimony that Alpine's management and ownership were very much focused on those requirements at least as of the spring of 2023 and took steps the available and appropriate steps to address it. Alpine sought FINRA approval for a subordinated loan and also confirmed to DTCC that it had ensured that the funds would be available from ownership to satisfy the new requirement, the obvious truth of which was borne out by the fact that ownership did provide the requisite $6.4 million when it was needed. The Decision characterizes Alpine's actions and communications as somehow deficient, apparently failing to understand that this small firm had the demonstrated ability and resources to obtain capital as needed.[37]

- The Decision repeatedly claims that Alpine failed to accept DTCC's insistence that Alpine could not become subject to the lower ENC requirement of $5 million simply by limiting its activity to self-clearing. But DTCC's communications to the industry fully supported the view that the applicable ENC depended on the firm's ***activity*** and Alpine reached out to DTCC precisely to learn what if any administrative steps it needed to take. Notably, throughout this proceeding, DTCC has failed to point to any rule, regulation or issuance that supported its contention that it was permitted to ignore Alpine's inquiries and, even over the course of the past six months, fail to acknowledge that the firm was self-clearing.

- The Decision adopts the plainly inaccurate conclusion that Alpine could not and did not limit its business to self-clearing as of the Compliance Date. Instead, the Decision states, falsely, that there was some process that had not been "completed" as of that date.[38] The Decision thereby deliberately conflates the issue of whether

[36] Decision at 4.

[37] Decision at 7.

[38] Decision at 10-13.

OS Received 04/30/2024

the firm was self-clearing with the steps involved in transferring business to Alpine. The evidence was undisputed that, as of October 26, 2023, Alpine actually engaged ***only in self-clearing***.[39] The fact that Alpine continued to receive and process accounts from the introducing firm does not in any way alter the fact that it was submitting to DTCC only trades from its own customers and was therefore self-clearing and the Decision's distortion of those facts is inexplicable and inappropriate.[40]

- The Decision fails properly to consider and address that the capital was received by the firm on October 25, 2023, designated in writing as paid in capital, and was properly considered capital at all times. The Decision also fails to acknowledge that DTCC presented no evidence that the funds were not capital: its witnesses admitted that they had no basis to believe that the funds were not "good capital" and had supposedly relied on a clearly erroneous statement from an unnamed individual at FINRA that the funds were somehow "encumbered."[41] Instead, the Decision quotes the admittedly *inaccurate* figures contained in Alpine's accountant's estimated net capital calculations[42] – figures which the testimony confirmed had been temporarily reduced by the accountant while he sought clarification relating to the shareholder resolution provided on November 3, 2023. At no time does the Decision come to terms with the basic fact that, once properly contributed to the firm as capital, those funds remained capital; that remains the incontrovertible fact and any statements to the contrary, either by Alpine or contained in the Decision, are error.

- The Decision relies heavily on the notion that the resolution provided to DTCC on November 3, 2023 was actually prepared earlier, on October 25, 2023. While the resolution bears that date, the testimony was clear that it was prepared and provided in response to DTCC's inquiry on November 2, 2023, and it referenced only a portion of the contributed capital to preserve Alpine's argument that it was subject only to the $5 million requirement.[43] It did not alter the fact that the funds were capital when received, remained capital at all times, and were then again confirmed as capital in the November 9, 2023 resolution.

In the end, the Decision concluded that, notwithstanding Alpine's capitalization and the fact that any inaccurate statements were made in error, the circumstances warranted DTCC's cease to act determination. The Decision completely fails to acknowledge that there is any governing

---

[39] Tr. 483:16-23 (Maratea).

[40] Decision at 10, n. 15.

[41] Tr. 254:12-255:23 (Cuddihy).

[42] Decision at 13.

[43] *See supra* at note 26.

OS Received 04/30/2024

principle or standard that constrains the ability of DTCC to deny a firm to the market. The Decision insists that the only issue is whether DTCC adhered to "its Rules," even as it ignores its own rules that make clear that cease to act is appropriate where there is a legitimate issue of risk and not because DTCC wants to penalize a firm or constrict a particular market.

OS Received 04/30/2024

ARGUMENT

The Commission weighs four factors in deciding whether to grant a stay: (1) "whether there is a strong likelihood that the moving party will succeed on the merits of the appeal"; (2) "whether the moving party will suffer irreparable harm without a stay"; (3) "whether any person will suffer substantial harm as a result of a stay"; and (4) "whether a stay is likely to serve the public interest."[44] The factors are "not accorded equal weight": "a stay may be granted where there is a high probability of irreparable harm, but a lower probability of success on the merits, or vice versa."[45]

A. Alpine Will Suffer Irreparable Harm Absent a Stay

As stated in the SEC Lek Decision, there is no "dispute that the cease to act determination will cause Lek to suffer irreparable harm."[46] That conclusion is plainly correct. Alpine is a clearing firm and, absent a stay of the DTCC Decision, it cannot perform that critical function for its customers and will be forced to close.[47] Assuming its appeal from DTCC's process and decision is successful, it will be far too late to undo the damage.

