BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Michael David Schwartz

For Review of Disciplinary Action Taken by

FINRA

File No. 3-17752

BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

Michael Schwartz, Pro Se
[redacted]
Burr Ridge, IL [redacted]
[redacted]gmail.com

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I. INTRODUCTION

Applicant Michael David Schwartz ("Schwartz") files this brief in support of his application for review of the suspension imposed in a December 1, 2016 decision of FINRA Office of Hearing Officers ("OHO") (Bates #873), including the costs assessed, as well as certain other orders entered contemporaneously relating to the conduct of a FINRA Regulatory Operations ("RegOps") employee and a certain third party (Bates #865 and #869) (collectively, the "Decision"). In the Decision, the Hearing Officer found that Schwartz had not met his burden in proving that a settlement agreement he had entered into with Barclays Capital, Inc. ("Barclays") (CX-18, Bates #851) eliminated his obligation to pay the award in full, and thus was not an effective defense to suspension under FINRA Rule 9554.

Schwartz strongly disagrees with the Decision. Schwartz acknowledges that an arbitration award was entered against him by FINRA. (CX-2, Bates #687) Schwartz and Barclays, the prevailing firm, entered into a fully-executed settlement agreement. (CX-18, Bates #851) FINRA's Rule 9554 provides no such requirement that a settlement agreement eliminate the need to pay an arbitration award in full. The acceptable FINRA Rule 9554 defense to suspension Schwartz relies upon specifically and only requires that he "entered into a fully-executed, written settlement agreement with the claimant(s), *and your obligations thereunder are current*", emphasis added. (CX-5, Bates #705) This requirement was, and continues to be, satisfied, and no argument has yet been put forward by any party that Schwartz was not, or is not, in fact current on his obligations under the settlement agreement.

More troubling, through these and related proceedings, FINRA has violated the Securities Exchange Act of 1934 ("Exchange Act") under its requirement for fairness. FINRA has unclean hands in these matters, and when also viewed in the totality of the circumstances, it would be inequitable to not overturn the Decision.

II. BACKGROUND

Schwartz was a general securities representative with Barclays beginning on or about October 28, 2010. In December of 2010, Schwartz witnessed activities at Barclays that he believed to be fraudulent. Doing what he believed was right, Schwartz immediately escalated his concerns to his managers, to legal, and then to increasingly higher levels of management over the course of 2010 and 2011. Facing

stiff retaliation for his [redacted] activities, Schwartz engaged an attorney in late March or early April of 2012 to seek protection under the [redacted] provisions of Sarbanes-Oxley and/or Dodd-Frank. (See Exhibit 1) On May 22, 2012 Schwartz's employment was terminated from Barclays for supposedly failing to meet performance expectations. On June 22, 2012 Schwartz sent a message directly to (then) Barclays CEO Bob Diamond ("Diamond"), copying other Barclays senior leadership. (See Exhibit 2) Not receiving any response, Schwartz forwarded matters onto the Securities and Exchange Commission ("SEC") and Her Majesty's Treasury in the UK. (See Exhibit 3) On July 2, 2012 an in-house attorney for Barclays responded to Schwartz at the direction of Diamond. (See Exhibit 4). As widely reported in the press, on July 2, 2012 Barclays Chairman of the Board Marcus Agius ("Agius") and Barclays Board Director Michael Rake ("Rake") met with the expanded Barclays Board to discuss a conversation that happened between Agius and Bank of England Governor Mervyn King. On July 3, 2012 Diamond resigned, and on July 4, 2012 Diamond gave testimony before a Treasury Select Committee in the U.K.'s House of Commons.

While the July 2, 2012 letter from Barclays's in-house counsel supposedly sought information related to the issues posed to Diamond on June 22, 2012 by Schwartz, Schwartz would later learn it was merely a deceitful ruse in a "race to the courthouse" to diminish his credibility as a [redacted] and the veracity of his claims. It was on June 28, 2012 that Barclays executed a Submission Agreement for FINRA, (See Exhibit 5) and on the same July 2, 2012 which Barclays in-house

counsel reached out to Schwartz per Diamond, and Agius and Rake met with the expanded Barclays Board, that Barclays filed its Statement of Claim with FINRA via its outside counsel, Patrick Gerard King ("King"). (See Exhibit 6). In July of 2012, and with updates in 2016, these and related matters were [redacted] respectively. These and related matters were referred and are currently under review by both the U.K.'s Financial Conduct Authority ("FCA") and its Financial Services Authority ("FSA"). Additionally, these and related matters have been taken under review by the New York Attorney General's office and the Federal Reserve Bank of New York.

On September 19, 2013 FINRA issued its arbitration ruling in favor of Barclays. (CX-2, Bates #687) On April 21, 2016 FINRA served on Schwartz a suspension notice for failure to pay the award. (CX-5, Bates #705) Schwartz timely exorcised the conveyed right to request a hearing, initially asserting as a defense an inability to pay the award. (CX-6, Bates #711) On May 18, 2016 Schwartz entered into the fully-executed Confidential Settlement Agreement and Release ("Settlement Agreement") with Barclays. (CX-18, Bates #851) In order to streamline and simplify matters for all parties involved, Schwartz then updated his hearing request as his inability to pay defense was no longer necessary after having entered into the Settlement Agreement with Barclays. (CX-7, Bates #713)

In the Decision dated December 1, 2016 the Hearing Officer found that the Settlement Agreement did not meet the requirements of FINRA's Rule 9554 as an

acceptable defense to suspension. (Bates #873) On December 23, 2016 Schwartz timely filed with the SEC a motion for stay and application for review. (Bates #881)

III. ARGUMENT

Schwartz has endured more hardship for having done the right thing than any financial industry employee should ever have to go through. This is not just about what is right and wrong, as protecting [redacted] has become a matter of public policy and is of intense public interest. Schwartz also leans on the principles of fairness, equity, and common sense. There is well-established precedent on the requirement of fairness in administrative processes and proceedings of Self-Regulatory Organizations ("SRO"), as required under 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).

It is unfortunate that when presented with a fairness argument, FINRA suggests in footnote 4 on page 5 of its brief in opposition to the request for stay that Schwartz received the "fair procedure" and that FINRA maintained the "procedural safeguards" that the Exchange Act requires. (Bates #901) The Exchange Act doesn't simply infer that a mechanical procedure be in place in order to meet its fairness requirement...the Exchange Act demands that the entire process must be fair.

Arbitration proceedings, and all processes, communications, procedures and employee conduct leading up to any disciplinary proceeding are derivative of the Exchange Act's fairness requirement. The unfortunate fact is that FINRA continues to fall on the wrong side of the law, and public policy, in protecting its member firms over [redacted] who are trying to do the right thing and whose protection is required under the [redacted] provisions of both Sarbanes-Oxley (Sarbanes-Oxley Act of 2002 (SOX)) and Dodd-Frank (Section 21F of the Securities Exchange Act of 1934, added by the Dodd-Frank Wall Street Reform and Consumer Protection Act). Not only has [redacted] retaliation and blacklisting been evident in ongoing matters relative to Schwartz, but also in numerous other matters. FINRA's role in this provides reason for concern. It is an important consideration that this very process, this application for review, is happening under provisions of the Exchange Act...the very same act that now requires protection from retaliation for engaging in [redacted] activities.

FINRA is at this time already having to answer tough questions relative to certain Wells Fargo employees who were [redacted] in the ongoing fake accounts scandal. It has also been widely reported in the press that over 600 registered employees of Wells Fargo Advisors were terminated for practices that led to bogus accounts, of which FINRA only had 207 accurate Form U5's on file for. Certainly, 200+ terminations from a single member firm for similar improper sales practices is a pattern worth investigating. Had FINRA done so, it could have identified the other 400+ in a timely manner, perhaps even bringing an end to the

entire bogus account scandal before more innocent customers were harmed. In looking out first for its member firms, however, FINRA consciously chose to look the other way. Johny Burris, the former JPMorgan Chase advisor who the Department of Labor recently awarded back pay wages after it found JPMorgan had violated the [redacted] retaliation provisions of Sarbanes-Oxley, is another stunning example. Mr. Burris was the [redacted] who brought forward improper JPMorgan sales tactics, ultimately leading to JPMorgan entering into a settlement with the SEC and Commodity Futures Trading Commission ("CTFC"), paying $307 Million for improperly steering clients to its in-house investment funds. Curiously, FINRA instead brought disciplinary action against Mr. Burris. (See Exhibit 7) In the case of former Morgan Stanley advisor Mark Mensack who blew the whistle on unethical sales practices at Morgan Stanley, specifically an illegal "pay-to-play" scheme involving retirement plan (ERISA) assets administered by Morgan Stanley, FINRA awarded Morgan Stanley $1.2 Million and drove Mr. Mensack into bankruptcy. To add insult to injury, eight hours of FINRA arbitration testimony were found to have been "destroyed, never recorded, or were otherwise missing and unavailable". (See Exhibit 8) Mensack is an Army veteran, whose final assignment in the military was teaching Ethics at the U.S. Military Academy at West Point.

FINRA's improper actions to protect its member firms have not only been against registered employees. The data is difficult to pull together, but most accounts suggest that in arbitration cases which are disputes between a member firm and a registered rep ("intra-industry"), FINRA finds in favor of the member

firm approximately 90% of the time. This is a staggering statistic that brings into serious doubt the independence, and fairness, of FINRA's arbitration forum. These dubious awards often then translate into enforcement actions/proceedings with FINRA's Office of Hearing Officers ("OHO") and/or its Regulatory Operations ("RegOps"). What many fail to understand is how FINRA is able to get away with such extreme bias and not run afoul of the Exchange Act's fairness requirement:

***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).

Because of FINRA's vague quasi-governmental status, it enjoys certain status when it suits it, and avoids it when it doesn't. (See Exhibit 9) How FINRA manages its arbitrator pool is of particular cause for concern. A great case that highlights this came back in 2011 when a panel of three arbitrators found in favor of a customer, in a securities arbitration against Merrill Lynch, for $520,000. Subsequent to issuing the award against Merrill Lynch, the three arbitrators were issued "black spot letters" and culled from the pool of available arbitrators going forward. Nothing about what the three arbitrators did was ever questioned, except by the attorney for Merrill Lynch who lost. In a story for Bloomberg written by William D. Cohan (See Exhibit 10), Mr. Cohan shed some light on how FINRA affects its bias:

> "He contacted me to share his story because he was so outraged that Wall Street has the ability to exact revenge on arbitrators in a quasi-judicial system where it already holds most of the cards anyway.
>
> 'It's unbelievable that they would take such an experienced panel and get rid of it,' Pinckney said. 'To me, this undermines the credibility of the entire Finra process -- I didn't say kangaroo court -- but when you have three well-credentialed people, doing their job, and there were no meritorious grounds for an appeal, and we get handed the 'black spot' -- and not all at once -- it makes for a pretty cheap novel.'"

Against this backdrop, we can better appreciate the facts and circumstances surrounding Schwartz. FINRA argued that the settlement agreement in question only related to a certain citation proceeding, and had no bearing on the arbitration award in question (or anything else). As a witness for FINRA, King testified in a signed affidavit that it was not Barclays intent that the Settlement Agreement be more broad than for just the citation proceeding. (Attempt to ignore the fact that Barclays is supposedly not allowed to be a party to such a proceeding.) Later, while under cross-examination at the hearing, King refused to speak to his client's intent, suggesting for him to do so would be improper. Can a proceeding be considered fair if one party's witness can violate privilege when it suits it, but then hide behind it when it doesn't? Poor behavior aside, a plain reading of the settlement agreement dispatches FINRA's, and King's, arguments entirely.

Four Corners:

In the final paragraph on page 4 of the Decision (Bates #873), it is acknowledged that the Settlement Agreement provides that it will be construed in accordance with the law of the State of Illinois. As such, the Settlement Agreement is considered a contract and is interpreted as such. Illinois uses a "four corners" rule in the

interpretation of contracts, holding that "if the language of a contract appears to admit of only one interpretation, the case is indeed over." *AM Internat'l*, 44 F.3d at 574. Contracts "must be construed to give effect to the intention of the parties which, when there is no ambiguity in the terms of the contract, must be determined from the language of the contract alone." *Flora Bank & Trust v. Czyzewski*, 222 Ill.App.3d 382, 164 Ill.Dec. 804, 809, 583 N.E.2d 720, 725 (1991). The Illinois Supreme Court once stated of this rule: "The terms of an agreement, if not ambiguous, should be generally enforced as they appear, and those terms will control the rights of the parties. Moreover, any ambiguity in the terms of a contract must be resolved against the drafter of the disputed provision." *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 230 Ill.Dec. 229, 239, 693 N.E.2d 358, 368 (1998) (internal citations omitted).

Under the "four corners" rule in Illinois, the threshold inquiry is whether the contract is ambiguous. *Ford v. Dovenmuehle Mortgage Inc.*, 273 Ill.App.3d 240, 209 Ill.Dec. 573, 577, 651 N.E.2d 751, 755 (1995); *Hillenbrand v. Meyer Medical Group*, S.C., 288 Ill.App.3d 871, 224 Ill.Dec. 540, 542, 682 N.E.2d 101, 103 (1997). Schwartz did not allege ambiguity as a first line of argument. Schwartz urged ambiguity in the alternative. In Illinois, "an instrument is ambiguous only if the language used is reasonably or fairly susceptible to having more than one meaning, but it is not ambiguous if a court can discover its meaning simply through knowledge of those facts which give it meaning as gleaned from the general language of the contract. A contract is not rendered ambiguous simply because the

parties do not agree on the meaning of its terms." *Flora Bank & Trust*, 164 Ill.Dec. at 809, 583 N.E.2d at 725 (internal citations omitted). When a contractual provision is "subject to more than one reasonable interpretation, it is ambiguous and must be construed against the drafter." *Elson v. State Farm Fire & Casualty Co.*, 295 Ill.App.3d 1, 229 Ill.Dec. 334, 338, 691 N.E.2d 807, 811 (1998).

On page 5 of the Settlement Agreement (CX-18, Bates #851) is found 15. Entire Agreement:

> "This Agreement sets forth the entire agreement between Judgment Debtor and Barclays with respect to the subject matter set forth herein, and fully supersedes any and all prior agreements or understandings between Judgment Debtor and Barclays pertaining to such subject matter."

On page 5 of the Settlement Agreement (CX-18, Bates #851) is found 14. Non-Reliance:

> "Judgment Debtor and Barclays represent and acknowledge that, in executing this Agreement, they have not relied upon any representation or statement not set forth herein, and the parties each represents that they have had adequate opportunity to have the provisions and such agreement reviewed and approved by legal counsel."

In the final paragraph of page 1 of the Settlement Agreement (CX-18, Bates #851), it reads:

> "WHEREAS, as set forth in the Agreement, Judgment-Debtor and Barclays wish to resolve, terminate and settle all disputes, claims ***and*** actions arising from the Citations without further litigation or other expense and pursuant to the terms and conditions contained herein below", emphasis added.

In debunking the argument that this contract should be interpreted as only relating to the Citations, the reader can easily identify that the settlement agreement addressed other ongoing lawsuits involving Barclays and Schwartz that had nothing to do with the Citations. On page 2 of the settlement agreement (CX-

18, Bates #851) is found 4. Waiver of Right to Appeal. Therein, Barclays and Schwartz resolved ongoing disputes and claims arising from an interpleader lawsuit brought by the Trustee from Schwartz's bankruptcy proceeding where both Schwartz and Barclays were co-defendants. This case was entirely separate from the Citations:

> "As a material condition of settlement, Judgment-Debtor agrees to waive, release and forever discharge any right to appeal or reconsideration of the order entered on April 1, 2016, by the court in the related interpleader lawsuit entitled "Steven R. Radtke, Trustee of the Estate of Michael D. Schwartz and Aseneta Schwartz v. Michael D. Schwartz, et al." and identified as Case No. 15-CH-05556 on the docket of said court, ***and*** further forever discharge any right to appeal or reconsideration of any order in the Citation Proceeding entered on or before the date of this Agreement", emphasis added.

This alone highlights that the Settlement Agreement is more broad than only relating to the Citations. Not only is the interpleader entitled differently, but it has an entirely different Case No., Schwartz and Barclays were of a different posture in each case (co-defendants vs. adversaries), and 4. specifically identifies the interpleader case from the Citation Proceeding with ***and***. There is more.

At the top of page 4, continuing under 7. Non-waiver:

> "...or the money judgment against Judgment Debtor becomes vacated."

There would have to be other lawsuits, legal findings, law enforcement and/or regulatory action(s) that would allow this provision to be triggered under 7. While particular cases or proceedings are not specified, the provision is provided for. In acknowledging this, it is important to recognize that Barclays is aware of Schwartz's [redacted] activities, that certain regulatory and law enforcement investigations are in fact underway, and the likelihood of action is sufficient enough

that Barclays would agree to the inclusion of such a provision. It also reinforces the Settlement Agreement as being more broad than for just the Citations.

At the top of page 5 is found 11. Enforceability of Agreement:

> "...The Parties further agree to waive any right to oppose the provisions of this Agreement being enforced upon them."

Schwartz has every right under the Settlement Agreement to enforce the provisions thereunder to utilize the Settlement Agreement as an acceptable defense to suspension, per Rule 9554. Importantly, Barclays has not argued, or even suggested, that the Settlement Agreement is anything other than what Schwartz has argued.

The Settlement Agreement is executed by Matthew Fitzwater, Managing Director and Head of Litigation, Investigations and Enforcement for the Americas at Barclays Capital, Inc. Not King. As King is not a party to the Agreement, nor an employee of Barclays, he is unable to speak to the intent of Barclays in entering into the agreement. As outside legal counsel to Barclays, it is entirely inappropriate for King to speak to his client's intent. Yet that is exactly what King did. Not of course when requested to do so under cross-examination and thus avoiding a line of questioning that could have brought clarity as to the intent of the parties, but in a signed affidavit on behalf of FINRA when attempting to seek a dismissal of the proceeding (Bates #133). (See Exhibit 11, at 10) Importantly, King refused to testify as to Barclays intent under cross-examination only after he had already violated privilege. Hiding behind a privilege you have already violated is quite persuasive, perhaps even more so than when Justice Louis Brandeis once admonished someone

pleading the 5th that "silence is often evidence of the most persuasive character". But King didn't plead the 5th to avoid self-incrimination, per-se, he just chose to hide behind a privilege he had already violated. In circumstances like these, courts take the important step of preventing the inclusion of someone's testimony about a matter concerning which they refuse to testify. As one court reasoned, "by his initial obstruction of discovery and his subsequent assertion of the privilege, defendant has forfeited the right to offer evidence disputing the plaintiff's evidence or supporting his own denials." *SEC v. Benson*, 657 F. Supp. 1122, 1129 (S.D.N.Y. 1987).

The testimony of Schwartz, and the attempt to question King under cross-examination, was not to establish that the Settlement Agreement was vague, but to highlight the true intent of the parties. As King was allowed to step aside of all questioning that could have shed light on the true intent of the parties, we have to rely on the language of the agreement, within its four corners, to establish the intent of the parties and the true meaning of the whereas clause. Because the language of the Settlement Agreement is clear, and because of 14. and 15. on page 5, no collateral information or questionable testimony from a shifty third-party witness should be relied upon in determining the intent of the parties. The true intent of the parties is easily found within the four corners of the Settlement Agreement (CX-18, Bates #851).

Perjury:

In King being allowed to step aside of all questioning that could have shed light on the true intent of the parties, it is surprising that King would feel the need to also perjure himself. King's testimony was under oath (Bates #123), and it is clear that despite that, and as an attorney knowing the ramifications of being found to have committed perjury, King was going to testify in any manner that would be detrimental to Schwartz. In the cross-examination of King, Schwartz questioned King's assertion that it was in fact Barclays intent for the Settlement Agreement (CX-18, Bates #851) to apply only as to the Citations. That would not seem to be in Barclays interest, as Schwartz would likely then become suspended, and thus unable to earn as much to pay towards amounts outstanding under the arbitration award. It wouldn't pass the "smell test". Schwartz followed by asking King whether he had ever suggested before a bankruptcy court that it was not in Barclays interest that Schwartz be suspended. King emphatically testified "No!" more than once.

On December 4, 2014 Schwartz and King appeared before the Honorable Pamela S. Hollis in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division. (See Exhibit 12) The discussion here is in the context of whether Schwartz had met the first two prongs, to make a threshold showing on a four-part inquiry, that he met the requirements for a stay pending appeal. Judge Hollis had already agreed that Schwartz met the first prong on likelihood of success on appeal,

but was having trouble getting to irreparable harm. Starting at page 43 of the transcript, at line 21, Judge Hollis states:

> "Then I wouldn't have to give the stay. And I know you may not like that because they can move forward on the judgment. But my - - I'm sorry but they're right on the law about just proceeding to collect a judgment is not irreparable harm. So your point is your license pull with me, that's what's irreparable harm. If Finra says we're not going to do anything until this appeal is finally decided, you're probably not going to get your stay. But you're going to get to go up and have it decided."

(The SEC should take note that when receiving future applications for review that include a motion for stay, the Bankruptcy Courts consider the loss of licensing to be irreparable harm in the context of granting a motion for stay pending appeal.) On page 44, and a few lines after Judge Hollis completes her statement, King begins at line 13:

> "Judge, we will contact Finra and say ***we do not want this gentleman's license suspended. That's not in our best interest.*** We want to stay the status quo on this. ***That's the last thing we want***" emphasis added.

Section 802(a) of Sarbanes-Oxley (SOX), 18 U.S.C. § 1519, states:

> "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

Contra Proferentem:

Schwartz did his best in arguing that the plain language of the Settlement Agreement (CX-18, Bates #851) could only mean that it was more comprehensive than applying only to the Citations (an argument under the concept of four corners).

As a fallback to that argument, Schwartz highlighted that under the concept of "contra proferentem", the Settlement Agreement (CX-18, Bates #851) must be interpreted against the drafter...which in this case was Barclays. King testified that every portion of the Settlement Agreement was heavily negotiated, but it is an inescapable fact that as smart and capable as Schwartz may be, he is not an attorney and is of uneven bargaining ability.

