UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

December 23, 2016

SECURITIES EXCHANGE ACT OF 1934

REGULATORY OPERATIONS, Complainant, v. MICHAEL DAVID SCHWARTZ (CRD No. 4554902), Respondent. Expedited Proceeding No. ARB160019 STAR No. 20160499725 Hearing Officer – RES	3-17752 **APPLICATION FOR REVIEW** *-and-* **MOTION FOR STAY**

This is an **Application for Review of Disciplinary Action Taken by FINRA, Application for Review of Order(s) Entered by FINRA**, and a **Motion for Stay Pending Review of Disciplinary Action Taken and Order(s) Entered by FINRA.**

Related TCR submissions to the United States Securities and Exchange Commission's Office of the Whistleblower:
-1344272885063
-1463546025861
-1478537517762

As Hearing Officer Simpson's decision(s) and order(s) in the referenced expedited proceeding dated December 1, 2016 ("Decision") were not called for review by the National Adjudicatory Council ("NAC") pursuant to FINRA Rule 9559(q), therefor constituting the final action of FINRA, Michael David Schwartz ("Schwartz"), pro-se, seeks review of the decision(s) and order(s) entered by Financial Industry Regulatory Authority, Inc. ("FINRA") suspending him from associating with any FINRA member firm until Schwartz satisfies an arbitration award, or until any of the recognized bases for nonpayment occur as provided under Rule 9554, and for denying his request that a FINRA attorney and a third-party witness be barred from appearing before FINRA, be barred from working for any FINRA Member Firm, and be officially referred to State Attorney Disciplinary Authorities.

The circumstances of how and why aside, it is undisputed that an arbitration award was entered against Schwartz. Schwartz contends that FINRA should have immediately backed away from its intent to pursue his suspension following receipt of verification that he in fact entered into a fully negotiated settlement agreement with the prevailing firm, which is an acceptable defense to suspension under FINRA Rule 9554. Schwartz also contends that FINRA violated the Securities Exchange Act of 1934 ("Exchange Act") under its requirement for fairness in such proceedings. *Securities Exchange Act of 1934*, Section 15A(b)(8)):

> b. An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that—

> (8) The rules of the association are in accordance with the provisions of subsection (h) of this section, and, in general, provide a ***fair*** procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof (emphasis added).

There is well-established precedent on the concept of fairness in administrative processes and proceedings of Self- Regulatory Organizations ("SRO") as required in the Exchange Act and which is rooted in equity. "Courts have consistently noted that 'fairness' concepts – whether in the context of constitutional, statutory or common law claims or defenses – are rooted in equity and require consideration of the facts and circumstances of each case." *Morgan Stanley*, 2002 NASD Discip. LEXIS 11, at *22. Prior to, the SEC stated in *Jeffrey Ainley Hayden*, "However, the NYSE does have a statutory obligation to ensure the fairness and integrity of its disciplinary proceedings." *Jeffrey Ainley Hayden*, Exchange Act Rel. No. 42772, 2000 SEC Lexis 946 (May 11, 2000).

As part of FINRA failing to "...provide a ***fair*** procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof...", it pursued the expedited proceeding in question in direct opposition to written guidance issued by David Carey ("Carey"), Associate Director of FINRA's Office of Dispute Resolution ("Dispute Resolution") and responsible for supervising the FINRA Rule 9554 expedited suspension process, that "Accordingly, FINRA will re-institute suspension proceedings against you for

award non-payment *upon request of the prevailing party. To date, FINRA has not received such a request.*" At no time did the prevailing party request suspension proceedings be re-instituted, and under oath before FINRA's Office of Hearing Officers ("OHO"), Carey testified that he remembered sending the guidance in question and that at no time did FINRA receive any request from the prevailing party to reinstitute suspension proceedings against Schwartz.

