UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 96293 / November 9, 2022

Admin. Proc. File No. 3-20238

In the Matter of the Application of

ALPINE SECURITIES CORPORATION

For Review of Action Taken by the

NATIONAL SECURITIES CLEARING CORPORATION

ORDER DENYING MOTION FOR STAY

On October 28, 2022, Alpine Securities Corporation ("Alpine") filed a motion to stay a Backtesting Charge that the National Securities Clearing Corporation ("NSCC") indicated it would assess on Alpine effective November 1, 2022, pursuant to generally applicable NSCC rules that the Commission approved previously (the "Expedited Stay Motion").[1] NSCC opposes Alpine's motion. For the reasons discussed below, Alpine's motion is denied.

I. Background

A. Alpine and NSCC.

Alpine is a small, self-clearing broker-dealer and NSCC member that is engaged primarily in clearing microcap or over-the-counter ("OTC") stock transactions for other firms, including stocks with a price less than $0.01 a share. As an NSCC member, Alpine submits trades to NSCC for clearing. NSCC is a registered clearing agency that provides clearance and settlement services for U.S. equity securities and that requires its members to post deposits, *i.e.*, margin, to address the risk that a member default or insolvency will prevent the completion of transactions.

[1] Alpine sought expedited consideration under Commission Rule of Practice 401(d)(3). 17 C.F.R. § 201.401(d)(3).

NSCC addresses this risk by, among other things, maintaining a Clearing Fund that consists of Required Fund Deposits made by each of its members.[2] NSCC determines the amount of each member's Required Fund Deposit by using a risk-based margin methodology reflected in its rules.[3] NSCC collects Required Fund Deposits in order to satisfy regulatory requirements that it cover its credit exposure to its members by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market, including the microcap and OTC securities in which Alpine typically transacts.[4] The Required Fund Deposit applies to a member's open positions pending before NSCC, and NSCC adjusts the amount of each member's Required Fund Deposit at least once a day to reflect the status of its open positions.[5] When applicable under its rules, NSCC also adds to each member's Required Fund Deposit a Backtesting Charge.[6] NSCC applies this type of charge to achieve its backtesting coverage target.[7] NSCC's Clearing Fund formula is designed to calculate individual member Clearing Fund requirements at a 99 percent confidence level.[8] NSCC imposes Backtesting Charges when a member's 12-month rolling backtest coverage falls below a 99 percent backtesting coverage target.[9]

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2 *See generally Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures* at 13, 48 (Dec. 2021) ("Disclosure Framework"), http://www.dtcc.com/~/media/Files/Downloads/legal/policy-and-compliance/NSCC_Disclosure_Framework.pdf (last visited November 7, 2022).

3 *See id.* at 48.

4 17 CFR § 240.17Ad-22(e)(6)(i).

5 Disclosure Framework at 48.

6 *See id.* at 49; NSCC Rules, Procedure XV, § I(B)(3); *see also Order Granting Approval of Proposed Rule Changes to Describe the Backtesting Charge and the Holiday Charge that may be Imposed on Members*, Exchange Act Release No. 79167, 2016 WL 6276856 (Oct. 26, 2016) (order approving Backtesting Charges); *Order Granting Approval of Proposed Rule Change to Accelerate [NSCC's] Trade Guaranty, Add New Clearing Fund Components, Enhance its Intraday Risk Management, Provide for Loss Allocation of "Off-the-Market Transactions," and Make Other Changes*, Exchange Act Release No. 79598, 2016 WL 7368268 (Dec. 19, 2016) (order approving amendments to rules governing Backtesting Charges).

7 NSCC Rules, Procedure XV, § I(B)(3).

8 Disclosure Framework at 50.

9 NSCC Rules, Procedure XV, § I(B)(3); *see also* Disclosure Framework at 49-50 (stating that the Backtesting charge "may require a [m]ember to make an additional deposit to mitigate exposures . . . as needed to achieve a 99 percent . . . back testing coverage target").

