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 FINRA	Admin Proc. File No. 3-22471 **ORAL ARGUMENT REQUESTED**

ALPINE SECURITIES CORPORATION'S BRIEF IN SUPPORT OF ITS APPEAL FROM THE DECISION OF THE NATIONAL ADJUDICATORY COUNCIL

MARANDA E. FRITZ PC
521 Fifth Avenue, 17th Floor
New York, New York 10175

Attorney for Alpine Securities

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Alpine Securities Corporation (CRD No. 14952) ("Alpine"), by and through its undersigned counsel, hereby submits this brief in support of its appeal from the decision of the National Adjudicatory Council ("NAC") (referred to hereinafter as "Decision").

PRELIMINARY STATEMENT

The Decision of the NAC, which is grounded on unsupported and untenable legal principles combined with a deep and abiding disregard for the evidence presented by Alpine during the 19-day hearing, should be reversed. First, on the issue of fees charged by Alpine, the NAC purported to consider the "reasonableness" of Alpine's fees but in fact employed and effectively set in stone a simplistic and narrow test that ignores the proper and far more rational analysis that should govern the issue. FINRA's own provisions, as well as substantial other authority, establishes that there are a multitude of business, economic and market-centric factors that bear on the "reasonableness" of a fee. But the NAC embraced FINRA's arithmetic approach that considers only *one* factor: the "actual costs" relating to the provision of a service. The NAC's restrictive approach constitutes an impermissible rule change implemented without Administrative Procedure Act ("APA") compliance and would further constrict the microcap market that is critical to small business development. The Decision on that issue should be reversed before it causes more damage to firms that are confronted by ever increasing regulatory, legal and compliance costs.

Even using that improper methodology, the NAC then properly found FINRA's claims as to Alpine's fees *unsubstantiated* except with respect to a $5000 fee. On that latter point, the NAC aggravated its analytical error by turning a blind eye to the evidence that was the focus of Alpine's presentation throughout the lengthy hearing: the raft of costs and expenses that underlie its imposition of that fee. The NAC persists, throughout its decision, in reciting the conclusion that Alpine failed to provide evidence that its fee was related to the costs of its services and insists that

Alpine instead levied the fee *only* to cause closure of accounts. But the NAC's contention that Alpine was acting based on only *one* of those considerations is, again, exceedingly simplistic and demonstrably incorrect. The evidence plainly demonstrated that Alpine was addressing *both* concerns, seeking to reduce the number of orphan and dormant accounts *while also* imposing fees that were commensurate with rising costs driven primarily by the intense regulatory activity directed at the microcap markets.[1]

Second, on the issue of conversion, FINRA fundamentally redefined this serious offense by eliminating the critical element that distinguishes conversion from lesser offenses of misappropriation: the intent to use and deprive an owner of the property. FINRA has decided that it can redefine conversion to dilute its elements and render it the equivalent of the lesser offense of misuse of property, while at the same time imposing more severe sanctions. It is truly the same as FINRA deciding that the definition of "steal" applies to any movement of cash or stock, regardless of circumstances or intent. There is no justification for FINRA's decision to invent and deploy its own new and different definition of conversion and the Commission should decline to

[1] FINRA's approach to microcap markets fundamentally contradicts federal policy objectives to foster capital formation and promote small business growth. FINRA's Regulatory Notice 21-03 requires member firms to treat microcap securities as presumptively suspicious, creating prohibitive compliance costs. FINRA, *Regulatory Notice 21-03*, https://www.finra.org/rules-guidance/notices/21-03. This directly opposes the SEC's explicit commitment to "reduce barriers to capital formation" and provide "meaningful pathways for entrepreneurs to obtain the capital that they need." SEC, *Remarks at the Small Business Capital Formation Advisory Committee Meeting*, https://www.sec.gov/newsroom/speeches-statements/remarks-atkins-small-business-capital-formation-advisory-committee-meeting-072225. FINRA's regulatory hostility is particularly misaligned with the current administration's comprehensive deregulatory agenda, as evidenced by President Trump's executive order to eliminate regulations that are "burdensome to small businesses and entrepreneurship." The White House, *Fact Sheet: President Donald J. Trump Launches Massive 10-to-1 Deregulation Initiative*, https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-launches-massive-10-to-1-deregulation-initiative/. Where the SEC recognizes that small businesses "can struggle to attract funding" and calls for regulatory clarity, FINRA's microcap policies create barriers that exclude legitimate companies from public markets and deny retail investors access to early-stage growth opportunities.

The Scottsdale case also reflects FINRA's use of mischaracterizations of the law to pursue participants in the microcap markets. In *SEC v. Scottsdale Capital Advisors Corp.*, Exchange Act Release No. 93052 (Sept. 17, 2021), the Commission sharply criticized FINRA's handling of Mr. Hurry's case, finding that "Hurry was deprived of a fair opportunity to rebut the theory under which he was held liable." *Id.* at 11. The Commission condemned FINRA's bait-and-switch tactics, ruling that "it was unfair for the NAC to impose liability on him under the circumstances" and rebuked FINRA for having "failed to correctly state and apply the appropriate legal standards.'" *Id.* at 9, 12.

Alpine's successful result in that case only served to further increase FINRA's level of animus toward Alpine as did Alpine's successful results in the pending FINRA Constitutionality case.

endorse it.[2]

Further, as the basis for the conversion claim, the NAC applied an unprecedented bootstrapping approach to justify the harshest possible sanctions against Alpine. FINRA argued that, where it asserts that fees are "unreasonable," it may at the same time charge the firm with "conversion" for having implemented those fees. This circular reasoning creates an impossible situation: any fee that is *later* determined to be excessive becomes grounds for a finding of theft, even if the fee was properly disclosed and the firm believed it was justified at the time. And the unfairness and illogic of that tactic is illustrated here: even the Hearing Panel and the NAC disagreed on whether "unreasonableness" had been established.

Also with respect to conversion, the NAC in perfunctory footnotes improperly applied the concept of imputation of conduct and intent to find Alpine liable for the actions of Chris Doubek, actions that were contrary to management's directions and engaged in by Mr. Doubek *only* for his personal benefit. Mr. Doubek, having failed for months to accomplish compliantly the closure of dormant accounts, apparently decided that his job was in jeopardy and so proceeded to shut down accounts suddenly and improperly. Mr. Doubek's actions were wrong and flatly contrary to his duties and responsibilities; it is beyond cavil that Alpine's experienced management would never have directed or tolerated conduct that ignored the numerous ways to accomplish the same result compliantly. Alpine's counsel learned of Mr. Doubek's actions and immediately intervened, those transactions were reversed, and Mr. Doubek was later terminated after it was determined that he

[2] Notably, the SEC has been, for nearly three years, pursuing claims against Alpine based on these same set of facts in federal district court in Nevada. *SEC v. Alpine*, No. 2:22-cv-01279 (D. Nev. filed Aug. 10, 2022). Alpine has repeatedly sought to put an end to the duplicative proceedings but continues to have to defend the same conduct before two regulators in two different forums simultaneously with all of the attendant damage from two separate cases and the very real possibility of inconsistent results. At the same time, though, the SEC's positions in the Nevada case illustrate some of FINRA's errors. The SEC is not, for example, claiming that the movement of stocks pursuant to a negative consent letter is improper; the NAC Decision asserts that it is. The SEC is claiming that the other movements of stock at issue here constituted unauthorized trading and the federal court is currently considering motions for summary judgment filed by both parties focused on issues of beneficial ownership and imputation of liability.

had not only lied to management but also misappropriated more than $1.3 million. The evidence at the hearing was clear that Mr. Doubek was a dishonest and rogue employee and the NAC's footnoted references utterly failed to engage with the significant factual and legal issues that pertain to the issue of imputation of liability.

The NAC also committed fundamental errors related to its findings of unfair pricing. It misapplied FINRA's 5% Policy, treating this express "guideline, not a rule" as a rigid ceiling rather than one that depended on a host of factors. Then, to manufacture a violation where none existed, the NAC improperly aggregated distinct fees charged for completely different services, conflated "mark-down" with "total compensation," and thereby formulated an artificial "total compensation" figure that exceeded the guideline. Alpine's actual commission rate was 4.5%, well within guidelines. Its market-making fee was 2.5%, also well within guidelines. Each compensated Alpine for different services and should have been evaluated separately for reasonableness, not combined through an analytical approach for which the NAC cited no authority, precedent, or policy justification.

On the critical issue of sanctions, the NAC doubles down on its unsupported conclusions that Alpine failed to relate the $5000 fee to its costs and that Alpine is liable for conversion, and layers on top of that the inappropriate contention that, six years after the events at issue, Alpine should be closed down because it has engaged in prior litigation relating to the interpretation and application of certain statutes and rules. The NAC focused on Alpine's "disciplinary history," which involved litigation of complex statutory issues, as a "key" and "compelling reason to expel Alpine from FINRA membership," expressly and severely penalizing the firm for availing itself of the right to access the courts. The Commission should not only reverse the NAC's conclusion but also send a clear message that it is *not* inappropriate for a firm to assert well-founded legal

arguments that are supported by the firm's experts, auditors and compliance professionals.

These infirmities arise against the backdrop of serious questions concerning FINRA's constitutionality and the validity of an enforcement process that denies fundamental rights to member firms and employs procedures that violate the private non-delegation doctrine.[3] FINRA is a far different entity than its predecessor, the NASD: it has become an enormously powerful and aggressive entity that is no longer self-regulated and conducts itself as a "deputy SEC" while eschewing obligations to provide due process or adhere to the Constitution. It pursues enforcement actions targeting segments of the market and individuals it disfavors, inflicting immediate and irreparable damage on its members, all without prior review or approval from the delegating agency. It forces its members to navigate through years of not just one but two levels of proceedings, overseen not by neutral arbiters but by FINRA's own employees, before a member can finally obtain review outside FINRA. It evades any obligation to abide by Constitutional protections by insisting that it is not engaged in governmental action, while at the same time embracing the benefit of governmental immunity *applicable only to governmental action*, and thereby deprives members of the precise protections that would be available if the same claim was pursued by the SEC. It is not accountable to its members or to the Executive Branch and it is not properly supervised by the delegating agency, at least in relation to its wielding of its power to investigate, prosecute and sanction industry participants.

This case amply illustrates the fundamental lack of fair process that infects every aspect of a member's effort to defend itself. Alpine was not only confronted with these systemic infirmities but also was subjected to a series of rulings that further diminished its ability even to present its

[3] The issues of FINRA's failure to comply with Article II, separation of powers, the Appointments Clause, the private non-delegation doctrine, and protections afforded under the 5th and 7th Amendments of the Constitution remain the subject of the pending FINRA Constitutionality case. *Alpine v. FINRA*, No. 1:23-cv-01506-BAH (D.D.C. 2023).

case or develop a proper record. One of the few protections embedded in FINRA's rules, the right to an in-person hearing, was acknowledged by the Hearing Officer but was then abruptly overridden by a *sua sponte* decision issued by the Chief Hearing Officer Maureen Delaney without consideration of the array of specific factors that rendered a remote proceeding in this case inadequate. That was combined with the Hearing Officer's striking of significant Alpine witnesses on the grounds that they were "cumulative" when in fact it was critical that Alpine provide consistent and substantiated testimony to combat FINRA's misleading narrative and her failure properly to sanction DOE for its withholding of relevant prior statements of its witness.

The Commission should address FINRA's lack of fairness, unaccountability and lawlessness. Even if FINRA is permitted to ignore the Constitution, it should not be permitted to continue to flout the private non-delegation doctrine by initiating and pursuing enforcement actions without *prior* agency approval. Solutions proposed by Commissioner Peirce would prevent FINRA from continuing to damage certain participants in the market and would help to revive financing of microcap and emerging growth companies:

> One option would be to acknowledge that FINRA looks a lot like the SEC and accordingly fold FINRA into the SEC. Alternatively, FINRA could be remade into an organization that is run by the industry it regulates. In other words, FINRA could become a true self-regulator. Competing SROs might emerge to tailor regulation to a particular group of firms, such as smaller broker-dealers. Another option would be to enhance FINRA's public disclosure and procedural obligations. Procedural requirements should include a clear requirement to conduct and document economic analysis and greater procedural protections in connection with disciplinary actions.[4]

[4] Hester Peirce, *The Financial Industry Regulatory Authority: Not Self-Regulation After All,* Mercatus Center of George Mason University, at 27-28 (Jan. 2015) (footnotes omitted).

