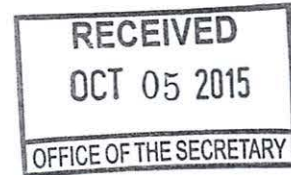


UNITED STATES OF AMERICA
before the SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT of 1934
Administrative Proceeding File No.3-16650~~8~~8

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



Petitioner

PETITIONER'S OPENING BRIEF

Marie Mirch
750 B Street #2500
San Diego, CA 92101
(619) 501-6220
(619) 501-6980 fax
marie@mirchlaw.com

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

Attorney for Petitioner
Michael DiPietro

STATEMENT REGARDING ORAL ARGUMENT

Oral argument may assist the Securities and Exchange Commission ("SEC") with the numerous issues involved herein and help clarify questions or concerns if oral argument is granted.

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STATEMENT OF APPEAL

This appeal arises from a Decision dated June 8, 2015, wherein the Financial Industry Regulatory Authority (“FINRA”), Office of Hearing Officers, suspended Michael DiPietro from FINRA for his inability to pay an arbitration award. Record¹ bates number 004389. The Award of \$157,506.79, plus interest, was entered in the matter of Martina Hutchison, individually, and as a Member of ARI-IBP 8 LLC, et. al. vs. First Allied Securities, Inc. vs. Michael DiPietro (Third Party Respondent), FINRA Dispute Resolution Arbitration Case No. 12-03374 (“Award”). CX-1 # 01139. For the reasons set forth below, Petitioner Michael DiPietro (DiPietro”) requests that the SEC reverse the Decision of the Hearing Officer that DiPietro failed to demonstrate that he had a *bona fide* inability to pay an arbitration award entered by the Financial Industry Regulatory Authority “FINRA”, and reinstate his membership in FINRA.

There are two valid reasons that Mr. DiPietro should not have been suspended from FINRA.

First, the Hearing Officer ignored the appeal of the arbitration award which is currently before the Ninth Circuit Court of Appeals, case number 14-16913. [RX] 69

¹ “Record # refers to the administrative record submitted pursuant to this appeal. “CX” refers to Claimant (FINRA’s) Exhibits. “RX” refers to Respondent’s (DiPietro’s) exhibit.

004423. The Hearing Officer should have stayed the Expedited Proceeding pending the outcome of the appeal. The gravamen of the issues in the appeal are significant: Mr. DiPietro's right to due process, the controlling effect of Independent Contractor's Agreement ("ICA"), the fact that the terms of the ICA supersede FINRA rules, the FINRA Panel exceeded their scope of authority in the underlying arbitration and the manifest disregard by the arbitrators of the preclusive effect of the prior final arbitration award. [RX]69 #04485. The Ninth Circuit appeal is an important case to reign in FINRA's unfettered arbitration system that makes its own rules, ignores the scope of its authority as defined by the contract of the parties, and inherently favors the financial institutions. FINRA refused to stay the expedited proceeding because DiPietro was unable to post a bond CX-8, #004417.

Second, DiPietro offer substantial evidence that established that he did not have the financial means to pay the award. FINRA provided no evidence to rebut the evidence and testimony of Mr. DiPietro. In fact, the Findings of Fact contained in the Decision support Mr. DiPietro's claim that he has a *bona fide* inability to pay the award. is unable to pay the award of \$157,506.79. Rec. #004390. Mr. DiPietro was the only witness who testified about his finances and ability to pay. See hearing

transcript². Mr. DiPietro is a CPA and expert in this field. FINRA offered no expert to contradict Mr. DiPietro's testimony and evidence. Rather, the Hearing Officer suspended DiPietro from FINRA. This is counterproductive, given that his work as a financial advisor provided income which is no longer available to him because of the suspension. Now Mr. DiPietro finds himself in a worse position with his financial lifeline cut and, if and when he is reinstated, his book of business has evaporated during the time it took to win a reversal or remand.

An affirmative finding of any one of these reasons warrants reversal and reinstatement to FINRA.

FACTS

a. Stipulated facts

Prior to the hearing, the parties entered the following stipulations:

1. In the matter of Martina Hutchinson, individually and as Member of ARI-IBP 8 LLC, et al. vs. First Allied Securities, Inc. vs. Michael Albert DiPietro (Third-Party Respondent), FINRA Dispute Resolution Arbitration Case No. 12-03374 ("Arbitration case"), an award was rendered against Respondent on or about February

² The hearing transcript will be referred to as "Tr". FINRA has not provided a transcript of the hearing, nor was it included in the Certification of the Record. Petitioner is in the process of obtaining a copy of the Transcript, and will supplement this brief if necessary.