B. Alpine's Application for Review and Expedited Stay Motion.

On March 2, 2021, Alpine filed an application for review of an NSCC rule change that the Commission approved in 2020.[10] That rule change concerned other charges (not Backtesting Charges) that NSCC assesses as part of the Required Fund Deposit. Alpine maintained that the Commission could review this rule change under Section 19(d) of the Securities Exchange Act of 1934. Alpine also contended that the charges that the rule change authorized should be set aside as "onerous, discriminatory and otherwise inconsistent with the requirements of the Exchange Act." At the time it filed its application for review, Alpine also sought a stay of various actions that NSCC purportedly took pursuant to the rule change; that stay motion remains pending.

On October 28, 2022, in connection with its application for review, Alpine filed its Expedited Stay Motion requesting a stay of NSCC's imposition of a $2,154,101.32 Backtesting Charge. As noted above, NSCC does not impose Backtesting Charges under the approved rule change that Alpine challenges in its application for review in these proceedings. Rather, NSCC imposes Backtesting Charges under rule changes that the Commission approved in 2016.[11] But NSCC assesses the Backtesting Charge based in part by reference to the other charges that NSCC imposes under the approved rule change that is the subject of Alpine's application.[12]

Alpine sought an expedited stay because NSCC informed it that the charge would be effective November 1, 2022. NSCC informed Alpine that deficiencies it observed in September 2022 caused Alpine to fall below the backtesting target, and it attributed the deficiencies to Alpine's "net short portfolios with the top driver being a concentrated short position in GTII."

Alpine argues that NSCC's imposition of this Backtesting Charge constitutes a limitation of access to NSCC services that the Commission may review pursuant to Section 19(d); further, it contends that the Commission should stay NSCC's imposition of the charge pursuant to Rule of Practice 401.[13] According to Alpine, the charge constitutes a limitation of access under Section 19(d) because Alpine lacks the capital necessary to pay it and the other charges to which

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10 *Order Approving a Proposed Rule Change to Enhance National Securities Clearing Corporation's Haircut-Based Volatility Charge Applicable to Illiquid Securities and UITs and Make Certain Other Changes to Procedure XV*, Exchange Act Release No. 90502, 85 Fed. Reg. 77,281 (Dec. 1, 2020).

11 *See supra* note 6.

12 NSCC Rules, Procedure XV, § I(B)(3) (providing that NSCC may require a member to make Backtesting Charges as an additional deposit to mitigate exposures to NSCC "caused by settlement risks that may not be adequately captured by [its] portfolio volatility model").

13 *See* 15 U.S.C. § 78s(d) (providing that any action taken by a self-regulatory organization ("SRO") that "prohibits or limits any person in respect to access to services offered by" the SRO is "subject to review" by the Commission); 17 C.F.R. § 201.401(d)(1) (providing for motions to stay actions for which "review may be sought pursuant to" Rule 420); 17 C.F.R. § 201.420 (providing that an application for review may be filed by a person aggrieved by a determination of an SRO with respect to a prohibition or limitation of access to services offered by the SRO).

Alpine is subject, and if Alpine is unable to pay the charges, the firm will no longer be able to process trades for its customers through NSCC. Alpine contends that NSCC also lacks a valid rationale for imposing the Backtesting Charge, because Alpine covered its positions at the time of the trades and says it has sufficient shares of stock to cover its sell-side positions before it submits trades to NSCC in the future. Alpine further claims that NSCC's own actions indicate that NSCC itself does not believe such charges are necessary for risk mitigation, because NSCC has submitted a proposed rule change that would eliminate a component of Backtesting Charges.

II. Analysis

Under Rule of Practice 401(d)(1), an aggrieved person may move to stay an SRO action reviewable under Section 19(d).[14] A stay is an "extraordinary remedy," and the moving party has the burden of establishing that relief is warranted.[15] In deciding whether to grant a stay, we consider whether: (i) there is a strong likelihood that the movant will eventually succeed on the merits of the appeal; (ii) the movant will suffer irreparable harm without a stay; (iii) no other person will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.[16] The first two factors are the most critical, but a stay decision rests on the balancing of all four factors.[17] Thus, a stay may be warranted even if the movant has not shown a strong likelihood of success if the movant raises a "serious legal question on the merits" and shows that the other factors weigh decidedly in his favor.[18] Alpine has not met its burden.

