

ORAL ARGUMENT NOT YET SCHEDULED
NO. 23-7126

In The United States Court of Appeals
For The District of Columbia Circuit

SUSAN SELTZER
Plaintiff-Appellant

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,
Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA No. 1:22-cv-0330-JMC

Introduction to Statement of Issues

In the appeal of Civil Case No. 1:22-cv-0330JMC, this Court is presented with critical questions pertaining to alleged violations of constitutional due process, potential defamation, and ongoing harm attributed to the actions of the Financial Industry Regulatory Authority (FINRA). The Appellant, Mrs. Seltzer, contends that her rights have been significantly compromised. This appeal challenges the lower court's dismissal of her claims based on the statute of limitations and the

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UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

doctrine of 'arbitral immunity,' particularly scrutinizing the extension of arbitral immunity to the purportedly harassing marketing activities on a commercial website – activities not explicitly sanctioned by the Securities and Exchange Commission (SEC).

This case probes the alignment of FINRA Rule 12212(c), as approved by the SEC, with foundational constitutional protections. It specifically contests the application of FINRA Rule 12212(c), arguing that this rule, as approved by the SEC, has encroached upon Mrs. Seltzer's due process rights and without proper pre-sanction notice, resulting in defamation of character. This appeal seeks judicial scrutiny of Rule 12212(c)'s implementation, positing that its application contravenes constitutional norms and subverts the investor safeguards envisaged by the Exchange Act. Furthermore, the appeal raises concerns that FINRA may be utilizing Rule 12212(c) to shield a member firm from securities law violations, thereby directly contravening the mandates of the Exchange Act of 1934.

STATEMENT OF ISSUES

I. Is FINRA a State Actor Upon Breach of an Investor's Constitutional Rights?

1. FINRA's Role as a State Actor: Does FINRA engage in government action subject to constitutional constraints when it allegedly fails to enforce federal securities laws and imposes sanctions, violating an investor's constitutional rights,

that contradict the force of federal law, potentially obscuring violations of securities laws?

2. Conflict of Interest and Securities Law Violations: Did the lower court fail to consider the possibility of a conflict of interest in the application of FINRA Rule 12212(c) by FINRA staff, specifically regarding whether the rule was used to shield a member firm from meritorious securities law claims, including potential violations of the Bank Secrecy Act? Might this scenario constitute a violation of Section 20(e) of the Exchange Act of 1934?

3. Due Process Violation in Rule Application: Did the lower court neglect to address a breach of Mrs. Seltzer's constitutional right to due process in the application of FINRA Rule 12212(c), particularly given the absence of any Panel Order that Mrs. Seltzer allegedly violated, which led to the imposition of sanctions and directly resulted in the defamation claims presented before this Court?

II. Broader Implications of SEC's Approval of FINRA Rule and the Potential State Actor Status of FINRA

1. Arbitrary and Capricious Breach of Due Process in Imposing Sanctions:

Did the lower court fail to address a potential breach of due process rights, by FINRA, in the imposition of sanctions on investor Mrs. Seltzer as arbitrary and capricious? Does this represent unequal treatment compared to the procedures afforded to attorneys and brokers, as highlighted in the case currently under review

in U.S.C.A., No. 23-5229, *Alpine v FINRA*, whereby there are *extensive* disciplinary protocols before a broker is ever sanctioned to ensure a broker's rights to be heard are not violated?

2. Severe Consequences to Investors of Constitutional Violations: In cases where the application of a FINRA rule leads to severe consequences¹, such as infringements on the rights to privacy, reputation, and *loss of livelihood*, did the Court properly consider whether FINRA's actions should be evaluated under constitutional standards? As FINRA's actions are the direct result of the SEC's approval of R. 12212(c) wouldn't FINRA actions warrant treatment as a state actor?

III. Misapplication of Arbitral Immunity in Digital Context for a Commercial Website

Did the lower court improperly apply arbitral immunity to FINRA's *post-arbitration activities*, particularly the digital dissemination of FINRA's known false information, tagged to Mrs. Seltzer's name in a biased and intentional manner through their commercial website?

The Scope of Arbitral Immunity: Did the Court misinterpret the fact that arbitral immunity is limited to activities directly related to the arbitral process and

¹ "The federal government has thereby outsourced enforcement of the securities laws to a purportedly private organization that operates unfettered by the constitutional protections that ordinarily constrain the government and protect the People." U.S.C.A. No.23-5129, Document #2014466, P. 13, *Alpine v FINRA*

should not extend to independent actions such as the operation of a commercial for-profit website and the management of online content with evolving technology platforms never approved by Securities and Exchange Commission?