ARGUMENT

I. THE NAC APPLIED A NARROW AND ERRONEOUS "ACTUAL COSTS" TEST TO DETERMINE FEE REASONABLENESS IN VIOLATION OF ESTABLISHED LAW

A. The NAC Abandoned Decades of Multi-Factor Reasonableness Analysis in Favor of an Unprecedented Single-Factor Test

This proceeding, at its core, presented the issue of FINRA's ability to penalize a firm for imposing what FINRA claims are "unreasonable" fees and charges under FINRA Rules 2121 and 2122. The NAC accepted FINRA's simplistic, unsupported and untenable view that "reasonableness" of a fee is dependent *on just one factor*: the "actual costs" incurred by a firm in performing a particular service. But that formulation appears nowhere in the language, history, or guidance for FINRA Rules 2121 or 2122, is contrary to rational economic policy and would work an insurmountable and confiscatory burden on firms by depriving them of the ability to recoup the dramatically increased legal, regulatory and compliance costs imposed by regulators, particularly on those still willing to participate in the microcap markets.

1. The NAC's Test Contradicts FINRA's Own Guidance and Established Authority

Looking first to the rules themselves, Rule 2121 regarding Fair Prices mandates "consideration [of] all relevant circumstances, including market conditions with respect to such security at the time of the transaction, the expense involved and the fact that he is entitled to a profit, … the expense of executing the order and the value of any service he may have rendered by reason of his experience in and knowledge of such security and the market therefor."

The Supplementary Material continues by listing relevant circumstances that should be considered in relation to pricing.

> Some of the factors which the Board believes that members and the Association's committees should take into consideration in determining the fairness of a mark-up are as follows:

(1) The Type of Security Involved
Some securities customarily carry a higher mark-up than others. For example, a higher percentage of mark-up customarily applies to a common stock transaction than to a bond transaction of the same size. Likewise, a higher percentage applies to sales of units of direct participation programs and condominium securities than to sales of common stock.

(2) The Availability of the Security in the Market
In the case of ***an inactive security, the effort and cost of buying or selling the security, or any other unusual circumstances*** connected with its acquisition or sale, may have a bearing on the amount of mark-up justified.

(3) The Price of the Security
While there is no direct correlation, the percentage of mark-up or rate of commission generally increases ***as the price of the security decreases***. Even where the amount of money is substantial, ***transactions in lower priced securities*** may require more handling and expense and may warrant a wider spread.

(4) The Amount of Money Involved in a Transaction
A transaction which involves ***a small amount of money*** may warrant a higher percentage of mark-up to cover the expenses of handling.

(5) Disclosure
Any disclosure to the customer, before the transaction is effected, of information which would indicate (A) the amount of commission charged in an agency transaction or (B) mark-up made in a principal transaction is a factor to be considered. Disclosure itself, however, does not justify a commission or mark-up which is unfair or excessive in light of all other relevant circumstances.

(6) The Pattern of Mark-Ups
While each transaction must meet the test of fairness, the Board believes that particular attention should be given to the pattern of a member's mark-ups.

(7) The Nature of the Member's Business
The Board is aware of the differences in the services and facilities which are needed by, and provided for, customers of members. If not excessive, the cost of providing such services and facilities, particularly when they are of a continuing nature, may properly be considered in determining the fairness of a member's mark-ups.[5]

[5] FINRA Rule 2121 (Emphasis added).

Regulatory Notice 08-36 also underscores that pricing should take into account the "expense of executing the order and the value of any service [the firm] may have rendered by reason if [its] experience in and knowledge of such security and the market therefore."

FINRA's guidance also explicitly recognizes that "the 5% Policy" is not a rule intended to "impose a maximum ceiling and to limit all mark-ups to five percent" and has highlighted the various circumstances that justify higher fees. FINRA Notice to Members 13-07 states that "inactive or infrequently traded" securities and trades for "small amounts of money" will "warrant a higher percentage of markup, markdown or commission" (emphasis added). Similarly, Notice to Members 08-36 recognizes that a firm's "experience in and knowledge of such securit[ies] and the market" is a basis for higher commissions. FINRA Rule 2121 Supplementary Material .01(b)(7) further provides that different or additional "services and facilities which are needed by, and provided for, customers" may warrant commissions exceeding 5%.

Alpine's trading fits squarely within the guidance regarding higher prices. Joseph Walsh testified extensively about the absence of normal market infrastructure for these securities. Many had "no market makers listed" and existed in "caveat emptor status," meaning "there's no market making and no quotes on that stock."[6] This lack of market infrastructure meant that even determining a current price was difficult if not at times impossible. Alpine's customers, who were generally engaged in small cap financing, were aware of these challenges. When asked about GrowLife shares in his account, Laurence Rosen acknowledged they were "thinly traded" and "difficult to sell," explaining that "there was a certain select group of market-makers that kind of controlled that stock and if you tried to sell a lot of shares at once, you would depress the market."[7]

[6] Tr. 3506, 3543 (Walsh) (RA 008039, 008076).

[7] Tr. 854 (Rosen) (RA 003197).

Even when buyers could be found, executing normal-sized trades would crater the stock price, requiring Alpine to break positions into smaller pieces and sell them "slowly, over time."[8]

These were among the concepts that formed the basis for Alpine's written fee policy which was provided by Alpine to FINRA in 2017.[9] The policy explained that "many items related to AML, BSA, and other regulatory compliance...generate costs, but are difficult or in certain cases not able to be allocated to a service" and that while "some fees and charges are priced less than costs...others may be priced far above the average due to market forces."[10] Alpine's fee policy concluded that "many activities may result in risk premium costs 2-5 years after the occurrence of the activity itself" making granular cost allocation not merely impractical but meaningless.[11] As Alpine documented: "It is not reasonable or even useful to specifically allocate each direct . . . cost to a specific activity. [The] [c]osts environment is dynamic, not static. Costs and risk continue to change as well as the revenues generated by such activity"[12] A firm is often unable to allocate those operational, regulatory, personnel and legal "actual costs" to its individual customers. It can only view those expenses – expenses that constitute the bulk of its operating costs – as being related to the service that it performs of handling customer liquidations and seek to recoup those amounts through a fee that is imposed on a customer that seeks to maintain an account at the firm.

At no time did FINRA respond to Alpine that its articulation of its fee policy was improper.

2. The NAC's Citations Do Not Support Its Narrow "Actual Costs" Rule

In its Decision, the NAC insists that its one-factor rule is based on well-settled authority; in fact, there is no authority or prior decision that applied such a limited analysis in this context of

[8] *Id.*

[9] RX-64 (RA 015687).

[10] *Id.* at 8 (RA 015694).

[11] *Id.* at 9 (RA 015695).

[12] *Id.*

a firm's effort to address escalating compliance, legal and regulatory costs. The NAC cites as support for its rule snippets from Notices to Members and from FINRA AWCs, none of which involved any meaningful discussion of the supposed rule applied by the NAC or establish that the reasonableness of any and every charge depends on only one issue: proof of "actual costs." Contrary to the NAC's citation, NASD Notice to Members 92-11 from thirty years ago did not state that, in every instance, a fee must correspond to the "actual costs." It discussed the basic notion of reasonableness and focused on the critical issue of adequate *notification* "at least 30 days prior to the implementation or change of any service charge." It then referenced charges being imposed *for ACATs,* expressing "concern" about members charging amounts for ACATs "unrelated to account transfers." Certainly that Notice could have articulated some broader rule; it did not. It said that ACAT fees should correspond to ACAT costs, a far cry from saying that all fees are limited to some "actual cost."

The NAC also cites to a 2012 Priorities Letter which, in one segment on page 7 of the 21-page letter, expressed concern about "hidden, mislabeled and excessive fees" and again emphasized the importance of *disclosure* of fees to customers *"so that retail investors can make informed investment decisions*."[13] It then stated that "charges must be reasonable and related to the services performed" and it mentioned settled cases involving "postage and handling charges that were unrelated to actual costs."[14] Again, the notion that a postage charge should reflect postage costs does not address the issues presented in relation to broader issues of regulatory, compliance and legal costs and business risks and it certainly does not convey that those substantial and escalating costs cannot form the basis for a fee pertaining to the firm's processing of microcap

[13] NAC Decision at 35 (RA 016027); FINRA, *2012 Annual Regulatory and Examination Priorities Letter*, at 7 (Jan. 31, 2012), https://www.finra.org/sites/default/files/Industry/p125492.pdf (emphasis added).

[14] FINRA, 2012 Annual Regulatory and Examination Priorities Letter, at 7 (Jan. 31, 2012), https://www.finra.org/sites/default/files/Industry/p125492.pdf (emphasis added).

trades.[15]

The NAC's references to FINRA's prior statements regarding ACATs and postage charges do not support the rule it espouses that the only factor that may considered in relation to pricing is the "actual" cost attributable to a specific service. Had FINRA wanted to convey such a rule, it could have done so properly or at least issued clear guidance rather than burying it in obscure materials; it did not. As it is, its contention flies in the face of FINRA's actual provisions, is at odds with the inherent import and purpose of a "reasonableness" standard and is destructive to business.

3. The NAC Ignored Established Economic and Legal Principles Governing Reasonable Pricing

The NAC's "actual costs" test abandons decades of economic theory and legal precedent requiring comprehensive analysis of fee reasonableness. Courts, economists, and FINRA itself have long recognized that reasonable pricing must account for market conditions, business risks, indirect costs, and the economic realities of providing specialized services—not merely direct, out-of-pocket expenses.

This error is particularly egregious in the microcap securities market, where escalating regulatory costs and compliance risks have driven most firms to exit. By limiting fees to direct costs only, the NAC creates an economically irrational rule that will force firms to operate at a loss or abandon the market entirely, harming the investors FINRA claims to protect.

a. Economic Principles Support Multi-Factor Analysis, Not "Actual Costs" Only

The NAC's "actual costs" rule is inappropriate if not disastrous for businesses who have

[15]The NAC also cites AWCs dating back to 2012 and 2015. Such settlement documents contain only FINRA's assertions, are not routinely viewed by industry participants and do not even rise to the level of guidance which itself should *not* be considered as evidence of any actual law or policy. *See* Executive Order 13891, 84 Fed. Reg. 55235 (Oct. 15, 2019) (promoting the rule of law through improved agency guidance documents); U.S. Dep't of Justice, Justice Manual § 1-19.000 (limiting issuance of guidance documents); Cong. Rsch. Serv., LSB10591 (2021) (discussing limitations on agency guidance).

substantial expenses that are not, at least in FINRA's view, attributable to particular services. In fact, using only the factor of "actual" or out of pocket costs as the criteria for fees is contrary to the most basic economic approaches to the issue of pricing. From a traditional pricing perspective, analysis may *begin with* but does not end with computation of marginal costs.[16] A failure to understand and account for "real" costs associated with a product or service will lead to poor outcomes and business failure.[17]

The better method of pricing in an industry that provides specialized services is activity-based costing ("ABC"), a method of accounting for and allocating overhead and indirect costs to a product or service. Through this method, the firm analyzes its activities, or units of work, that facilitate the provision of the product or service and allocates those to the services that it performs.[18] This type of analysis was discussed in the context of the SEC's authority to assess what constitutes a "fair and reasonable" fee under Section 6(b) of the Exchange Act. In connection with consideration of proposed rules concerning the pricing of services offered by exchanges, Nasdaq submitted statements from two economists who addressed the two critical components of the analysis of the "reasonableness" of those prices.[19] Those economists explained that a focus on "marginal" or incremental costs was an erroneous approach where the service or product is the

[16] Harvard Business School, Pricing: Design and Implementation, May 3, 2000. *See also* Kaplan and Anderson, Time Driven Activity Based Costing, Nov. 2004 (noting that where firm had "low volume and high variety" products, company implemented price increase and minimum order size); Vasilic, Use of Activity-Based Costing in Pricing Decisions, presented at 11th International Days of Statistics and Economics, Prague, Sept. 14-16, 2017; Activity-Based Costing Definition, https://www.accountingtools.com/articles/activity-based-costing ("An ABC system can sort through additional overhead costs and help you determine which customers are actually earning you a reasonable profit.").

[17] *See* Hinterhuber, Andreas, *Six pricing myths that kill profits*, Kelley School of Business ("Sixty years ago, Jules Blackmun, a professor at Columbia Business School, observed: "**The graveyard of business is filled with the skeletons of companies that attempted to base their prices solely on costs.**").

[18] This is precisely the methodology that was explained by John Hurry in his testimony. Tr. 4403-4436 (John Hurry) (RA 009128-61).

[19] Letter of Jeffrey S. Davis to Brent Fields, dated February 13, 2019, available at: https://www.sec.gov/comments/4-729/4729-4930892-178427.pdf.

result of other "joint and common costs."[20] Those experts also emphasized the critical factor of competition in the marketplace which inherently constrains pricing and ensures that the pricing is accepted only by those who consider it "reasonable." Such competitive constraints foreclose the possibility of supra-competitive pricing and ensure that fees are reasonable while also protecting investors and the public interest and avoiding unnecessary or inappropriate burdens on competition."[21]

A similar and thoughtful economic analysis was applied by the Supreme Court in *Verizon Communications v. FCC*, 535 U.S. 467, 479 (2002). There, the Supreme Court discussed at great length the factors associated with rate and price setting, including the different approaches to calculation of "costs," in deciding whether rates set by a telecommunication carrier were "just and reasonable." In the process, the Court also acknowledged that the process of determining a "just and reasonable" rate must take into account not only the interests of consumers but also the avoidance of "unconstitutional confiscation" of property.[22]

On this issue of economic approaches to the issue of pricing, the NAC claims that it "pass[es] no judgment on "methods of pricing" aside from comparison to "actual costs" and "does not with this decision pass any judgment on the ability of FINRA members to charge an all-encompassing account fee for its services or the reasonableness of any sum charged for such services."[23]. But by virtue of the rule that it applies throughout the decision, the NAC is passing judgment and foreclosing those other methodologies. Alpine offered abundant testimony regarding

[20] *Id.* at 9.