In the Decision (Bates #873), FINRA erred when relying upon the Stipulation and Agreed Order (CX-19, Bates #859) that brought an end to the Citation Proceeding, as that was related to only certain limited portions of the Settlement Agreement (CX-18, Bates #851) that addressed the Citation Proceeding. As a starting point, it certainly should be made clear that the Stipulation and Agreed Order (CX-19, Bates #859) is entirely separate from, and outside the four corners of, the Settlement Agreement. Another consideration that should have also been taken into account that highlighted the intent of the parties, outside of the four corners of the Settlement Agreement, is the timing of the execution of the Settlement Agreement and the receipt of the Notice of Suspension. (CX-5, Bates #705) On April 21, 2016 FINRA issued the Notice of Suspension. On May 18, 2016 Schwartz and Barclays entered into the Settlement Agreement following weeks of negotiation over the language in the document. Upon receiving FINRA's Notice of Suspension, there would have been no point in Schwartz entering into the Settlement Agreement if it was not going to be more encompassing than for just the Citations. Upon entering into the Settlement Agreement, Schwartz updated FINRA. On June, 1 2016

Schwartz and FINRA filed an Agreed Motion For Continuance (Bates #81) so that FINRA could have additional time to review the Settlement Agreement.

Bad Faith:

In the 1913 Webster's Dictionary, bad faith was equated with being double hearted, "of two hearts", or "a sustained form of deception which consists in entertaining or pretending to entertain one set of feelings, and acting as if influenced by another." The concept is similar to perfidy, or being "without faith", in which deception is achieved when one side in a conflict promises to act in good faith (e.g. by raising a flag of surrender) with the intention of breaking that promise once the enemy has exposed himself. A finding of bad faith on the part of FINRA, argued as an equitable defense under the concept of "unclean hands", demands that FINRA cannot prevail in these matters.

Throughout ongoing matters between Barclays and Schwartz, Schwartz met all of his obligations as required by FINRA in order to maintain his securities licenses (Series 7 and 66) in good standing. Barclays acknowledges this when suggesting before Judge Hollis on December 4, 2014 (See Exhibit 12, page 42, beginning at line 18):

> "...Finra's known about this for three months. They've known the case has been dismissed for three months. He's served them with copies of everything he's given to this court. Finra is well aware of what's going on."

Further, since the time of the award being issued in favor of Barclays, Schwartz has maintained ongoing communications with FINRA's David Carey ("Carey"). Carey is a Director at FINRA, responsible for supervising FINRA's Rule 9554

expedited suspension process. On March 10, 2016 Carey sent electronic written correspondence (See Exhibit 13, pages 2-3) to Schwartz stating:

> "Thank you for your emails concerning your failure to pay the award issued against you in this case.

In addition to highlighting that Schwartz kept FINRA apprised as to all matters, Carey provided Schwartz the following guidance as to how FINRA would handle matters going forward (See Exhibit 13, top of page 3):

> "Accordingly, FINRA will re-institute suspension proceedings against you for award non-payment ***upon request of the prevailing party. To date, FINRA has <u>not</u> received such a request***" emphasis added.

Under cross-examination, Carey testified as remembering having sent this correspondence. Additionally, Carey testified that he had not received any request from the prevailing party to re-institute suspension proceedings. When questioned further by Hearing Officer Simson, following Schwartz's cross-examination, Carey testified that there were no other documents in FINRA's possession that would suggest the prevailing party had requested FINRA to re-institute suspension proceedings. This is logical, as it would not be in Barclays interest for Schwartz to be suspended, and considering the optics of further [redacted] retaliation against Schwartz, is hard to believe that Barclays would pursue such a blatant and aggressive move against Schwartz.

Further, Schwartz also took FINRA's guidance to heart (See Exhibit 13, page 3, 2nd paragraph) where Carey advised:

> "In the meantime, we would strongly encourage you to seek a resolution of this matter with the prevailing party."

What doesn't make sense, however, is why FINRA then went against its written guidance to pursue the suspension of Schwartz. Nothing has been provided to suggest that Barclays requested the pursuit of Schwartz's suspension, or that Barclays intended for the Settlement Agreement to apply only in consideration as to the Citations. Instead, we have third-party King speaking in Barclays name, possibly in pursuit of his own agenda against Schwartz. In FINRA's RegOps, King seemingly had a willing partner. Without further investigation, we will never know how RegOps made the leap to pursuit of Schwartz's suspension, but when doing so it certainly threw caution to the wind. It was clear that RegOps, along with King, wanted Schwartz suspended. When faced with the likelihood of Schwartz maintaining his ability to stay in the industry, RegOps filed, untimely, its motion to dismiss (Bates #133). Therein, RegOps relied upon the signed affidavit of King (See Exhibit 11). On page 2 of the affidavit, at 10., King testifies:

> "At no time did Barclays Capital, Inc. ***contemplate*** or ***intend*** that the Settlement Agreement to be a settlement of the Judgment or the Award" emphasis added.

This is a critical point to consider. King is not testifying as to *his* intent or state of mind, but the supposed intent and state of mind of his client who he is the employ of as outside counsel. In speaking to his client's intent and state of mind, King violates privilege. In requesting and utilizing such a statement, RegOps participates in this violation of privilege against a FINRA member firm. Had Barclays somehow wanted this to happen, and King was released from privilege by Barclays to make such a statement, King would be stepping into Barclays shoes. In

doing so, King would have been precluded from being involved whatsoever in the proceedings. Everything about this stinks.

Totality of the Circumstances:

While a FINRA arbitration result is not reviewable by the SEC, all of the circumstances relating to, leading up to, or in any way impacting a particular decision under its review is subject to consideration under a totality of the circumstances inquiry. In its 2013 ruling in *Florida v. Harris*, the Supreme Court affirmed that "lower court judges must reject rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, al-things-considered approach." *Florida v. Harris*, 133 S. Ct. 1050, 1055-56 (2013). Considering that any unfavorable finding here by the SEC will be appealable for Schwartz to Federal Court, the SEC would in this instance be the "lower court" being given reference to. Schwartz does not seek to overturn the result of the arbitration award in this proceeding, and there are facts and circumstances surrounding the arbitration proceeding which are important for the SEC to consider under a totality of the circumstances inquiry.

[redacted] Retaliation: In the Background section at the beginning of this brief is discussed Schwartz's [redacted] activities, the [redacted] retaliation he faced, his questionable termination, and the shady manner in which Barclays distracted Schwartz into thinking it actually sought to understand the nature of the fraud he had brought forward to Diamond while rushing to FINRA to file its statement of claim instead. It is without question that Barclays used FINRA as a club with which to beat the credibility out of Schwartz and the veracity of his

claims. FINRA has seemingly been a willing partner in the retaliation against Schwartz for his [redacted] activities, and thus FINRA's suspension of Schwartz can only be viewed as blacklisting which is a prohibited action under Sarbanes-Oxley.

Jury Tampering: While preparing for the arbitration, Schwartz received notice from King that he was withdrawing from the case as was leaving Neal, Gerber & Eisenberg LLP ("NGE"). Shortly thereafter, King was back on the case at Ulmer & Berne. In an odd turn of events, an arbitrator from the panel shortly thereafter dropped out. That arbitrator was Alan Wolper, partner in charge of Ulmer's Chicago office and King's new boss. When the arbitration began, it became apparent that the last minute arbitrator addition knew Chris Williams who was Schwartz's boss while at Barclays. These matters were referred by Schwartz to Christopher Cook from FINRA's Office of the Ombudsman, who then referred onto "the correct place". Schwartz also then forwarded to FINRA's Office of Fraud Detection and Market Intelligence (OFDMI) where other matters had been previously referred with the help of Mr. Cook. (See Exhibit 14)

Libel: Following the 7th Circuit affirming the bankruptcy court's dismissal of Schwartz's case (on technical procedures, no bad faith or abuse was ever found, and Judge Hollis went out of her way to state as much), one of King's partners at Ulmer & Berne (Nathan Lamb) wrote a character assassination piece against Schwartz and his wife on Alan Wolper's (King's boss at Ulmer & Berne) blog, bdlawcorner.com, published on August 28, 2015 (See Exhibit 15). Entitled "Trying

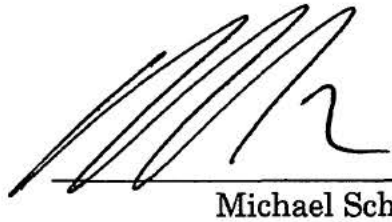
to Avoid Repaying a Forgivable Loan? No hiding in bankruptcy!", the article made numerous false and misleading statements about Schwartz, including "...Mr. Schwartz and his wife tried to spend their way into bankruptcy following an adverse arbitration award. The ruling sends a clear signal that manufacturing a bankruptcy to walk away from a forgivable loan won't work." First of all, this is entirely unfactual and misleading, as there was nothing whatsoever in the bankruptcy proceedings about Schwartz spending his way into bankruptcy, not the least of which happening between the time of the arbitration award and the filing for Chapter 7 less than a month later. Not only would it be impossible to spend down an estate in that amount of time, but the proceeding would be summarily dismissed for abuse. The court never found, or even suggested, that Schwartz had any inappropriate expenses or expenditures, other than his income level was too high to enjoy the benefits of Chapter 7. In fact, the transcripts (e.g. See Exhibit 12) tell an entirely different story than was fabricated by King's colleague. That "Mr. Schwartz and his wife tried to spend their way into bankruptcy" following the adverse arbitration award, or that he was "manufacturing a bankruptcy" are patently untrue statements, are incredibly damaging to Mr. Schwartz's reputation, and are libelous.

Collusion & Perjury: When taking into account the collusive actions of King and RegOps, followed by King's outright perjury, and against the historical backdrop provided herein, it would be impossible to allow the Decision to stand.

IV. CONCLUSION

The true intent of the parties is easily found within the four corners of the Settlement Agreement. The SEC must see FINRA's, and King's, arguments and actions for what they are and not allow them to benefit from their inappropriate behavior. FINRA has unclean hands in these matters, and when also viewed in the totality of the circumstances, it would be inequitable to not overturn the Decision. Further, Schwartz requests any other and further relief as deemed appropriate by the SEC.

Respectfully,



Michael Schwartz, Pro Se
[redacted]
Burr Ridge, IL [redacted]
[redacted]gmail.com

February 16, 2017

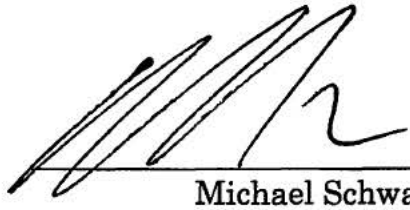
CERTIFICATE OF SERVICE

I, Michael Schwartz, Pro Se, certify that on the 16th day of February, 2017, I caused copies of the foregoing **BRIEF IN SUPPORT OF APPLICATION FOR REVIEW**, In the Matter of the Application of Michael David Schwartz, Administrative Proceeding File No. 3-17752, to be similarly served on the following parties via USPS:

Office of the Secretary
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

Respectfully,



Michael Schwartz, Pro Se
[redacted]
Burr Ridge, IL [redacted]
[redacted]gmail.com

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Michael David Schwartz

For Review of Disciplinary Action Taken by

FINRA

File No. 3-17752

EXHIBITS 1 - 15

Greiman, Rome & Griesmeyer, LLC
24115 W. 103rd Street, Suite B
Naperville, IL 60564
(630) 369-9901

Schwartz, Michael
[redacted]
Chicago, Il[redacted]

July 5, 2012
10191-485

Matter No. 10191-485
Dispute with Barclays Capital, Inc.
Bill No. 14380

Fees:			Hours	
[redacted]				
04/30/12	[redacted]	Conduct research regarding [redacted] claims under Sarbanes-Oxley and Dodd Frank	[redacted]	
05/01/12	[redacted]	Review and analyze legal research on Sarbanes-Oxley and Dodd Frank [redacted] claims [redacted]	[redacted]	
05/01/12	[redacted]	[redacted]	[redacted]	
05/01/12	[redacted]	[redacted] regarding Sarbanes-Oxley [redacted] claim [redacted] attend meeting with Mr. Griesmeyer and Michael Schwartz regarding case background and strategy.	[redacted]	
05/02/12	[redacted]	[redacted]	[redacted]	

05/02/12 [redacted]

05/10/12 [redacted]

05/11/12 [redacted]

05/14/12 [redacted]

05/15/12 [redacted]

05/15/12 [redacted]

05/16/12 [redacted]

05/17/12 [redacted]

05/21/12 [redacted]

05/22/12 [redacted]

05/23/12 [redacted]

05/24/12 [redacted]

[redacted]

05/28/12 [redacted]

05/30/12 [redacted]

05/31/12 [redacted]

06/01/12 [redacted]

06/06/12 [redacted]

06/11/12 Review and analyze dispute correspondence from Barclays regarding demand for payment, and draft response correspondence

06/11/12 [redacted]

06/11/12 [redacted]

06/15/12 [redacted]

06/15/12 [redacted]

06/16/12 [redacted]

06/18/12 [redacted]

06/19/12	[redacted]	[redacted]	[redacted]
06/20/12	[redacted]	[redacted]	[redacted]
06/21/12	[redacted]	[redacted]	[redacted]
06/27/12	[redacted]	[redacted]	[redacted]
06/28/12	Draft e-mail to Mr. Schwartz regarding return of documents.	[redacted]	[redacted]
07/03/12	[redacted]	[redacted]	[redacted]
	Hours:	[redacted]	
	Total fees:		$18,234.00

Expenses:

05/04/12	[redacted]	24/7 Discovere-Duplication of client documents.	$159.70
05/31/12	[redacted]	Westlaw Fee	$65.00
06/15/12	[redacted]	Fed Ex Expense	$23.80
		Total expenses:	$248.50

Retainer:

05/04/12	Check 171217	$10,000.00

Total retainer received:	$10,000.00

Billing Summary

Previous balance	$0.00
Payments & adjustments	0.00
Current fees & expenses	18,482.50
Total now due	**$18,482.50**
Retainer balance	$10,000.00

Michael D. Schwartz

From: Michael D. Schwartz [[redacted]gmail.com]
Sent: Friday, June 22, 2012 2:14 PM
To: 'bob.diamond@barclays.com'; 'robert.diamond@barclays.com'
Cc: nac@twogables.com; carol.lin@barcap.com; 'brian.wade@barcap.com'; 'john.vitalo@barclays.com'; [redacted]@gmail.com'; [redacted]yahoo.com'; 'geoffrey.valentino@barclays.com'; 'marcus.agius@barclays.com'
Subject: Confidential

Follow Up Flag: Follow up
Flag Status: Completed

Mr. Diamond,

My employment with Barclays Wealth was terminated on 5/22/12 and I have since been actively engaged with my attorney(s) in preparing a Statement of Claim against Barclays. Against the recommendations of my attorney(s), and despite the actions that have been taken against me during my tenure with Barclays, I have decided to put my case on hold to pursue this alternative course. I believe that Barclays is better than what I have experienced. I saw an incredible opportunity for someone like myself when Barclays began to recruit me from JPMorgan, and I still see that opportunity. I have developed tremendous relationships at Barclays globally in the course of serving the interests of the firm, my clients, and prospects. I believe that many of the actions against me were taken by individuals, while working in their specific capacity(s) with Barclays, who conducted themselves in ways inconsistent with your vision for Barclays, my vision for Barclays, shareholder(s) vision for Barclays, and likely the vision of the majority of its employees. Certain actions taken against me are inconsistent with, and in violation of, the laws of the US and UK and run afoul of the SEC, FSA, and certain other regulators based in the US and UK.

The majority of people in our industry conduct themselves in a moral, legal, and ethical manner seeking to do the right thing for their clients. At the same time they are also attempting to help their respective firms grow profitability, expand their client base, and contribute to something bigger than themselves. While not "God's work", we do really important work in helping to connect those who provide capital with those that need it. We provide advice to those that are seeking it, ideas to those open to them, and ultimately we provide value. Lately, we have become the picture of all that is bad with the world. Certainly the actions of a few have earned this reputation, but this is not who we are. Unfortunately, the actions of a few at Barclays have not put me in a very difficult situation where I have to add to the negative perception of our industry in order to protect myself, my wife, and my two young daughters. I did not seek this fight nor do I want it. I did not want to leave the firm, and in fact still have a strong affinity for it despite what I have been put through. In the right circumstance, I would even work for it again (though not within its wealth division).

I am asking you to simply do the right thing. I will share in full detail the actions that have been taken against me, those involved, and detailed documentation supporting all of my claims and assertions. I am asking that the Office of the Chairman negotiate with me, directly, in good faith and without bias. Seek out those with which I have had extensive dealings, find out how I have conducted myself, find out how I have developed major new client relationships and business opportunities globally. The following, while certainly not all-inclusive, are names of certain senior individuals within the organization who can add color to the discussion.

Carol Linn, MD – Distressed & Special Situations
Brian Wade, MD – Private Capital Markets
John Vitalo, CEO – MENA
Neil Cummins, MD – Senior Relationship Management

A "One Barclays" requires people who truly believe in that vision and have a demonstrated ability to drive business across divisions without regards for their particular team, division, or coveted silo. It is this approach that will enable the

firm to achieve and exceed your 13% marker and further distinguish itself for what is right in our industry. I look forward to discussing these matters, and others, with you shortly.

By way of clarification, this message does not constitute an admission by myself nor operate as a waiver of any of my rights.

Regards,

Michael Schwartz
[redacted]
Chicago, IL [redacted]
[redacted]

Michael D. Schwartz

From: Enquiries, CEU - HMT [CEU.Enquiries@hmtreasury.gsi.gov.uk]
Sent: Monday, July 02, 2012 4:56 AM
To: 'Michael Schwartz'
Subject: [UNCLASSIFIED] RE: Important & Confidential

Dear Mr Schwartz

Thank you for your e-mail dated 28 June.

I am writing to confirm receipt and to inform you that your enquiry is receiving attention. We aim to reply to all correspondence within 15 working days of receipt.

Regards

Correspondence and Information Rights Team
Her Majesty's Treasury

From: Michael Schwartz [[redacted]gmail.com]
Sent: 28 June 2012 23:13
To: Enquiries, CEU - HMT; chairmanoffice@sec.gov
Subject: Important & Confidential

To Whom It May Concern:

Despite my best efforts to resolve a very difficult and troublesome series of events from during my employment with Barclays in a way that would enable a favorable outcome for all involved, I am left with few other options. While most of my claims are required to be addressed via the FINRA arbitration process, others are more an issue of legality, both in the US and UK.

Please let me know how best to proceed. Please see below correspondence for background.

Regards,

Michael

Sent from Swartsy's iPhone

Begin forwarded message:

> **From:** Michael Schwartz < >
> **Date:** June 28, 2012 10:10:33 AM CDT
> **To:** "bob.diamond@barclays.com" <bob.diamond@barclays.com>
> **Cc:** "<robert.diamond@barclays.com>" <robert.diamond@barclays.com>,
> "<marcus.agius@barclays.com>" <marcus.agius@barclays.com>
> **Subject: Re: Confidential**
>
> Bob,

Having not heard back from you in the last week is deeply troubling and leaves me with few options that allow for positive outcomes for all involved. I realize your time has been required in dealing with the LIBOR situation, but I can assure you that what Barclays has done as it relates to me is just as troubling and will not be looked upon favorably from the outside.

I look forward to discussing with you this week.

Regards,

Michael
[redacted]

Sent from Swartsy's iPhone

On Jun 22, 2012, at 2:14 PM, "Michael D. Schwartz" < > wrote:

Mr. Diamond,

My employment with Barclays Wealth was terminated on 5/22/12 and I have since been actively engaged with my attorney(s) in preparing a Statement of Claim against Barclays. Against the recommendations of my attorney(s), and despite the actions that have been taken against me during my tenure with Barclays, I have decided to put my case on hold to pursue this alternative course. I believe that Barclays is better than what I have experienced. I saw an incredible opportunity for someone like myself when Barclays began to recruit me from JPMorgan, and I still see that opportunity. I have developed tremendous relationships at Barclays globally in the course of serving the interests of the firm, my clients, and prospects. I believe that many of the actions against me were taken by individuals, while working in their specific capacity(s) with Barclays, who conducted themselves in ways inconsistent with your vision for Barclays, my vision for Barclays, shareholder(s) vision for Barclays, and likely the vision of the majority of its employees. Certain actions taken against me are inconsistent with, and in violation of, the laws of the US and UK and run afoul of the SEC, FSA, and certain other regulators based in the US and UK.

The majority of people in our industry conduct themselves in a moral, legal, and ethical manner seeking to do the right thing for their clients. At the same time they are also attempting to help their respective firms grow profitability, expand their client base, and contribute to something bigger than themselves. While not "God's work", we do really important work in helping to connect those who provide capital with those that need it. We provide advice to those that are seeking it, ideas to those open to them, and ultimately we provide value. Lately, we have become the picture of all that is bad with the world. Certainly the actions of a few have earned this reputation, but this is not who we are. Unfortunately, the actions of a few at Barclays have now put me in a very difficult situation where I have to add to the negative perception of our industry in order to protect myself, my wife, and my two young daughters. I did not seek this fight nor do I want it. I did not want to leave the firm, and in fact still have a strong affinity for it despite what I have been put through. In the right circumstance, I would even work for it again (though not within its wealth division).

I am asking you to simply do the right thing. I will share in full detail the actions that have been taken against me, those involved, and detailed documentation supporting all of my claims and assertions. I am asking that the Office of the Chairman negotiate with

me, directly, in good faith and without bias. Seek out those with which I have had extensive dealings, find out how I have conducted myself, find out how I have developed major new client relationships and business opportunities globally. The following, while certainly not all-inclusive, are names of certain senior individuals within the organization who can add color to the discussion.

