

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

SIDNEY LEBENTAL
(CRD No. 5543658),

Respondent.

Disciplinary Proceeding
No. 2019063152202

Hearing Officer– CC

ORDER DENYING RESPONDENT’S MOTION FOR STAY

I. Background

On May 23, 2023, FINRA’s Department of Enforcement filed a four-cause Complaint against Respondent Sidney Lebental. Cause one of the Complaint alleges that over approximately six years, Lebental intentionally or recklessly engaged in 523 instances of “spoofing” by displaying a non-bona fide order to induce other market participants to execute against an order on an opposite side of the market in the same or a correlated security product, in violation of Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. Cause two alleges that Lebental intentionally, recklessly, or negligently violated Sections 17(a)(1) and (a)(3) of the Securities Act of 1933 (“Securities Act”) and, as a result, violated FINRA Rule 2010. Cause three alleges that Lebental placed 523 non-bona fide securities orders into one of three trading venues, causing the trading venues to publish or circulate non-bona fide quotations, in violation of FINRA Rules 5210 and 2010. Cause four alleges that by placing and immediately cancelling 523 large, fully-displayed non-bona fide orders, Lebental unethically injected false information into the marketplace, which induced execution of his orders on the opposite side of the market, in violation of FINRA Rule 2010.

On July 11, 2023, Lebental filed an Answer to the Complaint in which he denied any wrongdoing, asserted affirmative and other defenses, including that Enforcement’s action is barred in whole or part due to the (1) unconstitutional operation and structure of FINRA; (2) unconstitutional appointment of FINRA’s Hearing Officers; and (3) unconstitutional nature of FINRA’s in-house Hearing Panels.

On August 17, 2023, the parties participated in the Initial Pre-Hearing Conference (“IPHC”). At the IPHC, Lebental raised the same constitutional challenges identified in his Answer.

On August 25, 2023, Lebental filed a motion seeking a stay and indefinite postponement of this disciplinary proceeding (“Motion”). Lebental’s Motion stems from an Order issued by the United States Court of Appeals for the D.C. Circuit in a case involving a FINRA expedited proceeding unrelated to this disciplinary proceeding.¹ In that case, FINRA brought an expedited enforcement action against Alpine Securities Corporation (“Alpine”) on April 19, 2023, for Alpine’s alleged violations of a FINRA cease-and-desist order.²

On October 12, 2022, Alpine and an affiliate sued FINRA in federal district court in Florida asserting constitutional challenges. On May 9, 2023, Alpine filed an emergency motion in the Florida court for preliminary injunction seeking to prevent FINRA from conducting the expedited proceeding for Alpine’s alleged violations of a FINRA cease-and-desist order. On May 24, 2023, the Florida court transferred the case to federal district court in Washington, D.C. On May 30, 2023, Alpine filed a renewed emergency motion for preliminary injunction and temporary restraining.

The hearing in the underlying expedited proceeding against Alpine for alleged violations of a FINRA cease-and-desist order began on June 5, 2023, while Alpine’s motions were pending. On June 7, 2023, the federal district court in Washington, D.C. denied Alpine’s emergency motion for preliminary injunction and temporary restraining order to halt the expedited proceeding.³ In the district court’s opinion, the judge noted that “plaintiff concede[d] that no court has yet to hold that FINRA is a state actor.”⁴

Thereafter, Alpine appealed to the D.C. Circuit. Alpine also filed an emergency motion for injunction pending its appeal. On June 8, 2023, the D.C. Circuit entered an administrative stay of the expedited hearing already underway. On July 5, 2023, a divided three-judge motions panel for the Court of Appeals issued a *per curiam* order granting Alpine’s emergency motion for an injunction, with one judge dissenting (“Alpine Order”).⁵

¹ Respondent’s Motion to Stay Proceeding Pursuant to FINRA Rule 9222 (“Mot.”) 1-2 (citing *Alpine Sec. Corp., et al. v. Fin. Indus. Reg. Auth., Inc. et al.*, No. 23-5129, 2023 U.S. App. LEXIS 16987 (D.C. Cir. July 5, 2023)).

² *Alpine Sec. Corp.*, 2023 U.S. App. LEXIS 16987.

³ *Scottsdale Capital Advisors Corp. v. Fin. Indus. Reg. Auth., Inc. et al.*, No. 23-1506 (BAH), 2023 U.S. Dist. LEXIS 99350 (D.D.C., June 7, 2023).

⁴ *Id.* at *25.

⁵ *Alpine Sec. Corp.*, 2023 U.S. App. LEXIS 16987.