FINRA's Regulatory Operations ("RegOps") has unclean hands in these matters. In violation of FINRA protocols, RegOps included the prevailing party as a party to the expedited proceeding. RegOps colluded with the outside counsel of the prevailing party to commit ethical violations in pursuit of an untimely-filed motion to dismiss the pending hearing for Schwartz where he intended to assert his Rule 9554 defense. Written testimony was provided by the prevailing party's outside counsel in support of RegOps' motion to dismiss that it later suggested under oath could not be spoken to as would be an ethical violation. This statement by prevailing party's outside counsel was presumably provided in order to avoid a specific line of questioning on the topic while under examination before OHO and Hearing Officer Simpson, but in doing so it effectively admitted that its original written testimony was in fact an ethical violation. If not, then the prevailing party's outside counsel simply committed perjury. RegOps also colluded with the same outside counsel of the prevailing party to bring the expedited proceeding in circumvention of the written guidance issued by Dispute Resolution. This happened

at the very time that the prevailing firm was negotiating the Settlement Agreement with Schwartz via the same outside counsel.

When considered in the totality of the circumstances, the actions of FINRA, the prevailing party, and the prevailing party's outside counsel exhibit bad faith, were unfair, and exhibit a complete lack of integrity. Schwartz was a whistleblower while employed with the prevailing party, leading to his termination in May of 2012. Schwartz filed a Form TCR with the SEC in July of 2012 reporting the fraud in question. The FINRA arbitration proceeding in question was brought via questionable means by the prevailing party in order to diminish the credibility of Schwartz and the veracity of his claims, knowing that >90% of all intra-industry disputes are decided in favor of member firms within FINRA's arbitration forum. The prevailing firm's outside counsel engaged in conduct, leading up to the arbitration in question, akin to jury tampering. Schwartz has been steadfast in his pursuit of justice and the clearing of his name. This has caused the actions of the prevailing party and its outside counsel to be seen for what they are and has led to multiple and ongoing investigations by numerous regulatory and law enforcement organizations into the fraudulent activity reported by Schwartz for which he has been retaliated against. When viewed in the totality of the circumstances, the recent actions of the prevailing party's outside counsel and RegOps must be seen for what they are and cannot be rewarded. Further, when viewed in the totality of the circumstances, FINRA's actions can only be considered an act of Blacklisting which is a prohibited activity under the provisions of Sarbanes-Oxley. Recent events in

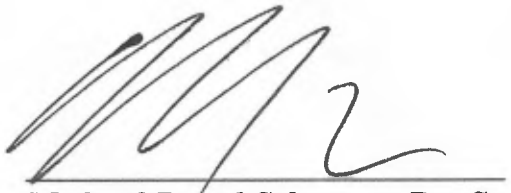
other matters, including those related to Wells Fargo, have brought the realization that FINRA has been acting as the outsourced agent of its member firms for retaliation and blacklisting in violation of numerous provisions found within both Dodd-Frank and Sarbanes-Oxley.

For the reasons set forth herein, which will be expounded upon in detail in Schwartz's opening brief and fully supported via documentary evidence, and pursuant to Rule 401 of the Commission's Rules of Practice, Schwartz requests (1) an immediate stay of the FINRA decision(s) and order(s), (2) a review of the FINRA decision(s) and order(s), and (3) for any other and further relief as deemed appropriate by the SEC.

Dated:

12/23/16

Respectfully,



Michael David Schwartz, Pro Se

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Certificate of Service

I do hereby certify that original copies of this **Application for Review** and **Motion for Stay** were served upon the following parties at the same time, and in the same form, on December 23, 2016 via USPS:

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
FINRA
Office of the General Counsel
1735 K Street, NW
Washington, DC 20006

Office of the Whistleblower
U.S. Securities and Exchange Commission
100 F Street NE
Mail Stop 5631
Washington, DC 20549

Dated:
12/23/16

Respectfully,

Michael David Schwartz, Pro Se

[redacted]
Burr Ridge, IL [redacted]
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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

REGULATORY OPERATIONS, Complainant, v. MICHAEL DAVID SCHWARTZ (CRD No. 4554902), Respondent.	Expedited Proceeding No. ARB160019 STAR No. 20160499725 Hearing Officer–RES

NOTICE OF EXPEDITED DECISION

The Hearing Officer's decision in this expedited proceeding dated December 1, 2016 ("Decision") is enclosed. This Decision was not called for review by the National Adjudicatory Council ("NAC"), pursuant to Rule 9559(q), and therefore it shall be effective upon service and shall constitute the final action of FINRA in this proceeding.

Appeal Rights

You may appeal this Decision to the U.S. Securities and Exchange Commission ("Commission"). To do so, you must file an application with the Commission within 30 days of your receipt of this Decision. You also must send a copy of your Application to FINRA Office of General Counsel, together with copies of all documents you file with the Commission. If you send any documents to the Commission by facsimile or overnight mail, you shall provide copies by like means to FINRA Office of General Counsel. The filing of an application for review shall not stay the effectiveness of final FINRA action, unless the Commission otherwise orders.