10, 2014 in the amount of approximately \$157,505.79 plus interest ("the Award"). See CX-1 #01139.

2. On or about February 10, 2014, Respondent received, via his counsel in the Arbitration case, notice of the Award and his obligation under FINRA rules to pay the Award in 30 days. See CX-2 # 01149, and CX-3 #01153.

3. On or about March 12, 2014, Respondent filed a motion to vacate the Award in U.S. District Court, District of Arizona. See CX-4 #01155.

4. On October 1, 2014, U.S. District Judge David G. Campbell issued an order denying Respondent's motion to vacate the Award ("Order"). See CX-5 #01157.

5. On October 3, 2014, Respondent filed a Notice of Appeal of the Order. See CX-7 #01173.

6. On October 7, 2014, FINRA sent Respondent a notice of suspension pursuant to FINRA Rule 9554 ("the 9554 Notice"), which was delivered to Respondent via Federal Express. Respondent was properly served with the 9554 Notice. See CX-9 #01177.

7. On October 10, 2014, Respondent filed a Motion to Stay Order Confirming Arbitration Award and Denying Motion to Vacate Arbitration Award Pending Appeal in U.S. District Court, District of Arizona ("Motion to Stay"). See CX-12 #01187.

8. On October 22, 2014, Claimant in the Arbitration case filed an opposition to

the Motion to Stay. See CX-13.

9. On October 24, 2014, in response to the 9554 Notice, Respondent timely filed a request for a hearing in this matter. In his request for a hearing, Respondent asserted, as a defense, a bona fide inability to pay the Award. See CX-14.

10. On October 27, 2014, the Court denied the Motion to Stay, in part, because Respondent posted no bond. See CX-19 at p. 3.

11. Respondent has not posted any supersedes bond in connection with his notice of appeal of the Order.

12. On or about October 3, 2014, Respondent filed a Notice of Appeal of the Order, which is currently pending in the Ninth Circuit Court of Appeals, under docket no. 14-16913. On January 9, 2014, Respondent was granted an extension of time to file his opening appeal brief until February 20, 2015. The Opening Brief was filed February 27, 2015.

13. Respondent has not paid any portion of the Award.

14. Respondent has not filed for bankruptcy protection.

15. Respondent has not entered into a fully executed, written settlement agreement with the Claimant in the Arbitration case to pay the Award.

See Signed Stipulation # 000237.

b. Background

Mr. DiPietro is a Certified Public Accountant who owns and works in his own accounting firm. He entered the securities industry in 1999. He associated with First Allied in a registered capacity with First Allied Securities from 2005 to 2008. CX 24-2 # 001292. After First Allied terminated Mr. DiPietro, he associated the Centaurus Financial Inc. From 2009 to May, 2014. In May, 2014, DiPietro voluntarily left Centaurus and associated with Transamerica Financial Advisors Inc. CX- 24 #1292. Mr. DiPietro currently is not registered with any firm because he is currently suspended from FINRA. #4389.

c. Mr. DiPietro's relationship to First Allied.

1. Mr. DiPietro acted as an independent contractor for First Allied pursuant to an Independent Contractor Agreement

On October 8, 2004, Mr. DiPietro and First Allied entered into an Independent Contractor Agreement, whereby First Allied engaged Mr. DiPietro to sell securities, insurance, advisory and other services facilitated by First Allied *Independent Contractor Agreement* ("ICA"). In December, 2008, First Allied terminated Mr. DiPietro. [RX] 69 #4434-4435.

2. The first FINRA arbitration between Mr. DiPietro and First Allied ("2010 suit")

In response to his termination and false reporting on his U-5, on or about

February 8, 2010, Mr. DiPietro filed a statement of claim against First Allied with FINRA. The FINRA Panel found in favor of Mr. DiPietro on his claims and awarded him compensatory damages in the amount of \$180,000 plus interest. Mr. DiPietro's claims included a claim for breach of the Independent Contractor Agreement, ("ICA") which is the very same contract that First Allied later relied on for a claim of indemnity against Mr. DiPietro. [69] # 4435-4436. The Arbitration Award in the 2010 FINRA Arbitration was a final order.