A. Alpine fails to establish a serious legal question on the merits.

1. Under *NASDAQ Stock Market v. SEC*, Section 19(d) is not available as a means for Alpine to challenge the Backtesting Charge.

Alpine requests that we stay NSCC's imposition of the approximately $2.1 million Backtesting Charge, but Alpine has not established that there is a serious legal question as to

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14 *See supra* note 13.

15 *See Nken v. Holder*, 556 U.S. 418, 432-34 (2009); *accord, e.g.*, *Mark E. Laccetti*, Exchange Act Release No. 79138, 2016 WL 6137057, at *2 & n.10 (Oct. 21, 2016); *Mitchell T. Toland*, Exchange Act Release No. 71875, 2014 WL 1338145, at *2 (Apr. 4, 2014).

16 *Potomac Cap. Markets, LLC*, Exchange Act Release No. 91172, 2021 WL 666510, at *2 (Feb. 19, 2021).

17 *See, e.g.*, *Harding Advisory LLC*, Securities Act Release No. 10330, 2017 WL 1163327, at *1 (Mar. 29, 2017); *see also Nken*, 556 U.S. at 434 (stating that "[t]he first two factors of the traditional standard are the most critical"); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (warning that "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course[,]" and emphasizing that "the balance of equities and consideration of the public interest[ ] are pertinent" to the assessment).

18 *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *6 (Nov. 27, 2017) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011)).

whether Section 19(d) is available as a means to challenge the charge. In *NASDAQ Stock Market v. SEC*, the D.C. Circuit held that "Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules."[19] The court explained that "Section 19(d)'s text does not contemplate challenges to generally-applicable fee rules, and the remedy and notice provisions are incompatible with a challenge to fee rules that do not target specific individuals or entities."[20] Rather, "Section 19(d) speaks to 'limits [on] any *person*' with regard to accessing the SRO's services,"[21] and "contemplates action targeted at individuals," rather than generally applicable fee rules.[22] The court thus vacated our underlying decision, which had set aside under Section 19(d) certain generally applicable fees charged by national securities exchanges.[23]

Alpine also challenges the application of generally applicable rules. We see no basis to distinguish between the generally applicable fee rules at issue in *NASDAQ Stock Market* and the generally applicable rules governing clearing fund deposits at issue here for purposes of Section 19(d). Like generally applicable fee rules, generally applicable rules governing a clearing agency's margin requirements, here NSCC's clearing fund deposits, do not target specific individuals or entities. Indeed, NSCC's rules do not address Alpine or any other person specifically; rather, they govern the assessment of both the Required Fund Deposit and additional Backtesting Charges and apply to all of its members. Accordingly, under *NASDAQ Stock Market*, Alpine has not raised a serious legal question as to whether it may challenge the imposition of charges under generally applicable rules governing deposit charges, like the imposition of Backtesting Charges, under Section 19(d).[24]

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19 961 F.3d 421, 424 (D.C. Cir. 2020).

20 *Id.*

21 *Id.* at 428 (quoting 15 U.S.C. § 78s(d) with emphasis added in opinion).

22 *Id.* at 430.

23 *Sec. Indus. & Fin. Mkts. Ass'n*, Exchange Act Release No. 84432, 2018 WL 5023228, at *11, *34 (Oct. 16, 2018) (finding that challenged fees "[we]re limitations of access to exchange services" and setting them aside as inconsistent with the purposes of the Exchange Act).

24 Limitations of access reviewable under Section 19(d) typically involve revocations of membership or denials of services, not the assessment of fees or charges under generally applicable rules. *See MFS Sec. Corp. v. New York Stock Exch., Inc.*, 277 F.3d 613, 620 (2d Cir. 2002) ("The NYSE's revocation of MFS's membership and its actions to cut off phone service manifestly limited MFS's access to services."), *cited with approval in NASDAQ Stock Mkt.*, 961 F.3d at 428-29; *Tower Trading, L.P.*, Exchange Act Release No. 47537, 2003 WL 1339179, at *5 (Mar. 19, 2003) (concluding that "Tower's loss of its guaranteed participation fundamentally altered its access to services offered by CBOE"); *Scattered Corp.*, Exchange Act Release No. 37249, 1996 WL 284622, at *2 (May 29, 1996) (finding that "the Exchange's determination not to process Scattered's application for registration as a market maker limits the firm's access to the CHX's services"); *Leon Greenblatt III*, Exchange Act Release No. 34953, 1994 WL 640090, at *1 (Nov. 9, 1994) ("We believe that the action taken by the [Chicago Stock Exchange denying access to the trading floor] constitutes a denial of Greenblatt's access to services offered by the Exchange."), *cited in MFS Sec. Corp.*, 277 F.3d at 619; *William J. Higgins*, Exchange Act