Did Court err in not addressing Conflict of Rule 12212 (c) and Publication

1. Limits of Arbitral Immunity: Does arbitral immunity extend to the publication of known defamatory material in awards and whether FINRA's rule requiring public disclosure of awards can supersede Mrs. Seltzer's rights when the award includes defamatory statements derived from a breach of a constitutional right to be heard?

IV. Tort of Defamation in the Digital Age

1. Misunderstanding of Google Tags and Defamatory Republication: Did the district court err in its understanding of the intentional use of Google tags by FINRA, failing to recognize their potential role in the alleged defamatory republication of content about Mrs. Seltzer, thereby reaching a new and broader audience?

2. Recognition of Defamation Evidence in Arbitration Award: Did the district court overlook clear evidence of defamation in the FINRA arbitration award against Mrs. Seltzer, particularly given email evidence that the removal of the Panel Chair was orchestrated by FINRA's Director of Arbitration, contrary to allegations of 'vicious' behavior by Mrs. Seltzer, thus indicating a known

defamation perpetrated by FINRA through denying her constitutional right to be heard?

3. Negligent Dissemination of False Information: Did the Court err by not recognizing that the knowing dissemination of false information on digital platforms by an entity like FINRA might constitute negligence or reckless disregard, especially considering evolving public policy towards enhanced consumer protection and considering the significant harm imposed upon Mrs. Seltzer?

Note: Google tags, far from being incidental, are tools actively used in digital marketing and SEO strategies, potentially influencing the visibility and association of online content.

4. Active vs. Passive Dissemination Discrepancy: Did the lower court fail to differentiate between passive online availability and the active, intentional use of Google Tags linked to Mrs. Seltzer's name in disseminating the arbitration award, thereby misinterpreting the nature of the dissemination?

5. Violation of FINRA Rule 12904(h) Through Active Dissemination: Did the lower court neglect to address the violation of FINRA Rule 12904(h), originally intended for passive dissemination of awards, in the context of FINRA's transition to active dissemination methods, such as individual tagging for awards?

6. Incompatibility of FINRA's Actions with the Exchange Act: Given the SEC's approval of the public posting of awards to aid investor confidence, does

FINRA's application of these postings, which has led to defamatory and harassing consequences for an investor like Mrs. Seltzer, contravene the intended spirit of the Exchange Act by creating a chilling effect on investors' willingness to file complaints against member firms?

V. Harm from Expansion of Defamation to a New Audience and Selective Dissemination

1. Republication and Expansion to New Audience: Did the district court err by failing to acknowledge the potential defamatory harm resulting from FINRA's actions in expanding the reach of defamatory content to a new audience?

Specifically, was there an oversight in not considering the implications of a FINRA Awards Google Snippet, which linked to Mrs. Seltzer's business in a 'Knowledge Panel', thereby constituting a form of republication and affecting the statute of limitations?

2. Liability for Dissemination Practices: Should a Self-Regulatory Organization (SRO) like FINRA, operating under SEC oversight per the Exchange Act, be held accountable for knowingly or negligently disseminating false information, particularly when it is tagged to an individual investor's name in a Google Search and when FINRA persistently refused to cease such actions upon repeated requests by the aggrieved party?

VI. Expansion of Defamation and Ethical Considerations

1. Ethical Implications of Searchable Awards: Did the Court err in overlooking the ethical implications of making each arbitration award searchable, tagged to an investor's name, especially considering compliance requirements under the Exchange Act of 1934? Is there a failure to balance the public's right to information with the individual's right to privacy and reputation?

2. Balancing Technology and Ethical Considerations: In evaluating the capabilities of technology used by FINRA, did the Court fail to recognize the necessity of a balanced approach that respects both individual reputational rights and genuine public interest, as mandated by the Exchange Act of 1934?

3. Alignment with the Exchange Act's Intent: Does the practice of making arbitration awards readily searchable and prominently displayed align with the intent and provisions of the Exchange Act of 1934, particularly concerning investor protection and the promotion of fair practices in the securities industry?

3. Reputational Impact and Biased Tagging: Was there an oversight by the Court in not considering the potential reputational impact and the implications of bias in FINRA's practice of tagging individual arbitration awards in online searches?

