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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

ALPINE SECURITIES CORPORATION, a Utah Corporation, Plaintiff, vs. FINANCIAL INDUSTRY REGULATORY AUTHORITY, a Delaware corporation, Defendant.	Case No: 2:20-cv-00794-DBB **OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** District Judge David Barlow

Financial Industry Regulatory Authority, Inc. ("FINRA"), though its counsel of record, hereby opposes the Motion for Preliminary Injunction (the "Motion") (Dkt. No. 4) of Alpine Securities Corporation ("Alpine").

Introduction

FINRA member Alpine is alleged to have stolen millions of dollars from its customers, and to have violated multiple FINRA rules by, among other things, (1) increasing its fees by 60,000%, from $100 *per year* to $5,000 *per month*, (2) assessing an "illiquidity and volatility fee" for trades that were never even executed, (3) deeming "worthless" any customer securities valued at or below $1,500 and purchasing those "worthless" securities for $0.01 per position, (4) falsely declaring that customer accounts had been "abandoned," including accounts valued at approximately $70,000, and (5) fraudulently transferring ill-gotten customer funds to affiliated entities though sham expenses, like a loan bearing a 120% annual interest rate, and a landlord "common area maintenance" charge of over $600,000. [*See* Department of Enforcement First Amended Complaint ("DOE Complaint"), attached hereto as **Exhibit A**, ¶¶ 1–6, 21, 39, 67, 88, 99, 106.]

As a result of Alpine's alleged misconduct, FINRA's Department of Enforcement ("DOE") initiated a disciplinary proceeding against Alpine seeking "immediate intervention . . . [and] expedited relief to halt Alpine's ongoing unauthorized trading and conversion and misuse of customer assets, to prevent further customer losses, to avoid the dissipation of assets, and protect investors from other significant harm." [*Id.* ¶ 7.] The disciplinary proceeding is ongoing, and at the time Alpine filed its Motion, the disciplinary proceeding was scheduled to resume via videoconference on November 30. [*See* Order Converting Hearing to Videoconference, Ex. 1 to Alpine's Complaint (Dkt. 2-1) (the "Zoom Order").]

Alpine objects to resuming the disciplinary proceeding via videoconference, and it purportedly brought this motion for preliminary injunctive relief due to the time exigency of the impending November 30 hearing date. That exigency—and thus the entire basis for Alpine's

Motion—is gone. The November 30 hearing has been taken off the calendar, and the parties have been ordered by the Deputy Chief Hearing Officer to submit briefing regarding whether the Zoom Order should be reconsidered (the "Reconsideration Briefing"). [*See* Order Postponing Hearing Date and Requiring Briefing ("Postponement Order"), attached hereto as **Exhibit B**.] Based on the briefing schedule set by the Postponement Order, the date on which the disciplinary proceeding will resume will not even be selected until after January 5, 2021. [*See id*. at 3.] For that reason alone Alpine's Motion fails. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (Injunctions are only appropriate to address imminent and certain harm.).

That Alpine sought relief from this Court to enjoin a proceeding that is no longer on calendar reflects an even more fundamental flaw with Alpine's Motion, and indeed with this entire action: this Court lacks subject-matter jurisdiction over claims involving FINRA disciplinary proceedings. Any grievance that Alpine has regarding the Zoom Order or the FINRA disciplinary proceeding must be presented in a manner consistent with the comprehensive and exclusive administrative review process established by Congress in the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*. (the "Exchange Act"). That statutory scheme vests exclusive Article III jurisdiction in the United States Court of Appeals, but only after the FINRA hearing panel, National Adjudicatory Council ("NAC"), and the Securities and Exchange Commission ("SEC") have finally ruled on the dispute. *See* FINRA Rules 9211(a), 9311, 9370; 15 U.S.C. § 78s(d)(2); 15 U.S.C. § 78y(a)(1). Indeed, the Fourth Circuit and D.C. Circuit both made this exact point when they affirmed the dismissal of claims asserted by Alpine's affiliate, Scottsdale Capital Advisors Corp.,[1] that would have had the effect of interfering with ongoing FINRA disciplinary

[1] Alpine and Scottsdale Capital Advisors Corp. are each directly or indirectly owned and operated by John Hurry.

proceedings. *See Scottsdale Capital Advisors Corp. v. FINRA*, 844 F.3d 414, 424 (4th Cir. 2016) ("*Scottsdale I*") ("Congress, through the Exchange Act, intended to channel objections to FINRA's authority through the agency and the courts of appeals. In so doing, it is clear Congress sought to preclude federal district-court jurisdiction."); *Scottsdale Capital Advisors Corp. v. FINRA*, 811 F. App'x. 667, 667 (D.C. Cir. 2020) ("*Scottsdale II*") ("The [Exchange] Act does not provide federal district courts with any role in adjudicating disputes between FINRA and its members.").

Even if Alpine's injuries were non-speculative and its claims could be considered by this Court, they substantively lack merit and cannot support the imposition of a preliminary injunction. First, there is no private right of action against FINRA for violation of its own rules. *See Turbeville v. FINRA*, 874 F.3d 1268, 1276 (11th Cir. 2017) ("Congress did not intend to create a private right of action for plaintiffs seeking to sue [FINRA] for violations of [its] own internal rules."). Second, FINRA is "absolutely immune from suit for the improper performance of regulatory, adjudicatory, or prosecutorial duties." *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008). Third, FINRA is not a state actor that can be sued for alleged constitutional violations. *See Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) ("The NASD [FINRA's predecessor] is a private actor, not a state actor."). Fourth, the FINRA Chief Hearing Officer complied with FINRA Rule 9261 ("Rule 9261") when she originally ordered that the remainder of Alpine's disciplinary proceeding would be conducted remotely. *See* Rule 9261 (granting the Chief Hearing Officer discretion to "determine that the hearing shall be conducted, in whole or in part, by video conference").

