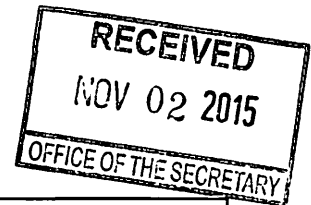


**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**



In the Matter of the Application of  
  
Michael Albert DiPietro  
  
For Review of Disciplinary Action Taken by  
  
FINRA  
  
File No. 3-16658

**FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW**

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October 30, 2015

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**FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW**

**I. INTRODUCTION**

Applicant Michael Albert DiPietro has appealed a June 8, 2015 FINRA expedited decision suspending him from associating with any FINRA member firm in any capacity for his failure to pay an arbitration award. (RP 4389-4398.)<sup>1</sup> DiPietro admits that he failed to pay any portion of the arbitration award issued more than nineteen months ago against him and in favor of First Allied Securities, Inc. ("First Allied"). After an evidentiary hearing, a FINRA Hearing Officer correctly found that DiPietro failed to establish that he had a *bona fide* inability to pay the award and that he had no other defense to his obligation to pay. The Hearing Officer suspended DiPietro's registration with FINRA until he: 1) pays the award in full; 2) provides evidence that First Allied has agreed to settle the award; 3) demonstrates that a court of

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<sup>1</sup> "RP" refers to the record page number in the certified record filed in this case. "DiPietro Br. \_\_\_" refers to DiPietro's September 30, 2015 submission in support of his application for review. "Stip. No. \_\_\_" refers to the parties' stipulations in this matter dated February 2, 2015, at RP 237-38.

competent jurisdiction vacates or modifies the award; or 4) files a bankruptcy petition or demonstrates that the award has been discharged by a bankruptcy court.

The record amply demonstrates that FINRA acted in accordance with its rules when DiPietro did not pay the arbitration award, and DiPietro failed to establish a *bona fide* inability to pay. DiPietro has sufficient assets to pay the award or to make a meaningful contribution towards paying it. DiPietro's refusal to do so stems from his disagreement with the merits of the award. Accordingly, FINRA urges the Commission to dismiss DiPietro's application for review.

## **II. FACTUAL BACKGROUND**

### **A. Michael DiPietro**

DiPietro is a certified public accountant who owns his own accounting practice, Michael DiPietro CPA, Inc. (RP 607.) DiPietro entered the securities industry in 1999. (RP 608, 1291, 2000.) Prior to his suspension, DiPietro was registered with Transamerica Financial Advisors, Inc. ("Transamerica"). (RP 609, 1291.) Before that, DiPietro was registered with Centaurus Financial, Inc. ("Centaurus"), from February 2009 to May 2014, and First Allied, from March 2005 to December 2008. (*Id.*)

### **B. The Arbitration Award and DiPietro's Related Court Actions**

In September 2012, one of DiPietro's customers filed an arbitration claim against First Allied. (RP 1139-48.) First Allied subsequently filed a third-party arbitration claim against DiPietro for indemnification. (*Id.*) Prior to the hearing, First Allied settled with the customer and the arbitration proceeded between First Allied and DiPietro only. (*Id.*) On February 10, 2014, the arbitration panel issued an arbitration award (the "Award"), ordering DiPietro to pay First Allied \$157,505.79 plus interest. (Stip. No. 1; RP 1139-48.) That same day, DiPietro's

counsel received notice of the Award and DiPietro's obligation to pay it within 30 days. (Stip. No. 2; RP 1149-54.)

On March 12, 2014, DiPietro filed a motion to vacate the Award in the United States District Court for the District of Arizona. (Stip. No. 3; RP 1155-56.) On October 1, 2014, the district court denied DiPietro's motion to vacate and confirmed the Award (the "Order"). (Stip. No. 4; RP 1157-68.)

On October 3, 2014, DiPietro filed a notice of appeal of the Order with the United States Court of Appeals for the Ninth Circuit.<sup>2</sup> (Stip. No. 5; RP 1173-76.) DiPietro did not, however, post a supersedeas bond in connection with the appeal. (Stip. No. 11.) DiPietro also filed a motion to stay the Order in the district court on October 10, 2014. (Stip. No. 7; RP 1187-1214.) The district court denied DiPietro's motion to stay the Order, in part because of his failure to post a supersedeas bond. (Stip. No 10; RP 1277-80, 1235-48.)