Carol Linn, MD – Distressed & Special Situations
Brian Wade, MD – Private Capital Markets
John Vitalo, CEO – MENA
Neil Cummins, MD – Senior Relationship Management

A "One Barclays" requires people who truly believe in that vision and have a demonstrated ability to drive business across divisions without regards for their particular team, division, or coveted silo. It is this approach that will enable the firm to achieve and exceed your 13% marker and further distinguish itself for what is right in our industry. I look forward to discussing these matters, and others, with you shortly.

By way of clarification, this message does not constitute an admission by myself nor operate as a waiver of any of my rights.

Regards,

Michael Schwartz
[redacted]
Chicago, IL [redacted]
[redacted]

BARCLAYS

Legal

745 Seventh Avenue
New York, NY 10019

Tel (212) 527-7000

barclays.com

July 2, 2012

VIA EMAIL AND FEDEX

Michael Schwartz
[redacted]
Chicago, IL [redacted]

Re: Your email of June 22, 2012

Dear Mr. Schwartz:

I am internal employment counsel to Barclays Capital Inc. ("Barclays"). I write concerning the email you sent on June 22, 2012 addressed to Bob Diamond. In your email, you suggested that you may have an attorney representing you – if that is the case, please share this letter with your attorney.

In your email, you alluded to certain unspecified wrongdoing concerning your employment at Barclays, and suggested that Barclays should "negotiate" with you so as to avoid the release of information that would purportedly "add to the negative perception of our industry." While the tone of your email was vaguely threatening, I am responding in a good faith attempt to understand the specifics of whatever concerns and information you may have.

In your email, you stated, "I will share in full detail the actions that have been taken against me, those involved, and detailed documentation supporting all of my claims and assertions." Accordingly, I am writing to offer you an opportunity to share with us any facts or information that you wish to share.

Please contact me, or have your attorney contact me, if you wish to share any information with us. I can be reached at (212) 526-0318. I look forward to hearing from you.

Yours sincerely,

Eric Hoffman

FINRA ARBITRATION Submission Agreement

Claimant(s)

Barclays Capital Inc.

In the Matter of the Arbitration Between

Name(s) of Claimant(s)
Barclays Capital Inc.

and

Name(s) of Respondent(s)
Michael Schwartz

1. The undersigned parties ("parties") hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related cross claims, counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure.
2. The parties hereby state that they or their representative(s) have read the procedures and rules of FINRA relating to arbitration, and the parties agree to be bound by these procedures and rules.
3. The parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of Arbitration or the arbitrator(s). The parties further agree and understand that the arbitration will be conducted in accordance with the FINRA Code of Arbitration Procedure.
4. The parties agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement. The parties further agree that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.
5. The parties hereto have signed and acknowledged the foregoing Submission Agreement.

Barclays Capital Inc.
Claimant Name (please print)

Claimant's Signature — June 28, 2012 — Date

State capacity if other than individual (*e.g.*, executor, trustee or corporate officer) Director, Legal

Claimant Name (please print)

Claimant's Signature — Date

State capacity if other than individual (*e.g.*, executor, trustee or corporate officer)

If needed, copy this page.

NEAL ▪ GERBER ▪ EISENBERG

Patrick G. King
Attorney at Law

Tel 312.269.8044
Fax 312.750.6449
pking@ngelaw.com

July 2, 2012

VIA FEDERAL EXPRESS

Ada Perez
FINRA Dispute Resolution
One Liberty Plaza
165 Broadway
New York, NY 10006

Re: ***Barclays Capital Inc. v. Michael Schwartz***

Dear Ms. Perez:

I represent Barclays Capital Inc. ("BCI") in the above-referenced matter. Enclosed is an original and four copies of BCI's Statement of Claim against Respondent Michael Schwartz. Also enclosed are the original and one copy of BCI's executed Uniform Submission Agreement, and a check in the amount of $3,825.00 for the requisite fees in this matter. FINRA can serve Mr. Schwartz at his last known address at: [redacted], Chicago, IL [redacted]

Pursuant to FINRA Rules 13806 and 13213, BCI respectfully requests the hearing be held before a panel of three arbitrators in Chicago, Illinois, the location of the branch office in which Mr. Schwartz was employed.

Please direct all future correspondence in this matter to my attention. Should you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Yours truly,

Patrick G. King

PGK/sph
Enclosures

NGEDOCS: 022396.0606:1993983.1

FINRA and JPMorgan go after [redacted] for $624 (not a typo) loss

By Ann Marsh
Published September 22 2016, 5:00pm EDT

More in Regulatory actions and programs, Compliance, RIAs, Independent BDs, Private banks, SEC regulations, Exclusive investigation, FINRA, J.P. Morgan Securities, SEC, OSHA

FINRA, the financial industry's self-regulator often accused of favoritism toward its large member firms, has filed a case against a [redacted] on behalf of JPMorgan Chase over a mere $624 client loss.

RIA Johnny Burris has been embroiled in a four-year dispute with the bank, his former employer, which he says pressured him to push his clients into the bank's own or favored investment products. JPMorgan, and now FINRA, accuse Burris of causing the loss and neglecting to make his superiors aware of the problem.

The regulator filed the action against Burris, a former broker with JPMorgan in Sun City West, Arizona, last week.

Burris said he's spent more than $100,000 defending himself in arbitration and [redacted] cases so far. He estimates FINRA's case could cost him another $60,000.

FINRA filed its complaint against Burris with its Office of Hearing Officers. FINRA calls these officers "impartial adjudicators of disciplinary cases" who nonetheless work for FINRA. In other words, FINRA will be hearing its case against Burris, who may have to pay for the proceedings.

"Are you serious?" securities lawyer and frequent FINRA critic Bill Singer asks. "Do we want to encourage [redacted] or do we want to collect $600? This gives ... the appearance that FINRA is retaliating against this guy so they can squash [redacted]"

JPMorgan referred questions about the case to FINRA.

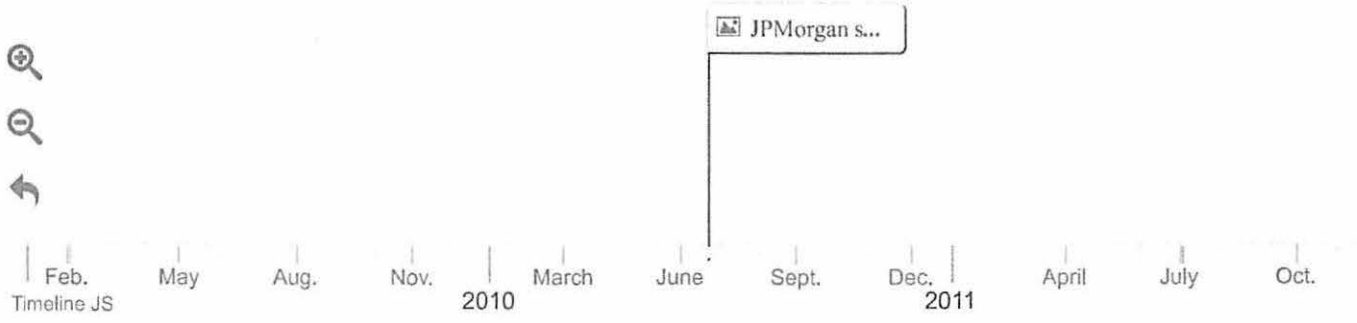
"The complaint speaks for itself," FINRA spokeswoman Michelle Ong wrote in an email. "These are very serious violations. ... FINRA does not file a formal complaint unless it has strong reason to believe there are violations at its core. FINRA has proceeded with this case as we would any other similar matter." Ong did not elaborate when asked to explain why FINRA regards the alleged violations in the case as "very serious."

Read more: The full text of FINRA's response

In 2012, Burris accused the bank of pushing favored products — either JPMorgan's own investments or outside ones such as hedge funds that paid the bank high fees. He considered those investments too expensive or too risky for his elderly clients. Five months after he refused to comply and challenged the firm's investment policy in writing, the bank laid him off.

Swipe to Navigate

OK



Three years later, last December, JPMorgan admitted that it failed to disclose to clients that it pushed its own products and paid a combined $307 million in fines in two linked cases to the SEC and the U.S. Commodity Futures Trading Commission.

Read more: Inside Story: Whistleblower Raised Concerns Before $307M JPMorgan Regulatory Settlement

Although JPMorgan caused "significant harm to clients" in the case, according to the SEC's head of enforcement, Andrew Ceresney, none of the fines were used to reimburse investor losses.

To date, "not a single person at JPMorgan has been publicly reprimanded in any capacity for those breaches" by a regulator, Burris says. The SEC action neither named nor sanctioned individuals.

Burris has a related pending case with the U.S. Occupational Safety and Health Administration. The SEC declined to comment when asked about the status of his [redacted] case with the commission. OSHA did not respond to a request for comment.

Wells exec sued by investor over accounts scandal
Warren to Wells Fargo CEO: 'Resign'
Wells Fargo bogus-account scandal said to draw U.S. probe

'YOU ARE IN BIG TROUBLE'

Now an independent RIA, Burris runs Burris Wealth Management in Surprise, Arizona, and serves mainly elderly clients. Two years after he initiated his OSHA [redacted] case, Burris says he got a got a call from Margery Shanoff, a FINRA enforcement attorney, in the spring of last year.

Burris said she told him that FINRA had completed a thorough investigation into his activities at JPMorgan.

"You are in big trouble," he recalls Shanoff telling him.

Burris said he asked how that could be, given that no one had called to get his side of the story. Shanoff did not respond to a request for her description of the conversation.

He says Shanoff offered him a deal: Settle, and the whole situation would go away.

He says FINRA wanted him to agree to the facts of the case against him by signing a Letter of Acceptance, Waiver and Consent, which he refused to do.

He suspects that FINRA planned to use the document during potential OSHA negotiations to show his culpability in the case.

"I'm fighting this," Burris says, "if for nothing else then just for the plain and simple fact that I'm not going to agree to something that is inaccurate."

'I MADE A MISTAKE'

The case Shanoff filed last week accuses Burris of neglecting to execute a trade for a client, which resulted in a tax liability. It also says he resolved the matter on his own without seeking appropriate approvals before doing so.

Burris acknowledges that he forgot to execute the trade in a married couple's account that resulted in his their having insufficient funds to cover a tax bill. "I made a mistake," he says.

He also concedes that he took care of the problem without informing supervisors, but says manager approval was not required because there was no customer complaint to elevate the issue. The couple signed an affidavit, reviewed by *Financial Planning*, saying they never intended to file a complaint about Burris and that the bank should not have done so in their names.

FINRA cited the following letter Burris wrote to his clients in the case as evidence against him:

"I want to apologize for the error that has caused your tax payment to be rejected," Burris wrote to the couple in April, 2012. "This has since been remedied with the enclosed cashier's check. ... You can be assured, if there are any tax penalties, and/or interest, please bring them to my attention. I will have those remedied."

Many financial advisers continue to work in good standing for large corporate firms after causing clients losses in the tens or hundreds of thousands of dollars, or more.

Singer said even if the charges in the case were found to have merit, the consequence they would normally draw would not rise above a so-called private letter of caution,

Instead, the bank terminated Burris for "failure to follow firm policies," the case says.

STRING OF ACTIONS

Last week's case is the latest in a string of actions JPMorgan has taken since Burris protested its policy of pushing more expensive and risky products to clients, he says.

He says the following two events, on successive days, support his claim that JPMorgan went looking for a pretext to get rid of him:

- On Nov. 2, 2012, JPMorgan decided it would fire Burris, according to Gabrielle Frawley (née Lehu), a JPMorgan human resources representative. Her comments were included in documents reviewed by *Financial Planning* from a 2014 arbitration case that Burris filed against the bank for alleged defamation in which Burris did not prevail.

- The next day, Nov. 3, the bank discovered the documents "that broke the camel's back" and led to the decision to fire him, according to testimony of Umbreen Kazmi, a JPMorgan supervisory manager in the arbitration case.

Neither Kazmi nor Frawley returned calls seeking comment.

At the time of his termination on Nov. 6, Burris' FINRA BrokerCheck record contained no client complaints. Weeks after *The New York Times* first wrote about his case on March 3, 2013, the bank filed the first complaint against him on BrokerCheck. By May 14, it had filed two more.

Burris obtained signed affidavits from the clients associated with these complaints in which each said they never intended to file a complaint against him. Several of those clients interviewed by *Financial Planning* last year reiterated the views they expressed in their affidavits.

"I think it was unethical because she didn't explain it to me," retiree Carolyn Scott told *Financial Planning* about the JPMorgan employee who filed a complaint in her name against Burris. "I had no problem with Johnny."

Laya Gavin, Burris' manager, who he says took over his $100 million book of business after his dismissal, wrote the complaints after contacting Burris's clients.

When asked in the arbitration if any JPMorgan employees ever write complaints on behalf of clients, Kazmi said, "Absolutely not." However, bank spokeswoman Patricia Wexler told *Financial Planning* last year that Gavin had done so "as a courtesy."

No longer with JPMorgan, Gavin now runs a consulting firm, Money Wisdom & Faith, in which she counsels people about "biblical financial stewardship." She did not return a call seeking comment.

"Part of the horrific problem we have as evidenced by the Wells Fargo mess is that we really need to encourage a lot of the men and women in this industry to call up FINRA when they see the nascent stages of this conduct," Singer says. "I would suggest that the good folks at FINRA really need to take a deep breath and step back and look at the full picture."

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Ann Marsh

Ann Marsh is Senior Editor and West Coast Bureau Chief of Financial Planning.

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Posted By **J. Burris**
Tuesday, October 25 2016 at 12:55 AM

Let me be clear about the FINRA allegations. First, there was no money given by myself to any client to allegedly "settle" a complaint, period. That's a fact. The client also confirms there was no complaint made to me via multiple signed affidavits and statements. This same client also notified FINRA of the same about December of 2015.

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FINRA's long march toward arbitration reform

By Kenneth Corbin
Published February 10 2017, 5:39pm EST

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2/28/2013 @ 8:25AM | 4,979 views

Former Morgan Stanley Broker Blows Whistle, Again

Mark Mensack was excited to go to work at Morgan Stanley (MS) in August 2008. A bit over a year later, he would be walking out the door not so excited ... he quit. What happened?

Mensack initially went to his superiors at MS telling them that he had reservations about the additional compensation the firm was receiving from certain 401k vendors. Among his concerns were that companies who were coming to MS for investment advice were being directed to 401k products that paid to be in MS's Alliance Partner program. Mensack took his concerns about the practice to his supervisor and then to the general counsel .... MS held the company line and responded to Mensack's concerns stating "Reasonable minds could differ." Mensack then left the firm and filed a [redacted] lawsuit in New Jersey Superior Court claiming that he was retaliated against for speaking out on compensation practices (pay to play) that he felt was wrong, illegal. MS responded to the claim by saying the case did not belong in NJ State court stating that Mensack's issues should go to binding arbitration through Financial Industry Regulatory Authority, Inc. (FINRA), despite the fact that his employment contract explicitly precluded arbitration for statutory employment issues (whistleblowing being one of those). The New Jersey court agreed with MS and dismissed Mensack's case.

By the time the case landed at FINRA, MS wanted $800,000 from a note (recruiting bonus) it had paid to Mensack upon accepting employment, along with attorney fees ($400,000) for taking the arbitration case to FINRA. MS claimed Mensack had not lived up to his commitment at the firm. Mensack's position was that the role he was promised at the firm did not match reality and, as a result of speaking up about his disagreements with the firm's practices, he was retaliated against thus necessitating him to leave. He wanted $5 million for the trouble. Upon conclusion of the arbitration, Mensack felt confident, but the decision was not what he had hoped, he lost and was ordered to pay $1.2 million to MS.

Mensack was upset with the loss because he and his attorney felt that they had proven that they had clearly won the case on the grounds that he was brought to MS with false promises, had proven that MS witnesses had provided false testimony and that MS had fabricated key pieces of evidence against him during the proceedings. He then planned his appeal, knowing that the odds of overturning the decision were low. One of the first things he needed from FINRA was an audio recording, standard procedure, of the 21 hours of proceedings from the arbitration so he could review his options with an attorney. He eventually received the recordings from FINRA, except 8 hours of it was missing .... 8 hours, Mensack claims, which had to do with the very topics he thought he had proven during the arbitration.

Mensack's case has been in the news before, but mostly through the musings of bloggers who write on the industry. Finance is a strange world and FINRA's oversight of the industry has been called into question before. Some believe that FINRA, whose revenue comes from investment firms and individuals involved in finance on Wall Street, are influenced by the dominant investment institutions. One can rightfully assume that large banks, like MS and others, make up the majority of the revenues for the private corporation. It is akin to an automotive regulatory firm made up of automakers, with the Big 3 making up the majority of the dues paid. So how do you think a panel who is getting paid by the majority rules? Many have wondered this before.

Perhaps no one is more outspoken about FINRA than Bloomberg's William Cohan. Cohan routinely writes on FINRA's decisions, including Mensack's. Our own Forbes writer Seth Lipner wrote an excellent piece in 2009 to shed some light on who exactly makes up FINRA's arbitrator panels that decides these cases. While some think that FINRA is unfairly rigged against investors and individual brokers, particularly those who lose in arbitration, the big firms seem to have a good batting average of winning. In one case in North Carolina last year, a former Wells Fargo broker had, like Mensack, received a sign on bonus that the bank wanted back after his resignation. FINRA agreed with Wells Fargo, surprise, and ruled the broker must pay the note amount plus legal fees of Wells Fargo. However, the broker took his case to U.S. District Court, an unusual move since arbitration is supposed to be binding, stating that he was railroaded. An attorney representing Wells Fargo told the judge about the numerous cases she had represented on behalf of banks at FINRA arbitration:

> "I've never lost one and I've never not gotten attorney's fees. I always win these cases."

Judge Max Cogburn was taken aback by the comment and replied, "Now *there's* a level playing field." In the end, Judge Cogburn told the broker that he agreed with FINRA's decision to have the broker repay the note but he waived the requirement to have to pay attorney's fees. A partial victory, however, the decision and the case makes one wonder how someone gets a fair shake.

While FINRA has cases where it has helped investors, self regulators certainly have been criticized for how they have handled [redacted] who claimed wrongdoing at their own firms. Take the case of Leyla Basagoitia, who was sued by her employer in 2003 for a bonus she received upon taking employment with the firm only to be fired two years later. The case was heard by FINRA predecessor, NASD. Basagoitia countered that she was retaliated against for not promoting products that she believed were illegal (sounds familiar). In fact, she went so far as to call her employer a Ponzi scheme. NASD ruled against Basagoitia and ordered her to pay the bonus back. Her firm? Stanford Financial, whose CEO Allen Stanford

was arrested in 2009 for running, well, a Ponzi scheme. Stanford was convicted and is currently serving 110 years prison term.

Thirty days after learning of his arbitration loss, FINRA threatened to suspend Mensack's license if he did not pay the $1.2 million, file a motion to vacate or file for bankruptcy within three weeks. Although Mensack felt a motion to vacate was warranted, without a complete copy of the record (missing recordings) he could not get an attorney to take his case. So not having $1.2 million handy to pay MS, he filed for bankruptcy in September 2011 in a move to protect his professional licenses. A New Jersey bankruptcy court, now in control of Mensack's estate, had to first approve his attorney's application to represent him in the new federal [redacted] case. In May 2012, MS objected to that application arguing that the court should block Mensack from moving forward with the latest lawsuit, a tactic which worked for a few months. It was not until October 2012 that the bankruptcy court over-ruled MS's objection so that Mensack could proceed with the new litigation against MS, FINRA and other individuals. In a strange twist, should Mensack win some award from this lawsuit, it would go to pay the $1.2 million that FINRA awarded to MS during arbitration. Oh, how we love our justice system.

For Mensack, the Army veteran, whose final assignment in the military was teaching Ethics at the U.S. Military Academy in West Point, NY, he is banking on having his case heard, and fully recorded, this time around. MS on the other hand is feeling pretty confident. In a quote to the Chicago Tribune, an MS representative said of Mensack's case that it was, "baseless" and further said in a statement that Mensack "had a full opportunity to present (the claims), represented by counsel, in an extensive hearing."

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BACKGROUNDER

No. 3181 | FEBRUARY 1, 2017

Reforming FINRA

David R. Burton

Abstract

FINRA is a regulator of central importance to the functioning of U.S. capital markets. It is neither a true self-regulatory organization nor a government agency. It is largely unaccountable to the industry or to the public. Due process, transparency, and regulatory-review protections normally associated with regulators are not present, and its arbitration process is flawed. Reforms are necessary. FINRA itself, the SEC, and Congress should reform FINRA to improve its rule-making and arbitration process. This Heritage Foundation Backgrounder *outlines alternative approaches that Congress and the regulators can take to improve FINRA, and provides specific recommended reforms.*

An Introduction to FINRA

The Financial Industry Regulatory Authority (FINRA) is the primary regulator of broker-dealers.[1] It regulates 3,895 broker-dealers and 641,761 registered representatives.[2] The Securities Exchange Act requires that a broker-dealer be a member of a registered "national securities organization,"[3] and FINRA is the only extant registered "national securities association."[4] Thus, broker-dealers must be members of FINRA in order to do business, and if FINRA revokes their membership, they may not do business.

In 2015, FINRA levied $94 million in fines against broker-dealers, took 1,512 disciplinary actions against broker-dealers, and ordered $97 million in restitution to harmed investors.[5] FINRA conducts the arbitration of almost all disputes between a customer and a broker-dealer as well as the arbitration of intra-industry disputes.[6] Investors are generally barred from pursuing relief in state

Key Points

- FINRA is a regulator of central importance to the functioning of U.S. capital markets. It is neither a true self-regulatory organization nor a government agency.
- FINRA does not provide the due process, transparency, and regulatory-review protections normally associated with regulators, and its arbitration process is flawed. Reforms are necessary.
- FINRA arbitrators should be required to make findings of fact based on the evidentiary record, and to demonstrate how those facts led to the award given. These written FINRA arbitration decisions should be subject to SEC review and limited judicial review.
- FINRA rules have played a key role in the decline in the number of small broker-dealers. This has an adverse impact on entrepreneurial capital formation.
- Congress and the SEC need to provide greater oversight of FINRA.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3181**

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or federal courts.[7] As discussed below, if conducted fairly, arbitration can be a cost-effective means of resolving disputes.