The Exchange Act's structure supports this conclusion with even greater force than in *NASDAQ Stock Market*.[25] The fee rules at issue in *NASDAQ Stock Market* were not subject to Commission approval prior to their effectiveness, so the Commission did not have to issue an order approving them, which would have been subject to judicial review.[26] Here, by contrast, the Commission reviews rules governing clearing fund deposits under Section 19(b), which provides that the Commission "shall approve" such rules if they are consistent with the Exchange Act and the applicable rules and regulations thereunder.[27] So the Commission approves rules governing clearing fund deposits before they are effective, and Alpine (or other aggrieved persons) could have sought judicial review of orders approving changes to NSCC's margin rules. It would make little sense to allow parties to challenge these rules under Section 19(d) as a limitation of access when the statute already expressly provides for Commission review under Section 19(b). And it would make even less sense to argue that review under Section 19(d) should follow the culmination of the Section 19(b) review process; this would result in Commission review (under Section 19(d)) following Commission approval (under Section 19(b)).[28]

Moreover, the statutory scheme for review of limitations of access is a poor fit for review of individual deposit charges, for reasons the court explained in *NASDAQ Stock Market*. The court declined to construe Section 19(d) "to mean that every generally-applicable fee rule could be a 'limit[ation]'on 'access to services'" because doing so would mean the notice requirements of Section 6(d) would apply and those requirements would be "unworkable" with regard to generally-applicable fee rules.[29] The same logic applies here. If the assessment of individual deposit charges were a limitation of access actionable under Section 19(d), it would require NSCC to provide notice of, and "an opportunity to be heard upon, the specific grounds for" the charges, "keep a record" of the proceeding, provide "a statement setting forth the specific grounds" on which the charge is based, and file with the Commission notice of the charges imposed.[30] Requiring that NSCC satisfy these requirements for every individual charge would be as unworkable as *NASDAQ Stock Market* found it to be for fees.

Release No. 24429, 1987 WL 757509, at *5 (May 6, 1987) (concluding that "denial of a member's request to be permitted to communicate from the Exchange floor with non-members located off-floor would constitute a prohibition of, or limitation on, access to services").

25 *NASDAQ Stock Market*, 961 F.3d at 429 (the "structure of the Exchange Act" supports the conclusion that the generally applicable fee rules are not reviewable under Section 19(d)).

26 *Id.* at 425.

27 15 U.S.C. § 78s(b)(2)(C)(i).

28 After publishing NSCC's proposed rule changes regarding Backtesting Charges for comment, the Commission received no comments, and approved the rules. *See supra* note 6.

29 *NASDAQ Stock Mkt.*, 961 F.3d at 429-30.

30 Exchange Act 17A(b)(5)(B), 15 U.S.C. § 78q–1(b)(5)(B); Exchange Act 19(d)(1), 15 U.S.C. § 78s(d)(1); *see also* Exchange Act Section 17A(b)(3)(H), 15 U.S.C. § 78q–1(b)(3)(H) (requiring clearing agency rules to provide fair procedures with respect to "the prohibition or limitation by the clearing agency of any person with respect to access to services").