Further, the balance of equities and public interest both favor denial of Alpine's Motion and resolution of this dispute by the hearing panel consistent with the terms of the Postponement Order and the comprehensive administrative review process established by Congress.

Factual Background

I. FINRA Has An Essential Role In Regulating The Securities Industry And Disciplining Its Members.

Through the Exchange Act, Congress established a comprehensive statutory plan for "cooperative regulation" of the securities market, "under which self-regulatory organizations [('SROs')] would exercise a primary supervisory role subject to ultimate SEC control." *Sparta Surgical Corp. v. NASD*, 159 F.3d 1209, 1213–14 (9th Cir. 1998), *abrogated in part on other grounds by Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562 (2016). Any person desiring to use any instrumentality of interstate commerce to sell securities must join an association of broker dealers registered as a national securities association. 15 U.S.C. § 78o(a)(1), (b)(1). FINRA, previously known as the National Association of Securities Dealers ("NASD"), is a private not-for-profit SRO, which since 1939 has been the only registered national securities association in the United States. *See Turbeville*, 874 F.3d at 1270 n.2. In order for FINRA to register as a national securities association and SRO under the Exchange Act, the SEC is required to approve FINRA's By-Laws, which contain FINRA's authority to adopt rules governing FINRA members and amendments to those rules. 15 U.S.C. §78s(b); *see also* FINRA By-Laws, Art. XI, Sec. 1 (https://www.finra.org/rules-guidance/rulebooks/corporate-organization/article-xi-rules) (last visited November 16, 2020).

The Exchange Act requires FINRA to establish rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade . . . and, in

general, to protect investors and the public interest . . . ." 15 U.S.C. § 78o-3(b)(6). FINRA is also required by the Exchange Act to "enforce compliance by its members and persons associated with its members," and to "appropriately discipline[]" such persons for violation of FINRA's rules or the Exchange Act. 15 U.S.C. § 78o-3(b)(2), (7).

Pursuant to FINRA's mandate to discipline its members, FINRA's rules establish a "multi-layered hearing and appeals process that governs disciplinary actions against FINRA-affiliated brokers and dealers." *Turbeville*, 874 F.3d at 1271. That process includes (1) a full hearing before a FINRA hearing panel, (2) an appeal of the hearing panel's final decision to FINRA's NAC, (3) a subsequent *de novo* appeal to the SEC, and (4) another appeal to the United States Court of Appeals. *See* FINRA Rules 9211(a), 9311, 9370; 15 U.S.C. § 78s(d)(2); 15 U.S.C. § 78y(a)(1).

II. FINRA's Disciplinary Proceeding Against Alpine.

Alpine is a FINRA member and is the respondent in an ongoing FINRA disciplinary proceeding. [*See* Complaint (Dkt. No. 2) ¶¶ 1–2.] Alpine is alleged to have (1) converted and misused customers' assets in violation of FINRA Rules 2150 and 2010; (2) executed unauthorized trades in violation of FINRA Rule 2010; (3) charged unfair, unreasonable, and discriminatory prices, commissions, and fees in violation of FINRA Rules 2121, 2122, and 2010; and (4) made unauthorized capital withdrawals in violation of FINRA Rules 4110(c) and 2010. [*See* DOE Complaint ¶¶ 112–167.]

The disciplinary proceeding, which was anticipated to last approximately two weeks, began in person on February 18, 2020, and was adjourned after five days of testimony due to a family emergency of Alpine's counsel. Prior to adjournment of the disciplinary proceeding, five witnesses testified live, including three witnesses jointly designated by DOE and Alpine: (1) Robert Tew,

who was Alpine's former President, Director, Chief Executive Officer, and Chief Compliance Officer; (2) Christopher Frankel, another former Alpine Director, Chief Executive Officer, and Chief Compliance Officer; and (3) Jason Kane, a former Alpine Chief Compliance Officer.[2] [*See* Postponement Order at 1.] Alpine completed its live direct examination of those three jointly designated former Alpine officers prior to adjournment of the disciplinary proceeding.

While the disciplinary proceeding was adjourned, the COVID-19 pandemic caused FINRA to administratively postpone the portion of the disciplinary proceeding that was to resume in person until November 30, 2020.[3] [*See* Complaint (Dkt. No. 2) ¶¶ 55–56, 68, 82, 99.] Five witnesses designated by each DOE and Alpine remain to testify.[4] [*See* Postponement Order at 2.]

III. The Administrative Rule Change To Rule 9261.

In order to permit FINRA to resume its critical adjudicatory function and to fulfill its statutory obligations to protect investors and maintain fair and orderly markets, FINRA filed a proposed temporary administrative rule change to FINRA Rule 9261 with the SEC that would allow the Chief Hearing Officer or the Deputy Chief Hearing Officer to order that a disciplinary proceeding be conducted in whole, or in part, by videoconference. [*See* Notice of Proposed Rule Change, Ex. 3 to Alpine's Complaint (Dkt. 2-3).] Interested parties were given 21 days from publishing of the Notice of Proposed Rule Change to "submit written data, views and arguments concerning the [proposed amendment to Rule 9261], including whether the proposed rule change is consistent with the [Exchange] Act." [*Id*. at 55717.] Although two parties submitted comments

[2] Some testimony was also taken from Alpine's current Chief Financial Officer, David Brant, but his examination is not complete.

[3] Since the initial adjournment, the disciplinary proceeding was resumed to take testimony from those witnesses whom the hearing officer had granted leave to testify telephonically or by videoconference. Of the five witnesses that testified virtually, two witnesses were jointly designated. [*See* Postponement Order at 1.]

[4] Three of those witnesses have been jointly designated by DOE and Alpine.

to which FINRA responded pursuant to the administrative process, Alpine did not comment on the proposed rule change. The temporary amendment to FINRA Rule 9261 became operative October 1, 2020, and remains in effect through December 31, 2020, pending any future extensions. [*See id*. at 55712.]

