

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

NEIL J. ASLIN, individually and on)	
behalf of all others similarly situated,)	
)	
Plaintiff,)	
)	Case No.
v.)	
)	
Financial Industry Regulatory)	
Authority, Inc., a Delaware)	
not-for-profit corporation,)	
)	
Defendant.)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NOW COMES Plaintiff, Neil J. Aslin (“Aslin”), individually and on behalf of all others similarly situated, by and through his undersigned attorney, and for his complaint against the Defendant, Financial Industry Regulatory Authority, Inc. (“FINRA”), a Delaware not-for-profit corporation, states as follows:

JURISDICTION AND VENUE

1. Plaintiff is, and at all times relevant hereto was, a citizen of the State of Illinois.
2. FINRA is a Delaware not-for-profit corporation with its principal place of business in New York City, New York and with offices in Chicago, Illinois.
3. This is an action arising out of the laws of the United States of America and involves a federal question and, therefore, this Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

4. The acts and omissions herein alleged occurred in Chicago, Illinois, and, therefore, venue is properly before the United States District Court for the Northern District of Illinois, Eastern Division.

CLASS ALLEGATIONS

5. Plaintiff brings this case as a class action pursuant to Federal Rule of Civil Procedure (F.R.C.P.) 23, on behalf of himself and all others similarly situated.

6. The members of the class (“the Class”) are all persons currently registered with FINRA who were registered or employed with a broker/dealer that FINRA has designated as a “Disciplined Firm” pursuant to Rule 3010(b)(2)(J).

7. Upon information and belief, the members of the Class exceed five hundred.

8. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff is knowledgeable concerning the subject matter of this action, has retained counsel competent and experienced in complex class actions, and intends to vigorously prosecute this litigation.

9. Plaintiff is aware of no conflicts of interest between himself and absent Class members.

10. Common questions of law and fact exist as to the claims of all Class members.

11. The aforementioned common questions of law and fact predominate over any questions that may affect individual Class members.

12. The common questions of law or fact include, but are not limited to, the following:

- a. Whether the promulgation of FINRA Rule Rule 3010(b)(2) and its approval by the Securities and Exchange Commission (“S.E.C.”) constitutes governmental action;
- b. Whether the imposition of the taping requirements of Rule 3010(b)(2)(H) merely because registered persons who had previously been associated with a “Disciplined Firm” is a denial of due process under the Fifth Amendment to the Constitution of the United States to such registered persons who were not involved in the activities that led to their former broker/dealer being designated a “disciplined firm” pursuant to FINRA Rule 3010(b)(2)(J); and
- c. Whether FINRA must provide a mechanism for a registered person to establish that he or she was not involved in any of the activities that led to FINRA designating the registered person’s former broker/dealer as a disciplined firm pursuant to Rule 3010(b)(2)(J).

13. The claims of Plaintiff are typical of those of the proposed Class.

14. The common questions of law and fact described above predominate over any individual issues that may affect any Class member.

15. A class action is superior to other means for the fair and efficient adjudication of the controversy for the following reasons, among others:

- a. Plaintiff is not aware of pending litigation by or against Class members with respect to the remedies sought in this action;
- b. The trial of a multiplicity of individual actions would cause a wasteful depletion of the limited resources of the courts and litigants, whereas concentrating the litigation of many identical claims in one forum is desirable and in the interests of judicial economy and efficiency;
- c. The Court may define the Class and create subclasses as may be necessary or desirable to adjudicate common issues and claims of the Class members; and
- d. Plaintiff does not know of any difficulties likely to be encountered in the management of this litigation that preclude its maintenance as a class action, particularly since FINRA knows the identity of all Class members and has in its possession the records necessary to provide the Class members’ damages.

THE REGULATORY STRUCTURE

16. The Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (Exchange Act), provides a comprehensive system of federal regulation of the securities industry.

17. The Maloney Act, Pub. L. No. 75-719, 52 Stat. 1070 (1938) (amending the Exchange Act, 15 U.S.C. §§ 78o *et seq.*), established extensive guidelines for the formation and oversight of self-regulatory organizations, such as FINRA.

18. Congress delegated power to these organizations to enforce, at their own initiative, compliance by members of the industry with the requirements laid down in the Exchange Act and the regulations promulgated thereunder.