NSCC's members must satisfy the charges imposed on them pursuant to NSCC's generally applicable rules, but the specific charges are not actions targeted at the member that limits its access to NSCC's services. With respect to the Backtesting Charge specifically, NSCC notes that Alpine remains a member in good standing and receives all services for which it is eligible. NSCC notes further that it has not yet taken any action against Alpine for a violation of NSCC's rules or for being in noncompliance with them.[31] Still, Alpine insists that NSCC should not be able to assess the Backtesting Charge despite it doing so pursuant to generally applicable rules that the Commission approved. *NASDAQ Stock Market* forecloses such a challenge.[32]

2. Alpine's efforts to distinguish *NASDAQ Stock Market* are unavailing.

Alpine argues that the Required Fund Deposit charges are not generally applicable fee rules because they are individually calculated and uniquely applied to each member. With respect to the Backtesting Charge, Alpine notes that in its rule filing proposing Backtesting Charges, NSCC stated that, when applicable, it would assess a Backtesting Charge specific to each member. But the fact that a rule is applied in specific circumstances does not establish that the rule is targeted at the entity to which it is applied. *NASDAQ Stock Market* explains that a decision by an SRO "to impose a fee after one-on-one negotiations with the only subscriber that would have paid the fee" would constitute a fee targeted at a single entity.[33] But NSCC did not impose the Backtesting Charge after one-on-one negotiations with Alpine, its rules governing Backtesting Charges do not apply only to Alpine, and Alpine is not the only entity that has to pay such a charge. NSCC imposed the Backtesting Charge as part of its application of its rules to all of its members. The same was true in *NASDAQ Stock Market*: the generally applicable fee rules at issue there were applied in a manner specific to each market participant.[34]

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[31] Such an action might constitute a limitation of access reviewable under Section 19(d). *See Lek Sec. Corp.*, Exchange Act Release No. 95014, 2022 WL 1769802, at *5 & n.16 (May 31, 2022) (reviewing the merits of NSCC's determination to cease to act for a member pursuant to its rule allowing it to prohibit or limit a member's access to its services if the member was in financial difficulty where NSCC found that the member's capital and liquidity were inadequate).

[32] Because Alpine has not shown a serious legal question with respect to whether we may review the Backtesting Charge under Section 19(d), we do not address its arguments as to why NSCC should not be able to impose the Backtesting Charge. *See, e.g.*, *Constantine Gus Cristo*, Exchange Act Release No. 86018, 2019 WL 2338414, at *6 (June 3, 2019) (finding that an argument about the merits of an SRO determination that applicant had to arbitrate a claim did not establish that the Commission had the authority to review that determination under Section 19(d)). We note that, although NSCC acknowledges in its opposition to the Expedited Stay Motion that it has proposed to eliminate one component of Backtesting Charges, it notes that it also proposed a new charge to mitigate risk as part of that proposal.

[33] *NASDAQ Stock Mkt.*, 961 F.3d at 429 (citing *NASD v. SEC*, 801 F.2d 1415, 1417, 1419-21 (D.C. Cir. 1986)).

[34] *See Sec. Indus. & Fin. Mkts. Ass'n*, 2018 WL 5023228, at *30 (showing that NYSE Arca fee rule imposed per subscriber fees on firms that differed based on user's status as a professional or nonprofessional and capped the amount of a firm's total professional fees);

Alpine also argues that the Backtesting Charge is a limitation of access because it lacks the capital to pay the Backtesting Charge, its Required Fund Deposit, and its trading-specific margin charges. But Alpine cannot establish that the charge limits its access to NSCC services simply because it currently lacks the capital to satisfy the charge. Under Alpine's theory, whether a charge constituted a limitation of access would depend on the amount of capital held by the broker. And the exact same charge might not constitute a limitation of access for some, but would reflect a limitation of access for those brokers without enough capital to satisfy the charge. Further, the charge would also cease to be a limitation of access once a broker who was not initially able to satisfy the charge later acquired sufficient capital to do so. Whether an SRO action is reviewable as a limitation of access cannot depend on the broker's finances.

Alternatively, Alpine's argument may be read to suggest that, in its view, any time NSCC imposes a charge on its members to ensure that they can satisfy their obligations, such charges necessarily reflect limitations of access to NSCC's services. But the decision in *NASDAQ Stock Market* would be meaningless if an applicant seeking to challenge generally applicable rules under Section 19(d) could do so simply by challenging particular instances of their application. Accordingly, for the above reasons, Alpine has failed to raise a serious question on the merits.