B. There is no Harm to Others from Issuance of a Stay and the Public Interest Favors It

DTCC has continued to act for Alpine and Alpine has continued its business since the Notice was issued last November.[48] DTCC waited two months even to move forward with its proceeding. Clearly it does not perceive actual risk in the operations of this decades-old firm, nor

---

[44] *Michael Earl McCune*, SEC Release No. 77921, 2016 WL 2997935, at *1 (May 25, 2016). *See In the Matter of Lek*, SEC Release No. 95014 at 6.

[45] *Id. See also*, *Scattered Corp*., 52 S.E.C. 1314, 1315 (Apr. 28, 1997) (the petitioner need only show "a substantial case on the merits" if the other three factors "strongly favor a stay"); *Lek* at 6 (where "other factors weigh heavily in its favor" [the movant must show] that it has 'raised a 'serious legal question' on the merits'").

[46] SEC Lek Decision at 11.

[47] Declaration of Raymond Maratea at ¶¶ 4, 21-22 (April 30, 2024).

[48] DTCC declined even to employ a summary process that would have enabled it to immediately cease to act for Alpine, again reflecting that Alpine's conduct did not constitute an urgent issue.

OS Received 04/30/2024

is there any. Contrary to DTCC's claims, all stock that is the subject of a sell order from Alpine is already on deposit at DTC and available for settlement. DTCC's witnessed claimed that a risk existed because "Alpine's NSCC trading activity is actively concentrated in short positions in relatively illiquid securities."[49] In fact, Alpine never engages in short trading and does not allow its clients to engage in short trading. Given that Alpine is always long on the stock that it trades, in Alpine's decades of transactions, there has never been an instance in which the stock was not delivered at the time of settlement.

In addition, even if Alpine were to default on delivery, NSCC requires enormous deposits on each individual transaction that are calculated to and would be sufficient to address any need to acquire the shares needed to complete the trade. That there is no issue of risk in relation to Alpine's customer's transactions is also obvious based on simple math: Alpine's capitalization under the new ENC requirements amounts to 2000% of the amount of its transactions. Alpine conducts approximately $200,000 in principal trading on a normal day and so has now been forced to carry a deposit that is *50 times that trading volume*. There is no firm that maintains that level of capitalization, in fact most firms operate on a reverse ratio, trading many multiples of their capital requirements. Alpine's business simply poses no risk to DTCC.

C. Alpine is Likely to Succeed on its Argument That DTCC Failed to Establish a Proper Basis for its Cease to Act Determination[50]

The Commission will conduct a *de novo* review of the Decision issued by the selected members of the DTCC Board.[51] DTCC was required to establish the basis for the Decision by "a

---

[49] Cuddihy Aff. at ¶ 35.

[50] In advance of the hearing, Alpine was advised that the Hearing Panel did not know which party bore the burden of proof and invited Alpine to brief the issue. Alpine did, and the Decision states that it does not "find" that DTCC bears the burden of proof but holds that DTCC "accepted the burden" and "met it." Decision at 2.

[51] *See ABN Amro Clearing Chicago LLC,* Exchange Act Release No. 80993, 2017 SEC LEXIS 1859 at *16 (June 20, 2017).

OS Received 04/30/2024

preponderance of the evidence."[52] Further, while the Hearing Panel advised that it could not and would not review the appropriateness of the sanction, and would consider only whether the sanction was "permissible" under DTCC's own rules, the Commission will review the sanction and may modify or reduce the sanctions or set aside a disciplinary sanction that is "excessive or oppressive."[53]

D. DTCC Failed to Establish a Proper Basis for a Cease to Act Determination

According to the Notice, DTCC's determination to cease to act was based on, Alpine's "noncompliance with its NSCC ENC financial membership requirement" and alleged misinformation, such that the Clearing Agencies are no longer able to "assess the risks presented to NSCC and DTC by Alpine with a high degree of confidence."[54] Pursuant to its rules, DTCC may cease to act if it has "reasonable grounds to believe … that such ceasing to act is necessary for the protection of the Corporation, other Participants or Pledgees or to facilitate the orderly and continuous performance of the Corporation's services."[55]

DTCC failed to establish that ceasing to act was necessary and the Decision fails to address that point or even acknowledge the requirement. It concludes only that the cease to act determination was consistent with NSCC's rules but then ignores perhaps the most important provision relating to DTCC's exercise of its ability to prevent a firm from accessing the markets. The Decision instead doubles down on the notion that DTCC is permitted to take action against a firm if it decides that a firm's reporting is "deceptive" and ignores the fact that it held the requisite capital at all times.