To date, DiPietro has not paid any portion of the Award. (Stip. No. 13.) Moreover, DiPietro has neither entered into a settlement with First Allied for payment of the Award nor filed for bankruptcy. (Stip. Nos. 14, 15.)

### **C. DiPietro's Finances**

#### **1. DiPietro's Compensation**

During the period from 2012 through 2014, DiPietro received substantial income. In 2012, DiPietro was paid commissions of approximately \$376,369 from Centaurus. (RP 384-85.) He was paid an additional \$10,920 for his work as a director of a bank. (RP 378, 385-6.) In 2012, the CPA Practice generated gross receipts of more than \$1.4 million. (RP 400.)

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<sup>2</sup> As of the filing of this brief, the Appeal remains pending under docket no. 14-16913.



In 2013, DiPietro's compensation included more than \$475,000 in commissions from Centaurus and approximately \$14,000 for his work as a bank director. (RP 389, 390.)

In 2014, DiPietro received \$161,805 in commissions from Centaurus, an additional \$48,000 from Transamerica, and \$13,900 for his work as a bank director. (RP 415, 418, 428.) DiPietro also received a \$75,000 loan from Transamerica in 2014. (RP 1993-2000.)

## **2. DiPietro's CPA Practice**

DiPietro is the 100% owner of his CPA practice. (RP 353.) While he listed the value of the business in his submission to FINRA as \$750,000, he testified at the hearing that the true value was likely in the \$800,000 to \$1,100,000 range. (RP 353-54, 803.) The record also reflects that, in connection with a 2011 loan application, DiPietro represented the value of his CPA practice to be \$1,750,000. (RP 361.) DiPietro testified that it is possible to sell an accounting practice and that typically such a sale would include a large upfront payment, followed by payment of the remainder of the purchase price over a short period. (RP 805-06.) As the Hearing Officer found, DiPietro did not identify any reason why his CPA practice could not be sold and the proceeds from that sale applied to payment of the Award. (RP 4389.)

## **3. The Myrtle Avenue Commercial Building**

In 2009, DiPietro purchased a commercial building ("Myrtle Avenue") for \$2,750,000. (RP 364.) DiPietro claimed that the money for the purchase was provided by a third party [REDACTED] and that he owns only 12% of the limited liability company that holds the property. (RP 356.) DiPietro admitted, however, that the property was purchased in his name and that he assumed significant expenses with respect to the purchase of the building, including investing \$600,000 to prevent foreclosure and paying all its operating expenses. (RP 341-42, 355-56, 358-59, 433, 440-41, 510-11, 757, 781, 789-89, 818, 875-76, 953, 1309.) In

addition, DiPietro took the benefit of the tax losses attributable to Myrtle Avenue. (RP 412.) Moreover, the operating agreement for the company that holds the property indicates that DiPietro owns 100% of its profits and losses. (RP 445-46, 450.) The record shows that in March 2014, one month after the Award was issued, DiPietro paid the gift tax related to the transfer of Myrtle Avenue [REDACTED] (RP 442, 444, 868, 2051-64.)

The record contains various evidence of Myrtle Avenue's valuation. In 2011, in connection with the refinancing of the mortgage on the property, DiPietro submitted a loan application that valued Myrtle Avenue at \$2,700,000. (RP 359, 361.) In 2012, the appraised value of the property was \$1,750,000. (RP 431.) DiPietro testified that a tax reassessment valued the property at \$2,200,000 and that this was a low estimate of its value. (RP 357.) In 2014, DiPietro listed the property for sale at \$2,900,000 and authorized his realtor to reduce the price as low as \$2,600,000. (RP 437.) DiPietro later lowered the selling price to \$2,600,000, and authorized the realtor to reduce the price to \$2,400,000. (RP 438.) DiPietro agreed to sell the property to a prospective buyer who offered \$2,600,000, but the sale fell through when the buyer did not qualify for financing. (RP 438.)