II. Motion for Stay

Respondent's Motion stems from the Alpine Order. One of the three judges on the motions panel issued a concurring statement writing only for himself.⁶ The Motion relies primarily on this judge's concurring statement, in which he voted to "grant an injunction preserving Alpine's business while it litigates its constitutional challenge."⁷

Respondent argues that the constitutionality of FINRA's Enforcement process and structure "is currently in significant doubt based on the D.C. Circuit Court's recent ruling in Alpine."⁸ Respondent argues that the outcome in the D.C. Circuit Court will relate directly to whether FINRA is a state actor, a question that the Court intends to resolve on appeal.⁹ He contends that the constitutionality of Enforcement's action against Respondent similarly "rises and falls" on whether FINRA is a state actor. Respondent argues that he "is even more likely to succeed on the merits, because he has an additional Fifth Amendment self-incrimination argument in his favor" as an individual rather than a firm (like Alpine).¹⁰ Respondent also argues that both the length of the proceeding to date and the early stage of the case weigh in his favor and that, so far, there have been no postponements of the hearing.¹¹ Finally, Respondent argues that, because he no longer works for a FINRA member firm, he poses no ongoing risk to the investing public if I grant his request for an indefinite stay of this proceeding.¹²

Enforcement opposes the Motion, arguing that an indefinite stay is improper because the "preliminary, non-precedential [Alpine Order] enjoined only the expedited proceeding against Alpine and did so based on circumstances not present here."¹³ Enforcement argues that the Alpine Order relied heavily on the potential harm of an imminent decision that could put Alpine out of business, a factor not present here.¹⁴ Enforcement further notes that the Alpine Order does not enjoin other "past, present, or future FINRA proceedings," and does not "broadly enjoin FINRA's entire disciplinary process."¹⁵ Enforcement notes, for example, that Alpine's own disciplinary appeal before FINRA's National Adjudicatory Council has not been stayed.¹⁶

⁶ *Id.* at *2-10.

⁷ *Id.* at *4-5.

⁸ Mot. 4.

⁹ *Id.* at 6.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 7.

¹² *Id.* at 7.

¹³ Department of Enforcement's Opposition to Respondent's Motion to Stay ("Opp'n") 1.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 6.

Enforcement also argues that, unlike in the Alpine proceeding, there is no potential for immediate harm to Respondent, who is not currently associated with a FINRA member firm.¹⁷

III. Discussion

Hearing Officers have broad discretion to decide whether to postpone a hearing.¹⁸ FINRA Rule 9222(b) provides that a Hearing Officer may, “for good cause shown,” postpone a hearing “for a reasonable period of time.” FINRA Rule 9222 also provides that a Hearing Officer shall consider certain factors when considering a request by a party to postpone the hearing.

The predicate to granting a request to postpone a hearing for any length of time is “good cause shown.”¹⁹ And Respondent simply has not established good cause to postpone this hearing. It is well-established that the mere existence of a parallel civil or criminal action does not constitute good cause to stay a FINRA disciplinary proceeding.²⁰ Indeed, “protection of the securities industry and members of the investing public often requires prompt action that cannot await the outcome of parallel proceedings.”²¹

Respondent does not even point to a parallel civil or criminal action as a reason to stay this proceeding indefinitely. Instead, Respondent cites the Alpine Order, which is not a binding authority for this case. The Alpine Order is preliminary and non-precedential and does not analyze the underlying matter, let alone this matter. The Alpine Order was issued in a civil action involving a different respondent, a different underlying proceeding, a different legal standard, and a different set of operative facts. An unpublished order of a divided motions panel offers no persuasive reason to postpone this hearing indefinitely, as the Respondent requests.

Additionally, in the Alpine Order, even the concurring judge made clear that his vote to grant a stay was not a decision on the merits, and that he might become convinced by further briefing and argument that Alpine’s claims have no merit. Indeed, the Alpine Order expressly left undecided the issue of whether Alpine would prevail in its constitutional challenge against FINRA.²² If the heart of the Alpine matter is whether FINRA is a state actor, as Respondent

¹⁷ *Id.* at 6.

¹⁸ *Dep’t of Enforcement v. Riemer*, No. 2013038986001, 2017 FINRA Discip. LEXIS 38, at *18 (NAC Oct. 5, 2017) (“It is well-settled that a hearing officer has ‘broad discretion as to whether or not a continuance should be granted.’”), *aff’d*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022 (Oct. 31, 2018).

¹⁹ FINRA Rule 9222(a).

²⁰ See OHO Order 19-18 (2015045312501) (Feb. 15, 2019), at 3, http://www.finra.org/sites/default/files/2019-10/OHO_Order_19-18_2015045312501.pdf (denying request to stay proceeding because of pending federal civil action and explaining that “[i]t is not inherently unfair for Respondents to defend two proceedings at the same time”).

²¹ OHO Order 11-08 (200917798201) (Sept. 7, 2011), at 3, http://www.finra.org/sites/default/files/OHO_Decision/p124573_0_0.pdf; see also OHO Order 98-3 (C10970172) (Jan. 8, 1998), at 3, http://www.finra.org/sites/default/files/OHODecision/p007681_0.pdf.