[21] *Id.* at 15-16.

[22] *Verizon Communications v. FCC*, 535 U.S. 467, 523-528 (2002) (holding that regulatory determination of "just and reasonable" rates can present a "serious constitutional question whether a methodology so divorced from actual investment will lead to a taking of property in violation of the Fifth (or Fourteenth) Amendment").

[23] NAC Decision at 42-43 (RA 016034-35).

its analysis of its costs that were escalating due in large part to regulatory burdens in the microcap sector. In response, the NAC ignored that evidence and mechanically repeats over and over that a fee is reasonable only if it corresponds to actual costs. The NAC may claim that it is not rejecting other reasonable views of pricing but it clearly is and, going forward, a firm can only satisfy the NAC's test if it can demonstrate that its fees are a reflection of "actual costs."

And that ruling would only worsen the circumstance already created by FINRA as it has aggressively pursued firms that operate in the microcap sector: firms will continue to go out of business, customers will be unable to find firms that will handle the sale of microcap stock, and the investors that had previously been willing to provide financing to start-up companies will decline to do so, leaving those companies with no choice but try to get the support of venture capital and then cede ownership and control to those larger investors and the entities that they represent.

b. The *Mobile-Sierra* Doctrine and Contract Principles Apply to Fee Agreements

The Decision does consider one issue raised by Alpine, the *Mobile-Sierra* doctrine, but misstates its import and its applicability to these facts. That doctrine is a critical corollary to the authority conferred on regulators to determine whether a rate or fee is "just and reasonable." Established by the Supreme Court in 1956, the doctrine holds that a tribunal must apply the "venerable" precept that rates set in freely negotiated contracts must be presumed to meet the "just and reasonable" standard.[24] The Court specifically addressed "the question of how the Commission may evaluate whether a contract rate is fair and reasonable" and emphasized that the regulatory system "contemplates abrogation of contracts only in circumstances of unequivocal public

[24] *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008).

necessity."[25]

The NAC dismissed the doctrine as inapplicable, concluding without any basis that it is "limited to issues concerning the Federal Energy Regulatory Commission's authority to regulate freely negotiated contracts under the Federal Power Act."[26] According to the NAC, Alpine did not present "compelling arguments as to why the *Mobile Sierra* doctrine should be applied" in the context of securities regulation. Of course, respect for contract is a compelling basis for the doctrine, even in the securities industry, but also Alpine demonstrated that the *Mobile-Sierra* presumption has been properly applied not only in relation to securities regulation but also in the specific context of FINRA Rule 2122. In *GT Sec. Inc. v. Klastech GmbH*, the parties had agreed to a particular fee in relation to the sale of a business, and the defendant sought to avoid having to pay the fee, arguing that it was "unreasonable" within the meaning of FINRA Rule 2122.[27] The court, operating on the assumption that Rule 2122 applied, noted that the minimum payment that had been agreed upon was justified by both the "substantial effort" and the risk associated with the project.[28] The court then turned to the "general principle" that "courts defer to freely negotiated contract provisions that are 'the product of an arms-length transaction between sophisticated businessmen, ably represented by counsel.'"[29] The court declined to set aside an agreement based on the "broad standard of reasonableness" contained in FINRA Rule 2122.[30]

The NAC's *ipse dixit* declaration that these authorities are not applicable to the issues in this case runs counter to law and logic. Alpine's customers agreed to the fees that Alpine charges

[25] *Id.* at 533-34.

[26] NAC Decision at 39 n. 107 (RA 016031).

[27] *GT Sec. Inc. v. Klastech GmbH*, 2015 U.S. Dist. LEXIS 64107, at *23-24 (N.D. Cal. May 15, 2015).

[28] *Id.* at *27.

[29] *Id.*

[30] *Id.* at *27-28.

and any customer can decide whether to accept Alpine's offered services or go down the street to another firm. In countless contexts, whether a credit card, a bank loan or even an apartment rental, consumers agree to contracts and are bound by them; those agreements are not and should not be lightly set aside. An Alpine customer should not be able to receive and sign an account agreement, avail itself of the services provided by the firm and then declare that it need not pay the fully disclosed price for those services.

4. The NAC's New Standard Constitutes Impermissible Rulemaking Without APA Compliance

Where, as here, a new standard is devised by a regulator, it constitutes a revision of the rule and cannot be affected without compliance with the APA.[31] All proposed SRO rule changes must both be filed with the SEC, *and* (with certain limited exceptions not applicable here) approved by the SEC, *after* interested persons are given an opportunity to comment.[32] And an "interpretation" of a rule by an SRO, including FINRA, constitutes a rule change under applicable law unless it is "reasonably and fairly implied by that rule." [33]

The Tenth Circuit's decision in *Gen. Bond & Share Co. v. SEC* underscores this point, holding that an interpretation that "sets forth a new standard of conduct for its members" must be submitted to "the SEC prior to enforcing it," no matter how "commend[able] NASD's goal."[34] "Because no such interpretation was filed with the SEC prior to the disciplinary proceeding below, we conclude that the enforcement of the rule against General Bond was contrary to 15 U.S.C. §

[31] *See Farrell v. Blinkin*, 4 F.4th 124 at *30 (D.C.Cir. 2021) ("The imposition of such haphazard and shape shifting administrative requirements is the very definition of arbitrary and capricious agency action.").

[32] *See* 15 U.S.C. § 78s(b)(1).

[33] 17 C.F.R. § 240.19b-4(c) and (d) (indicating that an interpretation of a rule by an SRO is a "rule change" unless it is "reasonably and fairly implied by that rule").

[34] *Gen. Bond & Share Co. v. SEC*, 39 F.3d 1451, 1460 (10th Cir. 1994).

78s(b)(1) and is therefore invalid."[35]

A similar issue arose in an action filed by the New York Stock Exchange and others based on the SEC's attempt to limit order flow fees, rebates and other revenue. The SEC had established what it called a "pilot program" to limit the exchanges' receipt of revenue, arguing that it was entitled to move forward with that program rather than complying with requirements of the APA including notice, comment, study and proper cost-benefit analysis. In June 2020, in a decision that illustrates the analysis that should apply to constraints on pricing, the D.C. Circuit held that the SEC had exceeded its authority and vacated the rule,[36] holding that regulation of transaction fees must be within the scope of the agency's authority, must not be arbitrary or capricious, and must have undergone proper consideration of the need for the rule and its impact on competition.[37] Before a rule is implemented, the Commission must have engaged in "reasoned decision making;"[38] it must confirm that the rule is "necessary or appropriate in the public interest, for the protection of investors and for the maintenance of fair and orderly markets,"[39] and must make determinations about the economic implications of the rule including its effects on efficiency, competition and capital formation."[40]

In response to this point, the NAC uses a line from the testimony of Alpine's Board Member, Richard Nummi, to argue that Alpine was "familiar with the requirement that its fees be reasonably related to its 'actual' costs."[41] That is not, of course, the relevant standard by which to

[35] *Id.* at 1458.

[36] *New York Stock Exchange LLC v. SEC*, 962 F.3d 541 (D.C. Cir. 2020) (vacating SEC's Transaction Fee Pilot as exceeding statutory authority and violating APA requirements)

[37] *Id.* at 553.

[38] *Id.* at 558-59.

[39] *Id.* at 558 (citing 15 U.S.C. § 78c(f)).

[40] *Id.* at 553, 558 (citing *Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005)).

[41] NAC Decision at 39 (RA 016031).

determine if a rule interpretation requires compliance with the APA. Further, Mr. Nummi's testimony does not support the view that Alpine understood that the reasonableness of its fees was subject to a *one-factor analysis* of cost as opposed to the array of factors that have been identified as relevant even by FINRA. In its cherry picking of Mr. Nummi's testimony, the NAC completely ignores the significance and substance of the evidence provided by Alpine's attorney and Board Member who evaluated and then implemented the fee.[42]

The NAC, in the end, concluded that its rule that costs constitute the *only* factor in assessing the reasonableness of fees did not require compliance with the APA because its interpretation is "fairly and reasonably implied by the rule."[43] To support that position, the NAC rehashes the same citations that it used to support the existence of such a rule – authorities that reference costs as a factor but do not support the abandonment of the many other factors that FINRA has cited as bearing on the issue. The NAC's edict in this case that the reasonableness of a fee is evaluated only by reference to "costs" is a new, unsupported and unworkable rule.

B. The NAC Misapplied Its Erroneous Test to Alpine's Evidence

While Alpine disagrees that costs are the only relevant factor in relation to the reasonableness of fees and charges, the evidence demonstrated that Alpine undertook and applied the analysis that the NAC repeatedly said is necessary to justify its fees. The NAC's conclusion that the $5000 fee was unreasonable hinged on its insistence, repeated and relied on heavily throughout the brief, that Alpine imposed the $5000 fee *only* to close accounts and *did not provide*

[42] Tr. 2681 (Nummi) (RA 006051) (Nummi testified that he understood his role as a board member was to ensure the firm was operating in compliance with SEC and FINRA rules); Tr. 2719-21 (Nummi) (RA 006089-91) (Nummi testified that the $5,000 fee would be permissible so long as it was correlated to costs, acknowledged that Alpine's substantial legal and compliance costs had not been passed on to customers, and indicated that he directed management to consider those unrecouped costs in relation to the $5,000 fee); Tr. 4667-68 (Brandt) (RA 009446-47) (heard about the $5000 fee from Nummi and it "was handed to me as a matter of fact from a board member"); Tr. 4768 (Brandt) (RA 009547) (discussion with Nummi regarding fee).

[43] NAC at 40.

evidence of costs that related to services that it performed.[44] The NAC's conclusion that Alpine did not seek "to relate the $5,000 monthly account fee to any specific service that Alpine supplied to customers or to allocate to the fee any specific direct or indirect costs"[45] improperly ignores the extensive evidence presented by Alpine regarding its mounting business costs and the fee's relationship to those costs.

The evidence established that, beginning in 2017, Alpine and its Board undertook a comprehensive analysis of its expenses precisely so that it could determine the amount that it needed to charge customers given the regulatory and operational obligations and mounting costs associated with the services that it provided to its customers. After joining Alpine's Board in 2017, Richard Nummi, a securities attorney and former SEC lawyer, conducted a comprehensive review of all aspects of Alpine's business operations including its costs and expenses, its staffing, changes in compliance and regulatory requirements, operational and legal risks, and its revenue.[46] The Board documented issues related to costs per account, regulatory and legal risk, compliance costs, operational costs and accounting costs.[47] It considered the extensive hardware, software, and storage costs that Alpine incurred for account record compliance.[48] It found that "BSA/AML costs and servicing associated with being a clearing firm and the responsibilities thereof entails higher staffing and outside legal cost."[49] As John Hurry explained, in the wake of the SEC's AML case, "the biggest cost was how are you going to do the AML for all of these [accounts]."[50]

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[44] *See, e.g.*, NAC Decision at 12-15, 35-43, 47-48, 83 (RA 016004-07, 016027-35, 016039-40, 016075).

[45] NAC Decision at 13 (RA 016005).

[46] Tr. 2681-2694 (Nummi) (RA 006051-64); RX-161 (RA 014009); RX-162 (RA 014011)

[47] RX-64 at 2 (RA 015688)

[48] Tr. 1785 (Frankel) (RA 004275).

[49] RX-64 at 8-9 (RA 015694-95).

[50] Tr. 4386 (Hurry) (RA 009111).

Alpine's analysis also referred to the "Special costs and servicing associated with being a clearing firm such as re org risks or fails to deliver and noted "that maintaining accounts required "multiple people" for tasks including "review[ing] and retain[ing] correspondence" and handling "unique AML and accounting risks."[51] Alpine reviewed and considered the personnel cost associated with these regulatory issues; the firm's *monthly* employee salaries exceeded $200,000[52] and Christopher Frankel confirmed that Alpine employees spent "well over half of that time...responding to regulatory-oriented items."[53] Alpine also was "saddled with the expense and exposure arising from thousands of inactive and orphaned accounts abandoned by" failed correspondent firms.[54] These accounts had little activity, paid no fees, and generally accrued unpaid debits owed to the firm.[55] The firm's and the Board's examination of those issues was not a one-time event but rather an ongoing process in 2017 and 2018; Nummi testified that Alpine's operations were a serious concern for the Board and that the Board considered these issues "on a regular basis."[56]

And Alpine's loss of its ex-clearing relationships in April 2018 made difficult matters worse. Its trading capacity was severely constrained by NSCC deposit requirements[57] and so Alpine could no longer service the volume of accounts it previously maintained or engage in the same level of trading. As discussed in the firm's analysis, "NSCC DTCC costs/calls" were

[51] RX-64 at 2 (RA 015688).