---

[52] 15 U.S.C. 78s(e) and (f).

[53] *Paz Sec. Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C.Cir. 2007).

[54] Notice of Determination to Cease to Act at 2.

[55] DTC Rule 10 (emphasis added).

OS Received 04/30/2024

Critically, this case presents an unprecedented circumstance: in the only prior cease to act proceeding, DTCC alleged and the Hearing Panel found that the firm, in fact, did not have sufficient resources – a specific finding that, according to the SEC, justified a cease to act determination. Here, *DTCC did not even attempt to argue that Alpine did not have sufficient resources*. Mr. Cuddihy relied primarily on a temporary shortfall of approximately $177,000 and then, after communicating with an unidentified person at FINRA, added a claim regarding Alpine's subsequent underreporting.[56] Based on those circumstances, DTCC then claimed that, after decades, it could no longer rely on Alpine's reporting. In other words, in this case DTCC falls back on the highly subjective notion that it no longer "trusts" Alpine as the rationale for closing a firm that unquestionably obtained and maintained capital that was not only sufficient but also consistent with their new rules. As demonstrated below, there is no precedent for such action and the record is devoid of evidence to support it.

1. DTCC Failed to Establish That It Properly Determined That Alpine is Subject to a $10 Million ENC Requirement

Based on the communications that had been sent by DTCC to the industry, and a month before the compliance date, Alpine sought confirmation from DTCC that its continued operation as only a self-clearing firm would subject it to the $5 million requirement. Given DTCC's own communications stating the ENC requirements in terms of "whether the firm was self-clearing," and the fact that Alpine had been engaged in self-clearing for decades, the firm considered that to be a viable option. It then, in an effort to communicate with its regulators and adhere to their processes, asked the regulators for a response a month prior to the compliance date. And then asked again and again.

---

[56] Mr. Cuddihy acknowledged that he did not have personal knowledge concerning the statements by FINRA and stated that he could not recall who provided such information to him. Tr. 246:12-247:20 (Cuddihy).

OS Received 04/30/2024

DTCC's claim that it did not have to address Alpine's inquiry because it could not discern its "true intentions" is unpersuasive at best. DTCC asserts that it did not have to address Alpine's inquiry until Alpine made and communicated a *final* decision to cease clearing for others, but those who have to make decisions for a business can certainly understand Mr. Maratea's inquiries: he properly sought to *get information* on that issue *in order to finalize the firm's decision.* DTCC, for its own reasons, refused to acknowledge it or take the simple step of communicating to the firm its position. In fact, to this day, DTCC has improperly failed to acknowledge that the firm is subject only to a $5 million requirement, apparently concluding that it need not deal fairly with Alpine given its cease to act determination.

Given those circumstances, the Panel should not have concluded that DTCC demonstrated that it fairly determined that the applicable ENC requirement on November 9, 2023 was $10 million.

2. DTCC Failed to Demonstrate That Alpine Did Not Meet its ENC Requirement

The actual evidence established that Alpine obtained funds to meet the $10 million ENC requirement, that it then reported (incorrectly) a shortfall of $177,000, that it then corrected the shortfall, and that it has maintained ENC of greater than $10 million at all times since. The evidence on that issue came from the incontrovertible documents and from the testimony of John Hurry who directed the transfer of the funds. And the discussion begins, and ends, with the transmission of the funds from the parent company and the designation, in writing, at the time of transmission, of their purpose: capital.[57] That undisputed evidence is amply supported by Mr. Hurry's own testimony that he provided the funds as capital, is fully familiar with the implications

---

[57] DTCC Ex. 19 at 1 (reflecting a $6.4 million transfer titled "Capital Paid Under Protest")

OS Received 04/30/2024

of that designation, and knew at all times that the funds were capital.[58] The accountant, Mr. Cosman, also testified that he understood from both the documents and discussions at the time that the funds were capital and he treated it as capital on the computation for October 26, 2023.[59] In the end, even Mr. Cuddihy agreed that it was good capital from the outset but claimed that he did not understand that at the time.[60]

But, argued DTCC, the capital was "encumbered." Mr. Cuddihy claimed that he believed that funds were "encumbered" based on "discussions with FINRA" in which FINRA told him that "only $1.6 million was unencumbered."[61] But DTCC's witnesses failed to present any evidence that those funds did not constitute capital or were restricted or encumbered in some way and DTCC's claims were revealed to be based on inaccurate information from FINRA accompanied by Mr. Cuddihy's eagerness to pursue a determination to Cease to Act. In fact, the funds were not restricted, no resolution is required for the funds to be considered "good" capital, and the provision of a resolution did not negate the fact that they were authorized capital from the outset.