Your Application must identify the expedited proceeding case number and set forth in summary form a brief statement of the grounds for your appeal. You also must include an address where you may be served and a telephone number where you may be reached during business hours. If your address or phone number changes, you must advise the Commission and FINRA Office of General Counsel. If an attorney represents you, he or she must file a Notice of

Appearance with your Application. The addresses of the Commission and FINRA Office of General Counsel are:

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

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

Questions concerning the appeal process should be directed to the Office of the Secretary at the Commission at (202) 551-5400.

Richard E. Simpson
Hearing Officer

Dated: December 1, 2016

Copies to:

Michael David Schwartz (via email and overnight mail)
Ann-Marie Mason, Esq. (via email and first-class mail)
Deon McNeil Lambkin, Esq. (via email)

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

REGULATORY OPERATIONS, Complainant, v. MICHAEL DAVID SCHWARTZ (CRD No. 4554902), Respondent.	Expedited Proceeding No. ARB160019 STAR No. 20160499725 Hearing Officer—RES **DECISION** December 1, 2016

Respondent is suspended from associating with any FINRA member firm in any capacity for failing to pay an arbitration award. The suspension will continue until he produces sufficient documentary evidence to FINRA showing: (1) the award has been paid in full; (2) the Respondent and the arbitration creditor have agreed to settle the matter; or (3) the Respondent has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the award.

Appearances

For the Complainant: Deon McNeil-Lambkin, Esq., Ann-Marie Mason, Esq., Department of Regulatory Operations, Financial Industry Regulatory Authority.

Respondent Michael Schwartz represented himself.

Decision

I. Introduction

On April 21, 2016, FINRA's Office of Dispute Resolution ("Dispute Resolution") notified Respondent Michael Schwartz ("Schwartz") that, under FINRA Rule 9554, his registration would be suspended effective May 12, 2016, because he had not paid an arbitration award (the "Award").[1] Schwartz timely filed a request for a hearing and claimed a *bona fide* inability to pay the Award, but he subsequently withdrew that defense.[2] In its place, he asserted the defense that he and the arbitration creditor had settled the Award. On September 1, 2016, the parties presented their cases in a hearing by telephone before the Hearing Officer.

[1] CX-5, at 1; Tr. 60. The Complainant's hearing exhibits are cited "CX-__" followed by the page number if applicable. The hearing transcript is cited "Tr." followed by the page number.

[2] CX-6, at 1; CX-7.

Schwartz concedes he has not paid the Award in full. Instead, he contends he settled the Award with the arbitration creditor. Complainant Department of Regulatory Operations argues he failed to meet his burden of proving settlement of the Award because the settlement agreement he proffers covers only certain assets and not the Award in full.

After the hearing and a review of the record, the Hearing Officer finds Schwartz did not meet his burden of proving a settlement of the Award. Effective immediately, he is suspended from associating with any member firm in any capacity until he produces sufficient documentary evidence to FINRA showing: (1) the Award has been paid in full; (2) he and the arbitration creditor have agreed to settle the matter; or (3) he has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award.

II. Legal Standards And Findings Of Fact

A. Schwartz's Background

Schwartz entered the securities industry in 2004.[3] From October 2010 through October 2012, he was associated in a registered capacity with Barclays Capital Inc. ("Barclays"), the arbitration creditor.[4] Since 2015, he has not been associated with a FINRA member firm.[5]

B. Factual and Procedural Background

On July 2, 2012, Barclays filed an arbitration claim against Schwartz with FINRA Dispute Resolution alleging he had not repaid a promissory note to Barclays.[6] Schwartz appeared in the arbitration hearing and contested Barclays' claim. On September 19, 2013, the FINRA Arbitration Panel rendered the Award in favor of Barclays and against Schwartz in the amount of $568,568.[7] Schwartz did not move to vacate the Award.[8] Although he filed for bankruptcy, the Bankruptcy Court dismissed his petition.[9]

On April 21, 2016, Dispute Resolution issued the Notice of Suspension informing Schwartz the suspension would be effective on May 12, 2016.[10] The Notice stated the suspension would continue until Schwartz produced documentary evidence showing he satisfied one of the defenses to suspension.[11] The notice also stated he could request a hearing before the FINRA

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[3] CX-1, at 6.