[52] JX-24 at 8, Item 4040 (RA 014562).

[53] Tr. 1788:10-15 (Frankel) (RA 004278.

[54] Tr. 1078:20-1079:25 (Jungling) (RA 003421-22) (acknowledging thousands of orphan accounts and costs to Alpine); Tr. 1150:24-1151:23 (Tew) (RA 003493-94); Tr. 3084 (Doubek) (RA 007493); Tr. 3472:10-3474:24 (Walsh) (RA 008005-07); Tr. 1785, 1788 (Frankel) (RA 004275, 004278) (extensive hardware, software, and storage costs for account record compliance and costs associated with "thousands of abandoned or orphaned accounts"). The record reflects that regulators took no action to protect the customers of those firms that closed, leaving it to Alpine to deal with the impact of those closures on customers.

[55] *Id.*

[56] Tr. 2663 (Nummi) (RA 006033).

[57] Tr. 1646-47 (Frankel) (RA 004136-37).

"substantial (requires owners to reserve millions in capital for potential calls or mistakes)" with "DTC charges [that] can be as high as $100K per month."[58] As a result of the costs imposed by NSCC, as Richard Nummi testified, “the business [fell] off a cliff.”[59]

The firm also considered industry practice and the fact that other similar firms had established minimum fees of as much as $25,000 per month.[60] Mr. Hurry testified that "a lot of financial firms today, if you don't have a million dollars with them or in some cases if you want to go to Fidelity and you want a family office account...the minimum is $250 million" and "a lot of brokerage firms today have million dollar minimums” because "if they are not making 100 grand a year on your account, they cannot service your account, given the level of service that particular firm is doing."[61] He also confirmed that which is implicit in FINRA’s own guidance: Alpine's business differed dramatically from discount brokers and required higher fees because of its highly technical, high-touch services including specialized attorneys, trading personnel, and compliance staff.[62] And, Mr. Hurry emphasized, Alpine’s situation was critical: absent immediate action, "the firm could have been broke and thousands of customers could have been trapped in there for years. Not to mention the fact that employees would lose their jobs."[63] Based on all of these circumstances, the Board considered even higher amounts, similar to competitors and others in the industry, but determined that $5,000 was commensurate with Alpine's costs per account.[64]

Customers were also aware of escalating costs driven by aggressive regulatory activity in

[58] RX-64 at 8 (RA 015694).

[59] Tr. 2708 (Nummi) (RA 006078).

[60] Tr. 3051-52 (Doubek) (RA 007460-61); Tr. 4547 (John Hurry) (RA 009272).

[61] Tr. 4549-4550 (John Hurry) (RA 009274-75)

[62] Tr. 4548 (John Hurry) (RA 009273).

[63] Tr. 4439 (John Hurry) (RA 009164).

[64] Tr. 4389-90 (Hurry) (RA 009114-15). This fee was intended to be a minimum level of account activity that a customer would need to engage in each month in order for Alpine to be able to maintain that account in view of costs and risk that Alpine faced

the microcap area. Randy Jones testified that he explained to customers that the fee "was an outgrowth of the additional expense and cost" Alpine faced and customers responded that they understood the increased costs facing Alpine and did not object to the fee.[65] Robert Tew also testified that management felt that the charging the fee was unavoidable [66] and that, after explaining Alpine's costs to one customer (such as high IT hardware and software costs), the customer apologized for complaining and agreed to work with Alpine to close his account.[67]

The firm's fixed and common costs, often attributable not to any single customer or account but to the nature of the business and the intensive regulation of microcaps, were increasing. Alpine had to consider ways in which to both limit those expenses *and* ensure that the amounts charged to remaining accounts were commensurate with its costs. In the context of the hearing, Alpine well knew that FINRA's case was focused on its costs and Alpine elicited evidence regarding its costs and financial challenges from virtually every witness. That evidence directly contradicts the NAC's conclusion, a cornerstone of its Decision, that Alpine provided only "vague and conclusory"[68] claims about costs.

The error of the NAC's conclusion concerning the $5000 fee is illustrated by its reversal of the Hearing Panel's conclusion as to the other fees that FINRA claimed were unreasonable. In relation to the illiquidity fee, for example, the NAC properly acknowledged that Alpine's fees related to services that were performed for the client and that those services involved costs and expense to the firm.[69] Notably, the NAC made clear that it was not actually assessing whether the

[65] Tr. 2075-78 (Jones) (RA 005293-96).

[66] Tr. 1129 (Tew) (RA 003472).

[67] Tr. 1154:11-21 (Tew) (RA 003497).

[68] NAC Decision at 42 (RA 016034).

[69] *Id.* at 43-44 (RA 016035-36).

charge imposed by Alpine was a dollar-for-dollar reflection of its costs.[70] And the NAC's view of the Certificate Withdrawal Fee was based on the same approach:[71] it confirmed that the fee in fact pertained to a service[72] and that related costs were incurred by the firm.[73] Thus, at least in these instances, the NAC employed a more rational and appropriate analysis, focusing on the fact that a fee pertained to customer services and that those services involved a cost to Alpine.

II. THE NAC FABRICATED UNFAIR PRICING, IGNORING THE NATURE OF ALPINE'S BUSINESS, AND IMPROPERLY AGGREGATING DISTINCT FEES

Undisputed evidence presented by Alpine witnesses established that, prior to August 2018, Alpine routed customer orders away to third-party market makers *that would charge the customer a markdown on the trade*.[74] As of 2018, Alpine determined that customers and the firm would benefit if, when possible, it executed the trades itself and charged a disclosed fixed, 2.5% markdown, [75] well below what customers were being charged by the third-party market makers.[76] As Mr. Frankel and Mr. Jones explained, all the charge did was *shift to Alpine the percentage that third party market-makers had charged* before Alpine established the ability to handle market making.[77]

The NAC ignored that reality and instead added that mark-down to Alpine's other charges to generate a supposed "total compensation" figure above 5%. It then declared that aggregated amount "unfair" and cited it as an "independent" basis for expulsion. To support this aggregation

[70] *Id.*

[71] *Id.* at 44-45 (RA 016036-37).

[72] *Id.*

[73] *Id.*

[74] Tr. 1695:15-24 (Frankel) (RA 004185); *see also* JX-8 at 3 (RA 014209).

[75] JX-4 (RA 014193).

[76] Christopher Frankel explained that the small cap trading environment led to extreme pricing by the few market makers willing to handle these securities. He testified that outside market makers "tried to rip people's heads off and make, you know, 4 or 5 percent, 6 percent even," with spreads varying dramatically "according to the security" Tr. 1697 (Frankel) (RA 004187).

[77] Tr. 1695:15-24 (Frankel) (RA 004185); Tr. 1697:5-24 (Frankel) (RA 004187); Tr. 2175:4-2176:5 (Jones) (RA 005393-94).

approach, the NAC employs incorrect terminology, treating the term "mark-down" as if it were the same as the NAC's misleading computation of "total compensation." For example, the NAC states: "The Hearing Panel did not err by including the market-making fee in Alpine's mark-downs for purposes of applying the 5% Policy."[78] In fact, the market making fee *was* Alpine's markdown, it was not included "in" the mark-down. The NAC also inaccurately describes Alpine's position: "Alpine argues that, even when the market-making fee is included, *its mark-downs* were reasonable under the circumstances of these transactions."[79] And it persists in lumping commissions, fees, charges and mark-downs together and calling the total a "mark-down:" "when a firm charges its customer more than *a 5% mark-down*, the firm 'must be fully prepared to justify its reasons for the higher . . . mark-down with adequate documentation.'"[80]

But Alpine never charged "more than a 5% mark-down;" its mark-down was 2.5%.

And Alpine's 2.5% market-making fee was not only reasonable but below market. Alpine presented unrebutted evidence that outside market makers charged between 2.5% and 6% for executing trades in these securities. By bringing these services in-house—hiring dedicated staff and building infrastructure—Alpine aimed to "recapture the spread that kind of heretofore had been . . . captured by firms where we sent the order flow out to" while also providing customers with better pricing.

To address Alpine's objections to the fee aggregation, the NAC claims that "Alpine appears to confuse the mark-down with net profit. It is 'well-established that the . . . mark-down in a retail securities transaction is the difference between the price at which the firm . . . buys the securities

[78] NAC Decision at 61 (RA 016053).

[79] *Id.* at 62 (emphasis added) (RA 016054).

[80] *Id.* at 61 (RA 016054).

from the customer . . . and the prevailing market price.'"[81] The NAC then cites various cases for the proposition that a firm's costs cannot be excluded when calculating its mark-down.[82] The NAC's discussion entirely misses the point. Alpine did not argue that it could impose a higher markdown *because of its costs*. Alpine's mark-down was 2.5%, period. The cases cited by the NAC including *DMR Securities,* which dealt with firms trying to exclude costs from their mark-up calculations, are therefore inapposite.

The NAC's unfair pricing analysis fails under any framework. If fees must be aggregated—despite the lack of authority for such an approach—then Alpine's supposed "average commission of 8.75%"[83] falls well within the reasonable range for the specialized compliance and extensive manual processing necessary to accomplish the sale of the illiquid and low-priced securities that Alpine handled. FINRA's own guidance explicitly recognizes that "inactive or infrequently traded" securities traded in "small amounts of money" warrant compensation exceeding 5%,[84] and Alpine presented unrebutted evidence that its customer's securities often had no market makers, existed in caveat emptor status, and required extraordinary efforts to execute.[85]

Alternatively, if fees are properly analyzed separately—as they must be when they compensate for distinct services—then each component is unquestionably reasonable: Alpine's 4.5% commission falls below the 5% guideline, and its 2.5% market-making fee represents the low end of the 2.5% to 6% range that outside market makers charged for the same service.[86] Under

[81] *Id.* at 60-61 (RA 016052-53).

[82] *Id.*

[83] *Id.* at 18 (RA 016010).

[84] Financial Industry Regulatory Authority (FINRA). (2013, February). *Notice to Members 13-07: Fair Prices and Commissions* (Regulatory Notice). https://www.finra.org/sites/default/files/NoticeDocument/p197796.pdf. S*ee also* Financial Industry Regulatory Authority (FINRA). *Rule 2121: Fair Prices and Commissions*, Supplementary Material .01(b)(2), (4). FINRA Manual. https://www.finra.org/rules-guidance/rulebooks/finra-rules/2121

[85] *See* Tr. 3506, 3543 (Walsh) (RA 008039, 008076); Tr. 854 (Rosen) (RA 003197).

[86] Tr. 1697 (Frankel) (RA 004187).

either analysis, Alpine's fees were justified by market conditions, fully disclosed to customers, and constituted reasonable compensation for services in the microcap market that most firms had abandoned as too complex and risky.[87]

III. THE NAC ERRONEOUSLY CONCLUDED THAT ALPINE MISUSED AND CONVERTED CUSTOMER FUNDS AND SECURITIES

The NAC's conversion analysis ignores established law, bootstraps its flawed fee analysis into a separate violation carrying the harshest possible sanction, and attributes to Alpine the conduct and intent of a decidedly dishonest and rogue employee. Each of the NAC's conversion theories—whether based on fee collection, worthless securities designation, or escheatment preparation—fails as a matter of law and fact.

A. The NAC Endorsed an Improper Definition of Conversion that Conflicts with Decades of Precedent

To reach its conclusions, the NAC employed a definition of conversion that eliminates the critical element of that offense that distinguishes it from a lesser offense of misappropriation: the intent to deprive the owner of the use and benefit of the property. According to the NAC, "we need not determine that Alpine intended to permanently deprive its customers of their assets to find that the firm engaged in conversion."[88] Intent and use of the property, the Decision says, is irrelevant: "We also need not find that Alpine used or disposed of customer assets for its own benefit to find that it converted customer securities and funds."[89] Therefore, the NAC concluded, the argument that Alpine had no intent to deprive the customer of property and in fact returned the securities to customer accounts "does not negate a finding that the firm engaged in conversion."[90] According

[87] Tr. 2711:4-2716:10 (Nummi) (RA 006081-86).

[88] NAC Decision at 49 (RA 016041).

[89] *Id.*

[90] *Id.*

to FINRA, even a custodial or a momentary movement of stock is enough to establish not only misuse but also conversion and support closure of the firm.

It is improper, in the first instance, for FINRA to concoct its own definition of conversion, inconsistent with the established and traditional elements of that offense, and then use it to employ its harshest sanction, the corporate death penalty.[91] Even FINRA's decisional authority does not support the position that a charge of conversion lies based on nothing more than movement of property. Rather, the conversion cases demonstrate far more egregious, fraudulent conduct deployed to obtain access to assets *and then use them for an undisclosed and unauthorized purpose*.[92] The NAC's dilution of the offense of conversion should be reversed.