FINRA maintains an Office of the Ombudsman to resolve investor, broker-dealer and other complaints about FINRA operations.[8] This office handles more than 500 inquiries annually.[9]

FINRA is a Delaware not-for-profit corporation that is tax exempt under section 501(c)(6) of the Internal Revenue Code.[10] The Securities and Exchange Commission (SEC) is responsible for the oversight of FINRA.[11] In 2015, FINRA had 3,500 employees.[12] In fiscal year (FY) 2015, the SEC had 4,300 employees.[13] FINRA has an annual budget of $1 billion,[14] and has $2 billion in cash and investments on hand.[15] The SEC has an annual budget of $1.6 billion.[16] FINRA contracts to perform regulatory functions for a wide variety of exchanges. The fees it receives from these contracts account for $126 million of its annual revenues.[17]

FINRA was formed when the regulatory functions of the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) were merged and given to FINRA[18] as part of a series of transactions in which both the NYSE and NASDAQ[19] became public, investor-owned enterprises.[20] These changes were approved by the SEC on July 26, 2007.[21]

FINRA is commonly called a self-regulatory organization (SRO) by both commentators and the SEC.[22] By "SRO," commentators typically mean an organization whereby the industry regulates itself. Although FINRA's predecessor organizations (the NASD and the NYSE's regulatory arm) were once true SROs,[23] FINRA is not.[24] FINRA is governed by a 23-member board.[25] Under the eighth article of its articles of incorporation, the number of its "public governors" (those not chosen by industry) "shall exceed the number of Industry Governors."[26] Industry governors are those elected by the industry. Currently, there are 10 board members who are industry governors. There are 12 public governors. In addition, FINRA's CEO, Robert Cook, also serves on its board. Thus, the industry controls only 10 of 23 governors, 43 percent of the board.[27] Because the industry does not control FINRA, it is inappropriate to regard FINRA as an SRO.

The Potential Virtues of Self-Regulation. Private individuals have the right to conduct their business, within the law, as they see fit. Firms should be free to hold themselves to higher standards than the law requires, or to establish standards, procedures, and practices by mutual agreement that improve the functioning of a market. True self-regulation by industry is one way to do that, and has potential merit.[28] Self-regulation may be thought of as spontaneous private legal ordering.[29]

Law professors William Birdthistle and Todd Henderson argue that "[i]ndustry professionals have strong incentives to police their own, since many of the costs of misbehavior are born by all members of the profession, while the benefits inure only to the misbehaving few. So long as the few do not control the regulatory process, self-regulation could in theory work as well or better than external regulation."[30] Industry representatives often have greater expertise than government regulators and are closer to the market. They may be able to more rapidly respond to changing circumstances and their regulatory response may be more proportional or scaled.[31] When the "self-regulator" becomes intertwined with government, however, self-regulation presents potential conflicts of interest and is often a guise for erecting barriers to entry in a market to protect incumbent firms and to extract economic rents at the expense of customers or clients.[32]

Why Reform Is Necessary

FINRA is an unusual entity. FINRA is a key regulator with a budget nearly two-thirds the size of the SEC's budget and a staff numbering more than 80 percent that of the SEC, but it is not a government agency. While critical to the functioning of the finance industry, and having industry representation on its board, it is not controlled by the industry. While it serves a governmental function and has coercive power, including the ability to completely bar firms and individuals from the marketplace,[33] it is not subject to any of the normal transparency, regulatory review, or due-process protections normally associated with government. It is not, for example, subject to the notice-and-comment provisions of the Administrative Procedure Act,[34] the Freedom of Information Act,[35] the Regulatory Flexibility Act,[36] the Sunshine Act,[37] the Paperwork Reduction Act,[38] or cost-benefit-analysis requirements.[39] In contrast to a court, FINRA's arbitration and disciplinary hearings are not generally open to the public.[40] Its arbitrators are not usually required to provide reasons for their decisions.[41] Its rule-making is general-

ly done in private,[42] and its Board of Governors meetings are closed.

Unless FINRA is ultimately held to be a state actor, constitutional due-process protections, either for broker-dealers or for investors, do not apply.[43] In *Jackson v. Metropolitan Edison Co.*, the Supreme Court held that in determining whether the actions of a private party constitute state action, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[44] In *Blum v. Yaretsky*, the Supreme Court held that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. [T]he required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'"[45]

In an unpublished[46] 2015 opinion, the Second Circuit held that FINRA is not a state actor.[47] In a similarly unpublished 2011 opinion, the Eleventh Circuit raised, and then side-stepped, the issue by finding that even if FINRA were a state actor, FINRA had provided due process in the case being considered.[48] Courts determining whether FINRA's predecessor organizations, the NASD and the NYSE, were a state actor were divided (although a majority found in most contexts relating to due process that they were not).[49] These cases, however, are of uncertain relevance given the differences between FINRA and NASD or NYSE governance structures, the monopoly status that FINRA enjoys, changes in the statutory and regulatory structure over time, and evolution in the judicial state action doctrine and the Supreme Court's separation of powers jurisprudence.

The IRS, however, has found that "FINRA is a corporation serving as an agency or instrumentality of the government of the United States" for purposes of determining whether FINRA fines are deductible as a business expense.[50] A "penalty paid to a government for the violation of any law" is not deductible under Internal Revenue Code section 162(f).

Furthermore, courts have routinely held that FINRA and its predecessor organizations *are* government actors for purposes of immunity from private lawsuits against them.[51] For example, in *Standard Investment Chartered Inc. v. National Association of Securities Dealers*,[52] the Second Circuit held that:

> There is no question that an SRO and its officers are entitled to absolute immunity from private damages suits in connection with the discharge of their regulatory responsibilities. This immunity extends both to affirmative acts as well as to an SRO's omissions or failure to act.... It is patent that the consolidation that transferred NASD's and NYSE's regulatory powers to the resulting FINRA is, on its face, an exercise of the SRO's delegated regulatory functions and thus entitled to absolute immunity.... The statutory and regulatory framework highlights to us the extent to which an SRO's bylaws are *intimately intertwined with the regulatory powers delegated to SROs by the SEC* and underscore our conviction that immunity attaches to the proxy solicitation here.[53] (Emphasis added.)

Thus, when dealing with FINRA, the many protections afforded to the public when dealing with government are unavailable, and the recourse that one would normally have when dealing with a private party—both access to the courts and the ability to decline to do business—is also unavailable. Like Schrödinger's cat, simultaneously dead and alive, FINRA is, under current rulings, both a state actor (for purposes of barring liability and for tax purposes) and, generally, not a state actor (for purposes of absolving it of due process and other requirements and for liability purposes).

Professors Birdthistle and Henderson have written that:

> SROs have been losing their independence, growing distant from their industry members, and accruing rulemaking, enforcement, and adjudicative powers that more closely resemble governmental agencies such as the Securities and Exchange Commission and the Commodity Futures Trading Commission.... This process by which these self-regulatory organizations shed their independence for an increasingly governmental role is highly undesirable from an array of normative viewpoints. For those who are skeptical of governmental regulation, deputizing private bodies to increase governmental involvement is clearly problematic.[54]

Former SEC Commissioner Daniel M. Gallagher has raised similar concerns:

> This decrease in the "self" aspect of FINRA's self-regulatory function has been accompanied by an exponential increase in its regulatory output. As FINRA acts more and more like a "deputy" SEC, concerns about its accountability grow more pronounced.[55]

Law professor Emily Hammond refers to FINRA's current status as "double deference" and argues that "the combination of oversight agencies' deference to SROs and judicial deference to oversight agencies undermines both the constitutional and regulatory legitimacy of SROs" and that reforms would "better promote accountability and guard against arbitrariness not only for SROs but also for the modern regulatory state."[56]

The U.S. Chamber of Commerce, referring to FINRA and the proxy adviser firm Institutional Shareholder Services, wrote:

> Despite their tremendous influence over the workings of the capital markets, these organizations are generally subject to few or none of the traditional checks and balances that constrain government agencies. This means they are devoid of or substantially lack critical elements of governance and operational transparency, substantive and procedural standards for decision making, and meaningful due process mechanisms that allow market participants to object to their determinations.[57]

It is also unclear how well FINRA is discharging its core mission of preventing fraud, misappropriation of funds, and other misconduct by those it regulates.[58] A recent empirical analysis found:

> Roughly 7% of advisers have misconduct records. At some of the largest financial advisory firms in the United States, more than 15% of advisers have misconduct records. Prior offenders are five times as likely to engage in new misconduct as the average financial adviser. Firms discipline misconduct: approximately half of financial advisers lose their job after misconduct.... [O]f these advisers, 44% are reemployed in the financial services industry within a year.[59]

Some of the largest firms have committed multibillion dollar frauds with few consequences for the individuals who committed this fraud.[60] There is bipartisan, bi-ideological concern about FINRA enforcement.[61] It is, of course, possible that the high level of advisers with misconduct records is due to aggressive FINRA enforcement, and that the high level (44 percent) of re-employment in the financial industry of advisers with misconduct records is because the misconduct involved was minor. Given the information currently available to the public and policymakers, it is simply impossible to know.

FINRA's Office of the Chief Economist[62] has conducted research on FINRA enforcement. In August 2015, it released a working paper that found that the "20% of brokers with the highest ex-ante predicted probability of investor harm are associated with more than 55% of investor harm events and the total dollar harm in our sample."[63] Thus, the one-fifth of brokers that FINRA's algorithm predicts have the highest likelihood of misconduct do, in fact, account for over half of the misconduct. Presumably, FINRA's Enforcement Department is taking this predictive algorithm into account when assessing its enforcement priorities. The study also found that "[w]ith respect to the impact of releasing additional non-public CRD information on BrokerCheck, we find that HAC [harm associated with co-workers] leads to an economically meaningful increase in the overall power to predict investor harm."[64] HAC is FINRA jargon that means if a firm employs or has employed brokers that engage in misconduct, other brokers at that firm are more likely to engage in misconduct, presumably because of the culture at the firm or poor internal controls. Releasing additional CRD information, then, may allow the public to better assess whether their broker, or a broker whom they are considering, is likely to harm them by engaging in misconduct. Among other things, unreleased information includes complaints, test scores, felonies, and bankruptcies, and some of the information is quite old. Release of unadjudicated complaint information where there has been no finding of fault by the broker-dealer is probably not warranted. FINRA should evaluate whether additional information should be released.

The bottom line is this. FINRA has a monopoly. It is the only SRO for broker-dealers. Broker-dealers must be a member of FINRA in order to do business. Quitting FINRA is not an option given

the legal requirement to be a member of an SRO. FINRA is virtually immune to legal challenges to its regulatory decisions. Thus, the normal recourse when dealing with a private party is not available. FINRA also has a virtual monopoly on arbitration of disputes between FINRA members and between a FINRA member and investors. Both investors and broker-dealers are generally barred from accessing the courts. FINRA has coercive authority over its members and investors. The federal government has effectively delegated regulatory and dispute-resolution authority to a private organization. When they are dealing with FINRA, neither broker-dealers nor investors enjoy the many protections that the law affords in dealing with government regulators in any court[65] or in the regulation formulation process. Furthermore, it is far from clear that FINRA is doing an adequate job of policing fraud, misappropriation, and other serious misconduct. FINRA is not adequately accountable to Congress, to the public, or to those it regulates. Reforms, discussed below, are necessary.

FINRA's Constitutionality

It is an open question whether FINRA, as currently constituted, is constitutional.[66] It is arguably unconstitutional for at least two reasons: (1) the separation of powers, and (2) the Fifth Amendment due-process clause and the associated private non-delegation doctrine. No matter how the courts ultimately rule on the constitutionality of FINRA's current structure, the due-process, transparency, accountability, and governance questions raised are policy questions that Congress should address.

The Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[67] held the dual "for cause" provisions[68] in the section of Sarbanes–Oxley creating the Public Company Accounting Oversight Board (PCAOB)[69] to be unconstitutional on separation-of-powers grounds.

In *Free Enterprise*, the Supreme Court asked: "May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?"[70]

The Supreme Court's answer:

> We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly.[71]

Because FINRA is tasked with enforcing the securities laws,[72] and its board and officers are not removable by the President, and SEC Commissioners are only removable for cause, it is quite possible that a court would conclude that FINRA, as currently structured, violates the separation-of-powers clause. The Supreme Court, however, did distinguish the PCAOB from "private self-regulatory organizations in the securities industry—such as the New York Stock Exchange."[73] So the central question becomes whether FINRA is exercising "executive power" within the meaning of the Constitution, or whether it is a truly private self-regulatory organization.[74]

Discussing the Supreme Court's private non-delegation doctrine in another context, Heritage Foundation Legal Research Fellow Paul Larkin wrote:

> The Fifth Amendment Due Process Clause ensures that the actors in each department cannot evade the Framers' carefully constructed regulatory scheme by delegating their federal lawmaking power to unaccountable private parties, individuals beyond the direct legal and political control of superior federal officials and the electorate. That is, the due process requirement that federal government officials act pursuant to "the law of the land" when the life, liberty, or property interests of the public are at stake prohibits the officeholders in any of those branches from delegating lawmaking authority to private parties who are neither legally nor politically accountable to the public or to the individuals whose conduct they may regulate.[75]

In *Todd & Co. v. SEC*[76] and *R. H. Johnson & Co. v. Securities & Exchange Commission*,[77] two circuits ruled the Maloney Act[78] delegation to the NASD (FINRA's predecessor organization) to be constitutionally compliant. The *Todd* court, however, explicitly disclaimed making a ruling on the

1975 amendments to the Securities Act,[79] let alone changes since FINRA was created.[80] As discussed above, the NASD and the NYSE were controlled by members of the organizations, while FINRA is not. Moreover, at the time of those decisions, the NYSE and NASDAQ were mutualized. Furthermore, the decisions predate the SEC's role in approving all SRO rules. Finally, the courts' state action and separation-of-powers jurisprudence has evolved considerably since the *Todd* and *R.H. Johnson* courts considered the issue.

Three Paths to Reform

There are three basic approaches to reforming FINRA. First, it could be changed back into a truly private SRO, controlled by the industry, with the SEC resuming its traditional regulatory role. This would, in effect, be a return to the regulatory environment before the NYSE and NASD handed off their regulatory function to FINRA.[81] Second, FINRA could be incorporated into the SEC. FINRA's status as a "national securities organization" would be terminated, its employees would have the option of becoming government employees,[82] and FINRA's regulatory functions would be discharged by the SEC, presumably by its Division of Trading and Markets. Those educational functions not conducted by its foundation and perhaps its market surveillance[83] and intra-industry dispute resolution functions could be retained. As discussed below, ideally, its arbitration function would be spun off. This approach would provide the transparency, due-process protections, and congressional oversight typically associated with government. Significant changes to the Securities Exchange Act provisions governing national securities organizations would be required. Third, the existing framework could be substantially reformed. This latter, incremental, approach is likely to have the best chance of success in the current policy environment.

In August 2016, Robert Cook became president and CEO of FINRA, and chairman of the FINRA Investor Education Foundation.[84] Jack Brennan was named FINRA's chairman.[85] Previously, Richard Ketchum had been both chairman and CEO. In addition, Bob Muh, the CEO of Sutter Securities, Inc., was elected in September as a small-firm governor on a platform of reducing the regulatory burden on small broker-dealers.[86] With new leadership may come a new openness to reform.

Incremental Reforms. Incremental—although major—reforms that would address the most substantial problems with FINRA's current structure are outlined below. In principle, many of these reforms could be implemented by FINRA itself, with SEC approval. Alternatively, Congress could amend § 15A and § 19 of the Securities Exchange Act, such that a national securities association (that is, an SRO) must meet the outlined requirements as a condition of registration. Current law already imposes more than 20 requirements.[87]

Transparency. Given FINRA's importance to U.S. financial markets, and the effective delegation to it of key regulatory functions by the SEC and Congress, openness and transparency in its regulatory and adjudicatory functions is entirely appropriate. FINRA should comply with a set of rules substantially similar to the requirements imposed on government agencies under the Freedom of Information Act.[88]

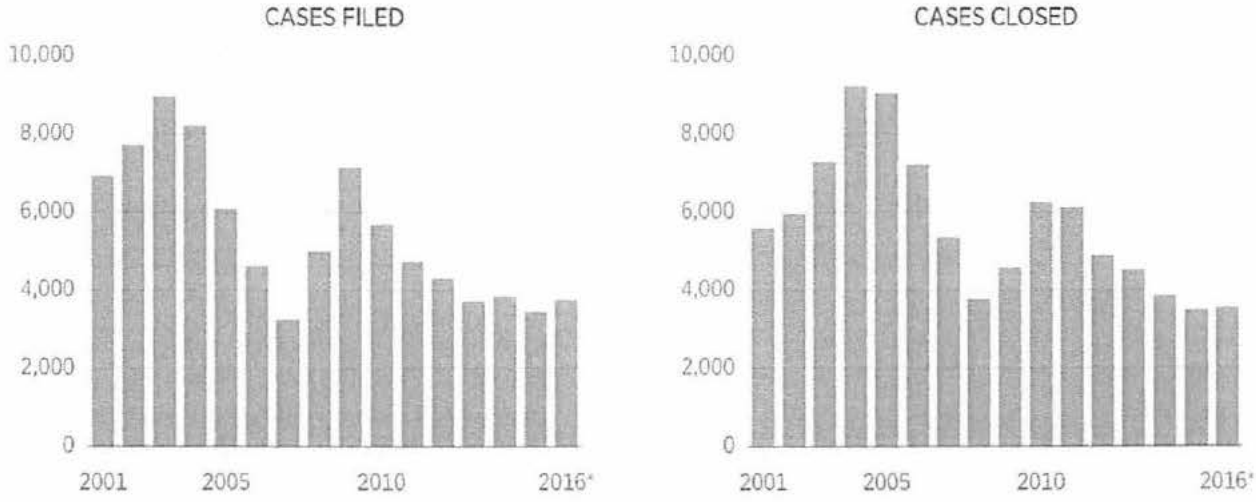
FINRA's Board of Governors meetings should be open to the public, unless the board votes to meet in executive session. The criteria for whether they can close the meeting should be established in advance and carefully circumscribed. FINRA currently does not make available in advance rule-makings that the FINRA board is expected to consider.[89] The complete board agenda should be made available to the public in advance, and board minutes describing actions taken should be published with alacrity. Such requirements are analogous to, but less stringent than, the requirements imposed on government agencies by the Sunshine Act.[90]

Given that under current law FINRA proceedings supplant a civil trial and there is no means of accessing the courts, FINRA arbitration hearings should be open to the public and reported. This is analogous to the public-trial requirement in the Sixth Amendment and the long-standing presumption that *all* court proceedings in the United States are open to the public.[91] Just as trials in criminal and civil courts and hearings in administrative courts are open to the public, so should disciplinary hearings.

In 1884, Oliver Wendell Holmes, then a justice on the Massachusetts Supreme Court, held in *Cowley v. Pulsifer*[92] that members of the public enjoy a right of access to civil trials. This right, he said, is rooted in democratic principles:

CHART 1

FINRA Arbitration Cases



* Projected.
SOURCE: Financial Industry Regulatory Authority, "Dispute Resolution Statistics," http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics (accessed December 22, 2016).

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> It is desirable that the trial of [civil] causes should take place under the public eye...not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Although proceedings are not public, adverse results in many disciplinary matters are made public via a database called Broker-Check.[93] Broker-Check, however, reports only some of the information available on FINRA's Central Registration Depository. FINRA's Office of the Chief Economist has found that the unreported information is relevant to predicting broker misconduct.[94] Other than unauthenticated complaint data,[95] FINRA should consider whether this information should be made public. As discussed below, FINRA's rule-making process should also be made more transparent.

Arbitration and Dispute Resolution. FINRA handles about 4,000 arbitration cases annually. About 70 percent of these involve customer complaints, and the remainder consist of intra-industry cases.[96]

Arbitration can be a lower cost, fair way of resolving disputes.[97] However, for the reasons discussed below in detail, FINRA's arbitration system is flawed and should be improved.

Alternatively, Congress should consider a different approach. It could create a specialized court, analogous to the Tax Court, to hear intra-industry and customer-securities cases. This could be a specialized Article III court with limited jurisdiction, or a non-Article III court, such as the U.S. Tax Court[98] or the U.S. Court of Federal Claims.[99] It should have a small claims division like the Tax Court and many state courts so that small claims can be handled in a less-formal and less-expensive manner. The small-claims division should be open to *pro se* litigants, and judges should take a more active role in fact finding. Such an approach would have two primary advantages. First, there would be no doubt about its impartiality as there is in the case of FINRA. These doubts arise because, although not controlled by industry, FINRA certainly has strong industry influence. Second, its judges would develop expertise in securities-law cases. Often, neither an Article III court of general jurisdiction nor current FINRA arbitrators have expertise in securities cases.

Due Process. Due process may be summarized as providing to a person who may suffer loss of life, liberty, or property "notice, an opportunity to be heard, and a determination by a neutral decision-maker"[100] in an open forum. In the words of the Supreme Court:

> Secrecy is not congenial to truthseeking.... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[101]

Due-process protections would, at a minimum, include (1) adequate notice of the charges or complaint; (2) the right to be present at a hearing or trial; (3) a public forum; (4) the right to be heard and to present evidence; (5) the right to retain counsel; (6) trial by jury or, at least, an impartial, neutral decision maker; (7) an adequate ability to compel the opposing party to disclose facts and documents that are material to the dispute (adequate discovery); (8) an adequate ability to call witnesses and to cross-examine witnesses called by the opposing party; (9) a requirement that findings of fact are made and legal reasons are given for a decision; and (10) an adequate review by an impartial party of the triers' decision to ensure that it is not arbitrary or capricious and has a rational basis in law and in fact (adequate appeal rights). Each of these is addressed in turn below.