IV. The Zoom Order, This Action, And The Subsequent Postponement Order.

On November 2, 2020, the Chief Hearing Officer exercised her discretion under Rule 9261 to order that the remainder of Alpine's disciplinary proceeding be conducted via videoconference. [*See* Zoom Order.] Alpine did not file any motions in the disciplinary proceeding seeking reconsideration of the Zoom Order, or to ask for postponement of the disciplinary proceeding. Instead, Alpine filed this action seeking to enjoin the disciplinary proceeding and invalidate the Zoom Order. [*See* Complaint (Dkt. No. 2) at ¶ 9.]

On November 16, 2020, the Deputy Chief Hearing Officer entered an order postponing the November 30 hearing date, and requiring Alpine and DOE to submit briefing on the issue of whether the Zoom Order should be reconsidered. [*See* Postponement Order at 3.] The Reconsideration Briefing is due to be complete on January 5, 2021. [*See id*.]

Argument

I. The Postponement Order Precludes Injunctive Relief.

A preliminary injunction is "an extraordinary and drastic remedy." *Munaf v.Geren*, 553 U.S. 674, 689 (2008) (quotation omitted). "In order for a party to be entitled to a preliminary injunction, that party must show (1) he or she will suffer irreparable injury unless the injunction issues . . . ." *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 (10th Cir. 2006) (quotation

omitted). Alpine's Motion fails because the Postponement Order defeats any contention that Alpine will suffer irreparable injury.

"If the possibility of future harm is speculative, the movant has not established that he will suffer irreparable injury if the preliminary injunction is denied." *Pinson v. Pacheco*, 397 F. App'x 488, 492 (10th Cir. 2010) (quotation omitted). Pursuant to the Postponement Order, Alpine has been given the opportunity to brief its arguments in the correct forum and to ask the Chief Hearing Officer to reconsider her Zoom Order and allow Alpine to present its witnesses live. [*See* Postponement Order at 3.] Because those arguments have not yet been briefed or ruled upon, Alpine cannot establish that in the absence of an injunction it is certain to suffer any concrete harm.

Even if the Chief Hearing Officer were to affirm her Zoom Order, the parties and this Court could only guess at when the disciplinary proceeding will resume. The only information known about resumption of the disciplinary proceeding is that it will occur after January 5, 2021, when Reconsideration Briefing is scheduled to be complete. [*See id*.] Because Alpine cannot show when its claimed harm will occur, or whether it will occur at all, Alpine cannot satisfy its burden of showing "that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *See Heideman*, 348 F.3d at 1189.

None of this is to suggest that Alpine would suffer irreparable injury if forced to present its witnesses remotely. Alpine's unsupported assertion (at 22) that presenting remote trial testimony constitutes irreparable harm has been roundly rejected and is undercut by the fact that the Federal Rules of Civil Procedure expressly allow remote trial testimony. *See* Fed. R. Civ. P. 43(a). Just months ago in *Legaspy v. FINRA*, 2020 U.S. Dist. LEXIS 145735 (N.D. Ill. Aug. 12, 2020), the District Court for the Northern District of Illinois refused to enjoin a remote FINRA

arbitration, and held that "[r]emote hearings . . . in no way prevent parties from presenting claims or defenses." *Legaspy*, 2020 U.S. Dist. LEXIS at **11–12. Similarly, this Court in *Vitamins Online, Inc. v. Heartwise, Inc.*, 2020 U.S. Dist. LEXIS 111709 (D. Utah June 24, 2020), recently concluded that it was appropriate to conduct a trial remotely even over the objection of a party. *See Vitamins Online*, 2020 U.S. Dist. LEXIS at **27–28. And in *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n*, 2020 U.S. Dist. LEXIS 118236, at *3 (E.D. Mich. June 30, 2020), the court ordered a remote bench trial over the objection of both parties.

Nor would Alpine be irreparably injured by the fact that DOE was able to present some of its witnesses live.[5] This exact issue was addressed earlier this year in *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967 (D. Minn. 2020). The district court in that case held that requiring the defendant to present its damages expert remotely despite that plaintiff presented its expert live was "absolutely preferable over an attempt to reschedule the trial." *See In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d at 972 (quotation omitted).

Alpine makes much of the fact that at the conclusion of the disciplinary proceeding the hearing panel may order that Alpine be expelled from FINRA. But Alpine faces the same sanctions irrespective of whether it presents testimony live or remotely. "[C]laims of corporate financial collapse cannot satisfy the irreparable harm exception, given that financial harm can occur in many, if not most, disciplinary hearings of securities traders." *PennMont Sec. v. Frucher*, 586 F.3d 242, 246 (3d Cir. 2009) (citation omitted); *see also Legaspy*, 2020 U.S. Dist. LEXIS at **10–11.

[5] Alpine's discussion (at 2–3) of the testimony that has been presented to date, and that which remains, is incomplete. Three of the witnesses who have already testified live in the disciplinary proceeding were Alpine's witnesses, including multiple former Directors, Chief Executive Officers, and Chief Compliance Officers. [*See* Postponement Order at 1.] Of the seven witnesses that remain to testify, two are DOE witnesses, two are Alpine witnesses, and three are jointly designated. [*See id.* at 2] Thus, like in *Legaspy*, the burden on the parties imposed by the Zoom Order is substantially the same. *See Legaspy*, 2020 U.S. Dist. LEXIS at **11–12.

The relevant harm, should the Zoom Order be upheld, is not the potential sanction but the requirement to present testimony remotely instead of live. Such "harm," to the extent it exists, is not irreparable. *See* Fed. R. Civ. P. 43(a); *Legaspy*, 2020 U.S. Dist. LEXIS at **11–12; *Wilbanks Sec., Inc. v. FINRA.*, 2017 U.S. Dist. LEXIS 71242, at *11 (W.D. Okla. May 10, 2017) ("SRO action likely to result in termination of a business cannot constitute irreparable harm." (quotation omitted)).