The only error in Alpine's reporting was the accountant's failure to include the $6.4 million in his daily estimates at all times. Thus, Alpine did not lack sufficient capital nor was its capital position "so weak as to present an unacceptable risk to NSCC and NSCC's members" – the basis on which the SEC has concluded that DTCC may cease to act.[62]

---

[58] Tr. 286:2-23; 291:6-21 (Hurry)

[59] Tr. 516:25-518:14 (Cosman).

[60] Tr. 252:20-253:6 (Cuddihy).

[61] Mr. Cuddihy could not recall who at FINRA provided the information that he then relied on in viewing a portion of the additional capital as "encumbered." Tr. 246:12-247:20 (Cuddihy). Mr. Leibrock admitted that he did not know if a resolution was required. Tr. 158:24-159:16 (Leibrock). This DTCC proceeding is the latest chapter in concerted and coordinated regulatory action relating to sales of microcap securities that has drastically reduced the ability of start-up firms to obtain capital and services. This action also occurred in the wake of Alpine's successful challenge to the structure and operation of FINRA and, according to DTCC witnesses, FINRA was actively involved in providing to DTCC inaccurate information that led to the Notice of Determination of Intent to Cease to Act.

[62] SEC Lek Decision at 10.

OS Received 04/30/2024

3. DTCC Failed to Demonstrate That Alpine Engaged in Material Misrepresentations or That Those Alleged Misrepresentations Prevented DTCC From Being Able to Assess the Risk Posed by Alpine

DTCC claims that ceasing to act is necessary because Alpine allegedly made statements that prevent DTCC from being able to assess the risk posed by its business. But DTCC is plainly able to understand that Alpine's business poses little or no risk, and the claimed misstatements were not designed to deceive DTCC into believing that its capital situation was better than reported. It was the exact opposite; the firm's accountants took a conservative position and underreported capital until they received clarification that the funds were, as originally understood, capital. The Decision, as a threshold matter, misstates that sequence of events. While the Decision claims that the cease to act process began on November 7, 2023, Mr. Cuddihy testified the recommendation to cease to act for Alpine was made "around the 25th to the 2nd of November" based on the fact that Alpine "was not in compliance with" its ENC requirements."[63] Mr. Cuddihy made clear that he knew Alpine had received the additional $6.4 million and that the cease to act determination was made based on Alpine's reporting of capital "between 9.8 and 9.9."[64] Then, according to Mr. Cuddihy, on November 2nd, "we hear from FINRA [that] only 1.6 of that 6.4 is considered good capital"[65] – a statement that was not accurate

According to Mr. Cuddihy, he did not understand, as he proceeded with a cease to act recommendation on "November 2nd or 3rd," that the capital had in fact been properly designated as capital from the moment it arrived and, even as of the date of the hearing, Mr. Cuddihy had not

---

[63] Tr. 245-46; 251:8-18. Mr. Cuddihy's testimony is not accurate: the $1.6 million resolution was not provided to DTCC until November 3, 2023 and so DTCC could not have had the conversation with FINRA until that date.

Alpine had requested discovery concerning the process and, had it received it, would have had evidence of when the recommendation occurred and whether it was, as Mr. Cuddihy stated, based solely on the shortfall that existed as of October 26, 2023.

[64] Tr. 249:11-250:16 (Cuddihy).

[65] Tr. 250:24 (Cuddihy).

OS Received 04/30/2024

reviewed those transfer documents. His understanding that the capital, throughout the entire period being discussed, was "good" capital "[came] after the fact."[66] And had Mr. Cuddihy received, a few hours earlier, the second resolution that was provided to clarify and confirm that the funds were "good" capital, DTCC "could have had a different view" of whether the firm should be shut down.[67]

Further, the evidence demonstrated that the accountant's underreporting of the capital was not an attempt at deception. To the contrary, it was the action of a conservative accountant who had seen a document that raised a question in his mind and sought clarification. That confusion was, in turn, triggered by DTCC's apparent misunderstanding regarding a need for a written resolution, and DTCC's November 2, 2023 communication demanding a resolution by close of business on November 3, 2023. John Hurry was, at that point, injured and frustrated by Alpine's inability to get answers concerning both self-clearing and Alpine's escrow obligation and provided a resolution referring to only $1.6 million of the capital. DTCC's insistence on obtaining a resolution followed by Alpine's receipt of the $1.6 million resolution left its accounting staff with the view that they needed further information to confirm the computation. That clarification came within a matter of days and confirmed that the funds had been, at all times, capital of the firm.

Most importantly, neither the resolution nor Mr. Cosman's estimated reports altered the incontrovertible fact that the funds were received as capital on October 25, 2023 and remained capital of the firm. Any other conclusion is not merely baseless but directly at odds with the reality of Mr. Hurry's contribution of capital on October 25, 2023.