3. The Hutchison Arbitration ("2012 suit")

During 2008, Martina Hutchison and her husband Ron Hutchison were clients of First Allied. [RX]69 #4436. In 2012 Ms. Hutchison filed suit against First Allied. First Allied subsequently filed a third party complaint against Mr. DiPietro. First Allied claimed that pursuant to the ICA, First Allied was entitled to indemnity and/or contribution from Mr. DiPietro for any damages awarded to Ms. Hutchison. First Allied relied on the very same Independent Contractor Agreement that had been adjudicated in Mr. DiPietro's favor in the 2010 FINRA Arbitration. [RX] 69 # 4437.

First Allied's conduct was in retaliation for Mr. DiPietro's success in the former suit and whistle blowing which is protected under the Dodd-Frank Act. First Allied retaliated against Mr. DiPietro by wrongfully subjecting Mr. DiPietro to indemnification and jeopardizing Mr. DiPietro's securities licenses.

The ICA defined the forum, venue and choice of law for any dispute between First Allied and Mr. DiPietro. [69] #4442. FINRA's Arbitration Panel exceeded the scope of their authority by holding the arbitration hearing in a jurisdiction and venue other than that which was expressly contracted by the parties. This is a significant ground that Mr. DiPietro relies on in his appeal of the Award to the Ninth Circuit Court of Appeal. [RX]69 at # 4423-4484, Opening Brief to Ninth Circuit.

d. Mr. DiPietro is suspended from FINRA

The Arbitration Panel entered an award in favor of First Allied on its claim for indemnity in the amount of \$100,000.00, attorneys' fees in the amount of \$56,047.55, and costs of \$1,458.24. CX-1 #1139. The Panel also assessed Mr. DiPietro \$8,250 in FINRA fees. *Id.*

On October 7, 2014, FINRA issued a Notice of Suspension Pursuant to FINRA Rule 9554, CX-9 # 1177. Mr. DiPietro requested a hearing on the 9554 Notice asserting the defenses of inability to pay the award, and the award was not final because of the appeal pending at the Ninth Circuit. CX-14 #1233. A telephonic hearing was held on February 18, and March 2, 9, and 16, 2015. #4390. On June 8, 2014, the Hearing Officer entered his decision and suspended Mr. DiPietro from FINRA. #4439-3298. The Hearing Officer concluded:

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. 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.

Record #4398

It is true that Mr. DiPietro does not agree with the arbitration award, thus the appeal to the Ninth Circuit. However, Mr. DiPietro's dissatisfaction with the award that does not affect the fact that Mr. DiPietro truly has a *bona fide* inability to pay the award.

ARGUMENT AND AUTHORITIES

- a. **The Hearing Officer should have stayed the expedited hearing pending the appeal to the Ninth Circuit Court of Appeals.**

On March 12, 2014 Third Party Respondent/Third party Counter-Claimant, Michael DiPietro, filed a motion to vacate the FINRA award in the above-captioned matter. CX-4 #1155. The motion was filed in US District Court, District of Arizona. As a result, pursuant to FINRA Code of Arbitration Procedure 12904(j) and 13904(j), Mr. DiPietro fell under the exception to the 30 day deadline for payment of the monetary award. *Id.* The United States District Court denied Mr. DiPietro's request

to vacate the award. CX-5 #1157. However, the decision on vacating the Award is not final as it is on appeal to the Ninth Circuit Court of Appeals. [RX] 69 # 4423-4485. Mr. DiPietro requested that the FINRA expedited hearing be stayed pending the outcome of the appeal. CX-7 #1187. Mr. DiPietro's request was denied because he did not have the financial means to post a supersedes bond. CX-19 "1279.

While the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure require a bond to stay the consequences of a judgment or award, FINRA is not bound by these rules of law. "Equity is justice in that it goes beyond the written law". Domke on Aristotle, FINRA Dispute Resolution Arbitrator's Guide September 2014 Edition. The Hearing Officer should have exercised his equitable power and granted the stay in favor of Mr. DiPietro.

b. The Arbitration Panel Exceeded the scope of their authority, and exhibited manifest disregard for the law.