B. The NAC's Three Theories of Conversion Each Fail as a Matter of Law

The NAC applied its watered-down definition of conversion as the foundation for three separate theories of liability against Alpine: that Alpine converted assets by collecting fees later deemed unreasonable; by moving securities to a worthless account even where Alpine had sent a negative consent letter to the customer; and by preparing securities for state escheatment. In each instance, Alpine acted pursuant to disclosed policies, reversed any questioned transactions, and *never* deprived customers of their property. Most critically, none of these actions involved the essential elements of conversion: the intentional exercise of dominion over customer property inconsistent with ownership rights.

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[91] Alpine Mot. for Summ. Disposition (Jan 10, 2020) at 20 (RA 001361); Order Denying Alpine Mot. For Summ. Disposition (Jan. 27, 2020) at 7 (RA 001651).

[92] *See, e.g., DOE v. Michael J. Clarke*, Discip. Proc. No. 2016050938301, 2020 FINRA Discip. LEXIS 42, at *21-23 (NAC Sep. 17, 2020) (representative who falsely claimed he intended to use victim's funds to purchase and resell tickets for a profit, and instead "immediately used the money to pay personal expenses and repay debts to other lenders instead of purchasing tickets" engaged in conversion); *In the Matter of the Application of Akindemowo,* Exch. Act. Rel. No. 79007, 2016 SEC LEXIS 3769, at *23 (S.E.C. Sep. 30, 2016) (affirming disciplinary finding that representative who "represented he would invest AG's and RB's money in Apex" and then "*used it for his personal expenses"* engaged in conversion); *In the Matter of Grivas*, Exch. Act. Rel. No. 77470, 2016 SEC LEXIS 1173, at * (S.E.C. Mar. 29, 2016) (representative who withdrew "$280,000 from the Fund and *transferred it through several intermediaries*" to cure another firm's net capital deficiency engaged in conversion).

1. The Fee Collection Theory Improperly Bootstraps Imposition of a Fee Into a Simultaneous Conversion if the Fee is Later Found to be Unreasonable

To assert the more severe charge of conversion, DOE mixed together the issue of the "reasonableness" of fees with the claim that imposition of such a fee constitutes a theft or conversion of the customer's assets *if the fee is later found to be unreasonable*. That bootstrapping was unprecedented and, under the circumstances of this case, impermissible. The NAC accepted that machination, finding unauthorized trading because Alpine transferred securities to a proprietary account based on imposition of an "unreasonable" fee.[93]

Even the NAC sought to limit and explain that holding, stating that it "do[es] not suggest that every unreasonable fee may lead to claims of unauthorized trading if a firm takes funds from customer accounts to pay for that fee."[94] But its attempt to distinguish the Alpine situation consists of yet more bootstrapping: the NAC states that Alpine "did not impose the fee for the purpose of covering a service" and so the fee was unreasonable and so its implementation was conversion.[95] That assertion not only is contrary to the evidence but also fails to address the bootstrapping problem of having a claim of conversion hinge on the after-the-fact litigation regarding the fee. On that basis alone, the finding of conversion should be reversed.

2. Movements to a Worthless Securities Account with Customer Notice Do Not Constitute Conversion

The Decision relies on certain movements of stock in May and June of 2019 to find conversion. Again, those events occurred after the firm had sent months of notices to customers asking that they deal with their accounts. Having finally realized that many customers were not

[93] NAC Decision at 47 (RA 016039).

[94] *Id.* at n. 118 (RA 016039).

[95] *Id.* (darting past the argument that a fee doesn't have to be tied to a specific service to be reasonable to land a tautological blow on the issue of conversion while ignoring any findings about intent).

responding and knowing that many of the accounts were orphan accounts from years earlier and from introducing brokers that had gone out of business, Doubek focused on whether the stocks should be considered worthless securities.[96] Doubek then decided to send customers a separate and standalone notification advising that securities with a statement value of $400 or less were worth less than the cost of liquidating or transferring and would be considered worthless unless the customer objected.[97] Customers in some instances responded and Mr. Walsh explained that he instructed his staff to deliver to him all customer communications and addressed them.[98] With respect to those customers who did not respond, Alpine proceeded on May 28th and 29th to move customer positions with a value of $400 or less to its worthless securities account in accordance with that March negative consent letter.[99]

On May 30, 2019, however, Mr. Doubek suddenly directed movements of other stock with a statement value of from $400 to $1500.[100] While Mr. Doubek's explanation of his conduct has twisted and turned over time, he initially insisted in his testimony that those movements were a mistake and a result of his miscommunication with Mr. Walsh.[101] Mr. Doubek and Mr. Walsh both testified that those movements of stock should not have happened, that those movements were inadvertent, not intentional and those movements were reversed.[102] That undisputed testimony of those men, that they made a mistake, combined with the reversal of those trades, undermines any imputation to Alpine of an *intentional* taking of the affected securities.

[96] Tr. 3092-96, 3232-34 (Doubek) (RA 007501-05, 007702-04).

[97] Tr. 3234-38 (Doubek) (RA 007704-08).

[98] Tr. 4012-13 (Walsh) (RA 008656-57).

[99] Tr. 4008:17-4009:17 (Walsh) (RA 008652-53).

[100] Tr. 3239-40 (Doubek) (RA 007709-10); Tr. 4029-30 (Walsh) (RA 008673-74).

[101] Tr. 3240-41 (Doubek) (RA 007710-11).

[102] Tr. 3241-42 (Doubek) (RA 007711-12).

Further, and notwithstanding the notifications to customers and the return of the stock to customers, the NAC held that *all* movements of stock to worthless securities accounts were unauthorized, misuse and conversion of assets.[103] That holding is error also because the NAC improperly rejects Alpine's use of a negative response letter under those circumstances, stating that movement of a securities to a worthless account always requires affirmative consent.[104] FINRA guidance confirms that a negative consent letter is permissible where the firm is no longer engaged in the business or is experiencing operational difficulties[105] and the NAC's conclusion as to the securities with a statement value of *$400 or less* should be reversed.

3. Securities Movements for Purposes of State Escheatment Do Not Impact Ownership and Do Not Constitute Misuse or Conversion

As of June 2019, and based on discussions with Utah securities regulators, Alpine employees took the view that the customer's failure to respond to notices over more than nine months constituted a basis for escheatment of their stock.[106] Mr. Walsh testified that, after that conversation, he began moving positions to custodial accounts in relation to possible state escheatment.[107] He also took steps, although they were imperfect, to ensure he did not move the assets of customers who had been in contact with the firm, creating a spreadsheet listing customers who had contacted the firm.[108]

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[103] NAC Decision at 50-51 (RA 016042-43).

[104] *Id.* at 49 n. 123 (RA 016041).

[105] FINRA Notice to Members 02-57 (Sept. 2002), https://www.finra.org/sites/default/files/NoticeDocument/p003486.pdf (recognizing that negative response letters may be appropriate when a member experiences "Financial or Operational Difficulties," when "[a]n Introducing Firm [is] No Longer in Business," and that "circumstances may exist outside of the scenarios described above where the use of negative response letters may be appropriate").

[106] Tr. 3092-96 (Doubek) (RA 007501-05); Tr. 3522-23, 3545:13-3547:5 (Walsh) (RA 008055-56, 008078-80); JX-33 (Account Agreement) at 13 (RA 015153) (providing that accounts may be presumed abandoned if the account is inactive and the customer has not contacted Alpine or otherwise expressed interest in the account).

[107] Tr. 3522:6-3524:16 (Walsh) (RA 008055-56).

[108] Tr. 4021:17-4022:15 (Walsh) (RA 008665-66).

Alpine's general counsel immediately became aware of those movements and contacted Mr. Doubek. Mr. Walsh then promptly *reversed* those movements.[109]

In defiance of plain law and logic, the Decision actually finds that activity to be a conversion of stock although the stock remained at all times the property of the customer.[110] The NAC does so based on another mischaracterization and expansion of the concept of conversion, treating a movement from one *custodial* firm account to another *custodial* firm account as both misuse and conversion of customer assets. In the process, the NAC employs vague and inapposite language from regulatory decisions to *further* water down the concept of conversion, holding that conversion does not even require that there be any impact on the customer's ownership of the stock.

The movements of stock to escheatment accounts plainly do not constitute conversion or misappropriation: it is not "taking" the property from the customer nor is it exercising "ownership" since there was no transfer of the stock to Alpine and the stock remained at all times the property of the stockholder.[111]

And again, after a communication from Alpine's general counsel, those stocks were immediately transferred back to the customer.

3. The NAC Improperly Imputed a Rogue Employee's Conduct to Alpine

The NAC, having concluded that Chris Doubek caused the movement of customer securities without authorization from the customer, states in a series of footnotes that it "imputes"

[109] Tr. 3529:13-3531:11 (Walsh) (RA 008062-64).

[110] NAC Decision at 54 n. 129 (RA 016046).

[111] Courts have consistently ruled that such custodial movements do not constitute a purchase or sale as contemplated by Section 10(b) and Section 15(c)(a)(1). *Sacks v. Reynolds Secur, Inc.*, 593 F.2d 1234 (D.C. Cir. 1978) ("lower federal court interpretations of purchase and sale, although encompassing many transactions that bear little overt resemblance to conventional cash sales, require some surrendering of control, change in ownership, or change in the fundamental nature of an investment before a transfer will be deemed within the ambit of Rule 10b-5.)

that conduct to Alpine.[112] The NAC's perfunctory references to imputation of conduct and intent utterly fail to address the substantial issues that exist in relation to the conduct of Chris Doubek in May and June of 2019. The NAC Decision on its face actually confirms that Doubek *acted out of self-interest* without direction from or the knowledge of management, suggesting that Doubek invented improper actions to close accounts when faced with the prospect of losing his job undermining the assertion that his conduct is properly attributable to Alpine.[113] While the NAC states that "management grew impatient waiting for customers to close their accounts," it would be more accurate to state that Alpine's owner had become impatient *waiting for management* to do the job that they had been hired to do. The record clearly demonstrated that, though the issue of inactive and abandoned accounts had plagued Alpine for years, management's efforts to address the issue were sporadic at best.[114] Doubek acknowledged that when he joined Alpine in 2018, he understood that his role included closing inactive accounts, and that Alpine's viability as a business depended on it.[115] As Doubek admitted, "John Hurry wanted the accounts closed, he did not dictate how it should happen."[116] After failing for months to make progress on the goals that he was specifically hired to do, Doubek decided to engage in actions intended to save his job with no regard for regulatory compliance or customer protection.

Chris Doubek stands as the quintessential former disgruntled employee and biased, demonstrably untruthful and unreliable witness and the NAC's reliance on his shifting and self-serving iteration of events is clear error. His level of dishonesty, disloyalty and animus toward Mr. Hurry was stunning. After the firm discovered the full breadth and depth of his disloyalty, and

[112] NAC Decision at 50 n. 122, 53 n. 127, 55 n. 130 (RA 016042, 016045, 016047).

[113] *Id.* at 52 (RA 016044).

[114] *See, e.g.*, Tr. 1159:17-1161:3 (Tew) (RA 002265-67); Tr. 1788-1793 (Frankel) (RA 004278-83).

[115] Tr. 3031-32 (Doubek) (RA 007440-41).

[116] Tr. 3096 (Doubek) (RA 007505).

terminated him, Mr. Doubek pressed ahead with his vow to try to harm Mr. Hurry, contacting FINRA that same day to offer information wholly inconsistent with his own OTRs.[117] He began to claim *inter alia* that the stock movements had something to do with Mr. Hurry[118] but then was to admit that John Hurry expected him to ensure the firm operated in compliance with regulatory requirements[119] and that "John Hurry wanted the accounts closed, he did not dictate how it should happen."[120] Ultimately, Doubek moved stock from customer accounts because, having failed to address the issue of account closure for months, he suddenly feared that if he did not close accounts he would be fired and so rushed and engaged in noncompliant conduct. He *did not* disclose to Alpine's ownership the critical fact that he had decided to direct movements of securities *without notice or adherence to applicable rules and regulations*.[121] Mr. Doubek and his associate, James Kelly, then stole $1.3 million from the firm and expressly threatened to harm the firm and its owner if the firm took action against him.[122] Mr. Doubek has since, in the duplicative SEC case, crafted a new version of events, insisting that it was James Kelly who harassed him and coerced him to engage in the improper closure of accounts.[123] Mr. Doubek is consistent only in this respect: he never accepts responsibility for his own actions and he will revise his story to blame whoever he wants to harm.

The NAC effectively ignores these issues of scienter and the relevant authorities. In *In re*

[117] Tr. 3001-02 (Doubek) (RA 007410-11).

[118] Tr. 3141-3145 (Doubek) (RA 007611-15).