B. Alpine fails to demonstrate that the remaining factors justify a stay.

To establish irreparable harm, "a stay movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent."[35] The movant must also show that the alleged harm will "directly result" from the action that the movant seeks to stay.[36]

In its Expedited Stay Motion, Alpine argues that it will suffer irreparable harm without a stay because it has insufficient capital to pay the Backtesting Charge, in addition to the other charges to which it is subject. NSCC responds that Alpine's CEO told an NSCC official in October 2022 that "financing the charge would not present an issue for Alpine." Alpine responds by stating that, "upon further analysis," it determined it lacked the requisite capital. And, according to Alpine, if Alpine is unable to satisfy the Backtesting Charge, NSCC "will impose it against Alpine's current deposit and effectively deprive Alpine of the ability to pay amounts necessary to . . . clear trades for its customers." Alpine states further that if it "is unable to process trades for its customers, it will go out of business."[37]

Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Rule 7019, Exchange Act Release No. 62907, 75 Fed. Reg. 57,314, 57,314 (Sept. 20, 2010), https://www.gpo.gov/fdsys/pkg/FR-2010-09-20/pdf/2010-23385.pdf (specifying method for calculating fees for Nasdaq data based on particular use of data and class of securities at issue).

35 *In re Revel AC, Inc.*, 802 F.3d 558, 571 (3d Cir. 2015) (internal quotation marks and citation omitted).

36 *Zipper*, 2017 WL 5712555, at *4 (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

37 In a supplement to the Expedited Stay Motion, Alpine states that, in order to pay the Backtesting Charge, it has gained access to "a bridge loan with an interest rate being calculated

NSCC disputes Alpine's assertions. NSCC says that it will not deduct the Backtesting Charge from Alpine's Required Fund Deposit. Rather, the "Backtesting Charge is added to the Required Fund Deposit," and if "the Backtesting Charge and the Required Fund Deposit exceed what Alpine has on deposit for a given day, Alpine will be required to fund the deficit." Alpine does not explain what immediate irreparable harm it will suffer if it is unable to do so. As noted above, NSCC has not yet taken any action against Alpine for a violation of NSCC's rules or for being in noncompliance with them. If NSCC does take such action, that action might constitute a reviewable limitation of access under Section 19(d), and Alpine could seek relief (including a stay) at that time.[38] As a result, it does not appear on this record that Alpine has established irreparable harm absent a stay of NSCC's imposition of the Backtesting Charge.

In any event, even if we assumed that the imposition of the Backtesting Charge will cause such harm, Alpine's failure to raise a serious legal question on the merits means Alpine has not met its burden for seeking a stay.[39]

Alpine also fails to establish that the final two factors—the likelihood of harm to others from a stay and a stay's impact on the public interest—favor relief. Staying the assessment of the Backtesting Charge on Alpine could provide Alpine an unfair advantage over competing NSCC members (and members to whom Backtesting Charges might also be applicable), particularly members similarly operating in the microcap sector. Granting a stay could also disrupt NSCC's ability to mitigate risk by assessing charges authorized under its rules for that purpose. Indeed, if Alpine could obtain relief from the Backtesting Charge, presumably other NSCC members could also obtain relief from charges imposed pursuant to NSCC's generally applicable rules. Undermining NSCC's ability to collect margin to manage risk pursuant to its rules could have significant ramifications for the securities markets and therefore the public.

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Accordingly, IT IS ORDERED that Alpine Securities Corporation's motion for an emergency interim stay of action of the National Securities Clearing Corporation is denied.

By the Commission.[40]

Vanessa A. Countryman
Secretary

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at 1% per day based on 360 days" but that, "if Alpine incurs that expense for more than 10 days, it would not be in a position to repay the bridge loan and will be unable to operate."

[38] *See Lek*, 2022 WL 1769802, at *5 & n.16 (reviewing NSCC's determination to cease to act for a member after NSCC determined that member's capital and liquidity were inadequate).

[39] *See, e.g., In re Revel AC, Inc.*, 802 F.3d at 570 (stating that "'even if a movant demonstrates irreparable harm . . . [it] is still required to show, at a minimum, serious questions going to the merits'") (alteration in original) (internal citation omitted)).

[40] Commissioner Peirce concurs in the result only.