FINRA is a congressionally approved SRO subject to SEC approved SRO rules, which include all of FINRA's rules and FINRA's Code of Procedure. *See, Securities Exchange Act of 1934, § 15A; 15 U.S.C.A. § 78o-3; see also, Birkelbach v. S.E.C., 751 F.3d 472 (7th Cir. 2014)* FINRA was created for the sole purpose of assisting the SEC with regulating the securities industry. *Id.*

Arbitration is a unique process arising from the parties contract which forfeits

his/her right to a jury trial. Arbitration is intended to be a cost-effective dispute resolution before neutral arbitrators. The arbitrators are given a significant amount of power and leeway in arbitrations. The rules of evidence are lax, and the arbitration award is given great deference, regardless of whether the arbitrators follow the law or misapply the facts. However, the arbitrators' power is not endless. They cannot exceed the scope of their power, nor can they ignore the preclusive effect of the prior final, binding, arbitration award. FASI's breach of the ICA had already been adjudicated in favor of Mr. DiPietro in the 2010 FINRA Case number 11-01116. Further, the arbitrators exceeded the scope of their power as independently defined by the parties to the contract.

In this case the ICA, and the venue and choice of law clause contained therein, defined the scope of the arbitrators' powers. Mr. DiPietro controlled the scope of the arbitrators' authority to adjudicate his dispute with FASI when he agreed to the terms of the ICA. The arbitrators and FINRA exceeded the scope of their authority as defined in the ICA. [RX] 69 #4423-4485.

Mr. DiPietro was also denied due process in the underlying arbitration. Procedural due process requires sufficient notice and opportunity to be heard at a meaningful time and in a meaningful manner. U.S.C.A. Const. Amend. 5, 14, Procedural due process, guaranteed by the Fifth and Fourteenth Amendments to the

United States Constitution and by Article I, section 7 of the California Constitution, exist "to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner." *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1072, 114 Cal.Rptr.2d 798; *United States v. James Daniel Good Real Property* (1993) 510 U.S. 43, 49-52, 114 S.Ct. 492, 126 L.Ed.2d 490. Notice must be both timely and sufficiently clear so that affected individuals will be able to appear and contest issues in a meaningful way.

Another ground to vacate the award is that FINRA had no authority to arbitrate the dispute between FASI and DiPietro in Arizona. The terms of the ICA are very clear that any dispute between Mr. DiPietro and FASI had to be adjudicated in San Diego, CA. The ICA controls and supercede FINRA rules. *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 739 (9th Cir.) cert. denied sub nom. *City of Reno, Nev. v. Goldman, Sachs & Co.*, 135 S. Ct. 477, 190 L. Ed. 2d 358 (2014); *UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 327 (4th Cir. 2013); *Applied Energetics, Inc. v. NewOak Capital Markets, LLC*, 645 F.3d 522, 525 (2d Cir.2011).

The scope of the authority of the arbitrators is defined by the contract, and this Court's finding in *Goldman Sachs, supra*, which held that the terms of the contract supercede FINRA rules. In this case, the language in the ICA venue clause is clear and unambiguous and not subject to discretionary interpretation by the arbitrators.

Polimaster Ltd. v. RAE Sys., Inc., 623 F.3d 832, 837 (9th Cir. 2010). The best evidence of the intent of contracting parties is the clear language of the contract itself, and clear contractual language therefore governs. *Westoil Terminals Co. v. Indus. Indem. Co.*, 110 Cal.App.4th 139, 145, 1 Cal.Rptr.3d 516 (Cal.Ct.App.2003); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, No. 06-0715-SC, 2012 WL 3757486, at 8 (N.D. Cal. July 5, 2012).

The arbitrators in the underlying suit also exhibited manifest disregard for the law. The arguments that fall under this category are presented in [RX] 69 on pages 38-44 of the Opening Brief to the Ninth circuit and all pertain to a prior FINRA arbitration between FASI and Mr. DiPietro. The findings in that case had a legal effect on the claims FASI asserted against DiPietro. Mr. DiPietro prevailed in the earlier FINRA arbitration against FASI on all of his claims, including breach of the same ICA that was the subject of the present suit. The two inconsistent arbitration awards cannot be recognized. The arbitrators manifestly disregarded the law by ignoring the legal effect of outcome in the previous arbitration.