II. Alpine Will Not Succeed On Its Claims.

Even if the Postponement Order did not render Alpine's alleged injury wholly speculative, denial of the Motion would still be appropriate because Alpine cannot satisfy its burden of showing that its purported right to injunctive relief is "clear and unequivocal." *Nova Health*, 460 F.3d at 1298 (quotation omitted). On the contrary, Alpine's claims are doomed to fail. *See id*. ("In order for a party to be entitled to a preliminary injunction, that party must show . . . (4) there is a substantial likelihood of success on the merits." (quotation omitted)). This Court lacks subject-matter jurisdiction to consider them, and they also substantively fail for multiple reasons.

A. The Exchange Act's Exclusive Review Process Strips This Court Of Subject-Matter Jurisdiction To Consider Alpine's Claims.

Here, like in *Scottsdale I* and *Scottsdale II*, FINRA initiated a disciplinary proceeding against a member firm. [*See generally* DOE Complaint;] *see also Scottsdale I*, 844 F.3d at 418; *Scottsdale II*, 811 F. App'x. at 667. Here, like in *Scottsdale I* and *Scottsdale II*, plaintiff filed suit against FINRA to alternatively halt or collaterally attack the FINRA disciplinary proceeding. [*See* Complaint (Dkt. No. 2) at ¶ 9]; *see also Scottsdale I*, 844 F.3d at 419; *Scottsdale II*, 811 F. App'x. at 667. Thus here, like in *Scottsdale I* and *Scottsdale II*, this Court lacks subject-matter jurisdiction to consider plaintiff's claims. *See Scottsdale I*, 844 F.3d at 424; *Scottsdale II*, 811 F. App'x. at

668. As the D.C. Circuit explicitly stated less than five months ago, "[h]aving now failed to evade the statutory review scheme for a second time, it should be clear to [Alpine and its affiliate] Scottsdale that it cannot sue FINRA in federal district court for FINRA's alleged failure to comply with the [Exchange] Act." *Scottsdale II*, 811 F. App'x. at 668.

Article III courts are "courts of limited jurisdiction," possessing "only the power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Congress has the absolute authority to grant or withhold subject-matter jurisdiction of the lower federal courts. *See Palmore v. United States*, 411 U.S. 389, 401 (1973). The withholding of subject-matter jurisdiction need not be express. Rather, as the Supreme Court explained in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), Congress shall be deemed to have stripped the subject-matter jurisdiction of the lower federal courts when (1) such intent is "fairly discernible in the statutory scheme" and (2) the litigant's claims are "of the type Congress intended to be reviewed within [the] statutory structure." *See Thunder Basin*, 510 U.S. at 207, 212 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984)).

Courts around the country—including the Fourth Circuit in *Scottsdale I* and D.C. Circuit in *Scottsdale II*—have repeatedly and consistently held that the comprehensive administrative review process established by the Exchange Act deprives district courts of subject-matter jurisdiction. *See, e.g.*, *Scottsdale II*, 811 F. App'x. 667, 667 (D.C. Cir. 2020); *Scottsdale I*, 844 F.3d 414, 424 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1241 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 282 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015); *Swirsky v. NASD*, 124 F.3d 59, 62 (1st Cir. 1997); *SEC v. Waco Financial*, 751 F.2d 831, 834 (6th Cir. 1985); *Merrill Lynch, Pierce, Fenner & Smith v. NASD*,

616 F.2d 1363, 1370 (5th Cir. 1980); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 700 (3rd Cir. 1979); *Charles Schwab & Co. Inc. v. FINRA*, 861 F. Supp. 2d 1063, 1069–70 (N.D. Cal. 2012); *Hayden v. N.Y. Stock Exch., Inc.*, 4 F. Supp. 2d 335, 340 (S.D.N.Y. 1998).

Those decisions were correctly decided and should be followed here. Indeed, application of the Supreme Court's two-part test in *Thunder Basin* plainly demonstrates that Congress intended to strip this Court of subject-matter jurisdiction over Alpine's claims.

1. It Is "Fairly Discernable In The Statutory Scheme" That Congress Allocated Initial Review To FINRA.

The first step of the *Thunder Basin* test is met here because it is "fairly discernable" that Congress intended the Exchange Act to channel challenges to FINRA's disciplinary actions through the Act's comprehensive administrative scheme. *See Thunder Basin*, 510 U.S. at 207. "Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose . . . ." *Id*. "Generally, when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Free Enterprise Fund v. Public Co. Acctg. Oversight Bd.*, 561 U.S. 477, 489 (2010). With the Exchange Act Congress did just that, providing for two levels of FINRA review and one level of SEC review of any contested disciplinary action. *See* FINRA Rules 9211, 9311, 9370.

Furthermore, as the D.C. Circuit observed in *Jarkesy*, "the securities laws' scheme of [regulatory] adjudication and ensuring judicial review resembles in material respects the enforcement scheme the Supreme Court found exclusive in *Thunder Basin*." *Jarkesy*, 803 F.3d at 16. Specifically, under the statutory scheme deemed to be exclusive in *Thunder Basin*, a party challenging regulatory action receives (1) a hearing before an administrative law judge, (2) discretionary review by the regulator, and (3) judicial review by a United States Court of

Appeals. *See Thunder Basin*, 510 U.S. at 207–08. Likewise, under the Exchange Act a party to any FINRA disciplinary proceeding receives (1) a hearing before a FINRA hearing panel, (2) an appeal of the hearing panel's decision to FINRA's NAC, (3) a subsequent *de novo* appeal to the SEC, and (4) another appeal to the United States Court of Appeals. *See* FINRA Rules 9211(a), 9311, 9370; 15 U.S.C. § 78s(d)(2); 15 U.S.C. § 78y(a)(1).