[119] Tr. 4256 (Doubek) (RA 008940).

[120] Tr. 3096 (Doubek) (RA 007505).

[121] Tr. 4491-92 (John Hurry) (RA 009216-17) (testifying that he wasn't aware of the transfers at the time they took place and only learned about them later).

[122] Tr. 2998-3001 (Doubek) (RA 007407-10).

[123] Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 20, *SEC v. Alpine Securities Corp.*, No. 2:22-cv-01279-RFB-MDC (D. Nev. Oct. 31, 2024), ECF No. 90. Actions against Doubek and Kelly are pending. *Alpine Securities Corp. v. James Kelly*, Case No. 21-CA-5621 (Florida Thirteenth Circuit); *Alpine Securities Corp. v. Christopher Doubek*, Case No. 21-02720 (FINRA Arbitration).

China Cast Educ. Corp., discusses at some length that whether the scienter of an employee or agent is imputed to its principal or to another employee depends of application of agency principles.[124] And under those principles of imputation, it is "fundamental that an employer is liable for the torts of his employee committed while acting in the scope of his employment."[125] But a well-established exception to imputation applies where the employee has acted to serve his own interest, adverse to the corporation.

> Under that exception, a rogue agent's actions or knowledge are "not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person." Restatement (Third) of Agency § 5.04 (2006); Hecksher v. Fairwinds Baptist Church, Inc., 115 A.3d 1187, 1205 (Del. 2015) ("[T]he ***adverse interest doctrine may prevent a court from imputing knowledge of wrongdoing to an employer when the employee has totally abandoned the employer's interests, such as by stealing from it or defrauding it***."). [126]

The court in *In re CENDANT Corp*., discussed the rationale for imputation of knowledge and intent, i.e., "the duty of the agent *to communicate all material information to his principal*, and the presumption that he has done so."[127] But, it explained, that presumption is not appropriate in relation to an "agent who is acting in his own antagonistic interest, or who is about to commit a fraud by which his principal will be affected."[128] In that circumstance, any presumption that he has informed his principal "is contrary to all experience of human nature."[129]

In accordance with that reasoning, there is "a line of decisions which hold that 'the knowledge and actions of employees acting adversely to the corporate employer cannot be imputed

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[124] *In re ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471 (9th Cir. 2015).

[125] *Fields v. Synthetic Ropes, Inc*., 215 A.2d 427, 432 (Del. 1965) (emphasis added).

[126] *ChinaCast*, 809 F.3d at 476 (emphasis added).

[127] *In re CENDANT Corp.,* 109 F. Supp. 2d 225, 232 (D.N.J. 2000) (emphasis added).

[128] *Id.*

[129] *Id.*

to the corporation.'"[130] Consideration of the "adverse interest" exception requires that the fact finder assess whether the defendant was acting in his personal interests or whether his misconduct was committed "for the benefit of the corporation."[131] A court can find that "a corporation's manager "totally abandoned" a corporation's interests even if the manager's actions also benefitted the corporation, because the relevant inquiry is whether the manager intended to benefit the corporation."[132]

Given the evidence that developed concerning the reasons for Mr. Doubek's conduct, his shifting stories regarding his actions, his insistence that certain movements of stock were his "mistake," his inexplicable failure to provide the requisite notice to Alpine's customers, and his obvious disloyalty, his rogue and improper conduct and intent do not provide a basis for imposing liability on either the firm or the individual who was his subordinate. Doubek's decision to close accounts in a noncompliant manner was based only on his own interest in taking some action quickly to avoid being terminated.

IV. THE NAC WRONGLY CONCLUDED THAT ALPINE'S CAMS PAYMENT WAS AN UNAUTHORIZED CAPITAL WITHDRAWAL

The NAC, finding "an unauthorized capital withdrawal because Alpine ***paid its landlord for back-due common-area maintenance*** ("CAMS") ***and related charges***," effectively and improperly invalidated a common and permissible contractual provision in Alpine's lease.[133] The

[130] *Kaplan v. Utilicorp United, Inc*., 9 F.3d 405, 407 (5th Cir. 1993) (discussing Section 10(b) standing); *see also Alpern v. Utilicorp United, Inc*., 1994 U.S. Dist. LEXIS 17529, 1994 WL 682861, at *3 (W.D. Mo. 1994) (rejecting shareholder's argument that the knowledge of subsidiary's corporate officers could be imputed to parent corporation merely because they held high ranking positions in the company).

[131] *F.D.I.C. v. Shrader & York,* 991 F.2d 216, 224-25 (5th Cir. 1993) (distinguishing between fraud committed by an officer against employer corporation, which is not imputed to the corporation, and fraud committed for the benefit of the corporation); *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co*., 267 F.3d 340 (3d Cir. 2001) (confirming that "fraudulent conduct will not be imputed if the officer's interests were adverse to the corporation and 'not for the benefit of the corporation.'").

[132] *Id.*

[133] NAC Decision at 66-72 (RA 016058-64).

conclusion is wrong and unsupported by any law, FINRA rule, or guidance and should be reversed.

Alpine's lease with its landlord, SCAP 9, LLC,[134] provided for the landlord to bill Alpine for expenses of the landlord associated with the leased property (i.e., management, improvements, taxes, insurance, etc.), typically referred to as "CAMS" charges.[135] Mr. Hurry testified that the invoices sent to Alpine in the prior years, including the 2018 amounts shown in CX-169, were incomplete and omitted other expenses that were the tenant's responsibility.[136] In fact, the landlord had only partially billed Alpine for taxes and insurance.[137] Mr. Hurry explained that his staff, which manages SCAP 9 and his various other real estate holdings, discovered the underbilling error as a result of an issue with a different tenant in late 2018.[138] His staff then reviewed leases with various tenants and discovered that they had not been properly billed for several years; in Alpine' case, the amount due was close to $5 million.[139] He explained that the underbilling included expenses for unpaid property taxes, capital improvements, appreciation in the value of the property, and amortization.[140]

As a result of this discovery, and in time for the next April 1 report due under the lease, Alpine's landlord issued a CAMS invoice representing amounts owed by Alpine for historic, uncharged CAMS expenses.[141] Mr. Hurry and Mr. Doubek testified that they discussed the CAMS charges after the invoice was sent and Mr. Doubek conducted his own research regarding CAM obligations. Mr. Doubek testified that he researched the issue and concluded that Alpine had no

[134] JX-29 at 1 (RA 014985).

[135] *See id.* at 2-3 (RA 014986-87) (describing tenant's obligations in sections 3.1 and 3.2).

[136] Tr. 4464:18-4465:3 (John Hurry) (RA 009189-90); CX-169 (RA 011319).

[137] *See id.*

[138] *See* Tr. 4512:17-24 (John Hurry) (RA 009237).

[139] *See* Tr. 4465:7-16 (John Hurry) (RA 009190).

[140] Tr. 4461-4464 (John Hurry) (RA 009186-89).

[141] *See* JX-31 (RA 015109).

basis on which to refuse to pay the CAMs invoice.[142] Based on the terms of the lease and his own research, Doubek directed that Alpine pay the amount owed.[143]

On those facts, and in clear contravention of the contractual provisions, the NAC concluded that Alpine's payment of the CAMS charges was an "unauthorized" capital withdrawal.[144] The NAC's reasoning is *not* that the payment was not required by Alpine's lease (it unquestionably was), or that some FINRA guidance required re-characterizing this ordinary business expense as a capital withdrawal. Rather, the NAC decided that Alpine could and should have ignored its contractual obligations under the lease.

To justify the abrogation of a contractual provision, the NAC pointed to the fact that the CAMS payment coincided with a period when Alpine sought FINRA's approval for a capital distribution.[145] The evidence, however, demonstrates that the timing of the CAMS invoice was dictated by the Landlord's discovery of the underbilling issue in late 2018, its assessment of the issue over the ensuing months, and the fact that the CAMS invoice had to be provided to Alpine under the lease on or before April 1st.[146] More importantly, the timing in no way invalidates the obligations of the tenant or the landlord's right to take the actions that it took. The NAC effectively invalidated a common and material lease provision based solely on its view concerning Mr. Hurry's motives, as if a landlord's frustration with a particular tenant constituted a basis for invalidating its contractual rights. The NAC's conclusion operates as an impermissible interference with the contractual obligations of Alpine and the rights of Alpine's landlord and should be reversed.

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[142] Tr. 2832-33 (Doubek) (RA 007241-42).

[143] Tr. 2825-26 (Doubek) (RA 007234-35); Tr. 4464 (John Hurry) (RA 009189).

[144] NAC Decision at 70-72 (RA 016062-64).

[145] *Id.* at 69-70 (RA 016061-62).

[146] *See* Tr. 4462-4464 (John Hurry) (RA 009187-89); JX-29 at 3 (RA 014987).

V. FINRA'S STRUCTURE AND OPERATIONS, INCLUDING ITS ENFORCEMENT PROCEEDINGS, VIOLATE CONSTITUTIONAL REQUIREMENTS AND DENY DUE PROCESS OF LAW

A. The Hearing Officer's Procedural and Evidentiary Rulings Violated FINRA Rules and Denied Alpine Due Process and Meaningful Review

1. Alpine's Fundamental Fight to Present Its Defense Was Violated When FINRA Forced It to Complete Its Hearing by Videoconference While DOE Had Been Able to Present Its Case in Person.

The constitutional infirmity of FINRA's process permeates the procedures that were employed against Alpine. Alpine was, for example, entitled to an *in-person* hearing on the claims at issue, one of the few protections afforded to a FINRA respondent.[147] That directive became particularly significant in this case because the hearing was initially conducted in person and DOE had the benefit of presenting its key witnesses in person and because it was a document intensive and complex case in which remote cross examination would be particularly unwieldy and ineffective.

The Hearing Officer acknowledged this, agreeing with Alpine that it should not be forced to complete the hearing by videoconference. The Hearing Officer expressly declined DOE's request to order that the hearing resume by videoconference, emphasizing that "we have a lot of witnesses to hear from and this is a case with a lot of documents" and that DOE would have to *file a motion* and explain "how and why you think we can have a fair hearing and give respondent a fair opportunity to present their defense in a case like this while proceeding remotely."[148] No such

[147] FINRA Rule 9261, Evidence and Procedure in Hearing, available at https://www.finra.org/rules-guidance/rulebooks/finra-rules/9261; FINRA Corporate Organization By-Laws, art. XII, § 2, Disciplinary Proceedings, available at https://www.finra.org/rules-guidance/rulebooks/corporate-organization/article-xii-disciplinary-proceedings.

[148] Pre-Hr'g Conf. Tr. (Apr. 29, 2020) at 15:9-20 (RA 004921). DOE did file a motion ***not*** to complete the full hearing by videoconference but to conduct specific witnesses including Alpine's witness, Richard Nummi. Dep't of Enforcement's Mot. for Remote Test. (July 15, 2020) (RA 005031-38). Alpine opposed that motion, stating that DOE's application appeared to be an effort to "dilute the impact of his testimony" but the Hearing Officer granted it. Resp't's Opp'n (July 29, 2020) (RA 005091-96); Pre-Hr'g Conf. Tr. (July 30, 2020) (RA 005101-34); Order (July 31, 2020) (RA 005135-36). And that testimony did not go smoothly: technical issues abounded that prevented an effective examination. Alpine's Br. (Dec. 18, 2020) at 12-15 (RA 006328-31).

motion was filed.

In July, the Hearing Officer advised that FINRA was establishing a facility in the Washington D.C. area at which in person hearings could proceed.[149] In September, the Hearing Officer reiterated that the hearing would resume in person, set the date of November 30, 2020 at the facility in the D.C. area and scheduled a conference for November 2, 2020.[150]

On the morning of November 2, 2020, without any motion having been filed by DOE and without consideration of the reasons repeatedly cited by the Hearing Officer for continuing in person, Chief Hearing Officer Delaney -- the Hearing Officer in the reversed Scottsdale matter and the subject of a recusal motion in this matter -- overruled the Hearing Officer and directed that the hearing proceed remotely.[151] And that ruling unquestionably placed Alpine at a disadvantage: the examination of Chris Doubek, who was testifying in the wake of his theft, termination and threats to Alpine, had to be done via videoconference as did the significant testimony of David Brandt, Richard Nummi and John Hurry. The use of documents for examination or impeachment was difficult if not impossible and the Hearing Panel, rather than showing flexibility given the circumstances, continued to issue rulings impeding Alpine's ability to present its case.[152]

2. The Hearing Officer Improperly Denied Sanctions Against FINRA By Diluting and Denying FINRA's Discovery Obligations

The remote examination of Mr. Doubek was further complicated by the fact that DOE had withheld from the defense a lengthy prior transcript of a two-day OTR of Mr. Doubek conducted

[149] Status Conf. Tr. (July 2, 2020) at 4-6 (RA 004998-5000); Status Conf. Order (July 22, 2020) (RA 005081-84).