Myrtle Avenue is subject to a mortgage of approximately \$1,200,000. (RP 434, 758.) DiPietro admitted that Myrtle Avenue contains substantial equity and that if the property was sold, [REDACTED]—would give him the money to pay the Award. (RP 779-80, 874.) DiPietro also testified, however, that it would be “unfair” to force him to sell the property at a loss to pay the Award, which he views as unjust. (RP 759.)

#### 4. DiPietro's Residence and Other Assets

DiPietro owns a home [REDACTED] (RP 406.) A 2012 appraisal valued DiPietro's residence at \$1,310,000. (RP 430.) DiPietro testified that he believes this appraisal is high and that his home is actually worth \$850,000-950,000. (RP 361, 692.) He, however, offered no evidence to support this valuation or any reason to doubt the accuracy of the appraisal. The residence is subject to a mortgage of approximately [REDACTED] and a home equity line of credit of [REDACTED]. (RP 431, 435.) In October 2014, after the Award was issued, [REDACTED] remained available on the line of credit. (RP 436.) DiPietro admitted that he regularly pays an extra \$600 per month on his mortgage in order to pay down the principal. (RP 431, 433.)

DiPietro testified about other assets that he owns. These include sports memorabilia he estimated to be worth \$ [REDACTED] artwork valued at \$ [REDACTED] and other personal property that DiPietro represented to be worth \$ [REDACTED] on a loan application. (RP 362, 369, 370.) DiPietro also owns and leases two vehicles. (RP 452-53, 2065-68.) Moreover, he is listed as the insured for various vehicles that he claims are owned by his children but for which he submitted no documentary evidence concerning ownership. (RP 453-56.) He also testified about a \$ [REDACTED] Roth IRA that he claimed to have cashed out in March 2014, a \$ [REDACTED] gift from [REDACTED], and a Roth IRA for his wife worth approximately \$ [REDACTED] (RP 459-60, 464-65, 593, 786.)

### III. PROCEDURAL HISTORY

On October 7, 2014, after learning that the district court denied his motion to vacate the Award, FINRA served DiPietro with a suspension notice pursuant to FINRA Rule 9554 for failure to pay the Award (the "Suspension Notice"). (Stip. No. 6; RP 1177-82.) The Suspension Notice advised DiPietro that unless he requested a hearing to assert an available defense, he

would be suspended on October 28, 2014. (RP 1177-82.) In subsequent communications with DiPietro's counsel, FINRA explained that an appeal to a court of appeals would not stay the suspension proceeding unless DiPietro posted a supersedeas bond. (RP 1185-86.) DiPietro did not post a bond, and the expedited proceedings against DiPietro went forward. On October 24, 2014, DiPietro filed a timely request for a hearing. (Stip. No. 9; RP 1233-34.)

At the hearing, DiPietro argued that (1) he had a *bona fide* inability to pay the Award, and (2) that the expedited proceeding should be stayed pending a decision on the Appeal. In a June 8, 2015 decision (the "Hearing Officer Decision"), the Hearing Officer evaluated the evidence and rejected DiPietro's defenses. (RP 4389-98.) The Hearing Officer found that DiPietro had income and assets sufficient to pay at least a portion of the Award and his failure to do so was based on his asset allocation decisions and his unwillingness to pay the Award, which DiPietro views as unjust. (*Id.*) The Hearing Officer also rejected DiPietro's arguments concerning his pending appeal of the district court's denial of his motion to vacate, finding no authority for staying an expedited proceeding pending such an appeal. (RP 4397) This appeal followed.<sup>3</sup>

#### IV. ARGUMENT

DiPietro admittedly has not paid the Award and, as discussed below, has not established any available defense to payment of the Award. The Commission should uphold FINRA's suspension of DiPietro because his refusal to pay has no legal merit.

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<sup>3</sup> DiPietro claims that FINRA did not provide a copy of the hearing transcript and that it was not included in the Certified Record. DiPietro Br. at 3, FN 2. DiPietro is wrong on both counts. The transcript is included in the record at RP 243-1029. Moreover, as provided in FINRA Rule 9265(b), a copy of the transcript was available for purchase by DiPietro from the court reporter.

