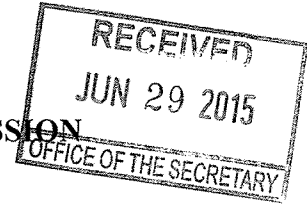


UNITED STATES OF AMERICA
before the SECURITIES AND EXCHANGE COMMISSION



SECURITIES EXCHANGE ACT of 1934
Administrative Proceeding File No. 3-1608

IN THE MATTER OF
MICHAEL ALBERT DIPIETRO
(CRD No. 2811047),

Petitioner

_____ /

**APPLICATION FOR REVIEW OF DETERMINATION BY THE FINANCIAL
INDUSTRY REGULATORY AUTHORITY (FINRA) SUSPENDING MICHAEL
DIPIETRO FROM FINRA MEMBERSHIP**

Petitioner, Michael Albert DiPietro (CRD No. 2811047), by and through his counsel, Marie Mirch hereby appeals the following: DECISION of the FINANCIAL INDUSTRY REGULATORY OFFICE OF HEARING OFFICERS dated June 8, 2015, FINRA Expedited Proceeding No. ARB140066, STAR No. 20140430876, which imposed an immediate suspension of associating from any FINRA member firm in any capacity. "Said suspension will remain in effect until (1) the arbitration award is paid in full, (2) he has entered in to a fully-executed, written settlement agreement with the claimant; (3) the arbitration award has been vacated or modified by a court of competent jurisdiction; or (4) he has filed a petition in the United States Bankruptcy Court and the award debt has been discharged by a United States Bankruptcy Court". A copy of the Decision is submitted herewith as Exhibit 1.

The grounds for this appeal are that the Hearing Officer erred when determine that Mr. DiPietro failed to establish a bona fide in ability to pay a FINRA arbitration award in the amount of \$157,506.79 plus interest. Mr. DiPietro is a certified public accountant and provided expert

testimony on his financial and financial reports submitted to the FINRA Office of Regulatory Authority Office of Hearing Officers. The Hearing Officer ruled that Mr. DiPietro could sell his accounting practice, which is the major source of his income from which he supports a wife and eight children. Mr. DiPietro has already lost one source of income by suspension from FINRA. To require Mr. DiPietro to sell his accounting practice, effectively puts Mr. DiPietro out of work, he will lose the clients from which he has built his CPA practice, and have no income.

The hearing officer also found that Mr. Dipietro could secure the funds to pay the award from his children, if his children would sell a commercial building. The hearing officer determined that there was substantial equity in the property. The record does not support this conclusion.

Finally the hearing officer determined that Mr. DiPietro had sufficient equity in his personal residence to pay the award. The evidence doe not support this conclusion.


Mr. DiPietro has a bona fide defense to non payment of the award - that being the lack of funds, and exhaustion of ability to take out a loan.

Mr. DiPietro further asserts that the expedited hearing should have been stayed pending his appeal in the Ninth Circuit Court of Appeals, case number 9th Cir. Case # 14-16913.

Wherefore, Petitioner, Michael DiPietro respectfully requests the SEC reverse the Order suspending him from FINRA.

Respectfully submitted this 22nd day of June, 2015.

Mirch Law Firm
750 B Street #2500
San Diego, CA 92101

By 
Marie Mirch
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that I am an employee of MIRCH LAW FIRM, LLP over the age of EIGHTEEN (18) and that on this date I personally mailed a true and correct copy of:

THIRD PARTY RESPONDENT MICHAEL DIPIETRO'S ANSWER TO THIRD PARTY CLAIMS AND THIRD PARTY COUNTERCLAIM

as follows:

- by placing the original true copies thereof enclosed in sealed envelopes addressed as follows:

Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Mail Stop 1090-Room #10915
Washington, DC 20549

Alan Lawhead,
Director - Appellate Group
Office of General Counsel
1735 K Street NW
Washington, DC 20006

BY MAIL

I deposited such envelope in the mail at San Diego, California. The envelope was mailed with postage thereon fully prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

By Overnight Delivery: I enclosed the foregoing documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons set forth above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

- BY FACSIMILE TRANSMISSION:** I sent the foregoing document via Facsimile transmission to the parties' facsimile telephone number listed below:
- BY ELECTRONIC MAIL TRANSMISSION:** I sent the foregoing document via electronic mail to the parties' email addresses listed below:
- STATE:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at direction the service was made.