---

[66] Tr. 252:20-253:6; 256:9-24 (Cuddihy).

[67] Tr. 257:17-258:5 (Cuddihy). According to Mr. Cuddihy, DTCC could have decided to take Alpine "down to trade capture, which is something we had previously done for Alpine." Tr. 257:2-11 (Cuddihy)

OS Received 04/30/2024

4. Alpine's Reporting Did Not Prevent NSCC From Being Able to Assess the Risk Presented by Alpine and the Cease to Act Determination Was Not Necessary to Protect DTCC

DTCC claims that, because of the reporting of a shortfall and then the underreporting of capital, NSCC can no longer assess and manage the risk posed by Alpine and its cease to act determination is "necessary" for the protection or operation of NSCC.[68] That language – "necessary for the protection of NSCC" – constitutes a substantial and specific hurdle that DTCC must overcome in order to deny access to the markets. Further, while the Hearing Panel concluded that it need not consider whether other less severe sanctions were warranted, that provision concerning whether a cease to act was "necessary" presented precisely that issue. And the Panel should have declined to endorse the notion that DTCC could not have engaged in other less severe actions to address the issue and could only be "protected" by putting Alpine out of business.

Mr. Cuddihy was the witness who sought to demonstrate the opposite, that DTCC was exposed to risk. To that end, he made a patently false statement that "Alpine's NSCC trading activity is actively concentrated in short positions in relatively illiquid securities."[69] DTCC is fully familiar with Alpine's business and knows that the witness' statements are misleading at best. In fact, Alpine is long the stock in relation to every security that is the subject of a sell order *and* it is required to hold in its clearing fund at NSCC, for each particular transaction, an amount calculated by DTCC to address the notion that NSCC could have to "cover" a failure to deliver by Alpine. Given these requirements, the funds that NSCC obtains for every transaction are calculated to and would be sufficient to acquire the shares needed to complete the trade.

Finally, as the SEC emphasized in the *Lek* proceeding, a cease to act determination is not

---

[68] NSCC Rule 46.

[69] Cuddihy Aff. at ¶ 35.

OS Received 04/30/2024

appropriate if the firm in fact properly addressed and complied with NSCC's highest ENC requirement. As stated in the decision, "NSCC's 'risk-based margin system' is designed to cover its potential future exposure."[70] The issue, therefore, is whether the firm has in place "a reliable way [] to meet its ongoing margin obligations or whether there was adequate cause for the Clearing Agencies to view the program as inadequate."[71] Here, Alpine obtained the capital in a timely fashion, reported the capital, experienced an accounting issue and then corrected that issue with the result that on and since November 10, 2023 it has reported greater than $10 million in excess net capital.

5. The Errors Served to Underreport – not Overstate -- its Capital, Were Promptly Resolved and Do Not Support the Cease to Act Determination

The underreporting by Alpine is a far cry from the allegations of misrepresentations in the *Lek* case that led the Panel to find that Lek's disclosures justified the cease to act determination. There, DTCC's Notice was based on statements made over the course of many months that allegedly concealed its liquidity issues and amounted to "deliberate obfuscation."[72] Certainly it cannot be claimed that Alpine's statements were "deliberate obfuscation" since each of the statements at issue inured to its detriment. They were, instead, nothing other than was described at the hearing: because it was demanded by DTCC, a resolution was provided that created confusion at the firm – and that confusion was then resolved.

E. DTCC'S Structure and Operations Violated Principles of Fairness and Constitutional Mandates

The underlying DTCC action employed a combination of procedures that appear to contravene principles of fairness as well as Constitutional mandates that apply to a private entity

[70] SEC Lek Decision at 7-8.

[71] *Id.*

[72] DTCC Lek Decision at 13-19.

OS Received 04/30/2024

engaged in state action. DTCC received from the SEC delegated power to literally control access to the markets, and the current proceeding constitutes a clear and severe exercise of that governmental power. And DTCC purportedly has authority to terminate a firm's access to the markets, without agency review, "in [DTCC's] discretion." Those circumstances raise a series of threshold issues. First, because it controls access to the securities markets, and does so by virtue of authority conferred by Congress on the SEC, DTCC is engaged in governmental action and is obligated to comply with the Constitution including the Appointments Clause. Governmental power cannot slip through the cracks in a manner that permits it to be outsourced to a private entity and then deployed without adherence to Constitutional guarantees. The SEC could not and did not grant to DTCC a power that the SEC itself does not have, *i.e.*, the ability to wield government power without abiding by the critical constraints and protections that Congress embedded in the Constitution.[73] Yet DTCC, in its governance and hearing procedures, fails to comply with the Constitution.