[4] CX-1, at 8.

[5] CX-1, at 11.

[6] CX-2, at 1.

[7] CX-2, at 4. *Accord* Tr. 56-57, 102. The amount of the Award has steadily increased because of the accrual of interest and the accumulation of attorney's fees. *See* Tr. 106-07.

[8] CX-4.

[9] CX-9, at 1, 2, 12.

[10] CX-5, at 1; Tr. 61-62, 103.

[11] CX-5, at 1. For the recognized defenses, see Section II.C. *infra*.

Office of Hearing Officers and a timely request would stay the effective date of the suspension.[12] Schwartz requested a hearing, stating his defense was a *bona fide* inability to pay.[13] He later filed a motion changing his defense to assert he had settled the Award.[14]

C. Legal Standard

FINRA's arbitration process and applicable rules are designed "to provide a mechanism for the speedy resolution of disputes among members, their employees, and the public."[15] To ensure payment of arbitration awards, FINRA promulgated rules—in particular, FINRA Rule 9554—to allow for expedited suspension proceedings against members, associated persons, and formerly associated persons who have allegedly failed to pay.[16] FINRA Rule 9554(a) provides:

> If a member, person associated with a member or person subject to FINRA's jurisdiction fails to comply with an arbitration award … FINRA staff may provide written notice to such member or person stating that the failure to comply within 21 days of service of the notice will result in a suspension or cancellation of membership or a suspension from associating with any member.

FINRA Rule 9554(a) implements Article VI, Section 3(b) of the FINRA By-Laws, which provides for the suspension of an associated person who does not pay an arbitration award:

> The [C]orporation after 15 days notice in writing, may suspend or cancel the membership of any member or suspend from association with any member any person, for failure to comply with an award of arbitrators properly rendered pursuant to the [C]orporation's Rules.

The following defenses are permissible in a suspension proceeding under Rule 9554: (1) the arbitration award has been paid in full; (2) the parties have agreed to installment payments of the award, or have otherwise agreed to settle, and the respondent is not in default 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 a bankruptcy petition pending in United States

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[12] CX-5, at 1. FINRA had jurisdiction to serve the Notice of Suspension because Schwartz was terminated from FINRA registration less than two years prior to the Notice. Tr. 76.

[13] CX-6, at 1.

[14] CX-7. *See* Tr. 104.

[15] *Regulatory Operations v. DiPietro*, No. ARB140066, 2015 FINRA Discip. Lexis 24, at *5 (OHO June 8, 2015) (quoting *Herbert Garrett Frey*, 53 S.E.C. 146, 153 (1997); *Eric M. Diehm*, 51 S.E.C. 938, 939 (1994)). *Accord Dep't of Enforcement v. Respondent*, (ARB060031) (Apr. 16, 2007), at 4, finra.org/sites/default/files/OHODecision/p038228_0_0.pdf (same); *Dep't of Enforcement v. Respondent*, (ARB040037) (Mar. 2, 2005), at 3, finra.org/sites/default/files/OHODecision/p038234_0.pdf (same).

[16] FINRA By-Laws, Art. VI, Sec. 3(b); FINRA Rule 9550 *et seq*. *Accord William J. Gallagher*, 56 S.E.C. 163, 171 (2003) ("Honoring arbitration awards is essential to the functioning of the NASD arbitration system."); *Richard R. Pendleton*, 53 S.E.C. 675, 679 (1998) ("[w]e 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 … to honor arbitration awards"); NASD Notice to Members 04-57, 2004 NASD LEXIS 90 (Aug. 2004); NASD Notice to Members 00-55, 2000 NASD LEXIS 63 (Aug. 2000).