Congress crafted the Exchange Act's administrative review scheme in "painstaking detail," and for that reason every court to consider the issue has concluded that the Exchange Act meets the first step of the *Thunder Basin* test, except for one district court decision that was reversed on appeal.[6] *See Scottsdale II*, 811 F. App'x. at 668 ("Given the painstaking detail with which Congress set forth the rules governing the court of appeals' review of FINRA and SEC action, it is fairly discernible that Congress intended to deny aggrieved FINRA members an additional avenue of review in district court." (citing *Jarkesy*, 803 F.3d at 17)); *Hayden*, 4 F. Supp. 2d at 339 ("Congress's failure to assign any role to the district courts strongly suggests that Congress intended the statutory review procedure to be exclusive. Indeed, any other conclusion would subvert the Congressional purpose of creating a partnership between government and private enterprise as the cornerstone for regulation of the nation's securities markets.").

2. Congress Intended To Preclude Initial Judicial Review.

The second step of the *Thunder Basin* test is also met here because Alpine's claims are "of the type Congress intended to be reviewed within [the Exchange Act's] statutory structure." *See Thunder Basin*, 510 U.S. at 212. "To unsettle the presumption of initial administrative review—made apparent by the structure of the [Exchange Act]—requires a strong countervailing rationale."

[6] *Hill v. SEC*, 114 F. Supp. 3d 1297 (2015), *rev'd by Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016).

Jarkesy, 803 F.3d at 17 (quotation omitted). That "strong countervailing rationale," may be present "if a finding of preclusion could foreclose all meaningful judicial review; if the suit is wholly collateral to a statute's review provisions; and if the claims are outside the agency's expertise." *Free Enterprise*, 561 US at 489 (citing *Thunder Basin*, 510 U.S. at 212–13). None of those countervailing rationales to exclusive administrative review exist here.

First, the Exchange Act provides for meaningful judicial review. Alpine can make its case regarding the propriety of the Zoom Order to (1) the hearing panel, (2) the NAC, (3) the SEC, and (4) one of multiple United States Court of Appeals. *See* FINRA Rules 9211(a), 9311, 9370; 15 U.S.C. § 78s(d)(2); 15 U.S.C. § 78y(a)(1); *see also Jarkesy*, 803 F.3d at 20 (The Exchange Act "presents an entirely 'meaningful' avenue of relief to [disciplinary proceeding] respondents.").

Second, there can be no reasonable assertion that Alpine's claims are "wholly collateral" to the Exchange Act's statutory scheme because Alpine's claims seek to enjoin an ongoing disciplinary proceeding that is part of that statutory scheme. [*See* Complaint (Dkt. No. 2) at ¶ 9]; *see Elgin v. Dep't of the Treasury*, 567 U.S. 1, 22 (2012) (A claim cannot be wholly collateral to a statutory scheme where plaintiff's challenge was "at bottom an attempt to reverse an agency's decision . . . ." (citation omitted)). Indeed, as the district court in *Scottsdale II* explained, "[c]laims that arise from actions FINRA took within the administrative enforcement scheme or that seek the same relief that plaintiff could obtain in the agency proceeding are not collateral at all, let alone 'wholly' so." *Scottsdale Capital Advisors Corp. v. FINRA*, 390 F. Supp. 3d 72, 80 (D.D.C. 2019) (quoting *Jarkesy*, 803 F.3d at 23), *aff'd*, *Scottsdale II*.

Third, consideration of whether FINRA's disciplinary proceeding provides Alpine a "fair procedure" as required by the Exchange Act falls squarely within agency expertise. *See Scottsdale*

I, 844 F.3d at 424 ("As part of the SEC's oversight of FINRA, Congress vested authority in the SEC to review a final disciplinary sanction imposed by FINRA and determine whether its rules were applied in a manner consistent with the purposes of the Exchange Act. Thus, Congress unambiguously channeled [plaintiff's] claim—whether FINRA has exceeded its authority . . .—to the SEC for determination in the first instance." (quotation omitted)).

The relief Alpine seeks here is to have the district court substitute the Chief Hearing Officer's interpretation of her powers and obligations under the Exchange Act and Rule 9261 with its own. [*See* Complaint (Dkt. No. 2) at ¶ 9.] As such, Alpine's claim, like its affiliate's claim in *Scottsdale II*, "is an impermissible attempt to short-circuit the detailed statutory scheme of administrative and judicial review of FINRA action. Accepting [Alpine's] argument would render that scheme largely superfluous and make nearly any disputed FINRA action subject to challenge in district court." *Scottsdale II*, 811 F. App'x at 668.

B. Alpine's Claims Substantively Fail.

1. Alpine Has No Private Right Of Action To Assert Any Of Its Claims.

Congress did not provide in the Exchange Act, or in any other statute, for a private right of action against an SRO for violation of its own rules. Given the comprehensiveness of the Exchange Act, and Congress's silence regarding any private right of action, courts have consistently held that there is no implied private right of action against SROs for acts or omissions under the Exchange Act. *See, e.g.*, *Turbeville*, 874 F.3d at 1276 ("Congress did not intend to create a private right of action for plaintiffs seeking to sue [FINRA] for violations of [its] own internal rules."); *Sparta*, 159 F.3d at 1212 (9th Cir. 1998) ("it is undisputed, even by [the plaintiff], that a party has no private right of action against an exchange for violating its own rules

or for actions taken to perform its self-regulatory duties under the Act."); *Desiderio*, 191 F.3d at 208 ("[T]here is no private right of action available under the Securities Exchange Act to . . . challenge an exchange's failure to follow its own rules." (citation omitted)); *MM&S Financial, Inc. v. NASD*, 364 F.3d 908, 912 (8th Cir. 2004) ("Any attempt by [plaintiff] to bypass the Exchange Act by asserting a private breach of contract claim . . . is fruitless."); *In re Series 7*, 548 F. 3d at 114 ("[C]ourts have consistently found Congress's intent under the Exchange Act precludes common law causes of action, and we agree with the reasoning of our sister circuits.").