[150] Tr. 2736 (RA 006133); Status Conf. Notice (Sept. 18, 2020) (RA 006167).

[151] Videoconference Order (Nov. 2, 2020) (RA 006169-72). Alpine filed an opposition, Alpine's Resp. Br. (Dec. 18, 2020) (RA 006317-56), which included a declaration by Alan Wolper concerning remote proceedings, *id.* at RA 006352-55). The Hearing Officer directed further briefing but not surprisingly hewed to the Chief Justice's directive that the matter proceed remotely.

[152] *See, e.g.*, Tr. 4398-402 (RA 009123-27) (Hearing Panel precluded Alpine from presenting a demonstrative exhibit that it prepared as an alternative given that it wasn't able to present calculations in-person using tools like a white board).

after he was fired from Alpine in June 2021.[153] The Hearing Officer finally had to order DOE to produce the transcript in the midst of Mr. Doubek's examination and then, because the transcript revealed that Mr. Doubek had made surreptitious and unlawful recordings of Mr. Hurry and others during his employment, DOE at that point produced a series of the recordings.[154] Mr. Doubek in the transcript also testified that, in the immediate wake of his termination, he provided "notes" to DOE; it turned out those "notes" had not been retained by FINRA but FINRA did then produce what turned out to be a ten page single spaced letter from Mr. Doubek to FINRA containing his newly minted claims against Mr. Hurry.[155] Counsel then had to review and process that substantial volume of written and recorded material and try to quickly incorporate it into a continued remote examination of the witness.[156]

Based on those events, Alpine filed a motion for sanctions describing DOE's prior misrepresentation and setting forth the relevance, materiality and exculpatory nature of the materials at issue.[157] The Hearing Officer held that neither FINRA Rule 9251 nor Rule 9253 required production of and of those seemingly relevant withheld materials and that "Enforcement fully complied with its discovery obligations."[158] According to the Hearing Officer, production was not required under Rule 9251 because they "were not connected to the investigation that led to the filing of the Complaint" and were not "relevant" or "exculpatory."[159] In relation to Rule 9253, the Hearing Officer focused on the fact that it "places the onus on the respondent to file a

[153] Order re Disc. Mot. (Oct. 28, 2021) at 1 (RA 015215).

[154] *Id.* at 2 (RA 015216).

[155] *Id.* at 3 (RA 015217).

[156] Tr. 4140-48 (RA 008824-32).

[157] Alpine Mot. for Sanctions (Oct. 8, 2021) (RA 015167-82).

[158] Order re Disc. Mot. (Oct. 28, 2021) at 11-14 (RA 015225-28).

[159] *Id.* at 11-13 (RA 015225-27).

motion to seek production of witness statements," ignoring the fact that the September 27, 2019 Case Management Order required DOE to produce witness statements regardless of whether a motion was filed.[160] The Hearing Officer's interpretation of FINRA's discovery obligations was erroneous and only serves to underscore the unfairness of the process that confronts a member when they seek to defend a FINRA proceeding.

3. The Hearing Officer Improperly Excluded the Testimony of Alpine's General Counsel, D. Michael Cruz and the Director of Scottsdale, John Busacca

As of the time period at issue, Michael Cruz had "frequently interacted with Alpine management and offered both legal and non-legal compliance and business advice." In fact, Mr. Cruz was the attorney who had specifically addressed the issue of Alpine's setting of fees and was the author of the firm's written policy on fees that was provided to FINRA. Alpine advised DOE that it intended to call him as a witness regarding "Alpine's compliance efforts in relation to its implementation of its fees and other conduct related to Alpine's business model,"[161] and that he would testify concerning non-privileged facts within his personal knowledge including management calls, fee notices and Alpine's reversal of the transfer of securities to escheatment accounts.

Alpine also included on its witness list John Busacca, stating that he would testify regarding the implementation of the fees at issue and his interaction with customers, his involvement in an audit of Alpine's fees in 2019, and DOE's claims concerning imposition of retroactive fees.[162]

DOE objected to both, arguing that their testimony would be "cumulative;" Alpine opposed, providing further information to the Hearing Officer pertaining to their anticipated

[160] *Id.* at 13 (RA 015227); Case Mgmt. & Scheduling Order (Sept. 27, 2019) at 6 (RA 000554).

[161] Alpine Resp. to DOE Obj. to Alpine's Ex. & Witness Lists (Feb. 7, 2020) at 5 (RA 002073).

[162] *Id.* at 4-5 (RA 002072-73).

testimony and establishing that the testimony was relevant and not cumulative.[163] The Hearing Officer, by Order dated February 12, 2020, struck both Mr. Cruz and Mr. Busacca from Alpine's witness list, agreeing with DOE that the testimony would be "cumulative."[164]

That ruling constituted error and warrants reversal. Alpine was literally fighting for its life and needed to present evidence to rebut DOE's aggressive narrative, counter the anticipated testimony that would be provided by a raft of disgruntled former employees that were being called by FINRA, and effectively address the allegations. Mr. Cruz was involved in perhaps the most critical aspect of the case, Alpine's fee policy which had been provided to FINRA and the notion that the testimony would be "cumulative" does not constitute a basis for their exclusion: where, as here, DOE pressed so many disputed issues concerning the events at Alpine, testimony that was arguably "cumulative" would have been essential to Alpine's ability to support its position. FINRA's ability to pick and choose which witnesses Alpine would be permitted to call was unfair, improper and damaging to Alpine's ability to defend itself.

4. The Hearing Officer Improperly Excluded the Testimony of Alpine's Customer Statement Vendor

DOE opened the hearing against Alpine with literally days of testimony seeking to establish that, in the midst of the firm's conversion to a new back-office system, it had failed to deliver statements and notices to its customers. DOE then proceeded to call customers and elicited from them claims that they had not received firm communications. Because "Enforcement had cherry picked the customer emails included in its proposed exhibit binders so as to create the misimpression that customers could not access their accounts or had not received notices of the availability of their statements," Alpine then sought to call the witness whose company tracked

[163] DOE Obj. to Alpine Witness & Ex. Lists (Jan. 31, 2020) at 4-6 (RA 001702-04).

[164] Order Ruling on Witness Obj. (Feb. 12, 2020) at 4 (RA 002192).

the delivery of email communications.[165]

DOE objected, arguing that Alpine was on notice of DOE's claims and that, again, the evidence was "cumulative."[166] The Hearing Officer agreed and precluded the witness and related exhibits.[167] The Hearing Panel then proceeded to incorporate DOE's narrative on that point into its Decision.[168]

B. FINRA Unconstitutionally Denies Due Process and Access to Courts

1. The NAC's Issuance of an Opinion Without Citations Is Not Consistent with Fair and Due Process

Even the format of the NAC Decision acts as an impediment to Alpine's ability to obtain meaningful review. The NAC spends scores of pages describing testimony and evidence *without citation to the record.* This practice cripples both the Commission's and Alpine's ability to evaluate the validity of the NAC's conclusions: Alpine must scour the record trying to divine the Decision's basis and the Commission is left with no choice but to review the entire lengthy hearing transcript or rely completely on the briefing. The Commission should remand and direct the NAC to do that which is essential to a fair appellate process: cite the portions of the record that it asserts support its conclusions.[169]

2. FINRA's Burdensome Administrative Gauntlet Violates the Right of Access to Courts

While SEC respondents can proceed directly to federal court after an adverse decision, Alpine has had to spend years and resources traversing not one but two different FINRA

[165] Alpine's Cross Mot. to Amend Witness & Ex. List (Dec. 11, 2020) at 6 (RA 006286).

[166] DOE Opp'n to Alpine's Mot. to Amend Witness & Ex. Lists (Jan. 25, 2021) (RA 006499-512).

[167] Order Denying Alpine Mot. to Amend Witness & Ex. Lists (Feb. 2, 2021) (RA 006513-006518).

[168] OHO Decision at 20-21 (RA 015410-11).

[169] *In re Richard T. Sullivan*, Exchange Act Release No. 40671 (where the SRO fails to "clearly explain[] the basis for its conclusions, …an applicant is impaired in his or her ability to urge a contrary position to us and we cannot discharge our review function").

proceedings before obtaining review outside FINRA, a multi-year journey that consumes enormous resources and still does not include access to an impartial Article III forum. And each week, month and year of delay has caused harm to Alpine including continuous and devastating reputational damage, increased staff turnover, difficulty recruiting executive officers, and maintaining its clients.

By this mechanism, FINRA imposes an impermissible and unnecessary barrier to meaningful appellate review and "infringes a member firm's fundamental right of access to courts.[170] There exists no proper purpose for FINRA's requirement that a member firm litigate its case twice before FINRA before it can obtain a "final action" appealable outside FINRA.

3. At Least In its Enforcement Proceedings, FINRA Engages in State Action and is Subject to Constitutional Requirements

The NAC's perfunctory rejection of Alpine's constitutional challenges rests on the erroneous premise that FINRA can exercise the full force of federal law while depriving member firms of the Constitutional constraints intended to rein in those who exercise that power.[171] When FINRA conducts disciplinary proceedings that enforce federal securities laws and imposes sanctions carrying the force of law, under authority delegated to it by the SEC, it engages in state action and it should not be permitted to deprive respondents of the rights that they would be

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[170] *Metropolitan Life Insurance Co. v. Bucsek*, 919 F.3d 184, 190 (2d Cir. 2019) ("[t]he right of access to courts is of such importance that courts will retain authority over the question of arbitrability of the particular dispute unless 'the parties clearly and unmistakably provide[d]' that the question should go to arbitrators." *Id.* (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). *See also Lewis v. Casey*, 518 U.S. 343, 346 (1996).

In his concurrence in *Axon Enterprise v. FTC*, where the appellant's "administrative proceedings [had] already dragged on for seven years" before she was able to obtain meaningful judicial review, Justice Gorsuch, observed that:

> Not many possess the perseverance of Ms. Cochran and Axon. The cost, time, and uncertainty associated with litigating . . . will deter many people from even trying to reach the court of law to which they are entitled."

Axon Enter. v. FTC, 598 U.S. 175, 215 (2023).

[171] NAC Decision at 75-77 (RA 016067-69).

afforded if the same proceeding occurred before the delegating agency, the SEC.[172] The D.C. Circuit recognized that FINRA's "disciplinary process essentially supplants a disciplinary action that might otherwise start with a hearing before an ALJ" and its "authority to discipline its members for violations of federal securities law is entirely derivative" and "ultimately belongs to the SEC."[173] As noted by Judge Walker in *Alpine Securities Corp. v. FINRA*,

> It would be odd if the Constitution prohibits Congress from vesting significant executive power in an unappointed and unremovable government administrator but allows Congress to vest such power in an unappointed and unremovable private hearing officer. That could create a constitutional loophole. It would suggest that Congress was free to fix the constitutional infirmity with the ALJs in *Lucia* simply by moving them outside of the Executive Branch. But that wouldn't cure the basic defect motivating the Supreme Court: Only the President and properly appointed Officers of the United States may exercise significant executive power. 'What cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows.[174]

Judge Walker summarized FINRA's constitutional violations in a later opinion: FINRA exercises the "significant executive authority that the Constitution vests in the Executive Branch alone," including the power to investigate, prosecute, and adjudicate violations—all "without any initial approval from its supposed supervisor, the SEC."[175] Either FINRA is engaging in state action when it conducts disciplinary proceedings, and should have to abide by the Constitution, or it unconstitutionally wields governmental authority as a private entity.[176] The Commission should not perpetuate these violations by affirming the NAC's decision.

Even Congress has expressly recognized that self-regulatory organizations "must exercise *governmental-type powers* if they are to carry out their responsibilities under the Exchange Act,"

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[172] *Alpine v. FINRA*, 2023 U.S. App. LEXIS 16987, at *9 (D.C. Cir. July 5, 2023) (Walker, J., concurring) (internal citations omitted).

[173] *National Ass'n of Securities Dealers, Inc. v. SEC*, 431 F.3d 803, 806 (D.C. Cir. 2005).

[174] *Alpine*, 2023 U.S. App. LEXIS 16987, at *8-9.

[175] *Alpine v. FINRA*, 121 F.4th 1314, 1343-45 (D.C. Cir. 2024) (Walker, J., concurring in part and dissenting in part).

[176] *Id.*

including "(1) imposing a disciplinary sanction . . . on a member or person affiliated with a member, (2) denying membership to an applicant, and (3) requiring members to cease doing business entirely or in specified ways."[177] And FINRA itself insists that it *is* engaged in governmental action when it wants the benefit of the immunity available to government actors even as it denies being engaged in governmental action to avoid being bound by the Constitution.[178]

4. FINRA is No Longer Self-Regulated and its Operations Violate the Separation of Powers and Appointments Clause

As Commissioner Peirce has emphasized:

> Broker-dealers in the United States are regulated by the Financial Industry Regulatory Authority (FINRA). Although commonly perceived to be a self-regulator, FINRA is not accountable to the industry in the way a self-regulator would be. **Nor is it accountable to the public, Congress, the president, or the courts**. FINRA's structure and monopoly status shield it from close oversight. Consequently, an important part of the securities markets is under the control of a regulator with limited accountability.[179]

The Supreme Court made clear in *Free Enterprise Fund v. PCAOB*, that, in relation to the PCAOB, a dual-layer removal protection identical to the one highlighted by Peirce violated Article II of the Constitution.[180] Similar to the PCAOB, the SEC cannot remove FINRA officials at will, 15 U.S.C. § 78s(h)(4)(B), and the President has no removal authority, creating the unconstitutional dual-layer protection struck down in *Free Enterprise Fund*.