19. Pursuant to the Maloney Act, any association of securities broker-dealers seeking to register as a "national securities association" must file with the S.E.C. an application for registration ... containing the rules of the association." 15 U.S.C. §§ 78o-3(a). Furthermore, an association must "comply with the [Exchange Act] and its own rules," *id.* § 78s(g)(1)(A), and must "enforce compliance ... by its members and persons associated with its members," *id.*; *see also* 15 U.S.C. Sec. 78s(h).

20. Although a national securities association is a self-regulatory entity, it remains subject to the S.E.C.'s oversight and control. *Id.* § 78s(b). FINRA is subject to extensive oversight, supervision, and control by the S.E.C. on an ongoing basis. 15 U.S.C. Sec. 78s(a)(3)(B). For example, any proposed change in the association's rules must be filed with the S.E.C. and no proposed rule change can take effect unless approved by the SEC. *Id.* § 78s(b)(1).

21. Furthermore, the S.E.C. may abrogate, add to, and delete from the rules of a self-regulatory organization as the S.E.C. deems necessary or appropriate to insure the fair

administration of the self-regulatory organization or to conform its rules to requirements of the federal securities laws. *Id.* § 78s(c).

22. FINRA, as the successor of the National Association of Security Dealers (“NASD”), is the only officially registered “national securities association” under the Exchange Act.

23. FINRA wears two institutional hats: it serves as a professional association, promoting the interests of its members and acting as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of violating the Exchange Act and/or S.E.C. regulations. See 15 U.S.C. § 78o-3(b)(7)).

24. Registered representatives such as the Plaintiff are required to register with FINRA and are subject to its rules.

25. All broker/dealers are required to register with FINRA and are, likewise, subject to its rules.

26. When FINRA promulgates and enforces its rules, FINRA is acting in a quasi-governmental capacity with the full force and authority of the United States Government and its actions in so doing are, therefore, governmental actions and, as such, are subject to the constraints imposed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

27. The Maloney Act specifies certain procedural safeguards for the self-regulatory organization's disciplinary process. *See e.g.* 15 U.S.C. Sec. 78o -3(h)(1).

28. FINRA, acting as delegated quasi-governmental regulatory authority has promulgated (and the S.E.C. has approved) Rule 3010(b)(2) (formerly NASD Rule 3010(b)(2)) whereby registered representatives, even though not involved in any wrong-doing are

stigmatized and denied the value of their FINRA registration, their expertise, and their work product without due process of law.

FINRA RULE 3010(b)(2)

29. FINRA Rule 3010(b)(2) provides that when a member firm (*i.e.* broker/dealer) “is notified by NASD or otherwise has actual knowledge that it meets one of the criteria in paragraph (b)(2)(H) relating to the employment history of its registered persons at a Disciplined Firm as defined in paragraph (b)(2)(J) shall establish, maintain, and enforce special written procedures for supervising the telemarketing activities of *all* of its registered persons” (emphasis supplied).

30. FINRA has a rule imposing the following supervisory requirement on its members:

The following members shall be required to adopt special supervisory procedures over the telemarketing activities of their registered persons:

- A firm with at least five but fewer than ten registered persons, where 40% or more of its registered persons have been associated with one or more Disciplined Firms in a registered capacity within the last three years;
- A firm with at least ten but fewer than twenty registered persons, where four or more of its registered persons have been associated with one or more Disciplined Firms in a registered capacity within the last three years;
- A firm with at least twenty registered persons, where 20% or more of its registered persons have been associated with one or more Disciplined Firms in a registered capacity within the last three years.

For purposes of the calculations required in subparagraph (H), firms should not include registered persons who:

- (1) have been registered for an aggregate total of 90 days or less with one or more Disciplined Firms within the past three years; and
- (2) do not have a disciplinary history.

FINRA Rule 3010(b)(2)(H).

31. A “Disciplined Firm” is defined by FINRA as:

For purposes of this Rule, the term "disciplined firm" means either a member that, in connection with sales practices involving the offer, purchase, or sale of any security, has been expelled from membership or participation in any securities industry self-regulatory organization or is subject to an order of the Securities and Exchange Commission revoking its registration as a broker/dealer; or a futures commission merchant or introducing broker that has been formally charged by either the Commodity Futures Trading Commission or a registered futures association with deceptive telemarketing practices or promotional material relating to security futures, those charges have been resolved, and the futures commission merchant or introducing broker has been closed down and permanently barred from the futures industry as a result of those charges; or a futures commission merchant or introducing broker that, in connection with sales practices involving the offer, purchase, or sale of security futures is subject to an order of the Securities and Exchange Commission revoking its registration as a broker or dealer.