1. Notice. FINRA appears to provide adequate notice both in disciplinary hearings and in its arbitrations.[102]

2. The Right to be Present. FINRA allows the parties to be present during proceedings.[103]

3. Public Forum. FINRA does not generally provide a public forum. Its proceedings are generally closed to the public.[104] As discussed above under "Transparency," these proceedings should generally be open to the public.[105]

4. The Right to Be Heard and Present Evidence. FINRA provides the opportunity for parties to be heard and to present evidence. As discussed below, however, parties' rights to present and obtain evidence are circumscribed, and the federal rules of evidence do not apply.[106]

5. The Right to Retain Counsel. The right to retain and be represented by counsel is preserved in FINRA proceedings.[107]

6. Impartial Decision Maker. FINRA does not provide the right to a trial by jury as is guaranteed in federal court by the Seventh Amendment[108] and in state courts by most state constitutions.[109] FINRA arbitration chairpersons are not judges. Although there are some requirements for arbitration chairpersons, there is no requirement that arbitrators have any special expertise in finance or the law. In fact, FINRA actively recruits from outside those fields.[110] FINRA arbitrators must be approved by FINRA and complete 13.5 hours of FINRA training.[111] FINRA maintains a list of 6,000 approved arbitrators[112] and generates a random list of arbitrators (typically 10 public arbitrators, 10 non-public arbitrators, and 10 chairpersons) from which the parties can choose.[113] FINRA changed its rules in 2011,[114] however, so that in arbitrations involving a dispute between customers and a firm, the customer may elect to have the arbitration panel composed of entirely public arbitrators rather than industry representatives.[115]

7. Adequate Discovery. FINRA discovery rules differ depending on the type of proceeding.[116] Discovery is more limited than it would be in a federal court.[117] In particular, the ability to depose witnesses is severely circumscribed.[118] This may make it more difficult for a party to pursue a claim. FINRA discovery is, however, more extensive than discovery made under American Arbitration Association rules.[119] Excess discovery costs are one of the primary reasons why conventional litigation is so expensive, and controlling dispute resolution costs is one of the primary advantages of arbitration.[120] Controlling costs is one of the core rationales underlying the Federal Arbitration Act,[121] which generally requires courts to enforce arbitration awards and bars access to courts when the parties have entered into a pre-dispute arbitration agreement[122] (as would be the case in virtually every customer-broker agreement). Whether FINRA discovery rules should be modified should be studied further.

8. Calling Witnesses and Witness Cross-Examination. Witnesses may generally be called, and opposing witnesses cross-examined. The limits on conducting witness deposition discussed above make it much more difficult to adequately rebut surprise testimony or to impeach a witness.

9. Findings of Fact and Law. In general, FINRA arbitrators need not explain their reasoning or make

findings of fact or law. If, however, all parties agree in advance,[123] they may request and pay $400 for an "explained decision."[124] But even an explained decision need not include "legal authorities and damage calculations."[125] Thus, neither the parties nor anyone reviewing the arbitrators' decision can meaningfully assess how much, or how little, thought or analysis about the facts or the law went into deciding the case or the amount, if any, of the award. Neither the parties nor anyone else can meaningfully assess whether the arbitrators' reasoning was flawed or sound. In contrast to very high compensation for FINRA employees,[126] arbitrators are paid between $300 (for a session up to four hours) and $600 (for a session lasting up to a day).[127] This amounts to $75 per hour—and substantially less than that, once the time traveling to and from the hearing and preparation time is considered. In contrast, the reimbursement rate for attorneys under the Equal Access to Justice Act is about $190 per hour.[128] Arbitrators are not paid for time spent on preparation, analysis, or discussion outside the actual arbitration session. Thus, they have every incentive to make a quick decision rather than a well-reasoned decision.

Administrative-law courts are required to make "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record."[129] FINRA arbitrators should be required to do the same for those cases where more than $100,000[130] is at stake or severe disciplinary sanctions are possible. This may be difficult for many existing FINRA arbitrators who do not have training in finance or in the law. If raising FINRA arbitrator honoraria is necessary in order to attract those with the requisite skills, FINRA should do so.

10. Adequate Review of Arbitration Decisions. Either party can appeal the result of a disciplinary hearing to the National Adjudicatory Council (NAC).[131] The NAC is a FINRA committee[132] with 14 members.[133] Any governor may request that FINRA's Board of Governors review the decision of the NAC.[134] A respondent may ask the SEC to review a final FINRA decision.[135] The SEC's decision, in turn, is subject to limited judicial review.[136]

There is no comparable review in customer or intra-industry arbitrations. The arbitrators' decisions are final.[137] The combination of arbitrators not needing to provide reasons for their decision and the near-total lack of review for customer or intra-industry arbitrations is fundamentally unfair and affords no recourse to either customers or firms that are the victims of poorly reasoned, unjust, or arbitrary decisions. Some of these disputes, of course, involve modest amounts of money. But others involve substantial sums and can, in the case of customers, involve their life savings. Similarly, a firm that is forced to unjustly pay an award has no recourse.

FINRA arbitrators should be required to make findings of fact based on the evidentiary record and to demonstrate how those facts led to the award given. These written FINRA arbitration decisions should be subject to SEC review and limited judicial review. Policymakers should carefully evaluate whether the current practice in disciplinary proceedings is sufficient to provide adequate review. Specifically, those reviewing the outcome in a disciplinary decision should be able to assess whether the findings of fact actually have an adequate basis, and to assess a written finding of how, in light of those facts, a specific FINRA rule or provision in the securities law was violated.

Improved Oversight. The Government Accountability Office (GAO) has found the SEC's oversight of FINRA to be insufficient.[138] In response, in October 2016, the SEC started a new office called the FINRA and Securities Industry Oversight (FISIO) group, designed to enhance its oversight of FINRA.[139] The new FISIO should issue annual reports describing its oversight of FINRA and addressing the issues raised in this *Backgrounder.*

Congressional oversight of FINRA has been light. To improve oversight, Congress should:

- Require that FINRA submit an annual report to Congress with detailed, specified information about its budget and fees; its enforcement activities (including sanctions and fines imposed by type of violation and type of firm or individual); its dispute resolution activities; and its rule-making activities;
- Conduct annual oversight hearings on FINRA, its budget, its enforcement activities, its dispute resolution activities, and its rule-making activities;
- Require an annual GAO review of FINRA with respect to its budget, its enforcement activities, its dispute resolution activities, and its rule-making activities and a separate review of the SEC's oversight of FINRA; and

CHART 2

FINRA Regulated Firms and Registered Representatives

SOURCES: Financial Industry Regulatory Authority, "Annual Reports and Financials, 2007–2010," http://www.finra.org/about/annual-reports-financials (accessed December 22, 2016), and Financial Industry Regulatory Authority, "Statistics," http://www.finra.org/newsroom/statistics (accessed December 22, 2016). Note: FINRA data for 2008–2010 are approxmiate.

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- Consider making FINRA, the Municipal Securities Rulemaking Board (MSRB),[140] and the National Futures Association (NFA)[141] each a "designated federal entity"[142] and establishing an inspector general with respect to financial SROs, including FINRA, the MSRB, and the NFA or, alternatively, placing FINRA, the MSRB, and the NFA within the ambit of an existing inspector general.[143]

Small Broker-Dealer Relief. As Chart 2 shows, the number of broker-dealers has declined by nearly 13 percent over the past five years (2011–2016), and 23 percent in the nine years since FINRA was created in 2007.[144]

Since 2009, the number of registered representatives who work for broker-dealers has remained fairly constant, but the number of firms has continued to decline. This reflects the concentration in the market and the decline in the number of small broker-dealers. The registered representatives that once worked for these smaller firms have found employment with the remaining firms.

A similar phenomenon is occurring in the banking sector.[145] The number of small banks has declined by 28 percent since 2000, and small banks' share of total domestic deposits has declined from 40 percent to less than 22 percent.[146] There are many reasons for the decline in small broker-dealers and small banks, but one obvious factor common to both banks and broker-dealers is the ever-increasing rise in the regulatory burden on small broker-dealers and small banks. FINRA rules are a major component of that regulatory burden for broker-dealers. Regulatory compliance costs do not increase linearly with size, and place a disproportionate burden on small firms, making them less competitive in the marketplace.[147] Small broker-dealers are more willing to underwrite the offerings of small and start-up businesses. The decline in the number of small broker-dealers impedes the ability of entrepreneurs to raise capital.

FINRA needs to undertake a systematic review of it rules and regulatory practices comparable to the small-entity impact review required of federal agencies under the Regulatory Flexibility Act.[148] This

review should include the impact of stress tests, the nature of FINRA audits, FINRA rules relating to the interaction between research and corporate finance, FINRA rules and practices relating to sanctions for inadequate policies and procedures or failure to supervise, the operation of "remedial" sanctions imposed without a hearing,[149] and other matters. FINRA needs to be open to experimentation and financial-technological innovation that most commonly occurs in small firms.

Budget and Finance. FINRA fees are not voluntary. As a matter of economics, though not law, they are effectively a tax. And, at $789 million in 2015, they are substantial.[150] The businesses that pay these fees must recover the costs.[151] Before raising these fees, FINRA should be required to obtain an affirmative vote by Congress or, at least, by the SEC.

The fines leveled by FINRA in 2015 ($94 million) were 263 percent higher than the $25.9 million in fines levied in 2008, its first full year of operation.[152] Average fines per member were $5,286 in 2008, and $23,755 in 2015, a 349 percent increase.[153] It is difficult to judge the appropriateness of FINRA fines without additional information, but FINRA should not have a budgetary incentive to impose fines. Currently, it is FINRA policy that FINRA fines are used to fund "capital expenditures and specified regulatory projects."[154] Revenues from fines imposed ($97 million in FY 2015)[155] should go to either a newly established investor reimbursement fund[156] or to the Treasury, not to FINRA's budget.

Congress should consider making FINRA "on budget" for purposes of the federal budget, along with various other government-sponsored enterprises, quasi-governmental entities, agency-related nonprofit organizations, and the like that currently escape congressional oversight during the budget process.[157] The Securities Protection Investors Corporation and the PCAOB are District of Columbia not-for-profit organizations but are on budget.[158] The MSRB and NFA are not.[159]

Regulatory Process. FINRA's rule-making process should also be made more transparent. Currently, it solicits comments from the public for many of its rules.[160] But this solicitation is not required. Its committee process is opaque and its Board of Governors' meetings, where final rules decisions are made, are closed. The proposed rules are subject to public scrutiny once they are submitted to the SEC for approval.[161] But, by this juncture, it is unusual for changes to be made, and the SEC rarely disapproves a rule proposed by FINRA.[162] In its rule-making process, FINRA should comply with a set of rules substantially similar to the requirements imposed on government agencies relating to the notice-and-comment provisions of the Administrative Procedure Act.[163]

Although FINRA made improvements in the economic analysis of its rules by creating its Office of the Chief Economist in 2013, its efforts are still relatively rudimentary compared to those of the SEC and most other government agencies.[164] FINRA should also examine whether its rules have a disproportionate impact on small, more entrepreneurial broker-dealers.[165]

Conclusion

FINRA is a key regulator of central importance to the functioning of U.S. capital markets. It is neither a true self-regulatory organization nor a government agency. It is largely unaccountable to the industry or to the public. Due process, transparency, and regulatory-review protections normally associated with regulators are not present, and its arbitration process is flawed. Reforms are necessary. FINRA itself, the SEC, and Congress should reform FINRA to improve it rule-making and arbitration process. Congress should amend § 15A and § 19 of the Securities Exchange Act such that a national securities association (FINRA) must meet the reforms outlined in this *Backgrounder* as a condition of registration.

*—**David R. Burton** is Senior Fellow in Economic Policy in the Thomas A. Roe Institute for Economic Policy Studies, of the Institute for Economic Freedom, at The Heritage Foundation.*

Endnotes

1. Financial Industry Regulatory Authority, "What We Do," http://www.finra.org/about/what-we-do (accessed December 9, 2016).
2. Financial Industry Regulatory Authority, "Statistics," September 2016 data, http://www.finra.org/newsroom/statistics (accessed December 9, 2016).
3. Securities Exchange Act sections 15(b)(8) ("It shall be unlawful for any registered broker or dealer to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), unless such broker or dealer is a member of a securities association registered pursuant to section 78o-3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member.") and 15(b)(11(A)(i). ("A broker or dealer may not register under this paragraph unless that broker or dealer is a member of a national securities association registered under section 15A(k).")
4. FINRA is registered pursuant to Securities Exchange Act section 15A [15 U.S. Code § 78o-3].
5. Financial Industry Regulatory Authority, *FINRA 2015 Year in Review and Annual Financial Report*, p. 3, http://www.finra.org/sites/default/files/2015_YIR_AFR.pdf (accessed December 9, 2016).
6. Financial Industry Regulatory Authority, "Arbitration and Mediation," https://www.finra.org/arbitration-and-mediation (accessed December 9, 2016), and Financial Industry Regulatory Authority, *Final Report and Recommendations of the FINRA Dispute Resolution Task Force*, December 16, 2015, http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf (accessed December 9, 2016). For a discussion of the history of securities-dispute arbitration in the U.S., see Jill Gross, "The Historical Basis of Securities Arbitration as an Investor Protection Mechanism," *Journal of Dispute Resolution*, Vol. 171 (2016), pp. 171-186, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728978 (accessed December 9, 2016). For statistics on FINRA arbitrations, see Financial Industry Regulatory Authority, "Dispute Resolution Statistics," http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics (accessed December 9, 2016).
7. This is because virtually all brokers require customers to sign a mandatory arbitration agreement, and FINRA's decisions are final in most cases. The Supreme Court has upheld the mandatory arbitration clauses in customer agreements. See *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L.Ed. 2d 742 (2011). Under FINRA Rule 12904(b) (approved by the SEC), "[u]nless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal." Code in this context means the FINRA Code of Arbitration Procedure for Customer Disputes, FINRA Rules 12000 et seq., http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4096&record_id=5174&filtered_tag (accessed December 9, 2016). See also the arbitration discussion below, in the section titled "Arbitration and Dispute Resolution."
8. FINRA, "Office of the Ombudsman," http://www.finra.org/about/office-ombudsman (accessed January 4, 2017).
9. FINRA, *Office of the Ombudsman 2014 Report*, p. 3 http://www.finra.org/sites/default/files/Office_Ombudsman_Report_072815.pdf (accessed January 4, 2017).
10. Foundation Center, IRS Form 990, http://990s.foundationcenter.org/990_pdf_archive/521/521959501/521959501_201312_990O.pdf (accessed December 9, 2016); Delaware Department of State: Division of Corporations, Entity Search, https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx (accessed December 9, 2016); and FINRA Articles of Incorporation, http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4589 (accessed December 9, 2016).
11. Securities Exchange Act section 19 [15 U.S. Code § 78s]; 17 C.F.R. §§ 240.19b-4-240.19h-1; Securities and Exchange Commission, "Self-Regulatory Organization Rulemaking," https://www.sec.gov/rules/sro.shtml (accessed December 9, 2016); Government Accountability Office, "SEC Can Further Enhance Its Oversight Program of FINRA," April 2015, GAO-15-376, http://gao.gov/assets/670/669969.pdf (accessed December 9, 2016). In October 2016, the SEC started a new office called the FINRA and Securities Industry Oversight (FISIO) group designed to enhance its oversight of FINRA. The SEC will also be reducing the number of examiners dedicated to broker-dealer examinations. See Marc Wyatt, "Inside the National Exam Program in 2016," Securities and Exchange Commission, keynote address at National Society of Compliance Professionals conference, Washington, DC, October 17, 2016, https://www.sec.gov/news/speech/inside-the-national-exam-program-in-2016.html (accessed December 9, 2016); Elizabeth Dilts, "SEC Says to Monitor Partner Regulator's Brokerage Oversight," Reuters, October 17, 2016, http://www.cnbc.com/2016/10/17/reuters-america-sec-says-to-monitor-partner-regulators-brokerage-oversight.html (accessed December 9, 2016); and "SEC Launches Dedicated FINRA Oversight Unit: Watching the Detectives," *National Law Review*, October 27, 2016, http://www.natlawreview.com/article/sec-launches-dedicated-finra-oversight-unit-watching-detectives (accessed December 9, 2016).
12. Financial Industry Regulatory Authority, *2015 Year in Review and Annual Financial Report*, p. 13, http://www.finra.org/sites/default/files/2015_YIR_AFR.pdf (accessed December 9, 2016).
13. On a full-time-equivalent (FTE) basis. FY 2017 SEC Congressional Budget Justification, p. 14.
14. *FINRA 2015 Year in Review and Annual Financial Report*, p. 14.
15. Ibid., p. 15.
16. Securities and Exchange Commission, *FY 2017 Congressional Budget Justification, FY 2017 Annual Performance Plan, FY 2015 Annual Performance Report*, p. 15, https://www.sec.gov/about/reports/secfy17congbudgjust.pdf (accessed December 9, 2016).

17. FINRA performs market regulation under contract for the New York Stock Exchange LLC (NYSE); NYSE Arca, Inc. (NYSE Arca); NYSE MKT LLC (NYSE MKT); The Nasdaq Stock Market LLC (NASDAQ); Nasdaq BX, Inc. (Boston); Nasdaq PHLX LLC (Philadelphia); BATS Global Markets, Inc. (the BZX, BYZ, EDGA and EDGX exchanges, collectively referred to as BATS); the International Securities Exchange, LLC (ISE, ISE Gemini, and ISE Mercury); the Chicago Board Options Exchange and the C2 Options Exchange (CBOE and C2); and other exchanges. See *FINRA 2015 Year in Review and Annual Financial Report*, pp. 12 and 19.
18. News release, "NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority-FINRA," Financial Industry Regulatory Authority, July 30, 2007, http://www.finra.org/newsroom/2007/nasd-and-nyse-member-regulation-combine-form-financial-industry-regulatory-authority (accessed December 9, 2016); and Securities and Exchange Historical Society, "Creation of FINRA," http://www.sechistorical.org/museum/galleries/sro/sro06g.php (accessed December 9, 2016).
19. NASDAQ was originally the acronym for National Association of Securities Dealers Automated Quotations.
20. The NYSE is owned by Intercontinental Exchange Inc. traded on the NYSE under the symbol ICE. Nasdaq, Inc. is traded on NASDAQ under the symbol NDAQ. Previously, NYSE and NASDAQ had been member (broker-dealer) owned (sometimes called "mutualized" exchanges).
21. "Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change To Amend the By-Laws of NASD To Implement Governance and Related Changes To Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc.," Notices, *Federal Register*, Vol. 72, No. 147 (August 1, 2007), pp. 42169–42190 and 42190–42192, https://www.gpo.gov/fdsys/pkg/FR-2007-08-01/pdf/E7-14855.pdf (accessed December 14, 2016).
22. For more on the history of securities SROs and FINRA in particular, see Roberta S. Karmel, "Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?" *Stanford Journal of Law, Business & Finance*, Vol. 14, No. 1 (Fall 2008), pp. 163 and 164, http://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1376&context=faculty (accessed December 9, 2016); Hester Peirce, "The Financial Industry Regulatory Authority: Not Self-Regulation after All," Mercatus Center *Working Paper*, January 2015, https://www.mercatus.org/system/files/Peirce-FINRA_0.pdf (accessed December 9, 2016); and Jonathan Macey and Caroline Novogrod, "Enforcing Self-Regulatory Organization's Penalties and the Nature of Self-Regulation," *Hofstra Law Review*, Vol. 40 (2012), pp. 963–1003, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5671&context=fss_papers (accessed December 9, 2016).
23. However, aspects of the NASD's regulatory function had left industry control as early as 1996. See Karmel, "Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?" In addition, the NYSE regulatory function was no longer under industry control by the 1990s. For a discussion of the history of the evolution of SROs, see Daniel M. Gallagher, "U.S. Broker-Dealer Regulation," Chapter 6 in Hester Peirce and Benjamin Klutsey, eds., *Reframing Financial Regulation*, (Arlington, VA: Mercatus Center at George Mason University, 2016) https://www.mercatus.org/system/files/peirce_reframing_web_v1.pdf (accessed January 4, 2017).
24. See, for example, Peirce, "The Financial Industry Regulatory Authority: Not Self-Regulation After All," and William A. Birdthistle and M. Todd Henderson, "Becoming a Fifth Branch," *Cornell Law Review*, Vol. 99, No. 1 (2013), pp. 1–69, http://cornelllawreview.org/files/2013/11/99CLR1.pdf (accessed December 9, 2016).
25. Financial Industry Regulatory Authority, "FINRA Board of Governors," http://www.finra.org/about/finra-board-governors (accessed December 9, 2016).
26. Financial Industry Regulatory Authority, "Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc.," Eighth Article, subsection (b), paragraph 2, http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4589 (accessed December 14, 2016), and Financial Industry Regulatory Authority, "By-Laws, Article VII, Board of Governors," http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4628 (accessed December 14, 2016).
27. Financial Industry Regulatory Authority, "FINRA Board of Governors."
28. Neil Gunningham and Joseph Rees, "Industry Self-Regulation: An Institutional Perspective," *Law & Policy*, Vol. 19, No. 4 (October 1997), http://onlinelibrary.wiley.com/doi/10.1111/1467-9930.t01-1-00033/epdf (accessed December 9, 2016).
29. Anthony Ogus, "Self-Regulation (9400)," in Boudewijn Bouckaert and Gerrit De Geest, eds., *Encyclopedia of Law and Economics, Vol. I. The History and Methodology of Law and Economics* (Cheltenham, PA: Edward Elgar, 2000), http://encyclo.findlaw.com/9400book.pdf (accessed December 9, 2016).
30. Birdthistle and Henderson, "Becoming a Fifth Branch," p. 10.
31. See Securities and Exchange Commission, "Foundations of Self-Regulation" section in "Concept Release Concerning Self-Regulation," *Federal Register*, Vol. 69, No. 235 (December 8, 2004), pp. 71256–71282, https://www.gpo.gov/fdsys/pkg/FR-2004-12-08/pdf/04-26154.pdf (accessed December 9, 2016).
32. SEC Commissioner Luis A. Aguilar, "The Need for Robust SEC Oversight of SROs," Securities and Exchange Commission, May 8, 2013, https://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1365171515546 (accessed December 9, 2016); Ogus, "Self-Regulation (9400)"; Birdthistle and Henderson, "Becoming a Fifth Branch," pp. 11 and 12; and Andrew F. Tuch, "The Self-Regulation of Investment Bankers," *George Washington Law Review*, Vol. 83, No. 1 (December 2014), pp. 101–175, http://www.gwlr.org/wp-content/uploads/2015/03/83-Geo-Wash-L-Rev-101.pdf (accessed December 9, 2016). Occupation licensing is often controlled by SROs or quasi-governmental organizations. On occupation licensing generally as a barrier to entry, see The White House, "Occupational Licensing: A Framework for Policymakers," July 2015, https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (accessed December 9, 2016), and Dick M. Carpenter et al., "License to Work: A National Study of Burdens from Occupation Licensing," Institute for Justice, May 2012, https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf (accessed December 9, 2016).