Under *Lucia v. SEC*, those who conduct enforcement hearings with "significant discretion"

[177] S. REP. 94-75, at 24, 1975 U.S.C.C.A.N. 179.

[178] *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008).

[179] Hester Peirce, *The Financial Industry Regulatory Authority: Not Self-Regulation After All,* Mercatus Center of George Mason University (Jan. 2015) (emphasis added).

[180] *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010).

and authority to ensure "fair and orderly adversarial hearings" are Officers of the United States.[181] FINRA Hearing Officers exercise identical powers to SEC ALJs—plus the power to impose immediate industry expulsion. Since FINRA proceedings "supplant" SEC ALJ hearings, and SEC ALJs are constitutional officers under Lucia, FINRA Hearing Officers must be as well.[182] Yet they are not appointed in accordance with the Appointments Clause.[183]

5. FINRA's Procedures Violate the Private Nondelegation Violations

If FINRA is truly private, then Congress and the SEC have unconstitutionally delegated governmental enforcement power. As the Supreme Court noted, "Congress cannot delegate regulatory authority to a private entity."[184] And its application to FINRA was confirmed in the D.C. Circuit's recent decision in *Alpine Securities Corp. v. FINRA* which held that Alpine demonstrated "a likelihood of success on the merits of its private nondelegation claim" because FINRA can "unilaterally expel a member" and thereby "bar the expelled entity from engaging in stock trading, all without governmental superintendence or control."[185] FINRA exercises the power to destroy businesses and careers without prior agency review, it tries them before arbiters who literally work for FINRA and are not appointed under Article II or subject to removal by the President, it expressly disclaims the obligation to adhere to the Fifth or Seventh Amendments, and it denies meaningful access to Article III courts until years after unconstitutional proceedings have

[181] *Lucia v. SEC*, 138 S. Ct. 2044, 2053-54 (2018)

[182] "The Supreme Court held in *Lucia* that the SEC's administrative law judges are 'Officers of the United States' who must be properly appointed and removable, regardless of the SEC's ability to review their decisions. There is no reason to think that nearly identical hearing officers who are private, rather than governmental, can enjoy the same degree of authority without (at least) the same restrictions." *Alpine*, 121 F.4th at 1345 (Walker, J., concurring in part and dissenting in part).

[183] "FINRA relies on a Goldilocks defense. It is too much like a private entity for Article II's strictures, yet too much like the government for the private nondelegation doctrine to apply. But FINRA 'cannot have its cake and eat it too.' Its split identity fails to provide the accountability required by our Constitution. When federal law empowers officials to decide a company's fate, they must be Officers of the United States, selected through the Constitution's Appointments Clause and properly removable by the President." *Id.* at 1351.

[184] *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring).

[185] *Alpine*, 121 F.4th at 1324.

already inflicted irreparable harm.

VI. THE SANCTIONS IMPOSED IN THE DECISION ARE UNSUPPORTED AND EXCESSIVE, IMPERMISSIBLY PUNITIVE AND IMPOSE AN INAPPROPRIATE BURDEN ON COMPETITION

The NAC's decision to expel Alpine, more than six years after the events, rests on four fundamental errors: a mischaracterization of Alpine's business decisions as malicious conduct, a disregard for Alpine's immediate remediation efforts and current responsible management, an improper weaponization of Alpine's exercise of its legal rights to challenge regulatory overreach, and a failure to assess the appropriateness of lesser sanctions[186] and explain why the sanction of expulsion, these many years later, is "necessary to protect the public" when it would in fact inflict devastating harm on the very investors FINRA claims to protect.[187]

A. The Evidence Establishes That Alpine Acted to Address Escalating Costs, Not to Harm Customers

The NAC assiduously ignored the evidence that the fees at issue here were proven to be a reflection of Alpine's real costs and the resources necessary to provide services to its customers in the microcap space that few, if any, other brokers were willing to provide. Again and again, the NAC returns to its baseless mantra that Alpine imposed the $5000 fee "for the express purpose of coercing the closure of customer accounts," and not in response to its escalating costs.[188] According to the NAC's repeated refrain, Alpine's imposition of the fee was "not in furtherance of any services the firm provided to its customers."[189] As explained above, Alpine acted with the goal of *both* defraying its costs and dealing with orphan accounts. The NAC's notion that it acted with

[186] *In re Wilson-Davis & Co.*, Complaint No. 2012032731802r (FINRA NAC July 10, 2025). (where NAC found that firm engaged in a series of "egregious" violations over the course of years and had a troubling "extensive disciplinary history, ordered that firm required to retain an independent consultant and engage in undertakings).

[187] *Wilson-Davis & Co.*, Exchange Act Release No. 99248 (Dec. 28, 2023). (remanding for explanation of why sanctions are necessary to protect the public).

[188] NAC Decision at 83 (RA 016075). *See supra* n. 44.

[189] *Id.*

a unitary motive that did not relate to its expenses is counterintuitive and belied by the evidence.[190]

B. The NAC Improperly Cited Mr. Hurry as a Basis for Expulsion

The Hearing Panel and the NAC insisted that Mr. Hurry's indirect ownership of the firm supports the sanction of expulsion.[191] But any conclusions about Mr. Hurry would be the product of a skewed and incomplete record. Alpine was specifically directed by the Hearing Officer *not* to adduce evidence concerning him – even in the wake of FINRA deliberately eliciting derogatory testimony about him from former employees. The Hearing Officer, near the start of this proceeding, sought to put an end to DOE's efforts to have its witnesses disparage Mr. Hurry, stating that "this case [was] against the firm" and not against Mr. Hurry.[192] Then, contrary to the Hearing Officer's insistence that it did not view as relevant DOE's constant efforts to inject and impugn Mr. Hurry, the Hearing Panel embraced DOE's vitriolic approach, referring to Mr. Hurry more than 140 times and basing its sanctions on its view of Mr. Hurry's conduct.[193]

In fact, Mr. Hurry has been in the industry for more than thirty years and has no disclosable issues. But that is not for lack of FINRA including Mr. Hurry in its pursuit of those in the microcap markets. FINRA previously sought to bar Mr. Hurry and was successful before the Hearing Panel and the NAC, but the Commission reversed the NAC decision and the sanctions in harsh terms.[194] There should be no question that Mr. Hurry's ability and decision to challenge FINRA, and his successful litigations against them, underlie FINRA's animus toward Mr. Hurry.

Further, Mr. Hurry's ability to manage the firm was—*during the events at issue in this*

[190] Here, as in *In the Matter of Wilson Davis*, Release No. 99248, the NAC failed to support a conclusion that Alpine acted with scienter. The NAC further failed to take into account that the conduct occurred over the course of a matter of weeks and was then remediated.

[191] NAC Decision at 88-89 (RA 016080-81).

[192] Tr. 1851-55 (RA 004341-45).

[193] *See* OHO Decision (RA 015391-476).

[194] *See supra* n. 1.

case—impeded by FINRA itself. In the against Scottsdale, FINRA initially obtained a bar that was stayed by the Commission pending appeal, but that stay was conditioned on Mr. Hurry not managing the "day-to-day affairs" of the firm—a restriction that remained in place until the Commission ultimately reversed FINRA's sanctions.[195] Thus, at the critical period of time, Mr. Hurry was able only to communicate to Mr. Doubek broad directives; he was not allowed to monitor the daily implementation of those directives and so was prevented from dealing with the "day to day" matters that enabled Mr. Doubek to get away with acting in his own self-interest, closing accounts without complying with proper procedures to save his job.

The evidence demonstrated that Alpine has been, since Mr. Doubek's theft and departure, managed by Ray Maratea, the Chief Executive Officer, and the firm's Chief Compliance Officer, Mike Fox. Both men have worked for decades in the industry without incident and, pursuant to a special condition in Alpine's membership agreement, ***had to be reviewed and approved by FINRA*** to hold these positions at Alpine. Under all these circumstances, the claim that Alpine presents any danger to investors is unsupported and punitive; to the contrary, its closure would cause harm to customers and to the already imperiled microcap market.

C. The NAC's Reliance on Prior Litigated Matters Punishes Alpine for Exercising Due Process Rights

Perhaps most egregiously, the NAC Decision holds that expulsion is warranted based on a "key" factor: prior proceedings involving Alpine. The NAC states that Alpine's disciplinary history "weighs heavily in favor of severe sanctions" and is a "key reason that we have decided to expel the firm."[196] According to the NAC, the fact that Alpine has engaged in prior litigations "provide[s]

[195] *Scottsdale Capital Advisors Corp.*, Exchange Act Release No. 83783, at 6-7 (Aug. 6, 2018) (granting stay conditioned on Hurry refraining from "managing the affairs of [SCA or Alpine] or of any other SEC registered broker-dealer during the pendency of the Commission's review").

[196] NAC Decision at 93 (RA 016085).

a compelling reason to expel Alpine from FINRA membership and that expulsion is vitally necessary to address the risks that it poses to the investing public."[197]

The use of those events to punish Alpine is reprehensible. It reflects less about Alpine and far more about FINRA's wrong-headed view that any decision to challenge or litigate an issue with which the firm disagrees is an affront to FINRA and that all firms must capitulate, not defend themselves. The two matters cited by the NAC involved substantial legal issues that involved years of litigation and complex briefing. And the only reason that the Scottsdale case as well as Alpine's current proceeding involving FINRA's constitutionality is not being used against Alpine is because Scottsdale and Alpine prevailed. Where, as here, a firm has defended itself and then fully complied with the result of the litigation, the Commission should reject FINRA's arguments and respond at high volume that member firms have every right to advance well-supported and have them considered by a court.

D. Expulsion Is Unprecedented for Fee-Related Violations and Would Harm the Very Investors FINRA Claims to Protect

The sanction against Alpine is without a doubt unprecedented. Enforcement has not and cannot cite to any instance in which an operating firm was expelled and shuttered based on isolated, short-term and remediated issues concerning disclosed fees. Every decision in which an expulsion occurred hinged on factors that are not present in this case, e.g., the actual taking and use of customers assets, willful false statements to customers, and conduct over the course of years. The closure of the *firm* under these circumstances is disproportionate to what occurred, including its months of efforts to communicate with its customers and its remediation of the wrongful actions taken by Chris Doubek.

[197] *Id.*

The Guidelines emphasize the importance of not immediately applying the harshest of sanctions for certain conduct in favor of "progressively escalating sanctions."[198] This case presents an unusual issue, not previously encountered by Alpine, and its precipitous closure would serve only to harm Alpine's customers who would have to deal with the vagaries and delays of a receivership and would negatively impact the microcap market, already largely decimated by aggressive regulatory action against participants in the microcap sector. Alpine is now led by a Chief Executive Officer and a Chief Compliance Officer, both with lengthy unblemished records whom FINRA approved for the positions. Given those circumstances, and the fact that management has plainly seen and considered the actions taken by FINRA in this matter, there exists no evidence that Alpine would engage in any conduct going forward that would be injurious to any customer. FINRA has failed to explain why such a result would serve to protect investors much less is necessary and why lesser and progressive sanctions are not appropriate.

Dated: July 29, 2025

Respectfully submitted,

/s/ *Maranda Fritz*

[198] FINRA, Sanction Guidelines at 2 (2024), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf. *See also Id.* at 3 (listing examples of tailored sanctions including requiring firms to retain qualified independent consultants).

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 FINRA	Admin Proc. File No. 3-22471 **CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2025, I caused to be served a copy of ALPINE SECURITIES CORPORATION'S BRIEF IN SUPPORT OF ITS APPEAL FROM THE DECISION OF THE NATIONAL ADJUDICATORY COUNCIL on counsel for FINRA via email to the following individuals:

gary.dernelle@finra.org

Dated: July 29, 2025

/s/ Maranda E. Fritz

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 FINRA	Admin Proc. File No. 3-22471 **CERTIFICATE OF COMPLIANCE**

I hereby certify that ALPINE SECURITIES CORPORATION'S BRIEF IN SUPPORT OF ITS APPEAL FROM THE DECISION OF THE NATIONAL ADJUDICATORY COUNCIL complies with the word limit requirements of the order entered in this matter on June 18, 2025 and contains 17955 words, exclusive of pages containing the table of contents and table of authorities.

Dated: July 29, 2025

/s/ Maranda E. Fritz