VII. Overlooking of Data Privacy Issues and Compliance with

Consumer Protection Standards in a For-Profit Website Context

1. Terms of Service and Defamation Practices: Did the District Court fail to consider the provisions in FINRA's Awards Online (AAO) Terms of Service that

prohibit excessive publication of defamatory content and harassment, particularly considering allegations that FINRA itself engaged in such practices against Mrs. Seltzer?

2. Understanding and Application of Google Tags: Was there a misunderstanding by the District Court regarding how FINRA employed Google Tags? Specifically, did the Court fail to recognize that using Google Tags to index specific awards on FINRA's website is a deliberate and controllable action, rather than a result of random algorithms?

Note: This distinction is crucial, as it underscores FINRA's ability to direct Google's indexing practices, including the potential to prevent continued dissemination of content alleged to be defamatory about Mrs. Seltzer.

3. Consumer Disclosures and Data Privacy: Did the District Court overlook the necessity of fundamental consumer disclosures and consent policies in FINRA's use of tracking technologies, considering the organization's failure to adequately inform investors about data collection, usage, and sharing practices as part of its privacy policy?

VIII. Erroneous Permission of FINRA Awards Online for Anti-Competitive Harassment

1. Recognition of Anti-Competitive Actions: Did the lower court err in failing to recognize the broader implications of FINRA's actions, particularly the potential misuse of a regulatory platform for competitive suppression, in violation of the

Terms of Service and fundamental free speech principles essential to democratic values?

2. Arbitration Process and Small Business Impact: Did the lower court overlook the potential conflict of interest in FINRA's administration of the arbitration process, specifically regarding concerns raised by FINRA member firms about Mrs. Seltzer's small business in an arbitration context unrelated to her livelihood?

Is there a legal error in not considering that FINRA may have used the arbitration process and the Awards Online platform as tools for anti-competitive behavior to protect its member firms, contrary to the intended public information purpose of such platforms as approved by the SEC?

IX. Erroneous Dismissal of Mrs. Seltzer's Claim for Intentional Infliction of Emotional Distress

1. Harassment and IIED: Did the lower Court err in failing to consider whether FINRA's alleged harassing and excessive publication of categorically false information, known as such by FINRA's Director of Arbitration, constituted intentional or reckless conduct that could give rise to a claim for Intentional Infliction of Emotional Distress?

2. Refusal to Cease Harmful Actions: Did the Court overlook FINRA's refusal to cease its dissemination of allegedly defamatory and harmful information upon Mrs. Seltzer's request, and its subsequent cessation of such actions only after Mrs.

Seltzer removed her small business from public view, potentially supporting a claim for IIED?

X. FINRA's Data Violations Under Privacy Act of 1974

1. Failure to Seal PII Upon Request: Did the lower court fail to address FINRA's alleged violations of the Privacy Act of 1974, particularly concerning its handling of Mrs. Seltzer's personally identifiable information (PII)? Specifically, did the court err in not addressing the harm by not enforcing FINRA's lack of response to Mrs. Seltzer's request in October 2020 to seal her PII, which had been exposed by a FINRA Member Firm, and FINRA's subsequent misleading guidance regarding FINRA's obligations to protect this information under their "*1999 Memorandum of Understanding with the SEC*"?

2. Expansion of harm due to Refusal to Seal: Did the Court overlook FINRA's potential breach of the Privacy Act of 1974 due to FINRA's refusal to seal exposed PII, leading to prolonged public exposure of this sensitive information and resulting in identity theft issues? Was this exposure exacerbated by the tagging of Mrs. Seltzer's PII in Google snippets, attached to the FINRA tagged Award, simultaneously, as evidenced in Case 1:02-00082, *Kosen et al*, Dockets 35, 35-1, and 35-2, and the subsequent notification of this information on the dark web by a credit agency to Mrs. Seltzer?

XI. Statute of Limitations for Excessive Marketing

1. Commencement Date Post-Evidence and Exhaustion of Remedies: Did the lower court err in determining the commencement date for the statute of limitations regarding excessive marketing claims by Mrs. Seltzer, especially given the misinformation previously provided by FINRA's Office of Legal Counsel about the unchanged public posting of awards under FINRA Rule 12904(h)?

2. Tolling During Administrative Process: Was there a legal justification to toll the statute of limitations until Mrs. Seltzer was informed of her right to sue, following the exhaustion of administrative remedies advised by FINRA's Ombudsman and the acquisition of critical evidence that the nature of award dissemination had evolved since the SEC's initial approval?