Arbitrators are not free to ignore the preclusive effect of prior judgments under the doctrines of res judicata and collateral estoppel," *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Cir. 2007), citing *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto., Aerospace & Agr. Implement Workers, UAW*, 97 F.3d 155, 159

(6th Cir. 1996). In this case, there were two FINRA arbitration awards adjudicating the same Independent Contractor Agreement between the parties. The first award found in Mr. DiPietro's favor. That ruling has preclusive effect on the present suit. Because the arbitrators ignored the prior final arbitration award, there are two inconsistent awards that cannot be reconciled. This is a manifest disregard for the law which supports vacating the arbitration award in this second suit between the parties. [RX] 4423-4484.

c. Mr. DiPietro's arguments are not a collateral attack on the Award

On page 4 of the decision the Hearing Officer states, " A Respondent in an expedited proceeding may not attack the merits of the underlying arbitration award". #4393. Mr. DiPietro was not using the expedited proceeding to collaterally attack the Award. The Award itself is being challenged in the Ninth Circuit Court of Appeals. However, the arguments set forth above are important to establish that Mr. DiPietro has a viable appeal that may reverse Award, and therefore, the expedited hearing should have been stayed. Otherwise, as it has now happened, Mr. DiPietro is suspended, thus causing a loss of his most significant revenue source, which cannot be replaced because his book of business has been transferred to other financial advisors.

It is essential to consider the arguments concerning the validity of the award

in the Ninth Circuit appeal to apply equity, and wait until the Ninth Circuit makes its decision on the merits before taking a man's right to earn a living, feed his family and pay his bills. The Hearing Officer has done in this case by suspending Mr. DiPietro from FINRA, thereby destroying not just his securities practice, but also his CPA practice which serviced many of the same clients. Regardless of the decision at the Ninth Circuit, the suspension has caused irreparable harm and destroyed any possibility that Mr. DiPietro can earn enough to make payments on the Award.

d. Mr. DiPietro has a *bona fide* inability to pay the Award.

There are certain defenses in an expedited suspension proceeding under FINRA Rule 9554, (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, (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 filed for bankruptcy. #4393. Another defense is a *bona fide* inability to pay the award. *Id.*

The Hearing Officer recognized the limits on Mr. DiPietro's earning in 2014 in footnote 3 of his decision. #4390. Mr. DiPietro's compensation from the member firms in 2014 was approximately 199,000. Tr. 169-71. His 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 #1393. His compensation from a bank for which he was a director was approximately \$12,000. Tr. 131. Now, with the suspension from FINRA, Mr. DiPietro's compensation has decreased by at least \$199,000 (the amount shown on his 1099's for 2014), leaving him an annual income of approximately \$60,000.

Mr. DiPietro submitted substantial evidence of his financial affairs that proved he cannot pay the award. In addition to W-2's and 1099's, Mr. DiPietro submitted copies of tax returns, loan agreements, promissory notes, appraisal of real properties, title and lease documents for his cars, bank statements for his retirement account, bank statements, credit card statements, profit and loss statements for his business, and the Myrtle Avenue Properties, depreciation schedule, and financial statements. *See Respondent's exhibits at ## 2945-4386.* Mr. DiPietro is the only witness that submitted exhibits and testimony. FINRA offered no evidence or opinion testimony that refuted either Mr. DiPietro's testimony or the evidence submitted at the hearing.

Nonetheless, FINRA and the Hearing Officer speculated as to Mr. DiPietro's ability to liquidate or borrow against his assets. This is discussed in the Decision. #4389-4398. The specific assets which FINRA believes Mr. DiPietro can extract funds are (1) sale of his CPA practice, (2) sale of the commercial building on Myrtle Avenue, and (3) borrow against the equity in his home. This conclusion is purely theoretical and is not supported by any of the evidence or testimony received at the

hearing.

1. Accounting Practice

The Hearing Officer found that Mr. DiPietro's accounting practice had a value sufficient to fund the payment of at least a meaningful portion of the arbitration award. This assumes that the accounting practice could be sold. There is no evidence or testimony by any expert on valuation and marketability of an accounting firm. Further, now with the loss of his clients he was serving as a financial advisor, the practice is worth much less. Mr. DiPietro offered testimony that he tried to borrow against the practice and his request for approximately \$35,000 was denied. He offered evidence of a loan of \$75,000 that was taken out against his business. RX-2a1, loan with World Financial Group dated May 2014 with promissory note. Mr. DiPietro also offered evidence that he had exhausted his efforts to obtain a loan against his business.

The hearing officer also failed to take into account the time it would take to sell an accounting practice. Moreover it is a draconian sanction for force Mr. DiPietro to dispose of his job and livelihood derived from his accounting practice. The effect of the Hearing officers decision would be to leave Mr. DiPietro unemployed, with no financial means whatsoever to be able to allocate anything towards payment of the award. There is no evidentiary basis or expert testimony to support the Hearing

Officer's conclusion that Mr. DiPietro could sell his accounting practice. Mr. DiPietro, a CPA, was the only witness who testified and he confirmed that he could not borrow against the accounting practice. If he were to sell it, he would not have a job.