### **A. The Applicable Standard of Review**

The Commission's review of an indefinite suspension that is contingent on the fulfillment of a condition, such as payment in full of an arbitration award, is governed by Section 19(f) of the Securities Exchange Act of 1934 (the "Exchange Act"). *See William J. Gallagher*, 56 S.E.C. 163, 166 & n.5 (2003). The Exchange Act directs the Commission to dismiss an application for review when: (1) the specific grounds upon which FINRA based its decision exist in fact; (2) FINRA's determination was in accordance with its rules; and (3) those rules were applied in a manner consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(f); *see also Gallagher*, 56 S.E.C. at 166-67. The record here demonstrates that DiPietro's suspension was based on grounds which exist in fact—i.e., that DiPietro failed to pay the Award—and that FINRA's decision to suspend DiPietro was consistent with its rules which were applied in a manner consistent with the purpose of the Exchange Act.

FINRA rules do not direct that expedited proceedings to suspend an individual for nonpayment of an arbitration award be stayed pending an appeal to a court of appeals. FINRA therefore acted properly in commencing the process to suspend DiPietro after the district court denied his motion to vacate the Award.

DiPietro's only relevant defense to the requirement that he pay the Award is without evidentiary support. He has not met his burden of proving a *bona fide* inability to pay and instead attempts to shift his burden to FINRA to "refute[]" the evidence that he submitted and show that he can pay. DiPietro Br. at 16. When evaluated under the proper standard of DiPietro shouldering the burden of proof, the Hearing Officer Decision is entirely correct.

DiPietro's other arguments fall equally flat. DiPietro, at every turn, contests aspects of the underlying Award. Such collateral attacks are not only impermissible according to scores of

Commission precedent; they are mere distractions from the key issue: DiPietro has paid none of the Award. FINRA properly suspended him for nonpayment.

FINRA urges the Commission to dismiss DiPietro's application for review.

**B. The Specific Grounds Upon Which FINRA Based Its Action Against DiPietro—that He Has Not Paid the Arbitration Award—Exist in Fact**

The evidence in the record shows that the specific grounds upon which FINRA based its action against DiPietro exist in fact. It is undisputed that DiPietro has not paid any portion of the Award.

FINRA Rule 13904(j) provides that all monetary arbitration awards be paid within 30 days of receipt of the award unless a motion to vacate is filed. Article VI, Section 3 provides that an associated person's membership may be suspended or canceled for failure to pay an arbitration award where a timely motion to vacate has not been made or "where such motion has been denied." It is undisputed that DiPietro did not pay the Award. (Stip. No. 13.) Although he filed a timely motion to vacate the Award, the district court denied that motion and confirmed the Award. (Stip. No. 4; RP 1157-68.) FINRA commenced suspension proceedings against DiPietro after the district court's denial of his motion. (Stip. No. 6; RP 1177-82.) Accordingly, FINRA's actions were based on grounds that exist in fact.

**C. FINRA Suspended DiPietro in Accordance with its Rules for His Failure to Satisfy the Award**

FINRA acted in accordance with its rules when initiating expedited proceedings against DiPietro for his failure to satisfy the Award and suspending him. FINRA Rule 9554 provides the procedures for suspending an associated person for failing to comply with an arbitration award. FINRA's action against DiPietro began after it learned that the district court had denied his motion to vacate and had confirmed the Award, as authorized by FINRA By-Laws Article VI,

Section 3, which permits the commencement of an expedited proceeding once a motion to vacate the award has been denied. (*Id.*) FINRA issued the Suspension Notice dated October 7, 2014 pursuant to Rule 9554(a). (*Id.*) The Suspension Notice informed DiPietro that he was entitled to a hearing. (*Id.*) DiPietro filed a timely request for a hearing, asserting, in part, a *bona fide* inability to pay the Award. The Hearing Officer allowed DiPietro to participate in the hearing by telephone, as did his counsel. (RP 243-1029.) DiPietro testified and introduced documents into evidence. (*Id.*) His counsel made legal arguments to the Hearing Officer. (*Id.*) FINRA acted in accordance with its rules at each step of the proceedings.