23 mm
DATED this 22nd day of June, 2015

Marie Mirch
Marie Mirch

Exhibit A

Exhibit A

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

REGULATORY OPERATIONS,

Complainant,

v.

MICHAEL ALBERT DIPIETRO
(CRD No. 2811047),

Respondent.

Expedited Proceeding
No. ARB140066

STAR No. 20140430876

Hearing Officer—KBW

DECISION

June 8, 2015

Respondent failed to pay an arbitration award and failed to demonstrate that he had a *bona fide* inability to pay the award or any other valid defense. In accordance with Article VI, Section 3 of the FINRA By-Laws and FINRA Rules 9554 and 9559, Respondent is suspended from associating with any FINRA member firm in any capacity and ordered to pay hearing costs.

Appearances

Meredith MacVicar, Esq., and Ann-Marie Mason, Esq., for FINRA Regulatory Operations, Complainant.

Kevin Mirch, Esq., and Marie Mirch, Esq., for Michael Albert DiPietro, Respondent.

DECISION

I. Introduction

On October 7, 2014, FINRA's Office of Dispute Resolution notified Respondent Michael Albert DiPietro that his registration would be suspended effective October 28, 2014, because of his failure to pay an arbitration award. On October 24, 2014, DiPietro timely filed a request for a hearing, in which he asserted three defenses. First, DiPietro claimed a *bona fide* inability to pay the arbitration award. Second, DiPietro contended that he cannot be suspended because he appealed the order denying his motion to vacate the arbitration award and the appeal is still pending. Third, DiPietro asserted that he cannot be suspended because he filed with a court a motion to stay payment on the award.

FINRA Regulatory Operations argues that the first defense fails because DiPietro has not established that he is unable to pay the award or some meaningful portion of it. Regulatory

Operations argues that the second and third defenses fail because DiPietro was obligated to pay the award after the court denied his motion to vacate the award, and the pendency of the appeal and the filing of a motion for stay do not further stay his payment obligation.

On February 18, and March 2, 9, and 16, 2015, the parties participated in a telephone hearing before the Hearing Officer on the first defense.¹ After a review of the record, the Hearing Officer finds that DiPietro has failed to establish a valid defense for his failure to pay the award. Accordingly, the Hearing Officer suspends DiPietro from associating with any member firm in any capacity.

II. Findings Of Fact And Conclusions Of Law

A. Background

DiPietro entered the securities industry in 1999. He associated in a registered capacity with First Allied Securities, Inc. from 2005 to 2008, and with Centaurus Financial Inc. from 2009 to May 2014. In May 2014, DiPietro voluntarily left Centaurus and associated with Transamerica Financial Advisors, Inc. DiPietro is currently associated with Transamerica.²

In addition to being a registered representative with retail clients, DiPietro is a certified public accountant with an active accounting practice. In 2014, DiPietro's income was more than \$250,000.³

In September 2012, one of DiPietro's clients filed a claim against First Allied. First Allied filed a third party claim against DiPietro asserting a claim for indemnification. In February 2014, a FINRA Dispute Resolution arbitration panel rendered an award in favor of First Allied and against DiPietro in the amount of \$157,506.79 plus interest.⁴ In February 2014, FINRA's Office of Dispute Resolution notified DiPietro that the arbitration panel had rendered the award and he was obligated to pay the award within 30 days unless a motion to vacate has been filed with a court of competent jurisdiction.⁵

¹ The hearing transcript is cited "Tr." followed by the page number. Regulatory Operations' exhibits are cited "CX-" followed by the exhibit number. Respondent's exhibits are cited "RX-" followed by the exhibit number. Stipulations are cited as "Stip." followed by the paragraph number of the stipulation.