33. "One cannot deal in securities with the public without being a member of FINRA. When a member fails to pay a fine levied by FINRA, FINRA can revoke the member's registration, resulting in exclusion from the industry." See *Fiero v. Financial Industry Regulatory Authority*, 660 F.3d 569, 576 (2d Cir. 2011).
34. 5 U.S. Code § 553.
35. 5 U.S. Code § 552.
36. 5 U.S. Code §§ 601–612.
37. 5 U.S. Code § 552b.
38. 44 U.S. Code §§ 3501–3531.
39. See, for example, Executive Orders 12866 and 13563 and Office of Management and Budget (OMB) Circular A-4.
40. FINRA Manual, Code of Arbitration Procedure for Customer Disputes, FINRA Rule 12602, Attendance at Hearings. See also FINRA Rules 9261 and 9265.
41. See detailed discussion below, in the section titled "Due Process."
42. However, once a rule is finalized by FINRA and submitted to the SEC for approval, the SEC does make the rule available for public comment. Dodd–Frank required that the SEC conduct its review of FINRA rules within 45 days. In FY 2015, only 63 percent were approved or disapproved within 45 days. Securities and Exchange Commission, *FY 2015 Annual Performance Report*, p. 25, https://www.sec.gov/about/reports/sec-fy2015-fy2017-annual-performance.pdf (accessed December 9, 2016).
43. Karmel, "Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?" pp. 151–197; Michael Deshmukh, "Is FINRA a State Actor? A Question that Exposes the Flaws of the State Action Doctrine and Suggests a Way to Redeem It," *Vanderbilt Law Review*, Vol. 67, No. 4 (2014), pp. 1173–1211, https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2014/06/Is-FINRA-a-State-Actor.pdf (accessed December 9, 2016); and Steven Irwin et al., "Self-Regulation of the American Retail Securities Markets–An Oxymoron for What Is Best for Investors?" *University of Pennsylvania Journal of Business Law*, Vol. 14, No. 4 (2012), pp. 1055–1084, http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1421&context=jbl (accessed December 9, 2016).
44. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).
45. *Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982).
46. See Federal Rules of Appellate Procedure (FRAP) 32.1, and John Szmer, Robert K. Christensen, and Ashlyn Kuersten, "The Efficiency of Federal Appellate Decisions: An Examination of Published and Unpublished Opinions," *The Justice System Journal*, Vol. 33, No. 3 (2012), p. 319, http://spia.uga.edu/faculty_pages/rc/law_pa_files/Pub12_JSJ_EfficiencyFedAppCourts.pdf (accessed December 9, 2016), finding that three-quarters of federal appellate decisions are now unpublished (unreported) and given that FRAP 32.1, after January 1, 2007, allows attorneys to cite opinions "designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like," unpublished opinions are of greater importance.
47. *Santos-Buch v. Financial Industry Regulatory Authority, Inc.*, U.S. Court of Appeals for the Second Circuit, No. 14-2767-cv, January 30, 2015, http://www.leagle.com/decision/In%20FCO%2020150130104/SANTOS-BUCH%20v.%20FINANCIAL%20INDUSTRY%20REGULATORY%20AUTHORITY,%20INC (accessed December 9, 2016).
48. *Busacca v. S.E.C*, U.S. Court of Appeals for the Eleventh Circuit, No. 10-15918, December 28, 2011, unpublished opinion, https://www.sec.gov/litigation/opinions/2010/34-63312-appeal.pdf (accessed December 9, 2016).
49. *D'Alessio v. S.E.C.*, 380 F.3d 112, 120 n.12 (2d Cir. 2004) [discussing whether the NASD is a state actor, but asserting that a determination of that issue was not necessary in that case]; *D.L. Cromwell Investments v. NASD Regulation*, 279 F.3d 155 (2d Cir. 2002) [finding that NASD is not a state actor]; *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) [finding that NASD is not a state actor but recognizing that "private entities may be held to constitutional standards if their actions are 'fairly attributable' to the state"]; *Gold v. SEC*, 48 F.3d 987 (7th Cir. 1995) [finding that due process was provided and side-stepping the state action issue]; and *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971) ["The intimate involvement of the [American Stock] Exchange with the Securities and Exchange Commission brings it within the purview of the Fifth Amendment controls over governmental due process."]. The American Stock Exchange was acquired by the NYSE in 2008 and since 2012 has been called NYSE MKT. See also *Saad v. SEC*, 718 F. 3d 904 (D.C. Cir. 2013) [finding that the commission abused its discretion in failing to address several potentially mitigating factors when upholding a FINRA lifetime bar].
50. Internal Revenue Service, Memorandum No. 201623006, Office of Chief Counsel, June 3, 2016, http://brokeandbroker.com/PDF/IRSFINRAFines.pdf (accessed December 9, 2016).
51. "The NYSE, as a[n] SRO, stands in the shoes of the SEC in interpreting the securities laws for its members and in monitoring compliance with those laws. It follows that the NYSE should be entitled to the same immunity enjoyed by the SEC when it is performing functions delegated to it." See *D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93 (2d Cir. 2001). See also *Sparta Surgical Corp. v. National Association of Securities Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998), and *Weissman v. Nat'l Association of Securities Dealers, Inc.*, 500 F.3d 1293 (11th Cir. 2007).
52. 637 F.3d 112 (2d Cir. 2011), cert. denied January 17, 2012. Citations omitted. Both progressive organizations and free-market groups filed amicus briefs urging the Supreme Court to grant *certiorari*.
53. Ibid.
54. Birdthistle and Henderson, "Becoming a Fifth Branch" (quote is from the introductory abstract).

55. Gallagher, "U.S. Broker-Dealer Regulation." See also Commissioner Daniel M. Gallagher, "Market 2012: Time for a Fresh Look at Equity Market Structure and Self-Regulation," Securities and Exchange Commission, October 4, 2012, https://www.sec.gov/News/Speech/Detail/Speech/1365171491376 (accessed December 9, 2016).
56. Emily Hammond, "Double Deference in Administrative Law," *Columbia Law Review*, Vol. 116, No. 7 (November 2016), http://columbialawreview.org/content/double-deference-in-administrative-law/ (accessed December 9, 2016).
57. Center for Capital Markets Competitiveness, "U.S. Capital Markets Competitiveness: The Unfinished Agenda," Summer 2011, p. 5, https://www.uschamber.com/sites/default/files/legacy/reports/1107_UnfinishedAgenda_WEB.pdf (accessed December 9, 2016).
58. For the first nine months of 2016, FINRA statistics show the following misconduct-controversy types in customer arbitrations: Breach of Fiduciary Duty (1,572); Negligence (1,465); Failure to Supervise (1,417); Misrepresentation (1,300); Suitability (1,239); Breach of Contract (1,207); Omission of Facts (1,086); Fraud (1,010); Unauthorized Trading (279); Violation of State Blue Sky Laws (254); Churning (201); Manipulation (191); Margin Calls (62); Errors-Charges (44); and Transfer (28). See Financial Industry Regulatory Authority, "Top 15 Controversy Types in Customer Arbitrations," http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics (accessed December 9, 2016).
59. Mark Egan, Gregor Matvos, and Amit Seru, "The Market for Financial Adviser Misconduct," SSRN, March 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739170 (accessed December 9, 2016).
60. David Burton, "No Get-Out-of-Jail-Free Card for Bankers," *Newsweek*, February 28, 2015, http://www.newsweek.com/no-get-out-jail-free-card-bankers-310256 (accessed December 9, 2016).
61. See, for example, letter by Senators Elizabeth Warren (D–MA) and Tom Cotton (R–AR) to FINRA, May 11, 2016, https://www.warren.senate.gov/files/documents/2016-5-11_Warren-Cotton_Letter_to_FINRA.pdf (accessed December 9, 2016).
62. FINRA created its Office of the Chief Economist in 2013: Financial Industry Regulatory Authority, "Office of the Chief Economist," http://www.finra.org/industry/chief-economist (accessed December 9, 2016).
63. Hammad Qureshi and Jonathan Sokobin, "Do Investors Have Valuable Information About Brokers?" FINRA Office of the Chief Economist *Working Paper*, August 2015, p. 21, http://www.finra.org/sites/default/files/OCE-Working-Paper.pdf (accessed December 9, 2016), and Qureshi and Sokobin, "Do Investors Have Valuable Information About Brokers?" non-technical summary, August 2015, http://www.finra.org/sites/default/files/OCE-Non-technical-Summary.pdf (accessed December 9, 2016).
64. Ibid., *Working Paper*, p. 4.
65. Including "regular" Article III courts, Article II courts like the Tax Court, federal administrative law courts or, for that matter, any state court.
66. Joseph McLaughlin, "Is FINRA Constitutional?" *Engage*, Vol. 12, No. 2 (September 2011), pp. 111–114, http://www.fed-soc.org/publications/detail/is-finra-constitutional (accessed December 9, 2016).
67. 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).
68. 15 U.S. Code § 7211(e)(6).
69. Public Company Accounting Oversight Board, "About the PCAOB," https://pcaobus.org/About/pages/default.aspx (accessed December 9, 2016).
70. 561 U.S. 477, 483–484.
71. 561 U.S. 477, 484.
72. The Free Enterprise decision found that the PCAOB being charged with enforcement of Sarbanes-Oxley was of central importance to determining if it was exercising executive power. FINRA is statutorily charged with enforcing the securities laws. See Securities Exchange Act § 15A(b)(2). See also FINRA By-Law Article XI ("to carry out the purposes of the Corporation and of the Act, the Board is hereby authorized to adopt such rules for the members and persons associated with members"). "The Act" is defined in FINRA By-Law Article I as the Securities Exchange Act of 1934.
73. 561 U.S. 477, 484.
74. McLaughlin, "Is FINRA Constitutional?" pp. 113–114. McLaughlin argues that FINRA does exercise executive power. For a discussion of these issues, also see *PHH Corporation v. Consumer Financial Protection Bureau* (DC Cir., October 11, 2016), https://www.cadc.uscourts.gov/internet/opinions.nsf/AAC6BFFC4C42614C852580490053C388/$file/15-1177-1640101.pdf (accessed December 9, 2016). ("Applying the Supreme Court's separation of powers precedents, we therefore conclude that the CFPB is unconstitutionally structured because it is an independent agency headed by a single Director.")
75. Paul J. Larkin, Jr., "The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking," *Harvard Journal of Law & Public Policy*, Vol. 38, No. 1 (2015), pp. 416 and 417, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2556440 (accessed December 9, 2016).
76. 557 F.2d 1008 (3d Cir. 1977).
77. 198 F.2d 690 (2d Cir.), cert. denied, 344 U.S. 855, 73 S. Ct. 94, 97 L.Ed. 664 (1952).
78. The Maloney Act, Public Law No. 75-719 (June 25, 1938), created section 15A of the Securities Exchange Act and extended the role of SROs beyond exchanges. The NASD was created as a result, and it registered as an SRO on August 7, 1939. The Maloney Act is available at http://www.sechistorical.org/collection/papers/1930/1938_0625_MaloneyAct.pdf (accessed December 9, 2016). For more on the history of SROs and links to many historical documents, see Securities and Exchange Commission Historical Society, "The Institution of Experience: Self-Regulatory Organizations in the Securities Industry, 1792–2010, Self Help and the New Deal," http://www.sechistorical.org/museum/galleries/sro/sro04b.php (accessed December 9, 2016).

79. Securities Acts Amendments of 1975, Public Law No. 94-29, 89 Stat. 97 (1975), https://www.gpo.gov/fdsys/pkg/STATUTE-89/pdf/STATUTE-89-Pg97.pdf (accessed December 9, 2016). These amendments made a wide variety of changes to the Exchange Act provisions governing national securities associations, their members, and hearings conducted by SROs.
80. 557 F.2d 1008 (3d Cir. 1977) at footnote 6. ("There are some changes in the amendments as they apply to hearings before the Commission, e.g., under the 1934 Act, the S.E.C. is to make its decision 'upon consideration of the record before the association and such other evidence as it may deem relevant...' The 1975 amendment, on the other hand, states '...which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction ...' Our consideration of this case is confined to the 1934 act, and we do not intimate any view on the constitutionality of the 1975 amendment.")
81. However, some of the governance changes made by the NASD and the NYSE in 1996 before FINRA's creation were important steps away from truly private, self-regulatory status. See Karmel, "Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?" p. 163, n. 58, discussing NASD bylaw changes.
82. The details of this conversion process and the degree to which the SEC would preserve the right to not hire FINRA employees would need to be decided.
83. It is possible that an organization with strong industry representation could be more effective in discharging this function. The issue would need to be evaluated carefully.
84. Liz Moyer, "Finra Names Robert Cook Its Chief Executive," *The New York Times*, June 13, 2016, http://www.nytimes.com/2016/06/14/business/dealbook/finra-names-robert-cook-its-chief-executive.html?_r=0 (accessed December 9, 2016).
85. News release, "John J. Brennan Elected Chairman of FINRA Board of Governors," Financial Industry Regulatory Authority, July 15, 2016, http://www.finra.org/newsroom/2016/john-j-brennan-elected-chairman-finra-board-governors (accessed December 9, 2016).
86. David Michaels, "FINRA Board Seat Goes to Ex-Bear Stearns Partner in Tight Race," *The Wall Street Journal*, September 19, 2016. Bob Muh is quoted as saying: "So many small firms are angry over the huge increase in compliance costs to meet the many new rules."
87. Securities Exchange Act § 15A(b)-(d).
88. 5 U.S. Code § 552.
89. FINRA, "Board of Governors Meetings," http://www.finra.org/industry/governors-meetings (accessed January 4, 2017).
90. 5 U.S. Code § 552b.
91. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n. 17 (1980) ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984); and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). See also *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) ("The experience in the American Colonies was analogous. From the beginning, the norm was open trials.... If the existence of a common-law rule were the test for whether there is a Sixth Amendment public right to a public trial, therefore, there would be such a right in civil as well as criminal cases.... Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context."). See also Jeanne L. Nowaczewski, "The First Amendment Right of Access to Civil Trials after Globe Newspaper Co. v. Superior Court," *University of Chicago Law Review*, Vol. 51, No. 1 (1984), pp. 286-314, http://chicagounbound.uchicago.edu/uclrev/vol51/iss1/10 (accessed December 9, 2016).
92. 137 Mass. 392 (1884), http://masscases.com/cases/sjc/137/137mass392.html (accessed December 9, 2016).
93. Financial Industry Regulatory Authority, BrokerCheck, http://brokercheck.finra.org/ (accessed December 9, 2016).
94. Qureshi and Sokobin, "Do Investors Have Valuable Information About Brokers?" *Working Paper*, p. 4. The nature of this unreported information is not entirely clear.
95. A mere complaint where there is no finding of wrong-doing, no award, no fine, or any adverse disciplinary action does not imply misconduct.
96. Financial Industry Regulatory Authority, "Dispute Resolution Statistics."
97. Securities Industry and Financial Markets Association, "White Paper on Arbitration in the Securities Industry," October 2007, http://www.sifma.org/uploadedfiles/societies/sifma_compliance_and_legal_society/whitepaperonarbitration-october2007.pdf (accessed December 9, 2016), and Barbara Black, "The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?" *University of Cincinnati Law Review*, Vol. 72 (2003), http://digitalcommons.pace.edu/lawfaculty/16 (accessed December 9, 2016).
98. The Tax Court was created in 1942 as the successor to the U.S. Board of Tax Appeals. Major changes were made in 1969. For a history of the Tax Court and a discussion of its constitutional status, see Harold Dubroff and Brant J. Hellwig, *The United States Tax Court, An Historical Analysis*, 2nd ed. (Washington, DC: Government Printing Office, 2014), https://www.ustaxcourt.gov/book/Dubroff_Hellwig.pdf (accessed December 9, 2016). See also 26 U.S. Code § 7441, and *Freytag v. Commissioner*, 501 U.S. 868 (1991).
99. United States Court of Federal Claims, "The People's Court," http://www.uscfc.uscourts.gov/sites/default/files/USCFC%20Court%20History%20Brochure_0.pdf#overlay-context=about-court (accessed December 9, 2016).
100. Edward J. Eberle, "Procedural Due Process: The Original Understanding," *Constitutional Commentary*, Vol. 4 (1987), pp. 339-362 and 339, http://docs.rwu.edu/cgi/viewcontent.cgi?article=1057&context=law_fac_fs (accessed December 9, 2016).
101. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172 (1951).

102. FINRA Rule 9212; FINRA Rule 12302; and FINRA Rule 13302.
103. FINRA Rule 9261; FINRA Rule 12602; and FINRA Rule 13602.
104. FINRA Rule 9265; FINRA Rule 12602; and FINRA Rule 13602.
105. This, of course, means that the date, time, and place of the proceeding must be made public. In addition, documents (notably pleadings) pertaining to the hearings should generally be made public as in court proceedings, perhaps using a database similar to the Public Access to Court Electronic Records (PACER), https://www.pacer.gov/ (accessed December 9, 2016).
106. FINRA Rule 12604(a).
107. FINRA Rule 9141; FINRA Rule 12208; and FINRA Rule 13208.
108. See also Federal Rule of Civil Procedure 38.
109. Margaret L. Moses, "What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence," *The George Washington Law Review*, Vol. 68 (2000), pp. 183–257, http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1301&context=facpubs (accessed December 9, 2016).
110. Financial Industry Regulatory Authority, "FINRA Arbitrators," http://www.finra.org/arbitration-and-mediation/finra-arbitrators (accessed December 9, 2016).
111. Financial Industry Regulatory Authority, "Required Basic Arbitrator Training," http://www.finra.org/arbitration-and-mediation/required-basic-arbitrator-training (accessed December 9, 2016).
112. Financial Industry Regulatory Authority, "FINRA Arbitrators."
113. FINRA Rule 12403.
114. FINRA Notice 11-05, "Customer Option to Choose an All Public Arbitration Panel in All Cases," effective February 1, 2011, http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=9973 (accessed December 9, 2016).
115. By striking all of the non-public (industry) arbitrators during the arbitrator-selection process; see FINRA Rule 12403.
116. For disciplinary proceedings, see FINRA Rules 9251–9253; for customer disputes, see FINRA rules 12505–12512; and for intra-industry disputes, see FINRA Rules 13505–13512.
117. See Federal Rules of Civil Procedure 26–37.
118. See FINRA Rule 12510. Federal administrative law courts permit depositions; see 5 U.S. Code § 556(c)(4).
119. American Arbitration Association, "Consumer Arbitration Rules: R-22. Exchange of Information between the Parties," 2016, https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased (accessed December 9, 2016).
120. Steven Shavell, "Alternative Dispute Resolution: An Economic Analysis," *The Journal of Legal Studies*, Vol. 24, No. 1 (1995), pp. 1–28; Christopher R. Drahozal and Samantha Zyontz, "An Empirical Study of AAA Consumer Arbitrations," *Ohio State Journal on Dispute Resolution*, Vol. 25, No. 4 (2010), pp. 843–930, https://kb.osu.edu/dspace/bitstream/handle/1811/76944/OSJDR_V25N4_0843.pdf?sequence=1 (accessed December 9, 2016); and Theodore J. St. Antoine, "Mandatory Arbitration: Why It's Better than It Looks," *University of Michigan Journal of Law Reform*, Vol. 41, No. 4 (2008), pp. 783–812, http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1466&context=articles (accessed December 9, 2016).
121. United States Arbitration Act, Public Law 68–401, 43 Stat. 883, February 12, 1925, codified at 9 U.S. Code §§ 1-16.
122. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L.Ed. 2d 742 (2011).
123. FINRA Rule 12514(d).
124. FINRA Rule 12904(g).
125. FINRA Rule 12904(g)(2).
126. In 2015, FINRA had 3,500 employees with compensation, including benefits, of $688.7 million. This amounts to *average* compensation of $196,771 per employee: *FINRA 2015 Year in Review and Annual Financial Report*, p. 20. FINRA's compensation for arbitrators, making the unrealistic assumption that they worked every work day with two weeks of vacation, amounts to the equivalent of $150,000 annually ($600 per day times 50 weeks times five days).
127. Financial Industry Regulatory Authority, "What to Expect: Honorarium," http://www.finra.org/arbitration-and-mediation/what-expect-training-case-service-and-honorarium (accessed December 9, 2016).
128. "Statutory Maximum Rates Under the Equal Access to Justice Act," Ninth Circuit Court of Appeals, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (accessed December 9, 2016), and 28 U.S. Code § 2412 (d)(2)(A). The DC Circuit is $190 per hour; see *Security Point Holdings, Inc. v. TSA*, September 2, 2016, p. 12, https://www.cadc.uscourts.gov/internet/opinions.nsf/FEEE2F100B567F3F85258022004E9F5F/$file/13-1068-1633546.pdf (accessed December 9, 2016).
129. 5 U.S. Code § 557(c).
130. This is the threshold for a three-arbitrator panel under current FINRA rules. See FINRA Rule 12401.
131. FINRA Rule 9311.