Section 15A(h)(1) of the Exchange Act requires FINRA proceedings to be fair. 15 U.S.C. § 78o-3(h)(1)(1994). Specifically, Section 15A(h)(1) requires that specific charges be brought, that notice be given of such charges, that an opportunity to defend against such charges be given, and that a record be kept. The record clearly shows that these procedural safeguards were satisfied in this matter and that FINRA followed its rules and provided DiPietro with a full and fair hearing. *See Sundra Escott-Russell*, Exchange Act Release No. 43363, 2000 SEC LEXIS 2053 (Sept. 27, 2000). In sum, DiPietro was afforded all of the fair processes that were due him pursuant to FINRA's rules governing expedited suspension proceedings.

DiPietro argues that the Hearing Officer should have stayed the expedited proceedings in this matter while DiPietro awaits the appellate court's decision on the merits of the Award. DiPietro Br. 9-10. FINRA rules demand no such delay. Instead, Article VI, Section 3 of the FINRA By-Laws authorizes FINRA to institute expedited proceedings where "a timely motion to vacate or modify [an arbitration] award has not been made . . . or where *such a motion has been denied.*" [Emphasis added.] FINRA properly commenced this expedited proceeding after DiPietro's motion to vacate was denied.

The Commission has previously confirmed that FINRA can suspend a registered person in precisely these circumstances. *See Gallagher*, 56 S.E.C. at 170-71. In that case, Gallagher appealed the denial of his motion to vacate an arbitration award. *Id.* at 165. Like DiPietro, Gallagher argued that his expedited suspension proceeding should be delayed until the appellate court rendered its decision. *Id.* The Commission rejected Gallagher's argument, holding that the FINRA By-Laws "do[] not require [FINRA] to delay its process until all appeals of [the] denial [of the motion to vacate] are exhausted." *Id.* at 170-71. In explaining its reasoning, the Commission highlighted the important public policy supporting the finality and prompt payment of arbitration awards. *Id.* To require FINRA to stay its expedited proceedings which, in effect, enforce payment of those awards is contrary to the language of FINRA rules, inconsistent with Commission precedent, and would subvert this important policy. *Id.*

**D. DiPietro Has Not Established a *Bona Fide* Inability to Pay**

There are limited defenses that a respondent may assert in a FINRA Rule 9554 proceeding. These include: (1) the award has been paid in full; (2) the parties have reached a settlement of the award; (3) the award has been vacated by a court; (4) a motion to vacate or modify is pending; and (5) the respondent has filed for bankruptcy. *See* FINRA By-Laws, Article VI, Sec. 3, *NASD Notice to Members 00-55*, 2000 NASD LEXIS 63, (Sept. 2000). A respondent in an arbitration involving a claim by a member firm may also assert a *bona fide* inability to pay the award. *See Gallagher*, 56 S.E.C. 163; Exchange Act Release No. 34-62211, *Order Approving Proposed Rule Change Relating to FINRA Rule 9554*, Exchange Act Release No. 34-62211, 2010 SEC LEXIS 1800, at \*10-12 (June 2, 2010) (SR-FINRA-2010-014) (approving a rule change eliminating the *bona fide* inability to pay defense in expedited proceedings involving customer arbitration awards).



DiPietro failed to establish his asserted defense of a *bona fide* inability to pay the Award. DiPietro, as the party asserting the defense, had the burden of proving his inability to pay the Award. See *Robert Tretiak*, 56 S.E.C. 209, 220 (2003); *Gallagher*, 56 S.E.C. at 169; *Herbert Garrett Frey*, 53 S.E.C. 146, 151 (1997). The party asserting the defense of inability to pay bears the burden of proof because the scope of the party's assets "is particularly within [his or her] knowledge." *Bruce M. Zipper*, 51 S.E.C. 928, 931 (1993); see also *Tretiak*, 56 S.E.C. at 221 (stating that the party asserting the defense of inability to pay has "the obligation to come forward with full documentation of his financial situation since issuance of the award"). In turn, the Hearing Officer was entitled to make a "searching inquiry" into DiPietro's claim of inability to pay. *Tretiak*, 56 S.E.C. at 220; see also *Gallagher*, 56 S.E.C. at 169 (stating that FINRA is entitled to make a "rigorous inquiry" into a claim of inability to pay).