The absence of a private right of action defeats Alpine's claims because they are predicated entirely on the assertion that the Zoom Order violates Rule 9261 and the Exchange Act's requirement that disciplinary proceedings provide a "fair procedure." *See* 15 U.S.C. § 78o-3(b)(8). To the extent that Alpine desires to challenge the promulgation or application of Rule 9261, it must do so within the framework of the comprehensive statutory scheme established in the Exchange Act. Within the context of the ongoing disciplinary proceeding, that means Alpine must first present its arguments to the FINRA hearing panel in its Reconsideration Briefing. And absent an ongoing disciplinary proceeding, a party desiring to challenge Rule 9261 must petition the SEC to amend or repeal the rule. *See* 17 C.F.R. § 201.192; 15 U.S.C. § 78s(b), (c); *see also Scottsdale I*, 844 F.3d at 423 ("Scottsdale could petition the SEC—apart from any disciplinary action—to amend or repeal FINRA Rule 2010. The SEC's decision on FINRA's rule would be final agency action of which Scottsdale could then seek review in the appropriate court of appeals."). Alpine cannot end-run Congress's statutory scheme by filing suit and asking this Court to declare what Rule 9261 means and whether its application by the Chief Hearing Officer in the Zoom Order is consistent with the Exchange Act.

2. FINRA Is Absolutely Immune From All Alpine's Claims.

All Alpine's claims substantively fail for the additional reason that FINRA is absolutely immune from suit for any claims regarding regulatory functions performed "under the aegis of the Exchange Act's delegated authority." *Sparta*, 159 F.3d at 1214–15. That has been the conclusion of every Circuit to consider the question. *See, e.g.*, *Sparta*, 159 F.3d at 1214–15; *In re NYSE Specialists*, 503 F.3d 89, 96 (2d Cir. 2007) (Sotomayor, J.) (An SRO "is entitled to absolute immunity for actions it takes pursuant to its quasi-governmental role in the regulation of the securities market."); *In re Series 7*, 548 F.3d at 114 (An SRO is "absolutely immune from suit for the improper performance of regulatory, adjudicatory, or prosecutorial duties.").

Applying this functional test, Alpine's claims fail. All Alpine's claims arise exclusively from FINRA's exercise of its statutory obligation to "enforce compliance by its members" by conducting disciplinary proceedings addressing violations of FINRA's rules or the Exchange Act. 15 U.S.C. § 78o-3(b)(2), (b)(7), (h). That Alpine seeks only injunctive relief does not change the fact that this is an action brought against FINRA in its regulatory capacity, and as such, is barred. *See, e.g., American Benefits Group, Inc. v. NASD,* 1999 U.S. Dist. LEXIS 12321, *24 (S.D.N.Y. Aug. 10, 1999) (denying injunctive relief against NASD on immunity grounds); *Lucido v. Mueller*, No. 08-15269, 2009 U.S. Dist. LEXIS 89775, *19 (E.D. Mich. Sep. 29, 2009) (denying injunctive relief on the grounds of FINRA's regulatory immunity), *aff'd*, 427 F. App'x 497 (6th Cir. 2011).

As then-Judge Sotomayor explained in *In re NYSE Specialists*, "the purpose of immunity is to give . . . SROs breathing room to exercise their powers without fear that their discretionary decisions may engender endless litigation," and to ensure that they "will not be excessively timid in their regulatory decisions . . . ." *In re NYSE Specialists,* 503 F.3d at 97. Because Alpine's claims

relate to the performance of FINRA's regulatory function, they lack merit and are barred by FINRA's absolute regulatory immunity.

3. Alpine's Due Process Claim Fails Because FINRA Is Not A State Actor.

Alpine's constitutional due process claim fails for the additional reason that FINRA is not a state actor. *See Johnson v. Rodrigues,* 293 F.3d 1196, 1203 (10th Cir. 2002) (To state a constitutional claim against a private actor "the conduct allegedly causing the deprivation of a federal right must be fairly attributable to the State." (quotation omitted)). That FINRA is not a state actor has been the conclusion of every Circuit to have squarely ruled on the issue. *See Desiderio*, 191 F.3d at 206 ("The NASD [FINRA's predecessor] is a private actor, not a state actor."); *D.L. Cromwell Invs., Inc. v. NASD*, 279 F.3d 155, 162 (2d Cir. 2002) (same); *Santos-Buch v. FINRA*, 591 F. App'x 32, 33 (2d Cir. 2015) ("As a private actor whose conduct in this case is not 'fairly attributable' to the government, FINRA could not have violated [plaintiff's] due process rights or the Ex Post Facto Clause."); *Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010) ("[Appellant] cannot bring a constitutional due process claim against [FINRA], because [FINRA] is a private actor, not a state actor."); *First Jersey*, 605 F.2d at 699 n.5 (same).

The Fourth and Seventh Circuits have also strongly suggested that FINRA and other SROs are not state actors. *See Jones v. SEC*, 115 F.3d 1173, 1183 (4th Cir. 1997) ("While the NASD is a closely regulated corporation, it is not a governmental agency, but rather a private corporation organized under the laws of Delaware. As such, it is highly questionable whether its disciplinary action of members, even if it is considered to be a quasi-public corporation, can implicate the Double Jeopardy Clause."); *Gold v. SEC*, 48 F.3d 987, 991 (7th Cir. 1995) ("The argument for treating [the NYSE] as an arm of the federal government [has] . . . the agency analogy . . . upside

down. The exchange is the principal rather than the agent; the purpose of the [Exchange Act] is to strengthen the power and responsibility of the exchange in performing a policing function that preexisted federal regulation.").