FINRA Rule 2010(b)(2)(J).

32. Whether an individual broker committed any wrongdoing is wholly irrelevant for the purposes of FINRA Rule 3010(b)(2)(H). The mere fact that the individual broker was registered with a “Disciplined Firm” taints the innocent, individual broker.

33. The individual broker who has been employed by the “Disciplined Firm” counts towards the percentage of brokers that a broker/dealer, pursuant to FINRA Rule 3010(b)(2)(H), is required to tape conversations with all current and prospective customers of that broker/dealer.

34. FINRA provides no mechanism whereby the broker who has been associated with a “disciplined” firm can establish that he or she had no involvement with the events that caused their previous employer to be designated a “Disciplined Firm.” Rule 3010(b)(2) is, therefore, a rule that applies a guilt-by-association stigma to all registered brokers of the “Disciplined Firm.”

35. The installation of a system to tape all telephone conversations with customers of a broker/dealer costs tens of thousands of dollars. Furthermore, implementation of special supervisory procedures as required by Rule 3010(b)(2) also adds to the costs of a broker/dealer who hires a broker from a Disciplined Firm if such a hiring places the broker/dealer above the

threshold number of registered representatives from “Disciplined Firms” as specified by FINRA Rule 3010(b)(2)(H).

36. As a result, the individual broker whose registration would exceed the percentage of brokers from one or more Disciplined Firms as set forth in FINRA Rule 3010(b)(2)(H) and who is denied the registration by a FINRA member firm because to hire him or her would raise the number of “tainted” brokers employed by the member firm to a level requiring mandatory taping of conversations and the implementation of special supervisory procedures, is a fundamental denial of due process and a deprivation of the individual’s property rights.

37. A rule, enforced by an agency of the United States Government, that places a taint upon an individual, regardless of whether that person has engaged in any type of illegal or otherwise sanctionable conduct, that deprives that individual of the ability to practice his or her vocation, is capricious and arbitrary.

38. FINRA provides no process by which a former registrant of a disciplined firm can remove the “taint” arbitrarily imposed by Rule 3010(b)(2).

39. A regulatory scheme that stigmatizes an individual without providing an articulated standard by which to determine if the individual bears any culpability for the actions that caused his or her broker dealer to be designated a “Disciplined Firm”, deprives such a registered individual of the right to practice his or her vocation with member firms who would otherwise agree to hire the broker but have refused to do so because such a hiring would trigger the taping and special supervisory system. This, in turn, constitutes a taking of property by a quasi-governmental agency without the benefit of fundamental due process safe guards.

PLAINTIFF'S SITUATION

40. Plaintiff first became registered with FINRA's predecessor, the NASD, in 1975. Eventually, Plaintiff registered with Brewer Financial Services, LLC ("Brewer Financial") in May of 2005.

41. Plaintiff left Brewer Financial in March of 2009 and became associated with BEST Direct Securities, LLC ("BEST Direct") in April of 2009.

42. BEST Direct is not a "Disciplined Firm" and has no disciplinary, financial or regulatory events. Nor have any customer complaints or arbitrations been filed against BEST Direct.

43. The only event on Plaintiff's CRD (the central registrar maintained by FINRA for registered representatives and member firms) is a 1988 consent and waiver for being a principal of a member firm that had a net capital violation.

44. The actions of Brewer Financial and its principals that formed the basis of the S.E.C. Complaint filed in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 10-cv-06932, alleged that the misconduct began in or around June of 2009, three months after Plaintiff left Brewer Financial.

45. Furthermore, the misconduct alleged by the S.E.C. in Case No. 10-cv-06932 involved promissory notes issued by FPA Limited, an Isle of Man company ("the FPA notes"). Plaintiff had no involvement with the issuance or sale of any of the FPA notes.