² CX-24, at 2.

³ According to DiPietro's testimony, in 2014, his compensation from the member firms with which he was associated was approximately \$199,000 (\$151,000 from Centaurus and \$48,000 from Transamerica). Tr. 169-71. DiPietro's compensation from his accounting practice was \$30,000. Tr. 144. In addition, his compensation from various health plans for which he served as an agent was approximately \$14,500. Tr. 133; CX-29, at 7-11. Finally, his compensation from a bank for which he was a director was approximately \$12,000. Tr. 131.

⁴ Stip. ¶¶ 1, 2; CX-1; CX-2; CX-3.

⁵ CX-3; CX-4; Stip. ¶¶ 1, 2.

In March 2014, DiPietro filed a motion in the U.S. District Court, District of Arizona, to vacate the award.⁶ On October 1, 2014, the District Court issued an order denying DiPietro's motion to vacate the award and confirming the award.⁷ Two days later, DiPietro filed a Notice of Appeal of the order.⁸ The appeal is pending.

By letter dated October 2, 2014, First Allied notified FINRA that DiPietro had not paid the award and DiPietro's motion to vacate had been denied.⁹ On October 7, 2014, FINRA properly served on DiPietro a notice of suspension pursuant to FINRA Rule 9554.¹⁰

DiPietro then filed in the District Court a motion to stay the order confirming the arbitration award.¹¹ The District Court denied the motion.¹²

DiPietro has not paid any portion of the arbitration award.¹³ Thus, FINRA's Office of Dispute Resolution issued the notice of suspension pursuant to Rule 9554.¹⁴

B. Expedited Proceedings

FINRA's arbitration process is designed "to provide a mechanism for the speedy resolution of disputes among members, their employees, and the public."¹⁵ To ensure compliance with arbitration awards, FINRA's rules allow for expedited suspension proceedings against members, associated persons, and formerly associated persons for failing to abide by such awards.¹⁶

A respondent may assert certain limited defenses in an expedited suspension proceeding under FINRA Rule 9554. These include: (1) the award has been paid in full; (2) the parties have agreed to settle the action, and the respondent is not in default of the terms of the settlement

⁶ Stip. ¶ 3.

⁷ Stip. ¶ 4; CX-5.

⁸ Stip. ¶ 5.

⁹ CX-6.

¹⁰ Stip. ¶¶ 6, 7.

¹¹ Stip. ¶ 7.

¹² Stip. ¶ 10.

¹³ Stip. ¶ 13.

¹⁴ Stip. ¶ 6.

¹⁵ *Herbert Garrett Frey*, 53 S.E.C. 146, 153 (1997); *Eric M. Diehm*, 51 S.E.C. 938, 939 (1994).

¹⁶ FINRA By-Laws, Article VI, Section 3; FINRA Rule 9550, *et seq.* See also *Richard R. Pendleton*, 53 S.E.C. 675, 679 (1998) ("We have repeatedly stated that the NASD arbitration system provides a speedy mechanism for settling disputes, which the NASD may foster by taking prompt action against those who fail either to honor arbitration awards or to seek to have them set aside.").

agreement; (3) the award has been vacated by a court; (4) a motion to vacate or modify the award is pending in a court; and (5) the respondent has a bankruptcy petition pending in U.S. Bankruptcy Court, or a U.S. Bankruptcy Court has discharged the award.¹⁷ A respondent may also assert a *bona fide* inability to pay the arbitration award.¹⁸

A respondent in an expedited proceeding may not attack the merits of the underlying arbitration award.¹⁹ To permit such collateral attacks would subvert FINRA's procedures, which are designed to promote prompt payment of arbitration awards.²⁰