132. Financial Industry Regulatory Authority, "National Adjudicatory Council," http://www.finra.org/industry/nac (accessed December 9, 2016).
133. Financial Industry Regulatory Authority, "NAC Committee Members," http://www.finra.org/industry/nac-committee-members (accessed December 9, 2016).
134. FINRA Rule 9351.
135. FINRA Rule 9370, and Securities Exchange Act section 19(d)(2).
136. "The SEC reviews sanctions imposed by the NASD to determine whether they 'impose any burden on competition not necessary or appropriate' or are 'excessive or oppressive.'" *Siegel v. SEC*, 592 F.3d 147, 155 (DC Cir. 2010) (quoting 15 U.S. Code § 78s(e)(2)). "This court reviews the SEC's conclusions regarding sanctions to determine whether those conclusions are arbitrary, capricious, or an abuse of discretion," *Saad v. SEC*, 718 F. 3d 904 (DC Cir. 2013).
137. FINRA Rule 12904(b), and FINRA Rule 13904(b).
138. Government Accountability Office, "Opportunities Exist to Improve SEC's Oversight of the Financial Industry Regulatory Authority," GAO-12-625, May 30, 2012, http://www.gao.gov/products/GAO-12-625 (accessed December 9, 2016), and Government Accountability Office, "SEC Can Further Enhance Its Oversight Program of FINRA," GAO-15-376, April 30, 2015, http://www.gao.gov/products/GAO-15-376 (accessed December 9, 2016).
139. Wyatt, "Inside the National Exam Program in 2016"; Elizabeth Dilts, "SEC Says to Monitor Partner Regulator's Brokerage Oversight," Reuters, October 17, 2016, http://www.cnbc.com/2016/10/17/reuters-america-sec-says-to-monitor-partner-regulators-brokerage-oversight.html (accessed December 9, 2016); and "SEC Launches Dedicated FINRA Oversight Unit: Watching the Detectives," *National Law Review*.
140. Municipal Securities Rulemaking Board, "About the MSRB," http://www.msrb.org/About-MSRB.aspx (accessed December 9, 2016).
141. The National Futures Association, "Who We Are," http://www.nfa.futures.org/nfa-about-nfa/index.HTML (accessed December 9, 2016).
142. See §8G(a)(2) of the Inspector General Act of 1978, https://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq2.html (accessed December 9, 2016).
143. Council of the Inspectors General on Integrity and Efficiency, "The Inspectors General," July 14, 2014, https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf (accessed December 9, 2016). For the Inspectors General Act of 1978, as amended, see https://www.ignet.gov/sites/default/files/files/igactasof1010(1).pdf (accessed December 9, 2016).
144. For years 2011 to 2016, see FINRA, Statistics, http://www.finra.org/newsroom/statistics (accessed December 9, 2016), and FINRA Annual Reports 2007–2010, http://www.finra.org/about/annual-reports-financials (accessed December 9, 2016). For the years 2008–2010, FINRA provides only approximate numbers.
145. Hester Peirce and Stephen Matteo Miller, "Small Banks by the Numbers, 2000–2014," Mercatus Center, March 17, 2015, https://www.mercatus.org/publication/small-banks-numbers-2000-2014 (accessed December 9, 2016); Hester Peirce, Ian Robinson, and Thomas Stratmann, "How Are Small Banks Faring Under Dodd-Frank?" Mercatus Center, February 27, 2014, https://www.mercatus.org/publication/how-are-small-banks-faring-under-dodd-frank (accessed December 9, 2016); and Roisin McCord, Edward Simpson Prescott, and Tim Sablik, "Explaining the Decline in the Number of Banks Since the Great Recession," Federal Reserve Bank of Richmond, March 2015, https://www.richmondfed.org/~/media/richmondfedorg/publications/research/economic_brief/2015/pdf/eb_15-03.pdf (accessed December 9, 2016).
146. Peirce and Miller, "Small Banks by the Numbers, 2000–2014."
147. Goldman Sachs CEO Lloyd Blankfein, for example, recently said: "More intense regulatory and technology requirements have raised the barriers to entry higher than at any other time in modern history. This is an expensive business to be in, if you don't have the market share in scale. Consider the numerous business exits that have been announced by our peers as they reassessed their competitive positioning and relative returns." See "Regulation Is Good for Goldman," *The Wall Street Journal*, February 11, 2015, http://www.wsj.com/articles/regulation-is-good-for-goldman-1423700859?KEYWORDS=Regulation+Is+Good+for+Goldman (accessed December 9, 2016); Craig M. Lewis, "The Future of Capital Formation," Chief Economist and Director of the Division of Economic and Risk Analysis, MIT Sloan School of Management's Center for Finance and Policy's Distinguished Speaker Series, April 15, 2014, http://www.sec.gov/News/Speech/Detail/Speech/1370541497283#.VITmIsmwU0Q (accessed December 9, 2016); Jeff Schwartz, "The Law and Economics of Scaled Equity Market Disclosure," *Journal of Corporation Law*, Vol. 39 (2014); and C. Steven Bradford, "Transaction Exemptions in the Securities Act of 1933: An Economic Analysis," *Emory Law Journal*, Vol. 45 (1996), pp. 591–671, http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1088&context=lawfacpub (accessed December 9, 2016). See also Securities and Exchange Commission, "Economic Analysis, Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act," *Federal Register*, Vol. 79, No. 15 (January 23, 2014), pp. 3972–3993 [Release Nos. 33-9497, 34-71120, and 39-2493; File No. S7-11-13], http://www.gpo.gov/fdsys/pkg/FR-2014-01-23/pdf/2013-30508.pdf (accessed December 9, 2016).
148. 5 U.S. Code § 603.
149. For a discussion of these issues, see Barbara Black, "Punishing Bad Brokers: Self-Regulation and FINRA Sanctions," *The Brooklyn Journal of Corporate, Financial & Commercial Law*, Vol 8 (2013), pp. 23–55, http://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1221&context=fac_pubs (accessed December 9, 2016).
150. Regulatory revenues ($445 million); user revenues ($218 million); and contract services revenues ($126 million) in FY 2015 for a total of $789 million (excluding fines, dispute resolution, and other revenues). See *FINRA 2015 Year in Review and Annual Financial Report*, p. 19.

151. As with any tax, barring extreme assumptions about elasticities, the incidence of the tax is borne partially by shareholders and partially by consumers (and potentially by employees).
152. *FINRA 2008 Year in Review and Annual Financial Report: Reforming Regulation to Better Protect Investors*, p. 10, http://www.finra.org/sites/default/files/Corporate/p119061.pdf (accessed December 9, 2016).
153. The figures in the previous sentence divided by the number of members in Chart 2 (3,957 in 2015 and 4,900 in 2008).
154. Financial Industry Regulatory Authority, "Fines Policy," http://www.finra.org/industry/fines-policy (accessed December 9, 2016).
155. *FINRA 2015 Year in Review and Annual Financial Report*, p. 3.
156. Such a fund would reimburse consumers when sufficient funds cannot be recovered from the firm or individual committing the misconduct.
157. Kevin R. Kosar, "The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics," Congressional Research Service, June 22, 2011, https://www.fas.org/sgp/crs/misc/RL30533.pdf (accessed December 9, 2016).
158. See appendix of *Budget of the U.S. Government, FY 2017.*
159. Ibid.
160. Financial Industry Regulatory Authority, "Requests for Comments," http://www.finra.org/industry/requests-comments (accessed December 9, 2016).
161. See §19(b) of the Securities Exchange Act.
162. It is the understanding of the author that the SEC staff has a major role in formulating FINRA rules and informally reviews proposed rules before they are formally submitted to the SEC.
163. 5 U.S. Code § 553.
164. Financial Industry Regulatory Authority, "Office of the Chief Economist," http://www.finra.org/industry/chief-economist (accessed December 9, 2016); Financial Industry Regulatory Authority, "Framework Regarding FINRA's Approach to Economic Impact Assessment for Proposed Rulemaking," September 2013, http://www.finra.org/sites/default/files/Economic%20Impact%20Assessment_0_0.pdf (accessed December 9, 2016); RSFI and OGC, "Current Guidance on Economic Analysis in SEC Rulemakings," *Memorandum*, March 16, 2012, https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf (accessed December 9, 2016); Executive Order 12866; and Office of Management and Budget Circular A-4.
165. This is analogous to Small Business Regulatory Enforcement Fairness Act (SBREFA) requirements that amended the Regulatory Flexibility Act, 5 U.S. Code §§ 601 et seq. See also Executive Order 13272.

WORLD

Wall Street's Captive Arbitrators Strike Again

9 JULY 8, 2012 5:30 PM EST

July 9 (Bloomberg) -- A set piece of Voltaire's 18th century masterpiece, "Candide," is a scene in which the British, after losing a battle, execute one of their own admirals "pour encourager les autres."

The analogy may be a bit heavy-handed, yet in many ways it fits what Finra -- the Financial Industry Regulatory Authority, Wall Street's self-regulatory organization -- did to three arbitrators who, in May 2011, had the temerity to find in favor of a customer in a securities arbitration against Merrill Lynch, the nation's largest brokerage and a unit of Bank of America Corp. After awarding the estate of the customer more than $520,000 -- a large amount by arbitration standards --Finra heard from unhappy Merrill executives and fired the arbitrators, two of whom had many years of experience.

"You mete out justice, and then you get slapped in the face," one of the fired arbitrators, Fred Pinckney, told me in an interview.

The matter began in December 2009, after Robert C. Postell, of Alpharetta, Georgia, and his wife, Joan, filed an arbitration claim against Merrill Lynch for more than $640,000 plus attorney's fees. Postell, who had a successful automotive-safety-equipment business, claimed that his Merrill broker failed "to adequately monitor" his accounts, according to a publicly available copy of the Finra arbitration summary. The Postells also asserted claims of "breach of contract" and "breach of fiduciary duty" against Merrill. Not surprisingly, the brokerage, through its attorney, Terry Weiss, of Greenberg Traurig LLP, in Atlanta, denied the Postells' claims.

FINRA WAIVER

Anyone who works on Wall Street or has a brokerage account must agree, from the outset, that any financial claims made against their employer or broker will be adjudicated not in the courts but in an arbitration process overseen by Finra, a private organization that derives the bulk of its $1 billion in revenue from the Wall Street companies that are its members. This upfront agreement by millions of Americans to

submit to a Finra arbitration process -- which I experienced first hand in 2003-2004 -- constitutes one of the largest ongoing abdications of legal rights in the U.S., and nobody seems to be bothered enough to rectify it.

(To make matters worse, Mary Schapiro, the chairman of the Securities and Exchange Commission, was previously head of Finra, whose board awarded her a $9 million bonus when she left that post in January 2009.)

In May 2011, the Postells' arbitration claim was heard in seven sessions over four days by the three Finra-appointed arbitrators: Ilene Gormly, the chairperson and a former compliance executive at a commercial bank; Daniel Kolber, a securities-law attorney and the founder of Intellivest Securities Inc., a small Georgia investment bank; and Pinckney, an Atlanta attorney. The arbitrators are paid about $200 a day.

According to Pinckney, at the final hearing, on May 6, the arbitrators were informed that Postell had committed suicide in February. His estate, along with Joan, would be the claimants in the arbitration and the beneficiaries of any award. Also during the final hearing, according to Pinckney, Weiss, Merrill's attorney, sensed that he was losing the case and repeatedly "exploded at the panel," accusing the arbitrators of being biased in their views and rulings against Merrill. The panel took a break, called Finra executives and explained Weiss's accusations. With Finra's blessing, the arbitrators decided to proceed to final arguments and conclude the matter. Soon thereafter, the arbitrators found in favor of the Postells and awarded Joan and her husband's estate $520,000 in damages.

CULLED ROSTER

According to Pinckney, about two months later, Kolber got what Pinckney called a "black spot letter" from Finra explaining that the private regulator periodically examined its "roster" and culled people from it. "As a result," Kolber's letter read, "please be advised that you are no longer being listed as an active member of Finra's dispute resolution roster of arbitrators."

Then, in January 2012, Gormly, who has about 20 years experience as an arbitrator, got her "black spot letter." In June, Pinckney was notified that he was relieved of his duties. According to Pinckney, Finra executives denied a request from Kolber for a meeting.

Then, Gormly sent a "whistle-blower" letter to the SEC, describing the situation. She hasn't heard back.

"I told her that she will probably be waiting until hell freezes over," Pinckney said.

Pinckney is pretty disgusted by this turn of events, especially since there were no grounds to appeal the arbitrators' decision in the Postell case and no appeal was filed. Nothing about what the three arbitrators did was ever questioned, except by Weiss, the Merrill lawyer who saw his case being lost. Pinckney said his fellow arbitrators weren't looking for reinstatement or compensation. He contacted me to share his story because he was so outraged that Wall Street has the ability to exact revenge on arbitrators in a quasi-judicial system where it already holds most of the cards anyway.

"It's unbelievable that they would take such an experienced panel and get rid of it," Pinckney said. "To me, this undermines the credibility of the entire Finra process -- I didn't say kangaroo court -- but when you have three well-credentialed people, doing their job, and there were no meritorious grounds for an appeal, and we get handed the 'black spot' -- and not all at once -- it makes for a pretty cheap novel."

Where does it all end? Will there really be zero accountability for bankers, traders and executives who caused a calamitous financial crisis, or the collapse of MF Global Holdings Ltd., or who were gambling with $350 billion of depositors' money, or who were manipulating Libor, or for those who are further cheapening a Wall Street-administered arbitration system that already reeks of injustice?

(William D. Cohan , a former investment banker and the author of "Money and Power: How Goldman Sachs Came to Rule the World," is a Bloomberg View columnist. The opinions expressed are his own.)

Today's highlights: the editors on whether it's a penalty or a tax and the latest jobs report; Susan P. Crawford on whether Google is a monopoly; Albert R. Hunt on gaming the Electoral College; Simon Johnson on banks' living wills; Pankaj Mishra on the false promise of Asian values; Jed Kolko on the downside of rising house prices.

To contact the writer of this article: William D. Cohan at [redacted]yahoo.com.

To contact the editor responsible for this article: Max Berley at mberley@bloomberg.net.

FINRA 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

AFFIDAVIT OF PATRICK G. KING

I, Patrick G. King, hereby declare and affirm:

1. I am counsel to Barclays Capital, Inc. and I am familiar with the proceedings relating to the arbitration entitled Barclays Capital, Inc. v. Michael Schwartz, FINRA Dispute Resolution Arbitration Case No. 12-02453, including personal knowledge of a Confidential Settlement Agreement and Release entered into as of May 18, 2016 by and among Michael D. Schwartz of 8360 Dolfor Cove, Burr Ridge, Illinois and Barclays Capital Inc., located at 200 Park Avenue, New York (the, "Settlement Agreement").
2. On or about September 19, 2013 and award was rendered in the arbitration case entitled Barclays Capital, Inc. v. Michael Schwartz, FINRA Dispute Resolution Arbitration Case No. 12-02453 in favor of Barclays Capital, Inc. in the approximate sum of $568,568 (the, "Award").
3. Barclays Capital, Inc. moved by motion to confirm the Award in the Circuit Court of Cook County, Illinois; the motion was granted confirming the Award.
4. Barclays Capital, Inc. obtained a money judgment on January 16, 2015, which was supplemented on April 9, 2015 against Michael D. Schwartz, the respondent in the above-captioned proceeding, in the amount of $900,950.00 (the, "Judgment").

5. Barclays Capital, Inc. initiated a supplementary proceeding in the Circuit Court of Cook County, Illinois, County Department, Law Division, entitled *Barclays Capital, Inc. v. Michael Schwartz*, Case No. 14-CH-15180 (the "Supplementary Proceeding").
6. Pursuant to the Supplementary Proceeding, Barclays Capital, Inc. served upon Michael D. Schwartz a Citation to Discover Assets on February 8, 2016 and Bank of America-Merrill Lynch, a Citation to Discover Assets to a Third Party on February 11, 2016 (the, "Citations").
7. The purpose of the Citations was to discover assets of Michael D. Schwartz that can be used to pay the Judgment.
8. The Settlement Agreement was intended to resolve and settle the then pending Citations, and nothing in the settlement agreement prohibits Barclays from initiating additional supplemental proceedings against Mr. Schwartz to satisfy the judgment.
9. The Settlement Agreement is not a settlement of the Judgment nor is it a settlement of the Award.
10. At no time did Barclays Capital, Inc. contemplate or intend that the Settlement Agreement to be a settlement of the Judgment or the Award.
11. As of the date of the signing of this Affidavit, the Award rendered in the arbitration case entitled Barclays Capital, Inc. v. Michael Schwartz, FINRA Dispute Resolution Arbitration Case No. 12-02453 is still outstanding.

Signed this 26th day of August, 2016 at Chicago (City), Illinois (State)

Patrick G. King

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Michael & Aseneta Schwartz,	)	13 B 44047
	)	Chicago, Illinois
	)	10:30 a.m.
Debtor.	)	December 04, 2014

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE PAMELA S. HOLLIS

APPEARANCES:

For Debtors:	Mr. Michael Schwartz; (pro se)
For Barclays Capital:	Mr. Patrick King; Mr. Booker Coleman;
Court Reporter:	Jackleen DeFini, CSR, RPR U.S. Courthouse 219 South Dearborn Room 661 Chicago, Il. 60604.

THE CLERK: Michael and Aseneta Schwartz, 13 B 44047.

MR. SCHWARTZ: Michael Schwartz for debtors.

MR. KING: Patrick King and Booker Coleman for Barclays Capital.

MR. RADTKE: Good morning, Your Honor. Steven Radtke, trustee.

THE COURT: Mr. Schwartz, I've got to tell you first that you need to take off your coat.

MR. SCHWARTZ: Yes, ma'am.

THE COURT: Unless you have a cold or something.

MR. SCHWARTZ: Yes.

THE COURT: Okay.

MR. SCHWARTZ: I apologize.

THE COURT: I don't know what's going on these days. If you want to participate as a lawyer, you have to be respectful. If you have a cold, I have no issue with that.

MR. SCHWARTZ: Thank you.

THE COURT: Okay. I had a chance to read through all the papers, and I want to have a discussion a little bit because of some things. First, I thought this was the easiest way to do it

under 707(a) and avoid the murky issue of 707(b), whether this was consumer debt or not. Okay? So I went in that direction and I didn't rule on 707(b). Then we got the motion for stay and I looked at all the cases out there on 707(a). And, clearly, the majority of bankruptcy judges in this district look at 707(a) as having the ability to dismiss on the basis that I did, lavish lifestyle, et cetera, because 707(a) says for cause and including. Now, you have Judge Goldgar's case which goes opposite of that, and post BAPCPA. That's what Mr. Schwartz's brief points out, that most of the other cases are pre BAPCPA. He doesn't say why that should change anything, although Judge Goldgar does talk a little bit about it.

But I do want to indicate, and I've got this somewhere, let's see if I can find it here. There are so many boxes here. There was a subsequent case to Judge Goldgar that Judge Barnes ruled on -- yes, and disagreed with Judge Goldgar. So Judge Goldgar's case in 2011 said dismissal for bad faith or other things aside from technical issues are not permitted under 707(a). That was in the Adolph case. And then Judge Barnes came back, I think in September of this year, and reached the opposite conclusion.

And I'll spell this because it's a foreign name, J-a-k-o-v-l-j-e-z-i-c, O-s-t-o-j-i-c, Bankruptcy, 517 BR 119.

So what we have here is we have two judges BAPCPA disagreeing. Okay? We have the Seventh Circuit, which hasn't ruled on the issue, and we have two courts of appeals going one way and two courts of appeals going the other way. So this is one of these rare instances where, in my view, Mr. Schwartz wins on this prong of the stay motion because I think it's an open question here. And I think he has a chance to win. And while I don't agree with Judge Goldgar's analysis, and I agree with Judge Barnes that it's not inclusive, and I don't know how else you interpret for cause including. And I don't know how you say oh, that just means technical stuff because it's certainly not being in the statute to me. So I go with the majority, but I think it's an open question. All right?

So now that brings us to the second prong of the issue of irreparable harm. And this one just absolutely throws me. And I'll tell you why. I looked at all the statutes. I looked at all the arguments made about Mr. Schwartz could have done something within a certain time. And Mr. Schwartz

indicates you guys could have done something to get your arbitration award confirmed within a certain amount of time. So there's kind of going back and forth. But doesn't it really boil down to me trying to predict what Finra will do? Because it's like let's say that, you know, there's lots of things to support that bankruptcy toll time period. And I don't know if that would occur here so that if Mr. Schwartz's case was dismissed, he would be able to go back into Finra and say under -- I don't know what it is, 109? 108 of the Code? periods are tolled and I can still contest it. And, you know, beyond that I don't even know if this is a fait accompli. I can't tell.

It seems to me like in order to determine irreparable harm, I have to guess how Finra will adjudicate his license. And I'm not sure how I can do that. All right, so that's one angle. I'm just going to throw this stuff out there. So, that's -- and then the fun thing is if I did decide to stay the case, stay the dismissal pending appeal, what does that do to Mr. Radtke?

MR. RADTKE: That puts me on hold, Your Honor.

THE COURT: He's like in limbo.

MR. RADTKE: That's right. I have no problem with that. That's fine.

THE COURT: Well, it's just an odd thing. So I dismiss the case. Say I stay this pending appeal. It goes up to the Seventh Circuit. And, by the way, this is a case that I think you might even be able to bypass the district court because I'm going to certify it on 707 so that you can go directly to the Seventh Circuit. It would skip a level of court and save everybody some money because we haven't had the Seventh Circuit talk about this.

But let's say it goes there and I've stayed the dismissal and the Seventh Circuit disagrees with me and agrees with Judge Goldgar and it's reversed. So now what happens to the estate during the interim? Who's in charge? These are rhetorical questions. I'm not asking anybody to answer that. These are the things that are running through my mind. Okay?