In order to establish a *bona fide* inability to pay, DiPietro had to "demonstrate that he is unable to make some meaningful payment toward the award from available assets or income." *Dep't of Enforcement v. Respondent*, Non-Summary Suspension Proceeding No. ARB010032, at 3 (NASD Hearing Panel Mar. 15, 2002), available at [https://www.finra.org/sites/default/files/OHODecision/p006652\\_0\\_0.pdf](https://www.finra.org/sites/default/files/OHODecision/p006652_0_0.pdf). The Hearing Officer may reject the defense if the respondent has the ability to borrow funds or divert funds from other expenditures in order to pay the Award. *Id.*

The record shows that DiPietro has failed to meet his burden here. DiPietro has assets sufficient to pay the Award or, at least, a meaningful portion of it. The Hearing Officer properly rejected DiPietro's inability to pay because DiPietro failed to meet his burden. (RP 4389-98; see *Gallagher*, 56 S.E.C. at 169-70. The Commission should therefore affirm the Hearing

Officer Decision, affirm the imposition of the suspension, and dismiss DiPietro's application for review.

**1. DiPietro's Failure to Pay is Based on his Asset Allocation Decisions; not a *Bona Fide Inability to Pay***

The record shows that DiPietro received significant compensation from his securities and other work in the period after the filing of the arbitration. This compensation totaled more than \$386,000 in 2012 (RP 378, 384-86), almost \$490,000 in 2013 (RP 389, 390), and more than \$220,000 in 2014 (RP 415, 418, 428). DiPietro also received a \$[REDACTED] loan from Transamerica in 2014. (RP 1993-2000.) DiPietro, however, used this compensation to pay other expenses and did not allocate any of it to the Award.

The record includes evidence of a number of expenditures that DiPietro could have avoided to pay at least a portion of the Award. These expenditures included extra principal payments on his mortgage amounting to \$[REDACTED] per year, almost \$[REDACTED] per year in charitable contributions, payments of more than the minimum amounts required on student loans for his children, \$[REDACTED] and payments of more than the minimum for credit cards. (RP 433, 469, 497, 521-22, 536-38, 546-47, 600, 739, 741-42, 816-17, 829). DiPietro's decision to allocate his available funds to these expenses rather than pay the Award undermines his claim of inability to pay. *See Dep't of Enforcement v. Respondent*, Non-Summary Suspension Proceeding No. ARB010001, at 12-13 (NASD Hearing Panel July 26, 2001), available [https://www.finra.org/sites/default/files/OHODDecision/p006655\\_0\\_0.pdf](https://www.finra.org/sites/default/files/OHODDecision/p006655_0_0.pdf) (rejecting an inability to pay defense where respondent paid more than the minimum on debts due, failed to apply a tax refund to an award, and failed to reduce expenses, and stating that the failure to pay the award was the result of "financial choices").

Here, DiPietro's has made the financial choice not to pay the Award. The record amply reflects DiPietro's unwillingness to use his assets to pay the Award, and his choice to allocate funds to uses other than the Award. Under these circumstances, DiPietro has not met his burden to show a *bona fide* inability to pay the Award.

## **2. DiPietro's CPA Practice**

DiPietro's CPA practice is also an asset with substantial value. DiPietro's own estimate of the value of the CPA practice was \$800,000 to \$1,100,000 and he testified that he had the ability to sell it. (RP 353-54, 803, 805-06.) While DiPietro may be unwilling to sell the practice, the fact remains that it is an asset with substantial value available to DiPietro which undermines his claim of inability to pay.