Bankruptcy Court, or a Bankruptcy Court has discharged the award.[17] The respondent also may assert a *bona fide* inability to pay an award rendered in an industry dispute.[18] The respondent has the burden to prove the defense.[19]

D. Discussion: Schwartz's Putative Settlement

In support of his defense, Schwartz proffers a Confidential Settlement Agreement and Release dated May 18, 2016 (the "Settlement Agreement").[20] The Settlement Agreement is in form, name, and substance a settlement agreement, signed and dated by both Schwartz and Barclays, and disposes of certain of Schwartz's assets by assigning some of them to Barclays and some of them to Schwartz. The Settlement Agreement does not explicitly say what effect, if any, it has on the Award.[21]

But at the same time they executed the Settlement Agreement, Schwartz and Barclays signed and submitted to the Circuit Court of Cook County, Illinois, a Stipulation and Agreed Order dated May 18, 2016 (the "Stipulation"). The Stipulation is dispositive in defeating Schwartz's defense that the Settlement Agreement is a settlement of the Award in full. It provided that Barclays was still entitled to full satisfaction of the Award:

> Subject to the terms of the settlement agreement entered on May 17, 2016, this stipulation shall not be construed as waiving any right of Barclays to full satisfaction of the final judgment in Case No. 2014 CH 15180.[22]

The final judgment of which Barclays was entitled to full satisfaction was the final judgment it had obtained in the Circuit Court of Cook County, Illinois recognizing and enforcing the Award.[23]

The Settlement Agreement provides that it will be construed in accordance with the law of the State of Illinois.[24] Under that law, a settlement agreement is considered a contract and is

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[17] NASD Notice to Members 00-55, 2000 NASD LEXIS 63, at *5-6 (listing the defenses). *Accord Dep't of Enforcement v. Respondent*, (ARB060031) (Apr. 16, 2007), at 4-5, finra.org/sites/default/files/OHODecision/p038228_0_0.pdf.

[18] *See, e.g., William J. Gallagher*, 56 S.E.C. 163 (2003).

[19] OHO Order EXP15-02 (ARB150039) (Dec. 18, 2015), at 3-4, finra.org/sites/default/filesOHO_EXP15-02_ARB150039_0.pdf; OHO Order EXP15-03 (ARB150048) (Dec. 3, 2015), at 4, finra.org/sites/default/files/OHO_EXP15-03_ARB150048_0_pdf. *Accord Robert Tretiak*, 56 S.E.C. 209, 220, (2003) ("[i]t is well settled that a respondent bears the burden of demonstrating his or her inability to pay").

[20] CX-18.

[21] *See* Tr. 91.

[22] CX-19.

[23] CX-11, at 1, 4. *Accord* Tr. 83 (Schwartz) ("The judgment is just the confirmation of the arbitration award. They are one in the same."). *See* Tr. 105.

[24] CX-18, at 5.

interpreted as such.[25] "[T]he objective to be reached in construing a contract is to give effect to the intention of the parties involved," which "must be ascertained from the language of the contract."[26] If the contract permits only one interpretation, that interpretation controls.[27] Here, when the Settlement Agreement and the Stipulation are considered together, the only rational interpretation of the parties' agreement is that Barclays retained its right to full satisfaction of the Award. The Settlement Agreement only dealt with certain of Schwartz's assets which Barclays had located in a supplementary proceeding brought under the auspices of the Circuit Court case enforcing the Award. Barclays settled only with respect to those assets, not with respect to the Award as a whole. In the Stipulation, the parties made clear that the Settlement Agreement did not waive Barclays' right to full satisfaction.[28]

Provisions in the Settlement Agreement indicate it did not terminate Barclays' right to recover future amounts from Schwartz under the Award. Paragraph 6 of the Settlement Agreement provides that "[n]othing in this agreement shall prohibit Barclays from perfecting a lawful garnishment of any … future wages."[29] Under the heading "Non-waiver," Paragraph 7 provides that Barclays can collect the Award from Schwartz's future income or assets with a value in excess of $30,000:

> Non-waiver. Judgment Debtor and Barclays agree that nothing in the foregoing shall be understood or construed as a waiver, release or discharge of Barclays' right to lawfully collect from Debtor's future income and/or assets he may acquire with a value in excess of $30,000, until the full, unpaid portion of its money judgment against Judgment Debtor … is paid in full, or the money judgment against Judgment Debtor becomes vacated.[30]

It is common for a judgment creditor and a judgment debtor to reach an agreement as to the debtor's current assets without the creditor giving up its right to enforce the judgment against future assets or income. In these circumstances, the judgment remains in full force and effect. Here, the settlement documents show Barclays and Schwartz adhered to the common practice and did not agree to the aberrational result Schwartz seeks—Barclays' supposed waiver and

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[25] *Cushing v. Greyhound Lines, Inc.*, 2013 IL App. (1st) 103197, 991 N.E.2d 28, 92 (Ill. Ct. App. 2013); *Haisma v. Edgar*, 218 Ill App. 3d 78, 86, 578 N.E.2d 163, 161 (Ill. Ct. App. 1991).