XII. Expansion of Defamation to a New Audience and

The Statute of Limitations Under the 'Republication Doctrine'

1. Republication and New Audience: Did the lower court overlook the republication of defamatory content under the 'republication doctrine' when FINRA created a Google Knowledge Panel linking the defamatory arbitration award to Mrs. Seltzer's business? This linkage represents a republication to a *new audience*, potentially inflicting additional harm to Mrs. Seltzer's professional reputation and arguably resetting the statute of limitations to the date of this discovery, January 26, 2022.

XIII. Errors at the Dismissal Stage

1. Standard of Review at Dismissal Stage: The legal standard at the motion to dismiss stage requires the court to accept all factual allegations in the complaint as true and to draw all reasonable inferences in favor of the plaintiff. It is understood that at this juncture, the court should not weigh evidence or demand proof.

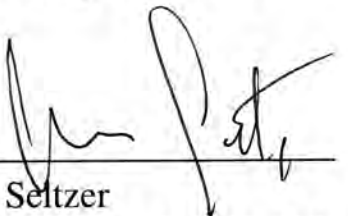
2. Expectation of Amendment as a Pro Se Litigant: Mrs. Seltzer, representing herself, anticipated that the court would provide her an opportunity to amend her filings, particularly if her initial submissions were not clear, on Google Tags, yet factually accurate.

Conclusion and Relief Sought

This appeal invites critical judicial scrutiny of regulatory actions in the digital era, challenging the lower court's rulings on matters of due process violations, the application of arbitral immunity, defamation, and the alleged failure of FINRA to comply with the Privacy Act of 1974. It also raises broader concerns regarding consumer data privacy and harassment in the context of websites that utilize tagging and data collection technologies without necessary approvals.

The Appellant respectfully requests that this Court remand the case for further proceedings consistent with the legal arguments presented herein. Such remand is crucial for ensuring the protection of constitutional rights and addressing the nuanced implications of digital technology within regulatory frameworks, particularly regarding online harassment and defamation law.

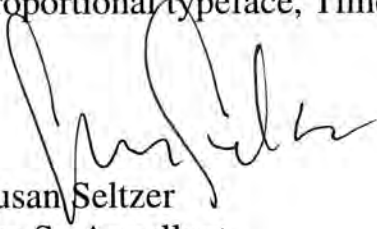
Respectfully submitted,

/s/ 
Susan Seltzer
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DATED: November 9, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Statement of Issues is composed in 14-point proportional typeface, Times New Roman and it contains 2596 words.


Susan Seltzer
Pro Se Appellant

CERTIFICATE OF SERVICE

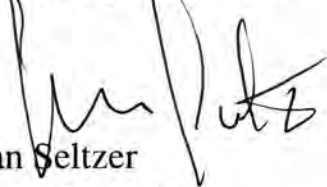
I HEREBY CERTIFY that on November 9, 2023, I filed four copies of the foregoing document, Statement of Issues, via FED EX to the Clerk of Court of the United States Court of Appeals for the District of Columbia Circuit. I mailed by U.S. Mail the foregoing document to the following list of Counsel in this Case for Appellee, FINANCIAL INDUSTRY REGULATORY AUTHORITY, Inc.

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Respectfully Submitted,



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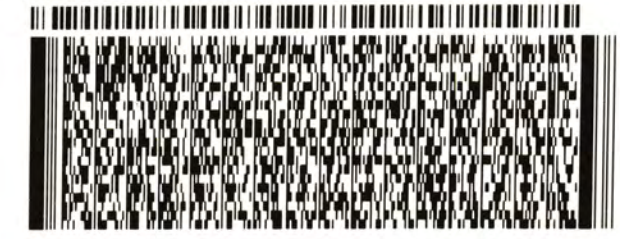


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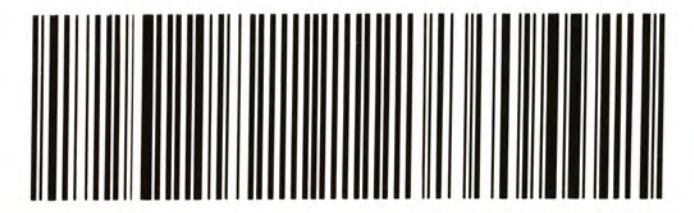


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