Further, the conferral of power constitutes an unconstitutional delegation of legislative power to a private entity and violates the private non-delegation doctrine in at least two respects. First, by allowing DTCC to act in its "discretion," the delegation lacks the "reasonably fixed statutory standards" and articulable guidelines that are required for a permissible delegation of governmental power to a private entity.[74]

> Taken together, these cases draw a line between impermissible delegation of unchecked lawmaking power to private entities and permissible participation by private entities in developing government standards and rules. *Adkins* shows that a private entity may aid a public federal entity that retains authority over the implementation of federal law. But if a

[73] *United States v. Ackerman*, 831 F.3d 1292, 1300 (10th Cir. 2016) (Gorsuch, J.) (observing that "when an actor is endowed with law enforcement powers beyond those enjoyed by private citizens, courts have traditionally found the exercise of the police power engaged"). *See also Alpine v. FINRA*, 2023 WL 4703307, at **2-4; *Financial Oversight & Management Bd. For Puerto Rico v. Aurelius*, 140 S.Ct. 1649, 1657 (2020) (Constitution's "structural constraints, designed in part to ensure political accountability, apply to all exercises of federal power[.]").

[74] *Todd & Co. v. Sec. & Exch. Com.*, 557 F.2d 1008, 1012 (3d Cir. 1977).

OS Received 04/30/2024

> private entity creates the law or retains full discretion over any regulations, Carter Coal and Schechter tell us the answer: that it is an unconstitutional exercise of federal power.[75]

The express authorization to DTCC to act "in its discretion" is not only an impermissible grant of governmental power to a private entity but also deprives a litigant of the ability to obtain meaningful review of its actions: that language suggests that the only issue on appeal would, in effect, be whether the DTCC in fact acted in its "discretion" and the answer would inevitably be yes.

Further, delegation to a private entity passes Constitutional muster only if the entity acts subordinately to the government agency.

> Decisions from the courts of appeals hold this line. Private entities may serve as advisors that propose regulations. And they may undertake ministerial functions, such as fee collection. But a private entity may not be the principal decisionmaker in the use of federal power, may not create federal law, may not wield equal power with a federal agency, or regulate unilaterally.[76]

In relation to rulemaking, therefore, a private entity may propose rules and regulations so long as those rules do not become effective until they are reviewed and approved by the agency.[77] And the Court in *Oklahoma* made clear that the same must be true of adjudications:

> As with rulemaking, so with adjudication: The Authority's adjudication decisions are not final until the FTC has the opportunity to review them.[78]

Here, DTCC has been given "discretion" to deprive a firm of access to the markets and that decision becomes effective immediately, prior to any agency involvement or review. And while there is an opportunity to appeal from its decision, that review is meaningless where, as here, the

---

[75] *Oklahoma v. United States*, 62 F.4th 221, 228-29 (6th Cir. 2023) (internal citations omitted, emphasis added). *See also FCC v. Fox Tel. Stations Inc*. 597 U.S. 239, 253 (2012) (regulatory standards are inadequate when they are "so standardless" that they permit discriminatory enforcement).

[76] *Oklahoma*, 62 F.4th at 229 (cleaned up)

[77] *Id*. at 231 (holding that a private entity is subordinate where it "may only 'propose' rules to the Commission" which rules cannot go into effect "unless the proposed rule has been approved by the Commission.").

[78] *Id.*

OS Received 04/30/2024

appeal would involve the amorphous issue of DTCC's exercise of its own "discretion" and only after DTCC's cease to act determination destroys the business.

This conferral of enormous power, without the articulation of clear standards that would govern its exercise or meaningful review, is invalid also because it occurs without fair process. The DTCC proceeding lacks even the semblance of a neutral arbiter; its Board members are reviewing decisions made by DTCC's management and their fellow Board members. In any proceeding, whether in arbitration or in court, it would be nonsensical to suggest that the judge or arbitrator could serve as the adjudicator if he or she were a member of the Board of the plaintiff; the need for recusal would be considered self-evident.

CONCLUSION

For the foregoing reasons, Alpine respectfully requests that the Commission grant a stay of the Cease to Act determination pending resolution of the appeals in this matter.

Dated: April 30, 2024

/s/ *Maranda E. Fritz*

Maranda E Fritz PC
521 Fifth Avenue 17th Floor
New York, New York 10175
646 584-8231
maranda@fritzpc.com

OS Received 04/30/2024

Maranda E. Fritz
MARANDA E. FRITZ, P.C.
521 Fifth Avenue
New York, New York 10175
Telephone: 646.584.8231
Email: maranda@fritzpc.com

UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of ALPINE SECURITIES CORPORATION, For Review of Adverse Action Taken By THE DEPOSITORY TRUST AND CLEARING COMPANY	**DECLARATION OF RAYMOND MARATEA IN SUPPORT OF ALPINE SECURITIES CORPORATION'S MOTION FOR AN EMERGENCY INTERIM STAY AND OTHER APPROPRIATE COMMISSION RELIEF**

I, RAYMOND MARATEA, under penalty of perjury, declare as follows:

1. I am currently the Chief Executive Officer ("CEO") and a board member of Alpine Securities Corporation ("Alpine") having held these positions since July of 2021.