C. Inability To Pay Standard

A respondent bears the burden of establishing a *bona fide* inability to pay.²¹ The SEC has stated that, "[b]ecause the scope of [a respondent's] assets is peculiarly within [his] knowledge, [the respondent] should properly bear the burden of adducing evidence with respect to those assets."²² Furthermore, FINRA is entitled to make a searching inquiry into a respondent's assertion of inability to pay.²³

To establish an inability-to-pay defense, a respondent must show more than a current lack of funds on hand to pay the award in full.²⁴ "An inability-to-pay defense may be rejected if it appears that the respondent is capable of reducing his living expenses, has the ability to divert funds from other expenditures to pay the award, could borrow the funds, or could make some meaningful payment toward the settlement of the award from available assets or income, even if

¹⁷ FINRA By-Laws, Article VI, Section 3; NASD Notice to Members 00-55, 2000 NASD LEXIS 63, at *4; *Dep't of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB060031, at 4-5 (Apr. 16, 2007), http://www.finra.org/sites/default/files/OHODecision/p038228_0_0.pdf.

¹⁸ *William J. Gallagher*, 56 S.E.C. 163, 169 (Mar. 14, 2003); OHO Redacted Decision ARB060031, at 5.

¹⁹ *Robert Tretiak*, 56 S.E.C. 209, 221 (2003) (citing *Herbert Garret Frey*, 53 S.E.C. 146, 150 (1997)).

²⁰ *Tretiak*, 56 S.E.C. at 221.

²¹ *Gallagher*, 56 S.E.C. at 169; *Frey*, 53 S.E.C. at 151.

²² *Bruce M. Zipper*, 51 S.E.C. 928, 931 (1993).

²³ *Tretiak*, 56 S.E.C. at 220.

²⁴ *Dep't of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB010013, at 9 (Jan. 25, 2002), http://www.finra.org/sites/default/files/OHODecision/p006654_0_0.pdf.

he could not pay the full amount of the award.”²⁵ An inability-to-pay defense may be rejected when the evidence provided by a respondent is insufficient or incomplete.²⁶

D. Discussion

As set forth below, DiPietro’s decision not to pay the arbitration award, or at least a meaningful portion of the award, by obtaining funds based on his assets “hinges more on his own asset-allocation choices than on a genuine inability to pay.”²⁷

1. Accounting Practice

There is conflicting evidence regarding the value of DiPietro’s accounting practice, Michael DiPietro CPA, Inc.²⁸ However, all of the evidence indicates that the value was substantial.

[REDACTED]

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DiPietro testified that accounting practices can be sold and purchasers typically make a down payment that is equivalent to a large percentage of the sale price.³² DiPietro did not identify any obstacle to his selling all or a portion of his accounting practice. Based on DiPietro’s estimate of the value of his practice and his testimony regarding the marketability of accounting practices, the Hearing Officer finds that DiPietro’s practice had a value sufficient to fund the payment of at least a meaningful portion of the arbitration award.

²⁵ *Dep’t of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB010001, at 11 (July 26, 2001), http://www.finra.org/sites/default/files/OHODecision/p006655_0_0.pdf; *Dep’t of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB010032, at 3 (Mar. 15, 2002), http://www.finra.org/sites/default/files/OHODecision/p006652_0_0.pdf (“To establish [the inability-to-pay defense], a respondent must demonstrate that he is unable to make some meaningful payment toward the award from available assets or income. . . . An inability-to-pay defense may be rejected if it appears that the respondent has either the ability to divert funds from other expenditures or the ability to borrow the funds.”).

²⁶ *Gallagher*, 56 S.E.C. at 169-170.

²⁷ OHO Redacted Decision ARB010032, at 5.

²⁸ Tr. 106.

²⁹ RX-19a-2, at 7; Tr. 114-15.

³⁰ CX-27; RX-10.

³¹ Tr. 106-07, 554.

³² Tr. 556-57.

[REDACTED]

⁴⁴ Tr. 532; RX-3d2, at 3.

⁴⁵ Tr. 698.