Alpine erroneously contends (at 17) that the Tenth Circuit in *Rooms v. SEC*, 444 F.3d 1208 (10th Cir. 2006) held that FINRA was a state actor. On the contrary, the issue in that non-precedential decision was whether "*the SEC* violated [Rooms's] due process rights by upholding the bar without finding a violation of Rule 8210." *Rooms*, 444 F.3d at 1210 (emphasis added). The passing statement in *Rooms* that "[d]ue process requires that an NASD rule give fair warning of prohibited conduct" was at most dicta, as the First Circuit concluded in *Cody v. SEC*, 693 F.3d 251 (1st Cir. 2012). *Id.* at 257, n.2. (*Rooms* "has dicta referring to due process as governing NASD rules.").

A more recent Tenth Circuit opinion confirms that *Rooms* did not decide the state-actor issue. In *McCune v. SEC*, 672 F. App'x 865, 869–70 (10th Cir. 2016), the Tenth Circuit declined to "resolve whether constitutional mandates apply" to FINRA because it could resolve the case without deciding that issue. *Id.* If the Tenth Circuit had previously decided that FINRA is a state actor, it would have said so when acknowledging the appellant's reliance on *Rooms*. It did not. *Id.*

Further, Alpine's conclusory assertion (at 16) that this Court should deem FINRA a state actor because it is purportedly "serving a governmental function" is wrong. For a party to be deemed a state actor under the public functions test, the function performed must have been both traditionally and exclusively governmental. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (The relevant question for the public functions test "is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" (quoting *Jackson v. Metro. Edison Co.*, 419

U.S. 345, 353 (1974) (emphasis in original)). Alpine has not shown that regulating securities markets meets either of those requirements, and the Supreme Court has explained that it does not. *See Silver v. NYSE*, 373 U.S. 341, 350–53 (1963) (The securities industry was traditionally self-regulated, and "[t]he pattern of governmental entry [after the stock market crash of 1929] . . . was by no means one of total displacement of the exchanges' traditional process of self-regulation."); *see also Sparta*, 159 F.3d at 1213–14; *Gold*, 48 F.3d at 991.

Likewise, Alpine's unsupported argument (at 16) that FINRA is "acting as an agent of the Federal Government" because it is subject to SEC oversight is contrary to law. *See, e.g.*, *Jackson*, 419 U.S. at 350 (The mere fact that regulation may be "extensive and detailed" does not convert private action to state action.); *Graman v. NASD*, 1998 U.S. Dist. LEXIS 11624, *8 (D.D.C. Apr. 27, 1998) (same); *People v. Cohen*, 187 Misc. 2d 117, 122 (Sup. Ct. 2000), *aff'd*, 9 A.D.3d 71, 85–86 (NY. Ct. App. 2004) ("While Congress certainly provided for comprehensive Federal regulation of the securities industry, and charged the SROs with the duty of self-regulation, the fact that the NASD is subject to extensive oversight by the SEC, and ultimately Federal court review, does not metamorphose the NASD into an organ of the Federal Government.").

As the Second Circuit correctly explained in *Desiderio*, FINRA "is a private actor, not a state actor. It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any [FINRA] board or committee." *Desiderio*, 191 F.3d at 206; *Santos-Buch v. FINRA*, 32 F. Supp. 3d 475, 484 (S.D.N.Y. 2014), *aff'd*, 51 F. App'x 32 (2d Cir. 2015) (same). Because FINRA is not a state actor Alpine's constitutional claim will fail, and it thus cannot serve as a basis for injunctive relief.

4. FINRA Complied With FINRA Rule 9261.

Alpine's claims regarding the application and promulgation of Rule 9261 likewise fail on the merits. Alpine argues that the Chief Hearing Officer breached Rule 9261 by *sua sponte* entering the Zoom Order. [*See* Complaint (Dkt. No. 2) at ¶¶ 143–144.] Rule 9261, however, does not limit the Chief Hearing Officer's authority to enter the Zoom Order to circumstances where the parties have first submitted motions or presented argument. *See* Rule 9261(b). Alpine next argues that the Chief Hearing Officer breached Rule 9261 by purportedly not considering "the particular circumstances of this Hearing, including the number of remaining witnesses and the volume of documentary exhibits . . . ." [*See* Complaint (Dkt. No. 2) at ¶ 145.] But, Rule 9261 requires only that the Chief Hearing Officer consider "the current public health risks presented by an in-person hearing" prior to ordering the presentation of remote testimony. *See* Rule 9261(b). The Zoom Order expressly provides that the Chief Hearing Officer did so. [*See* Zoom Order at 2, fn. 2.] Alpine also argues that it was a breach of Rule 9261 to require Alpine to present some of its witnesses remotely despite that DOE presented many of its witnesses live. [*See* Complaint (Dkt. No. 2) at ¶ 146.] The express terms of Rule 9261, however, authorize the Chief Hearing Officer to order that only part of a disciplinary proceeding be conducted remotely. *See* Rule 9261(b) ("[T]he Chief Hearing Officer . . . may, on a temporary basis, determine that the hearing shall be conducted, in whole *or in part*, by video conference." (emphasis added)).

Unable to identify anything about the Zoom Order that fails to comply with the express terms of Rule 9261, Alpine requests that the Court throw out the amendment to Rule 9261 altogether. [*See* Complaint (Dkt. No. 2) at ¶¶ 186–203.] First, as noted above, this Court lacks the subject-matter jurisdiction to invalidate the amendment to Rule 9261 and the Zoom Order applying

it. Determining whether Alpine is being afforded a "fair procedure" is a task that Congress gave exclusively to the FINRA hearing panel, the NAC, the SEC, and the United States Court of Appeals. *See* FINRA Rules 9211(a), 9311, 9370; 15 U.S.C. § 78s(d)(2); 15 U.S.C. § 78y(a)(1).