## **3. DiPietro's Residence**

The evidence also supports that there is substantial equity in DiPietro's residence. A 2012 appraisal valued the property at \$1,310,000. (RP 430-31, 435.) While DiPietro disputed this valuation, he neither provided evidence supporting his opinion that his residence was worth less than the appraised value, nor identified any problems with the appraisal methodology. The record shows that the residence is subject to a mortgage and home equity line of credit totaling \$ [REDACTED] leaving sufficient equity in the home to pay the Award. (RP 431, 435) Moreover, the record shows that in October 2014, months after the Award was issued and after his motion to vacate the Award had been denied by the district court, DiPietro had access to \$ [REDACTED] remaining on the equity line of credit. (RP 436.) Rather than use this credit to pay a portion of the Award, DiPietro used it for other expenses. Again, DiPietro can elect keep his home rather than sell it to pay the Award, but the consequence of that decision is his suspension.

#### **4. Myrtle Avenue**

DiPietro acknowledged that Myrtle Avenue has substantial equity. (RP 779-80.) Even taking the lowest valuation in the record—the 2012 appraisal of the property at \$1,750,000—, which even DiPietro admitted is too low, the record supports equity of more than \$500,000 in Myrtle Avenue, more than enough to pay the Award. (RP 431, 434, 758). Moreover, DiPietro testified that, notwithstanding his transfer Myrtle Avenue to [REDACTED] around the time the Award was issued, if the property were sold, [REDACTED] would give him the funds to pay the Award. (RP 442, 444, 868, 874.) While DiPietro has listed Myrtle Avenue for sale, if he elects not to lower the sales price sufficient to attract a buyer, his choice does not excuse his obligation to pay the Award. *See Dep't of Enforcement v. Respondent*, Expedited Proceeding No. ARB010032, at 8-9 (NASD Hearing Panel Apr. 16, 2007), *available at* [https://www.finra.org/sites/default/files/OHODDecision/p038228\\_0\\_0.pdf](https://www.finra.org/sites/default/files/OHODDecision/p038228_0_0.pdf) (stating that it was the respondent's choice to not use an asset to pay the arbitration award, but that the consequence of the choice was a suspension). The record is clear that the equity in Myrtle Avenue is an asset available to DiPietro from which he could pay the Award.

#### **5. DiPietro's Other Assets**

DiPietro also testified about a number of other assets that could have been used to pay a meaningful portion of the Award. These included sports memorabilia, artwork, vehicles, and other personal property. (RP 362, 369, 370, 453-56.) DiPietro admitted that he liquidated an IRA and received a \$ [REDACTED] gift from [REDACTED], yet allocated none of these funds towards payment of the Award. (RP 459-60, 464-65, 593, 786.)

**D. The Commission Should Reject DiPietro's Attempts to Collaterally Attack the Arbitration Award**

Much of DiPietro's application for review is based on his disagreement with the Award itself. DiPietro Br. 10-14. DiPietro argues that the arbitration panel made various errors in reaching its decision and that the district court made the same errors in denying his motion to vacate the Award. DiPietro's efforts to collaterally attack the Award are ill-fated. The Commission has repeatedly reaffirmed the well-established principal that an arbitration award cannot be collaterally attacked by a respondent in an expedited proceeding. *See Robert Tretiak*, 56 S.E.C. 209, 221 (2003) ("As we have stated on numerous occasions, an applicant may not collaterally attack an arbitration award . . . in a proceeding for failure to pay that award."); *Richard R. Pendleton*, 53 S.E.C. 675, 677 (1998) (explaining that collateral attacks on arbitration awards have been "consistently rejected"); *Herbert Garrett Frey*, 53 S.E.C. 146, 150 (1997) (same); *Bruce M. Zipper*, 51 S.E.C. 928, 930 (1993) (same); *Eric M. Diehm*, 51 S.E.C. 938, 941 (1994) (same); *Peter Thomas Higgins*, 51 S.E.C. 865,868 (1993) (stating that a challenge of the merits of the arbitration decision "cannot be considered"). The proper forum for DiPietro's challenge to the Award was in the district court. That court heard his arguments, faithfully applied the high standards contained in the Federal Arbitration Act, and rejected DiPietro's challenges.