⁴⁶ DiPietro testified that he obtained some of the debt on his residence in order to refinance debt on the Myrtle Avenue property. Tr. 582. Debt on DiPietro's residence is not relevant to the ability of DiPietro to obtain funds by selling the Myrtle Avenue property, even if he contracted the debt in connection with refinancing the Myrtle Avenue property. Accordingly, debt on DiPietro's residence is not included in this discussion of the Myrtle Avenue property.

⁴⁷ Tr. 108-109.

⁴⁸ Tr. 108-109.

⁴⁹ Tr. 528-529. [REDACTED]

⁵⁰ Tr. 621.

⁵¹ CX-34, at 6-7; Tr. 622.

⁵² CX-30, at 175-381.

⁵³ CX-28, at 573.

[REDACTED]

Based on the appraisal, the absence of evidence identifying any flaws in the appraisal or indicating that housing prices have declined since the date of the appraisal, and DiPietro's testimony regarding the debt on his residence, the Hearing Officer finds that there is substantial equity in the residence.

E. Other Defenses

The Hearing Officer rejects DiPietro's other two defenses. The District Court denied DiPietro's motions to vacate and for a stay. There is no need to defer this proceeding while his appeal is pending. As the SEC has noted in a decision rejecting a similar argument:

Article VI, Section 3 of the NASD's By-Laws authorizes the NASD to initiate proceedings to suspend registration for failing to pay an arbitration award if a "timely motion to vacate or modify such award has not been made pursuant to applicable law or where such motion has been denied." It does not require the NASD to delay its process until all appeals of that denial are exhausted. We conclude that the NASD's suspension determination was in accordance with its rules.⁶²

Similarly, Article VI, Section 3 of FINRA's By-Laws authorize FINRA to initiate proceedings to suspend the registration of a registered individual for not paying an arbitration award if a "timely motion to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied," without requiring FINRA to delay its process until all appeals of that denial are exhausted.

III. Conclusion

The Hearing Officer finds, and the parties do not dispute, that Respondent Michael Albert DiPietro has failed to pay any portion of the arbitration award. At the hearing, DiPietro made comments exhibiting hostility to the award, explaining that he should not have to pay for a fraud that First Allied had committed against his client.⁶³ Based on these comments and the information in the record regarding the assets available to DiPietro, it appears that the issue is not DiPietro's inability to pay the arbitration award, but his refusal to pay an award that he finds unjust.

⁶¹ Tr. 700.

⁶² *Gallagher*, 56 S.E.C. at 171 (citations omitted).

⁶³ Tr. 374-75, 616.

The Hearing Officer finds that Respondent has failed to establish any of the defenses permitted by FINRA rules or case law, including a *bona fide* inability to pay.⁶⁴

Accordingly, pursuant to Article VI, Section 3 of FINRA's By-Laws and Rule 9559(n), Respondent Michael Albert DiPietro is suspended effective as of the date of issuance of this Decision from associating with any member firm in any capacity. The suspension shall continue until Respondent provides documentary evidence to FINRA showing that: (1) the arbitration award has been paid in full; (2) he has entered into a fully-executed, written settlement agreement with the claimant; (3) the arbitration award has been vacated or modified by a court of competent jurisdiction; or (4) he has filed a petition in a United States Bankruptcy Court and the arbitration award debt has been discharged by a United States Bankruptcy Court.

In addition, Respondent is ordered to pay FINRA costs of \$6,612.26, which includes an administrative fee of \$750, and hearing transcript costs of \$5,862.26. The costs shall become due upon the issuance of this Decision.



Kenneth Winer
Hearing Officer

Copies to:

Michael Albert DiPietro (*via overnight courier and first-class mail*)
Marie Mirch, Esq. (*via email and first-class mail*)
Kevin Mirch, Esq. (*via email and first-class mail*)
Ann-Marie Mason, Esq. (*via email and first-class mail*)
Meredith MacVicar, Esq. (*via email and first-class mail*)

⁶⁴ The Hearing Officer has considered all of the arguments made by the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.