2. Myrtle Avenue Commercial Building

In 2009 Mr. DiPietro purchased a commercial building on Myrtle Avenue at the request of his friend [FB] for the behalf of the [REDACTED]. Tr 117. The monies for the purchase of the property came from [FB] as part of a trust that FB had set up for the [REDACTED]. CX-25, TR 111-12, 186, 263-64, 532, 540, 541, 569, 626-27, 699. Mr. DiPietro has only a 12% interest in that property, and owes a total of approximately \$1,407,875 in connection with the Myrtle Avenue property, which consists of two loans. Tr 532, RX 3d2 at 3, TR 698. Mr. DiPietro has tried to sell the property, including reducing the price to no avail. TR 625.

The Hearing Officer states that Mr. DiPietro can derive funds from the sale of the Myrtle Avenue property to pay the award. #4393. Again this is theoretical, not reality. Mr. DiPietro offered evidence of his unsuccessful efforts to sell the property. There is no evidence to support the Hearing Officer's expectation that Mr. DiPietro can sell the Myrtle Avenue property and use the equity to pay the award . FINRA offered no expert witness as to the marketability of the property, the time it would

take to sell it, and how much equity could be derived from said sale. On the other hand, Mr. DiPietro provided evidence and testimony of his efforts to sell the property, all of which were unsuccessful.

3. Residence

Finally, the hearing officer ruled that Mr. DiPietro has enough equity in his home to pay the award. #4397. This is his house where he lives with his wife and [REDACTED] children. TR 159, 305. In the decision, the Hearing Officer finds that Mr. DiPietro did not demonstrate that the [REDACTED] [REDACTED]. *Id.* [REDACTED] has no bearing on whether Mr. DiPietro is able to borrow against the equity in his residence.

Mr. DiPietro owes approximately \$1,000,000 on his residence. That is approximately 75% of the 2012 appraisal of the home. CX-33, TR 183. #2001. As stated earlier, Mr. DiPietro has unsuccessfully tried to get loans to meet his obligations. Nonetheless, the Hearing Officer finds that Mr. DiPietro has enough equity in his home to pay the Award. Since Mr. DiPietro has been unsuccessful in securing a loan, it appears the only option under the Hearing Officer's Decision is that Mr. DiPietro [REDACTED], and outright sell his residence.

The finding that the Hearing Officer makes with respect to Mr. DiPietro's

ability to pay the award are not realistic. Mr. DiPietro testified as to the value of the properties, his indebtedness, and the unsuccessful efforts to borrow against the properties. FINRA offered no evidence that would contradict Mr. DiPietro. It is easy to say theoretically he could sell or borrow against assets, but in reality Mr. DiPietro has tried, and continues to try with no success. Now with his FINRA license suspended, Mr. DiPietro has lost not only that income, which comprised nearly two third of his annual compensation, but also the securities clients who were also clients of his accounting practice. Mr. DiPietro has met his burden to establish his inability to pay.

CONCLUSION

Mr. DiPietro should be reinstated to FINRA. The expedited proceeding should have been stayed pending the Ninth Circuit Appeal. Furthermore, Mr. DiPietro met his burden to establish that he has a bona fide inability to pay the award. FINRA offered no evidence to defeat Mr. DiPietro's evidence and testimony. The finding that Mr. DiPietro has enough assets to either sell or borrow against is not supported by the record. Mr. DiPietro has tried to borrow money and to sell the Myrtle Avenue property. His efforts have been unsuccessful. The suspension from FINRA is a draconian sanction that has eliminated a significant amount of income, which puts Mr. DiPietro in a less favorable position toward obtaining the ability to pay the

Award.

Wherefore, Mr. DiPietro respectfully request that this Court reverse the Decision of FINRA's Office of Hearing Officers and reinstate him to FINRA.

Respectfully submitted this 30th day of September, 2015.

Mirch Law Firm, LLP

By  /s/ Marie Mirch

CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing Opening Brief contains 5145 words.

Dated September 30, 2015.

By 
/s/ Marie Mirch

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:

OPENING BRIEF

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
Clara Gray
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 Office of the Secretary SEC .
- 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.

DATED this 30th day of September, 2015



/s/ Marie Mirch

Marie Mirch