²² *Alpine Sec. Corp.*, 2023 U.S. App. LEXIS 16987, at *4-5 (“To be clear, I do not rule out the possibility that further briefing and argument might convince me that my current view is unfounded.”) (internal quotation omitted).

contends, many courts have repeatedly considered and rejected similar attempts to treat FINRA and its predecessor, NASD, as government actors.²³ In sum, the Alpine Order does not provide “good cause” to postpone this hearing.

In addition, even if Respondent could demonstrate good cause for a stay, it is uncertain when Alpine’s lawsuit against FINRA will ultimately conclude. FINRA Rule 9222(b) requires that Hearing Officers limit any postponements to “a reasonable period of time.” The uncertainty about the timing of the Alpine litigation, including possible appeals, makes the stay requested by Respondent incompatible with FINRA Rule 9222(b)’s requirement that any postponement be for a “reasonable period of time.” Indeed, “[t]here is no provision in the [FINRA] Code of Procedure that specifically authorizes a Hearing Officer to grant an indefinite stay of a disciplinary proceeding.”²⁴ An indefinite stay of this proceeding is therefore improper.

Finally, the other considerations identified in FINRA Rule 9222(b)(1) are equally unavailing for Respondent. The length of the proceeding to date, number of extensions or postponements, and the stage of the proceedings do not weigh in favor of Respondent’s requested indefinite stay. Enforcement filed the Complaint on May 23, 2023, so the matter has been open for several months, and the Respondent requested and received an extension of time to file his answer to the Complaint. The parties requested, and I scheduled, the hearing in June 2024, several months later than the February 2024 date I had requested in my Order Setting IPHC. And although Respondent represents that he is currently not associated with a FINRA member firm and therefore poses no danger to the investing public, his status can change. He may choose to reassociate with a firm.

²³ See *Saad v. SEC* 980 F.3d 103, 104 (D.C. Cir. 2020) (holding that FINRA is a private self-regulatory organization that oversees the securities industry); *Epstein v. SEC*, 416 F. App’x 142, 148 (3d Cir. 2010) (holding that NASD is a private actor, not a state actor, and finding that “Epstein cannot bring a constitutional due process claim against the NASD.”); *D. L. Cromwell Invs., Inc. v. NASD Reg., Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (“It has been found, repeatedly, that the NASD itself is not a government functionary.”); *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) (“The NASD is a private actor, not a state actor.”); *Jones v. SEC*, 115 F.3d 1173, 1182 (4th Cir. 1997) (“As we have already observed, the NASD is a private non-profit corporation regulated as a registered securities association.”); *Charles Schwab & Co. v. Fin. Indus. Reg. Auth., Inc.*, 861 F. Supp. 2d 1063, 1065 (N.D. Cal. 2012) (“FINRA is a private, not-for-profit Delaware corporation functioning as a self-regulatory organization (“SRO”)”); *McGinn, Smith & Co. v. Fin. Indus. Reg. Auth., Inc.*, 786 F. Supp. 2d 139, 147 (D.D.C. 2011) (“Courts have repeatedly held that FINRA is a private entity and not a government functionary.”); *Graman v. NASD*, No. 97-1556-JR, 1998 U.S. Dist. LEXIS 11624, at *9 (D.D.C. 1998) (“Every court that has considered the question has concluded that NASD is not a governmental actor.”). FINRA is a private, not-for-profit corporation that is registered with the Securities and Exchange Commission as a national securities association and a self-regulatory organization (“SRO”). SROs, like FINRA, are private organizations that employ no government officials and receive no public funding.

²⁴ OHO Order 98-31 (C06980015) (Oct. 23, 1998), at 1, http://www.finra.org/sites/default/files/OHODecision/p007764_0.pdf. See also OHO EXP21-02 (FPI21005) (Aug. 24, 2021), at *4-5, http://www.finra.org/sites/default/files/2021-12/OHO_EXP21-02_FPI210005.pdf (finding that an indefinite stay is “contrary to FINRA’s regulatory mission and its responsibility as an SRO (self-regulatory organization) for overseeing the conduct of member firms and their associated persons”).

I do not find these arguments persuasive. FINRA must stand ready to “fulfill its statutory obligations to protect investors and maintain fair and orderly markets,” and “[a]n indefinite postponement would thwart FINRA’s ability to fulfill its statutory obligation.”²⁵

For these reasons, I **DENY** Respondent’s Motion.

SO ORDERED.



Carla Carloni
Hearing Officer

Dated: September 20, 2023

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²⁵ OHO Order 21-01 (2018058588501) (Jan. 7, 2021), at 4, <http://www.finra.org/sites/default/files/2021-07/oho-order-21-01-2018058588501.pdf>.