46. Nevertheless, on April 6, 2011, FINRA sent a notice (a copy of which is attached as Exhibit "A" hereto and incorporated by reference herein) to BEST Direct informing BEST Direct that, pursuant to what FINRA terms the "Taping Rule" (Rule 30110(b)(2)), BEST Direct had to either institute taping pursuant to the FINRA Rule or cut its work force or implement the

required taping:

In particular, the amendments permit firms, within 30 days after receiving notice that they are subject to the Taping Rule or obtaining actual knowledge that they are subject to the Rule (and have promptly notified the Department of Member Regulation that they are subject to the Rule) to reduce their staffing levels to fall below the threshold levels set forth in the Taping Rule and thus avoid its application. Please review *Notices to Members 02-61 and 05-46* for the requirements pertaining to this reduction.

If Best Direct Securities LLC has triggered application of the Taping Rule for the first time and elects to take advantage of the relief described above, Best Direct Securities LLC must notify the Department of Member Regulation within 30 days of receipt of this notice, and include in the notification the names and CRD numbers of the terminated individuals, the dates of termination, the total number of registered representatives **currently** associated with the firm, and a written representation by the firm that it will not rehire persons terminated to accomplish the staff reduction for a period of 180 days.

(Bold and emphasis in original)

47. The Plaintiff was one of individuals that was “counted” to make BEST Direct subject to the “taping rule.” *See* Exhibit “A” hereto.

48. BEST Direct thereafter terminated Plaintiff on May 4, 2011 for the sole purpose of avoiding the taping requirements of FINRA Rule 3010(b)(2).

49. BEST Direct has informed Plaintiff that if the “taint” regarding his association with a Disciplined Firm is removed or if he is not counted by FINRA as an individual under the “taping” requirement of FINRA Rule 3010(b)(2), BEST Direct would revoke Plaintiff’s termination.

50. On June 13, 2011, FINRA confirmed that an individual broker cannot challenge his or her inclusion as a “tainted” registrant on a FINRA notice to a member firm requiring said firm to either conform to the numerical limitations of FINRA Rule 3010(b)(2)(H) or to reduce its “staffing level.” *See* Affidavit of Jennifer Muchoney attached as Exhibit “B” hereto and incorporated by reference herein.

51. As a result of the arbitrary and capricious actions of FINRA as herein previously alleged and the absence of any mechanism within the FINRA and S.E.C. regulatory scheme for Plaintiff to remove the stigma of having been registered with a “Disciplined Firm”, the Plaintiff has lost his position with BEST Direct and now is foreclosed from using his securities license with those firms who, if they hired, Plaintiff, would be subject to the “Taping Rule.”

52. Plaintiff has a vested right in his securities license and registration. Plaintiff has committed no act that would cause him to be personally censured, fined, expelled, or otherwise disciplined by FINRA or the S.E.C.

53. As a direct and proximate cause of FINRA’s arbitrary and capricious action in naming him as a former associate or registrant of a “Disciplined Firm”, even though Plaintiff committed no wrongdoing whatsoever, FINRA has deprived the Plaintiff of a valuable property right without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

COUNT I

(Injunctive and Declaratory Relief)

54. Plaintiff re-alleges paragraphs 1 thru 53, above, as though each is specifically set forth herein in this, Paragraph 54 of this Count I of the Complaint.

55. An actual controversy concerning the application of FINRA Rule 3010(2)(b) exists between the Plaintiff and FINRA within the meaning of 28 U.S.C. §2201.

56. As a result of FINRA’s application of FINRA Rule 3010(b)(2) as herein previously alleged, the Plaintiff is suffering irreparable harm.

57. Plaintiff has no adequate remedy at law.

58. The Plaintiff has a likelihood of success on the merits.

59. The prevention of the violation of the Plaintiffs and other Class Members constitutional rights outweighs any interest FINRA may have in continuing to violate the due process rights of the Plaintiff and members of the punitive class.

WHEREFORE, Plaintiff prays that the Plaintiff prays that this Court enter an order:

- A. Declaring the enforcement of FINRA Rule 3010(b)(2)(H) without the availability of a procedural process through which a registered person can contest the imposition of the taint of having been associated with a “Disciplined Firm” as defined by FINRA Rule 3010(b)(2)(J) is a violation of the Fifth Amendment right to due process of the Plaintiff and all others similarly situated;
- B. Enjoining FINRA from enforcing the taping requirements of FINRA Rule 3010(b)(2)(H) until FINRA implements a process whereby the Plaintiff and all others similarly situated may challenge their status as a “tainted” individual; and
- C. Any other relief that the Court deems proper and just.

Respectfully submitted,

/s/Nicholas P. Iavarone
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