2. I am providing this declaration in support of Alpine's Motion for an Emergency Interim Stay and Other Appropriate Commission Relief to stay a recent decision by DTCC issued on April 25, 2024 (the "Decision"). The Decision affirmed a determination by two of DTCC's subsidiaries to "cease to act" for Alpine, a result that would put Alpine out of business. Because of the substantial issues that Alpine has raised in its complaint in this action, and the lack of any fair or due process in the DTCC proceeding that Alpine faced, we ask that the SEC stay the Decision while the issues presented by Alpine's request for review are considered and resolved.

OS Received 04/30/2024

Background of Alpine, NSCC and the OTC/Microcap Markets

3. Alpine is a more than 30-year old, small firm that has historically cleared for others and for its own customers, registered with the SEC. Alpine's business is limited to liquidation (or sale-side) transactions in microcap or over the counter ("OTC") stock transactions for its customers.

4. In order for Alpine to provide clearing and settlement services and function as a clearing firm for its customers, Alpine must be a member of National Securities Clearing Corporation ("NSCC") and a participant of the Depository Trust Company ("DTC"). Alpine has been a member in good standing of NSCC and a DTC participant for many years.

5. As an ongoing condition to membership, and thus use of NSCC's clearance, settlement and other essential services for Alpine and its customers, NSCC requires members, including Alpine, to contribute daily to a "Clearing Fund," by making "Required Deposits," that NSCC indicates serves as "margin" against risk of default.

6. Alpine is subject to three separate deposit or capital requirements that are imposed by NSCC in order for Alpine to be able to execute its customer's transactions. First, NSCC has established a minimum deposit requirement specific to Alpine; that amount was set at $1 million and then, in 2019, began exponentially increasing to a total of $3 million. According to NSCC, Alpine may not engage in any trading unless that amount remains on deposit at NSCC, and that amount has been held by DTCC since 2019.

7. Second, NSCC calculates and imposes deposit requirements based on each of Alpine's actual transactions. Those amounts, according to NSCC, are based on the risk

OS Received 04/30/2024

associated with a given transaction, the supposed risk being that Alpine as the seller would default and fail to deliver the stock, and NSCC as the central counterparty would have to "cover," i.e., acquire that stock in the market for delivery to the buyer.

8. But *there is no such risk* in Alpine's transactions: Alpine engages only in sell side transactions in which the stock is *already on deposit with DTC*. Since I have been CEO (and I understand before that time), Alpine always has sufficient shares in its account at DTC to cover every sell order and position in every sale-side trade before submitting a sell order on behalf of a customer to NSCC. In other words, Alpine's sell positions in every trade *are always covered because Alpine is long the stock at DTC*.

9. Under no circumstances would NSCC need to acquire stock to "cover" the trade; the stock is already held by its sister entity, DTC. NSCC, in its assessment of risk, has failed entirely to acknowledge that only relevant risk in these transactions would be a refusal of DTC to deliver the stock to NSCC – a circumstance that has *never* occurred and is entirely fictional.

The Increase in ENC Requirements

10. NSCC in October dramatically increased a third layer of capital requirements, supposedly based on its risk. For years, DTCC had insisted that its massive transactional requirements were necessary and carefully developed by its economists to ensure that DTC and its subsidiaries are not exposed to risk. But DTCC then took the position that it was actually ***not*** adequately protected from risk by those requirements, that in addition to the standing minimum deposit requirement *and* the transactional deposit requirements, it *also* needed an enormous increase in the ENC capitalization requirements.

11. As of October 26, 2023, the capitalization requirements imposed by

OS Received 04/30/2024

regulators on Alpine and other firms skyrocketed. A self-clearing firm was previously required by NSCC to maintain $500,000 in Excess Net Capital ("ENC"); the new rule requires $5 million. A firm that "clears for others" was required to maintain $1 million; the requirement is now $10 million.

12. In response to those new requirements, Alpine obtained from its ownership an additional $6.4 million capital infusion. Those funds were received on October 25, 2023. While there were certain errors in its reporting of excess net capital, Alpine has, at all times since that date, maintained excess net capital of greater than $10 million.

Soon After the Filing of a Complaint Questioning the Constitutionality of DTCC, DTCC Issued to Alpine a Notice of Determination to Cease to Act

13. Although Alpine received and maintains greater than $10 million in ENC, DTCC – twelve days after Alpine filed a complaint in the federal court for the District of Utah – commenced the pending "cease to act" proceeding. The proceeding purports to be based on Alpine's failure to satisfy those new NSCC capitalization requirements.