[26] *In re Doyle*, 144 Ill. 2d 451, 468, 581 N.E.2d 669 (Ill. 1991).

[27] *Omnitrus Merging Corp. v. Illinois Tool Works, Inc.*, 256 Ill. App. 3d 31, 628 N.E.2d 1165, 1168 (Ill. Ct. App. 1993).

[28] A contract term is ambiguous only if "the language is reasonably or fairly susceptible to more than one construction." *Tishman Midwest Management Corp. v. Wayne Jarvis, Ltd.*, 146 Ill. App. 3d 684, 689, 500 N.E.2d 431, 434 (Ill. Ct. App. 1986). Here, the Stipulation is not susceptible to the construction that Barclays waived its right to recover the Award in full.

[29] CX-18, at 3.

[30] CX-18, at 3-4. Part of the supplementary enforcement process consists of the issuance of "Citations" seeking the disclosure of assets owned by the judgment debtor. *See* Tr. 107-08. Here, one of the Whereas clauses of the Settlement Agreement expressed the parties' intent to limit its scope to the assets located in the citations process: "Judgment-Debtor and Barclays wish to resolve, terminate and settle all disputes, claims and actions arising from the Citations …" CX-18, at 1.

release of the entire six-figure Award for less than ten cents on the dollar. Schwartz has failed to meet his burden of proving the Settlement Agreement was a settlement of the Award in full.

III. Regulatory Operations' Motion to Dismiss

Two days before the hearing, Regulatory Operations filed a motion to dismiss Schwartz's hearing request on the ground that he had not asserted a valid defense. At the beginning of the hearing, the Hearing Officer orally denied the motion because: (1) it was untimely; (2) Schwartz had raised a factual issue as to whether the evidence supported his defense that a settlement agreement had settled the Award; and (3) there is no FINRA Rule or decision authorizing the Hearing Officer to dismiss a hearing request where the respondent has raised a factual issue regarding his defense. Notwithstanding the Hearing Officer's oral decision, Regulatory Operations requested and proceeded to present arguments in support of its motion orally, and renewed its motion at the end of the hearing, after all the evidence had been presented.

In February 2016, the National Adjudicatory Council issued the decision in *Dep't of Enforcement v. Lundgren*.[31] In that case, respondent Lundgren filed a motion to dismiss an expedited proceeding to provide time for an investigation into "possible irregularities" by FINRA staff. The decision is dispositive in holding that motions to dismiss are not allowed in expedited proceedings:

> As an initial matter, we deny the Motion for two reasons. First, the rules governing these proceedings provide a streamlined, expedited adjudicatory process. That process begins with a request for hearing in which the respondent must assert his defenses, and it culminates in a prompt hearing at which the respondent presents those defenses. ... The rules do not provide an alternative, pre-hearing means for adjudicating defenses. Specifically, the rules do not authorize dispositive motions, such as motions to dismiss, motions for summary disposition, or similar procedural devices. Indeed, allowing such motions would inject an increased level of procedural complexity inconsistent with the expedited nature of these proceedings.[32]

Bound by the holding in *Lundgren*, the Hearing Officer finds that the FINRA Rule 9500 Series, which governs expedited proceedings, does not allow for pre-hearing dispositive motions. Regulatory Operations' motion to dismiss was correctly denied.

IV. Conclusion

The Hearing Officer finds, and the parties do not dispute, that Schwartz has not paid the Award in full. Schwartz did not prove the defense he asserted—that he has purportedly settled the Award—on which he had the burden of proof.

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[31] No. FPI150009, 2016 FINRA Discip. LEXIS 2 (Feb. 18, 2016).

[32] *Id.* at *11 (citations omitted).

Under Article VI, Section 3(b) of FINRA's By-Laws and Rule 9559(n), Schwartz is suspended from associating with any member firm in any capacity, effective immediately. The suspension shall continue until Schwartz produces sufficient documentary evidence to FINRA showing: (1) the Award has been paid in full; (2) Schwartz and Barclays have agreed to settle the Award in full; or (3) Schwartz has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award.