The Commission has explained previously the importance of prompt payment of arbitration awards and the necessary preclusion of collateral attacks. FINRA arbitrations provide a "mechanism for the speedy resolution of disputes." *David Joseph Avant*, 52 S.E.C. 442, 444 (1995). FINRA makes arbitration "effective and workable by requiring members either to honor an award" or be suspended. *Stix & Co., Inc.*, 46 S.E.C. 578, 580 (1976). Permitting a party to collaterally attack an arbitration award would subvert this important public policy in favor of

arbitration. *See id.* (allowing collateral attacks would “subvert the salutary objective” of arbitration); *see also Tretiak*, 56 S.E.C. at 221 (stating that allowing collateral attacks would “subvert [FINRA’s] procedures, which are designed to promote prompt payment of arbitration awards”); *Pendleton*, 53 S.E.C. at 678 (allowing collateral attacks would be “inconsistent with the Exchange Act policy in favor of finality and prompt payment of [FINRA] arbitration awards”); *Frey*, 53 S.E.C. at 150 (same); *Zipper*, 51 S.E.C. at 930 (same); *Diehm*, 51 S.E.C. at 941 (same); *Higgins*, 51 S.E.C. at 868 (same).

DiPietro claims that he is not collaterally attacking the Award before the Commission because his challenge on the merits is before the Ninth Circuit. DiPietro Br. 10-14. Irrespective of his attempt to recast these arguments before the Commission, they illustrate nothing more than a dual track attack on the merits of the Award that the Commission should reject. In addition to being contrary to overwhelming Commission precedent, allowing such a collateral attack on a judgment that is already under review by a court raises the risk of inconsistent judgments. The Commission should act in accordance with its long-standing precedent and reject DiPietro’s collateral attack on the merits of the Award.

## V. CONCLUSION

The specific grounds for FINRA’s decision to suspend DiPietro exist in fact and his suspension is in accordance with FINRA rules, which are consistent with the purposes of the Exchange Act. DiPietro failed to pay the Award and failed to prove that he has a *bona fide* inability to pay at least a portion of the Award. To the contrary, the record supports that DiPietro could pay the full amount (and certainly a meaningful portion) of the Award and that his failure to pay is based on his own asset allocations and his view that the Award is unjust. DiPietro’s argument that the expedited proceeding should have been stayed pending exhaustion of his

appeals is contradicted by the FINRA By-Laws and Commission precedent. Equally unsound is DiPietro's challenge to the merits of the Award.

Accordingly, the Commission should dismiss DiPietro's application for review.<sup>4</sup>

Respectfully submitted,



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October 30, 2015

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<sup>4</sup> DiPietro has requested oral argument before the Commission. DiPietro Br. unnumbered introductory page . FINRA opposes the request. DiPietro has not shown that an oral presentation of the facts and arguments would aid the Commission's decisional process. *See* SEC Rule of Practice 451(a), 17 C.F.R. § 201.451. The issues raised in this appeal are readily reviewable based upon the parties' briefs.

**CERTIFICATE OF SERVICE**

I, Celia L. Passaro, certify that on this 30th day of October 2015, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review, In the Matter of Michael Albert DiPietro, Administrative Proceeding File No. 3-16658 to be served by messenger and facsimile on:

Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090  
Fax: (202) 772-9324

and via FedEx on:

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

Service was made on the Commission by messenger and on Applicant's counsel by overnight delivery service due to the distance between FINRA's offices and Applicant's counsel.



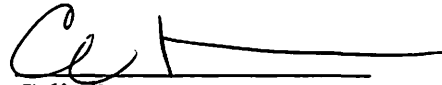
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**CERTIFICATE OF COMPLIANCE**

I, Celia Passaro, certify that this brief complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 5,421 words.

A handwritten signature in black ink, appearing to read 'Celia Passaro', with a long horizontal line extending to the right.

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Financial Industry Regulatory Authority

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October 30, 2015

**VIA MESSENGER AND FACSIMILE**

Brent J. Fields, Secretary  
Securities and Exchange Commission  
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RE: In the Matter of the Application of Michael Albert DiPietro  
Administrative Proceeding File No. 3-16658

Dear Mr. Fields:

Enclosed please find the original and three (3) copies of FINRA's Brief in Opposition to the Application for Review in the above-captioned matter.

Please contact me at (202) 728-8985 if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Celia L. Passaro". The signature is fluid and cursive.

Celia L. Passaro

Enclosures

cc: Marie Mirch, Esq. (via FedEx)