14. In fact, Alpine not only has greater than $10 million in ENC but has also limited its business to self-clearing and so should be subject only to the lower requirement of $5 million. Faced with the increase in its capital requirements, Alpine had to consider its alternatives. Given the dramatic difference between the requirements for self-clearing as opposed to clearing for others, and given the fact that Alpine has historically had its own customers for which it cleared, Alpine decided to cease clearing for others and continue only as a self-clearing firm,_and it asked DTCC, a month in advance of the effective date of the

OS Received 04/30/2024

new requirements, for a response on that issue.[1]

15. In response, DTCC contended that, regardless of the fact that Alpine would only be self-clearing, it had to seek a change to its "NSCC Membership Status" and that change would have to be agreed to and implemented by NSCC. [2] Alpine objected to DTCC's position that it could determine and "evaluate" whether Alpine was self-clearing; as Alpine pointed out, it is simply a fact evidenced by Alpine's submission only of transactions of its own clients.[3] Alpine also provided additional information sought by DTCC.[4]

16. At no time has DTCC pointed to any language in the new rule that supports the notion that Alpine, which had engaged in self-clearing activities for decades, can be prevented from continuing those *self-clearing* activities so long as it has $5 million in ENC, and the purported rationale of the rule supports a need for $10 million in ENC only for those who have multiple correspondent firms for which they clear. Nonetheless, DTCC has refused to agree that Alpine is self-clearing, claims that they are still considering but have not yet resolved the issue, and continued to insist that Alpine was subject to the $10 million ENC requirement.

17. Because of the monopolistic position occupied by DTCC, its refusal to continue

---

[1] Email dated September 27, 2024. I have been advised that Michael Leibrock testified that, in a conference call on October 5, 2023, he explained to me that there was a "process" that would have to be undertaken before DTCC would acknowledge that Alpine was engaging only in self-clearing. I can confirm that I have no recollection of him doing so; to the contrary, when he did finally provide that information, I sent a more formal letter to him the following day.

[2] On an email on October 23, 2023, DTCC Managing Director Michael Leibrock insisted "[t]o be clear, Alpine is required to satisfy its NSCC minimum ENC requirement of $10 million by October 25, 2023 – there aren't any alternative options on that point." Alpine's failure to satisfy that requirement, Mr. Leibrock confirmed, "will result in NSCC taking action under its rules which may include, among other things, the imposition of disciplinary actions and/or the limitation or suspension of Alpine's NSCC membership." Email from DTCC dated October 23, 2023.

[3] Alpine also pointed out that its limitation on its business would be known to and within the control of the Defendants: obviously if Alpine submitted a transaction for another firm, as opposed to only self-clearing transactions, that trade would be visible to and presumably rejected by DTCC.

[4] Letter to DTCC dated November 3, 2023.

OS Received 04/30/2024

to process trades for Alpine would have forced the closure of its business. Alpine therefore arranged to obtain an additional $6.4 million from its ownership and has been in compliance even with the higher $10 million ENC requirement with the exception only of a $177,000 shortfall that it promptly remedied.

18. On November 9, 2023, DTCC initiated to Alpine a Notice of Determination of Intent to Cease to Act. It then took no further action relating to Alpine for more than two months, and Alpine continued to operate its business with its ENC of greater than $10 million. On or about January 19, 2024, DTCC communicated to Alpine that its Hearing Panel, composed of members of the same Board that had approved the cease to act determination, would be conducting a conference on or about January 26, 2024. The DTCC proceeding then moved forward, a hearing was conducted and the Panel on April 25, 2024 issued its decision affirming the actions taken by its management and Board.

19. Under applicable rules, that Decision becomes immediately effective; while Alpine has promptly filed its appeal from that Decision, the appeal does not stay the effectiveness of DTCC's cease to act determination.

20. Alpine's counsel, after issuance of the Decision, spoke with DTCC's counsel and obtained an assurance that DTCC would not cease to act for at least 30 days.

DTCC's Action Would Force the Immediate Closure of Alpine

21. DTCC's action against Alpine consists of three members of DTCC's board affirming the "determination" of its own executives. By eliminating Alpine's ability to clear trades for its customers, the Decision also prevents Alpine from being able to operate. DTCC's procedures do not provide for an objective or neutral judge to decide the matter and no right to review of the Decision prior to the effectiveness of the most severe of sanctions on the firm.

OS Received 04/30/2024

22. Because Alpine has raised substantial issues in this case, because the continuation of the action would result in irreparable injury to Alpine, and because there is no risk or prejudice to DTCC, we ask that the SEC stay the Decision while the Alpine's request for review is considered.

WHEREFORE, I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 30, 2024

/s/ Raymond Maratea
Raymond Maratea

OS Received 04/30/2024