Second, the SEC has the express statutory right to suspend an administrative rule change if it believes that doing so is "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]." 15 U.S.C. § 78s(b)(3)(C). The SEC had 60 days to exercise that right with regard to the amendment to Rule 9261, and this Court should not assume, as Alpine necessarily suggests, that the SEC has erred in not suspending the temporary rule amendment.

Third, Alpine's argument (at 19–20) that having to present testimony remotely deprives it of "due process" or "substantial rights" is overwrought and contrary to the SEC's own holdings. The Zoom Order does not change the testimony and evidence Alpine will be permitted to introduce in the disciplinary proceeding. Although the nature of Alpine's presentation may be different, the assertion (at 11–12) that the hearing panel will ignore or be unable to understand documents or witnesses presented remotely is pure speculation. The SEC itself explained in *Ronald W. Gibbs*, 52 S.E.C. 358, 364 (1995), that "disciplinary proceedings are not criminal prosecutions," are intended to be "conducted in an informal manner," and that a fair procedure "does not necessitate a formalistic face-to-face evidentiary proceeding." *Ronald W. Gibbs*, 52 S.E.C. at 364.

Fourth, Alpine's argument (at 20) that the amendment to Rule 9261 is a "one-size-fits-all proposal," completely ignores that the amendment grants hearing officers significant discretion to consider the particular circumstances of a given disciplinary proceeding when fashioning an order regarding the presentation of evidence. *See* Rule 9261(b); [*see also* Notice of Proposed Rule

Change, Ex. 3 to Alpine's Complaint (Dkt. 2-3), 55716–17 (describing the discretion to be exercised by FINRA's Office of the Hearing Officers ("OHO")); FINRA's October 9, 2020 Response to Comments, attached hereto as **Exhibit C**, 3–4 ("In deciding whether to schedule a hearing by video conference, OHO and the NAC may consider a variety of other factors in addition to COVID-19 virus trends . . . [including] case-related or other relevant factors . . . .").]

Fifth, Alpine's suggestion that accepting remote testimony represents a fundamental transformation of how FINRA conducts disciplinary proceedings is without merit. "[T]elephonic testimony frequently is used in NASD disciplinary proceedings, and neither the Commission nor the courts have found the use of such testimony to be unfair." *Ronald W. Gibbs*, 52 S.E.C. at 364; *see also Robert D. Tucker*, 2013 FINRA Discip. LEXIS 45, *18 (2013) ("[T]elephone testimony is not uncommon in FINRA proceedings . . . ."). Indeed, according to FINRA's COVID website, "Expedited Proceedings generally are not conducted in person [and thus should] proceed as scheduled." *See https://www.finra.org/rules-guidance/key-topics/covid-19/oho-hearings* (last visited November 16, 2020).

III. The Balance Of Equities And The Public Interest Support Denying The Motion.

The balance of equities tips sharply in favor of denying Alpine's Motion. If the requested injunctive relief is denied, then Alpine will still have an opportunity to present its arguments in favor of live testimony to the Chief Hearing Officer—exactly the process it complained about not receiving prior to entry of the Zoom Order. If injunctive relief is granted, however, then, in the words of the *Legaspy* court, FINRA would be forced "to choose between either holding in-person hearings that expose the [hearing officers], [parties] . . ., and witnesses to COVID-19, or indefinitely delaying its hearings." *See Legaspy*, 2020 U.S. Dist. LEXIS at *12. That would be

contrary to FINRA's mandate under the Exchange Act "to protect investors and the public interest." *See* 15 U.S.C. § 78o-3(b)(6).

Alpine argues (at 24) that no harm can come from indefinite delay because Alpine is "operating under the cease and desist order."[7] But indefinite delay is contrary to FINRA Rule 9290, which requires this expedited disciplinary proceeding to be completed "at the earliest possible time." *See* FINRA Rule 9290. The public interest favors a timely resolution of this dispute, not least of which are the hundreds of customers from whom Alpine is alleged to have taken over $2.3 million. The longer the disciplinary proceeding takes to resolve, the less likely there are to be assets from which injured customers can obtain restitution to which they are allegedly entitled. There is no countervailing public interest in demanding that—during a global pandemic without a known or definite ending date—FINRA disciplinary proceedings be required to be conducted in person or not at all.

And for the reasons described above, to the extent Alpine has concerns about the prospect of being sanctioned in the absence of a "fair procedure," those concerns are addressed by the Exchange Act's comprehensive administrative review process, which affords Alpine three appeals of any unfavorable hearing panel decision. *See* FINRA Rules 9211(a), 9311, 9370; 15 U.S.C. § 78s(d)(2); 15 U.S.C. § 78y(a)(1).

Conclusion

For the foregoing reasons, Alpine's Motion should be denied.

[7] Alpine paints an unreasonably rosy picture of its compliance with the temporary cease and desist order ("TCDO"). As but one example, Alpine agreed in the TCDO to stop charging its customers a $5,000 monthly account fee (which Alpine increased 60,000% from $100 per year). [*See* TCDO, attached hereto as **Exhibit D**, ¶ 1(d); *see also* DOE Complaint ¶ 1.] Less than six weeks after entering the TCDO, Alpine issued a new fee schedule that, while ostensibly removing the $5,000 monthly account fee, imposed four brand new fees on its customers—totaling $5,000 per month. [*See* Notice of Revised Fee Schedule, attached hereto as **Exhibit E**.]

DATED this 17th day of November, 2020.

/s/ Clint R. Hansen
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2020, I caused a true and correct copy of the foregoing to be filed via the Court's electronic filing system, which made service by email upon the following counsel of record:

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