Schwartz is ordered to pay FINRA costs of $2,206.50, which include an administrative fee of $750 and hearing transcript costs of $1456.50.[33] These costs are due and payable immediately on issuance of this Decision.

Richard E. Simpson
Hearing Officer

Copies to:

Michael David Schwartz (*via email and overnight delivery*)
Meredith A. MacVicar, Esq. (*via email*)
Deon McNeil Lambkin, Esq. (*via email*)
Ann-Marie Mason, Esq. (*via email*)

[33] The Hearing Officer has considered all arguments made by the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed in this Decision.

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

REGULATORY OPERATIONS, Complainant, v. MICHAEL DAVID SCHWARTZ (CRD No. 4554902), Respondent.	Expedited Proceeding No. ARB160019 STAR No. 20160499725 Hearing Officer—RES

SECOND ORDER DENYING RESPONDENT'S REQUEST THAT A FINRA ATTORNEY AND A THIRD-PARTY WITNESS BE BARRED FROM APPEARING BEFORE FINRA, BARRED FROM WORKING FOR ANY FINRA MEMBER FIRM, AND OFFICIALLY REFERRED TO STATE ATTORNEY DISCIPLINARY AUTHORITIES

This is an expedited proceeding under the FINRA Rule 9550 Series to determine whether the registration of Respondent Michael Schwartz ("Schwartz") should be suspended for alleged failure to pay an arbitration award (the "Award"). The Complainant is FINRA's Department of Regulatory Operations. Schwartz has asserted the defense that he and the arbitration creditor, Barclays Capital Inc. ("Barclays"), settled the Award. In support of his defense, Schwartz proffered a Confidential Settlement Agreement and Release dated May 18, 2016. On September 1, 2016, the parties presented their cases in a hearing by telephone before the Hearing Officer. A Decision based on the evidence presented is being issued at the same time as this Order.

On November 1, 2016, Schwartz sent an email to the Office of Hearing Officers requesting that action be taken against PK, an outside counsel to Barclays who testified in the hearing, and an attorney for Regulatory Operations. Schwartz asked that they: (1) be barred from appearing before FINRA's Office of Hearing Officers; (2) be barred from appearing before any FINRA Arbitration Panel; (3) be barred from working for or being associated with any FINRA member firm; and (4) be officially referred to the relevant State attorney disciplinary authority. The ground for Schwartz's request was that, in a declaration in support of a Motion to Dismiss filed by Regulatory Operations, PK allegedly breached the attorney-client privilege by averring: "At no time did Barclays Capital, Inc. contemplate or intend that the Settlement Agreement to be [sic] a settlement of the Judgment or the Award." FINRA counsel unethically aided and abetted the breach—Schwartz's argument runs—by inducing PK to make the averment and including it in the papers Regulatory Operations filed in support of its Motion to Dismiss.

On November 7, 2016, the Hearing Officer was informed that Schwartz had contacted the FINRA Office of the Ombudsman about his suspension hearing, presumably raising the same complaint about PK and FINRA counsel. The Hearing Officer was further informed that the Office of the Ombudsman was reviewing the hearing transcript. In light of that development, the Hearing Officer denied Schwartz's motion for disciplinary action, deferring to the Office of the Ombudsman. The Hearing Officer emphasized that he was not suggesting in any way that PK or FINRA counsel had done anything wrong in this proceeding.

On November 29, 2016, Schwartz sent an email to the Office of Hearing Officers stating that the Office of the Ombudsman would not take any action and contending that "this Complaint needs to be put back in front of" the Hearing Officer for decision. The Hearing Officer treats Schwartz's November 29 email as a motion for reconsideration.

The Hearing Officer has re-read the relevant portions of the record and, after careful deliberation, denies Schwartz's motion for reconsideration. The Hearing Officer finds no basis to grant the relief Schwartz seeks. Neither the record nor Schwartz's motion establishes that PK violated the attorney-client privilege or that counsel engaged in any other unethical conduct.

Dated: December 1, 2016

SO ORDERED.

Richard E. Simpson
Hearing Officer

Copies to:

Michael David Schwartz (*via email and overnight mail*)
Meredith A. MacVicar, Esq. (*via email*)
Deon McNeil Lambkin, Esq. (*via email and first-class mail*)
Ann-Marie Mason, Esq. (*via email and first-class mail*)