All right. Now let's switch over to -- well, you thought the 707(a) would be the easiest way to deal with this without getting into the murky issue of 707(b), whether this is a consumer debt or a business debt. So I went with what I

thought was maybe the quicker route to getting it resolved.

So maybe I just switch over and I look at 707(b) and I decide instead whether this is a consumer or business debt. And I ran across a new case, I think it was in October, that nobody cited to me yet. And I don't know why you would because that kind of became a nonissue. A very interesting case, it's out of the Ninth Circuit, bankruptcy appellate panel, so it's one level up from me. And I only have the Westlaw cite. I'll give you the name of it. It's Cherrett, C-h-e-r-r-e-t-t, that's basically the debtor, it's 2014 Westlaw 5843769, Ninth Circuit, BAP, and it was -- looks like the opinion was corrected November 18, 2014. So a very recent opinion. And basically, while not identical, the facts are somewhat similar where there was a loan given pursuant to a compensation package. And the court actually addressed the Kelly decision that you folks talked about that said, hey, if it's a mortgage, you know, it's a consumer debt. They rejected that and they said it was the purpose of the original loan not what things were spent on. Okay?

So if I -- so what I'm telling you, what I'm saying is that it's no easy thing to uphold

my result by dropping down to 707(b) because I'm kind of leaning toward agreeing with this case. I went through everything and thought about it a lot, and I don't think I want to ambush you. I want you folks to read the case. But now I'm kind of like, "what do I do here?" So that's my rhetorical sort of statement.

Everybody did a nice job on the briefs. I do think this is one of these rare situations when I told Mr. Schwartz, you mean I've got to rule that I'm wrong? And it's not really that, it's just that it's such an open question. We have two judges disagreeing in the circuit, so it is an open legal question.

Then I really -- I have no idea what happens if I stay this. Obviously the easiest route for me is to say I'm right, you know, Mr. Schwartz wins on the first prong but he loses on the second prong of irreparable harm. But I'm not sure I can conclude that. I know that in a sense he has the burden to prove that, but I don't know how it would be possible for him to prove that unless he got Finra on the stand and said yes, we are going to yank the license. Because it seems like it's an unknown as to what they will do. But it is clear from their rules

that they sort of back off if you file bankruptcy, you know.

Okay. Now I'll let you folks talk.

MR. KING: If I could just address a few things in reverse order, Judge. And I'm not aware of the Cherrett case, but I really don't think it changes the analysis if it says what the purpose of the loan was because we cited extensively both in this brief and I believe it was in the opposition to the brief that we ultimately decided probably was not the right --

THE COURT: Well, I don't want you to argue that. I've looked at all the cases --

MR. KING: Right.

THE COURT: -- on that, and I want you to read that case. And I may have not raised it perfectly. I'm telling you that I read this and I kind of agreed with this case. Okay? You need to know that.

MR. KING: I guess my response to that would be, Judge, we'd like to address that issue.

THE COURT: I think that I want to give you an opportunity to do that. But that's not even relevant to my current ruling when you think about it, because my current ruling -- that's 707(b),

my current ruling is 707(a). And I dismissed the case. Mr. Schwartz is asking me to stay my dismissal. I think he wins on the first prong; that there's a question even though the majority view here in this district -- which is why I didn't dwell on it too much at the time, and I thought, you know, pretty much everybody I knew was going that way, they felt for cause meant it could be pretty much what the court thought was appropriate. But I took a closer look at Judge Goldgar's opinion, post BAPCPA. I took a closer look at the appellate court decisions that were split. And, you know, researched the fact obviously that the Seventh Circuit hasn't spoke on this issue.

MR. KING: I see two issues here, Judge. And the one, if the court's concerned about having to predict what Finra would do, I don't think you have to predict what Finra would do because it's irrelevant. The case law in the Seventh Circuit, the case law in the Supreme Court, all the cases we cited in our brief: Losing your job is not irreparable harm. It's not sufficient to establish irreparable harm. The Gleason case was right on point with respect to whether a judgment creditor, in our situation we're trying to become a judgment creditor,

whether them having a judgment creditor pursue you while your case is pending on appeal, that's not irreparable harm.

THE COURT: Well, that I agree, that the fact that somebody's trying to collect a judgment and then you'd have irreparable harm in every case. And you would -- you know, this I see is a little bit different. A license is going to be yanked, not lose a job. Because one could argue well, you lost that job but you can go apply for this job.

MR. SCHWARTZ: That's correct.

THE COURT: When your license gets yanked, you're out. So do you have a case like that? Because I don't see that those are right on point.

MR. KING: Judge, I think the cases that we cited, there is a Supreme Court case that I do believe involves a licensure issue that we could also bring before the court. Whether you lose your job even in situations -- there was -- one of the cases involved doctors where they claim that there was damage to their reputation in the medical field. That's not irreparable harm. Nothing says you have to be able to get the same job back. And, quite frankly, Judge, there's an entire issue here that arises under securities law is whether Mr. Schwartz

is required to be licensed at all because he's not doing -- he's not facing customers. It's called a client facing job. That's a whole other issue.

THE COURT: Well, the problem is -- there's two sides to this, Mr. Schwartz. The problem is that, you know, I don't see any way around this case now other than having some kind of hearing with pretty extensive fact finding, not necessarily on the first prong, but on the second prone of irreparable harm. Alternatively, we could go and have a hearing on everything, including 707(b), to see if that was an alternative way to dismiss it, with you understanding that I kind of agree with this case. Now there may be factual issues that change my mind and other things that change my mind, but it's just out there and nobody discussed it, it's new.

Okay. So I want to give Mr. Schwartz a chance to address the court.

MR. KING: Can I just addressed the first prong that you raised Judge? And that is what I think you are considering, a split in the circuits, and I very respectfully disagree. Both the Huckfeldt case and the Padilla case, Huckfeldt expressly found under 707(a) dismissing for bad faith. In Padilla, they acknowledge that Huckfeldt was right, but the

facts in Padilla just didn't support that. Neither of them say bad faith wasn't an issue. Now I understand that the issue before this court is not bad faith, but it's irrelevant because the issue is whether there's something other than the three enumerated factors. And there clearly is. Before BAPCPA, when all those cases were decided, Congress had all those cases before it and when they made the 2005 amendments, and if they wanted to say all those courts were wrong, they could have. Instead, what the legislative history says is that the three enumerated factors appeared to be technical in nature. But then they go on to say but income alone is not sufficient. It doesn't say income without other factors, but income alone is not sufficient. If it meant something other than -- if it did not mean something other than the three enumerated factors, why would Congress address income, which is not a technical factor, it's an underlying factor of the case.

THE COURT: Well, you know, you're arguing to me -- you're arguing my position. I've already agreed with you that this falls under 707(a). What we're arguing now is would he have an opportunity to prevail. And you don't -- if you

don't let a person -- if you don't win on that prong in a situation like this, I don't know when you ever win because you've got a disagreement among the judges, the bankruptcy judges here, and you have the Seventh Circuit that hasn't ruled on it. And you do have some different results.

I agree with you. You're preaching to the choir on it, but I don't know if I would ever grant a stay under your scenario. You're just saying you're right, Judge. You're right. And I'm saying well, I do think I'm right, but there are people that disagree with me. And I respect those people. And, you know, Judge Goldgar specifically went through a post BAPCPA analysis. And, you know, I respect that analysis. And I somewhat think the Seventh Circuit should have an opportunity to take a look at it and speak on it. It's very important for us to have some guidance. Unfortunately, I know you don't like being a test case. That's just the way I feel about it. So you're probably not going to change my mind on the first prong. Where I have an issue is the second prong.

Now I would like Mr. Schwartz to have a chance to talk to the court. He's been very patient.

MR. SCHWARTZ: Thank you, Your Honor. First a question on something you mentioned as far as opening up a hearing, I presume within this court --

THE COURT: Yes.

MR. SCHWARTZ: -- on reevaluating and looking under 707(b) as well as --

THE COURT: Well, we first talked about -- let me explain so you understand. I talked about having a hearing on 707 -- I mean on irreparable harm --

MR. SCHWARTZ: Okay.

THE COURT: -- so that there was findings of fact because, for example, if I deny you your stay, you can appeal that as well. You know, but there should be some kind of record of this. And I think it's important -- it might be important for Finra to look at it in terms of, you know, when they're trying to make their decision, if the stay's denied, that you're still attempting to get a stay, that you're still attempting to get a ruling on this to stay in bankruptcy. So I talked about --

But what I went on to say is, is it more efficient to go ahead and also have a hearing on 707(b). But it's not relevant because the case right now in its posture is dismissed. So 707(b) is just

not there. That's what I'm trying to work through. I mean, I would hate to see, you know, I don't know -- if they say -- if I get reversed on 707(a) --

MR. SCHWARTZ: We'll be back here on (b).

THE COURT: You'll be back on (b), exactly. And I don't know what Mr. Radtke's role -- he's like in total -- I'd hate to be in your spot.

MR. RADTKE: I'm here, and I'm happy to be here, Judge. But I think that procedurally, since there's no appeal, this really is a motion to reconsider.

THE COURT: You know what? Yes.

MR. RADTKE: And if you want to --

THE COURT: I'm thinking about treating it that way.

MR. RADTKE: -- treat it as a motion to reconsider, you can say okay, I'm going to reconsider and we're going to have a hearing on everything. And I think that's the appropriate way to go, especially if this is going up somewhere.

MR. SCHWARTZ: I wouldn't be opposed to that.

MR. KING: The only issue I would raise with that, Judge, is because there's actually a

different standard from a motion to reconsider than there is on the issue of whether this court should grant a stay. And that's because the unique animal that bankruptcy is, you have to ask the bankruptcy court first. So in the matter of the Forty-Eight 48 case --

THE COURT: Wait. But it would be just a motion to reconsider really to, I guess under 707(b)? I mean, I've already ruled under 707(a) and I don't know if I'm going to change. I'm not inclined to change my ruling under that. I mean, there was enough facts that weren't contested that, you know, I didn't feel that there were factual issues. Where I feel there are factual issues that were not flushed out is on the irreparable harm. And then also -- so it might be a motion to reconsider on 707(b). I guess it would be something that you guys might file even. I didn't even rule on 707(b).

MR. SCHWARTZ: There's nothing to reconsider.

THE COURT: I didn't even rule on it. I guess it would be a motion to reconsider my -- and it would be brought by Mr. Schwartz, to reconsider my dismissal since -- but if 707(a) applied, it doesn't work to reconsider.

MR. KING: I think we clearly have standing to raise a motion to reconsider under 707(b). Obviously we dropped in a footnote. We think it should have been granted on that ground to start with. And we could absolutely ask Your Honor to reconsider that issue. There's no question.

THE COURT: I do think that we should probably try to build a record on both issues just because I think it would be horrible if it goes all the way up there and it comes back down and it's still not decided.

MR. KING: We were concerned about that 707(b) issue going back and forth as well.

THE COURT: Right. And I thought I was doing the efficient thing. And I said I think I messed this case up, when I thought about it.

MR. KING: We messed it up, Judge. We should have asked you to do the motion to reconsider first.

MR. SCHWARTZ: That was part of the reason why I requested it, so if we have to appeal...

THE COURT: I think we need to have a full record.

MR. KING: So if I understand the court correctly, I think this would involve both

briefing and an evidentiary hearing on the facts?

THE COURT: Well, the evidentiary hearing -- you know, I guess the question I would ask you folks now, I don't know how much is contested under the facts under 707(a). I mean, his salary, the expenditures, the lifestyle. I'm not aware of anything that was totally contested. Now there was some strong language used, hyperbole and things like that that Mr. Schwartz denied, like, you know, there were statements, and when he went through in the motion to dismiss he tried to answer a number of paragraphs. And where there were facts he would admit or deny, mostly I think he admitted the facts, but when there was an opinion as to his motive for behaving, what have you, he denied that. I don't know if I really felt that was necessary to ruling under 707(a). I just simply looked at the salary level -- you know, it really came down to what I said. I said I would never let a Chapter 13 person who is actually trying to pay some of their debts have that kind of lifestyle. I gave Mr. Schwartz the option to go to Chapter 11 because I know that he doesn't have the income to go to a 13. It was more that type of thing, sort of a fairness issue with the knowledge or the feeling and belief that I still hold

that 707(a) says for cause - including. I mean, it has two sort of technical things. But, you know, I respect Judge Goldgar's analysis. I respect the other, and I could see the Seventh Circuit maybe going the other way.

MR. KING: Judge, I think I was suggesting evidentiary in terms of if we are going to ask the court, which we will, under 707(b) to reconsider, then there are factual issues --

THE COURT: Yes.

MR. KING: -- we do a pretty -- I'm sorry, extensive 2004 exam, and maybe we should just submit that with the motion. The court can review that. And if you think additional fact finding is necessary, we could then --

THE COURT: I don't know. I don't know. I may want a full-fledged hearing on it. What we're really trying to decide today is are we just going to deal with irreparable harm based on my ruling or are we also going to fold in a hearing on 707(b) --

MR. KING: Our preference --

THE COURT: -- which may moot out, if I rule in favor of you and decide it's a consumer debt, it may moot out the 707(a) issue.

MR. KING: Our preference would be the latter, Judge. We'd rather have one record going up on appeal.

THE COURT: I agree.

MR. SCHWARTZ: Then we address the issue of if it's consumer or --

THE COURT: I think the Court of Appeals in particular would be very upset with me allowing this to go up piecemeal. And like I said, I'd actually be willing to certify this so that you can skip the district court level. They have been taking some of these. There is that provision in the Code that if I think it's an open question, there's a disagreement among the judges here, we ought to just bypass the district court and go up to the Seventh Circuit. I would be amenable to that so that we could speed it up. But knowing that, we need to have a good record.

MR. KING: We agree.

THE COURT: They'll be upset with all of us.

MR. SCHWARTZ: Just from a time and expense to all, I think it makes sense to do that, because it's going to come back. Then we'll get a decision out of the way which is going to get sent

back up again.

THE COURT: Well, you know, if one of you wins at the district court level, it won't necessarily come back. Somebody may appeal to the Seventh Circuit. Then it sits there. Then it may come back on the one issue, then it may go back up on the second issue. So, you know, I think we need to get -- I apologize for just ruling on the one issue. I thought I was expediting it. Okay? And now that I look at it, I think for everybody's benefit we need to kind of get the whole thing decided, send it up, try to certify it.

MR. SCHWARTZ: So, Your Honor, based on that, I did want to answer the -- to respond relative to the Finra case as far as what they may or may not --

THE COURT: The what case?

MR. SCHWARTZ: Finra. You had a question as to what they would do.

THE COURT: Well, you know what? We're going to have a hearing on that. So I understand that there are two sides to this. Just because the attorneys talk more than you do, I get it. I know what your position is. I read your papers. And I'm not going to be deciding anything

today. Okay? I want this to be a full-fledged hearing where I get all the facts in so I can do the right thing. And I would suggest to people if there's any way somebody can get a Finra person here to testify, it would be quite helpful to know how all this works, instead of me just looking at the regs. Because in a way it's like to determine irreparable harm, I'm trying to figure out how they will decide it, what will they do.

You know, the thing that bothers me about that is that, yes, Mr. Schwartz has the burden of proof on irreparable harm, but how does he prove how a person will adjudicate something? And if they do adjudicate it against him, it's probably, in my view, irreparable harm.

I know you disagree with me. Show me those license cases. But I think losing a job is different from losing a license, especially a license that permits someone to earn a very good level of income. So, you may have cases like that and I'm happy to look at it and see where that falls.

You both did great jobs. Okay? Which is why this thing is, you know, kind of gotten messy, kind of gotten a little interesting. I had some open questions. I mean, the briefs on both sides -- I

mean, Mr. Schwartz did not so much write like a lawyer, more like a novelist, but I got the points. I got the cases, and I did some of my own research. So I want to congratulate you both on doing a fine job.

MR. SCHWARTZ: Thank you.

THE COURT: It's just, you know, we'll have to go from here. So, I don't know -- I would think the parties may want to try to take a little discovery, maybe not. Because, you know, remember, we're going to have a hearing where we're going to deal with irreparable harm. So you may want to take some discovery vis-a-vis Finra, or something like that, and flush that out a little bit more for me other than just attaching the ruling, because they have options under those rules.

MR. KING: Judge, you actually raise one issue I was going to address with the court in light of the fact that we're going to go forward and address 707(b). Mr. Schwartz has been unable to get his American Express records from American Express. If we could have leave just to serve a subpoena on American Express? He hasn't objected to it. It's just they haven't given him --

THE COURT: Well, I would give him

that leave. I'm mean, I'm not sure you really need leave.

MR. RADTKE: You just file a motion, 2004.

THE COURT: We don't have an adversary, so it would be a 2004. Did I ever say that I would take this under 9014, like a contested matter, and allow discovery?

MR. KING: I don't recall.

THE COURT: I honestly don't understand why these motions have to be filed. You know in the olden days we just issued 2004 notices, but -- okay. You will need to file a motion so the order can be attached to it.

The same goes for you if you want to take any discovery, Mr. Schwartz. If you want to issue subpoenas, you'll need to file a motion. When I say 9014, that means even though this isn't phrased in terms of a complaint, it's a contested matter and the Bankruptcy Code rule says you can take discovery under 9014 sort of like you would in an adversary complaint proceeding.

MR. SCHWARTZ: Are there any time bars to 9014?

THE COURT: No, I set the time. Oh,

you mean for them to respond? What is it?

MR. RADTKE: It's just routine.

THE COURT: It's what?

MR. RADTKE: The motion for 2004 exam, is that what you're asking?

THE COURT: No, but I thought he was thinking like for the other side to respond.

MR. RADTKE: Oh. You serve a subpoena on them and they call if they can comply in time or not.

THE COURT: What is it normally?

MR. RADTKE: You know, I don't think the rule specifies.

THE COURT: I've never had that issue. I never had that issue where I said you must respond in 30 days. Normally people will call you up and you will work it out with them. And then if they're being unreasonable, you come and talk to me.

MR. SCHWARTZ: I did everything in my power in regards to American Express. I can't make them do it. I've tried. I gave --

MR. KING: We're not suggesting Mr. Schwartz --

THE COURT: I got that.

MR. KING: We just need the subpoena

to make them do it.

THE COURT: They won't do it for you? Strange.

MR. RADTKE: You just never know. It's difficult. I go through this all the time. Depending on who you get on the phone.

THE COURT: All right. I think we need to have some discovery, a little bit. I would feel better if you both at least did some Finra discovery and we fleshed it out a little bit so I can rule properly. You can also take discovery as we talked about on 707(b), but you need to bring your motion. So, they may be bringing a motion in order to issue a subpoena to American Express. Either side may be bringing a motion to issue subpoenas to Finra. That's all up to you as to what you want to do on it.

Now, the big point, this is not going to be an inexpensive process. It's going to be a long, drawn-out process.

How much money did you get from the bonus amount?

MR. RADTKE: $58,000.

THE COURT: So Mr. Schwartz handed over 58,000. I just hate to see all of that chewed up by everything that's going on here. It's in limbo

now. Mr. Radtke, he's incurring time. I guess -- I don't want to know what bad blood is going on here, but for some reason I sense bad blood, that people aren't able to settle on something like this because arguably so much money is going to be spent on this.

MR. SCHWARTZ: I already spent it.

THE COURT: Well, yeah, and I obviously can't -- this is not a slam dunk your way, folks, and so a lot of money is going to be spent. Sometimes I wonder if people are behaving in a rational business way, but I don't know. Maybe the demands are unreasonable. I have no idea. But I know that there's already been $58,000 turned over, which is a chunk of money.

And are you -- I guess you have other creditors? But I think you're like 90 --

MR. RADTKE: 91 percent or so.

MR. SCHWARTZ: 93 percent.

THE COURT: By the way, if this thing would just, you know, boom, there would be some money there, and that would be a chunk right there. And I can't make people settle. I find it to be an interesting case. I have no issue doing my job on it, but I'm wondering what's going on in the hallway here. That's my euphemism for, you know, things that

are happening outside the law, what have you.

If at any point in time you guys think it would help, I just -- I don't normally get involved in settlement conferences because I'm the trier. I just had a party ask me to do it anyway, and they waived everything. But it's not real good, and this is kind of contested. I mean, I would like to try to help if I could. I won't ask another bankruptcy judge to do it because I won't take theirs. So it's not fair. And this comes from an old day of, back, you know, years and years ago when bankruptcy judges had nothing to do and they were taking mediations from the district court and it kind of became a tradition where we would start to do that. But what I have found, for example, would you be real happy if I took some other judge's mediation and postponed my work on your case for a year? And that's kind of the way I come down to it. I think my first responsibility is to the cases that are before me. It does have that side bad thing, though, but then I can't really go and ask a judge to mediate for me.

MR. KING: Judge, if you wanted to do it in this case, our client is a huge proponent of mediation. We mediate almost every case we have.

THE COURT: Well, the only problem is is that I'm going to be ruling on things --

MR. KING: And that's why.

THE COURT: You know, parties have to almost waive everything. And then how do you let -- I don't even know how I would do this one because I would like to take one party alone, and yet you're not supposed to have ex parte conversations with the judge that -- so I don't even know, they may say we waive everything. So I'll have to address that with them. Let me get through that one.

You know, I'm just concerned about, we've already got a chunk of money there and that would be a start. And it's all just going to be frittered away, basically. I know Mr. Radtke is probably trying not to do too much.

MR. RADTKE: Right now I'm really just an observer, Your Honor.

THE COURT: Right, but it's kind of like the case is dismissed right now, but --

MR. RADTKE: But it really isn't until the --

THE COURT: I know. It's just bizarre.

MR. RADTKE: Until the appeal is --

MR. SCHWARTZ: Can you award a partial disbursement?

MR. RADTKE: I was actually, if Your Honor was going to rule on that today, and I don't think you ought to, but if you were I was going to take out all language directing any payment of anything because I really can't do anything until this case is over, until there has been decisions upstairs.

THE COURT: Right. See, partial disbursements are -- when we don't know if we have a case or we don't have a case, that's really a problem for the trustee.

MR. SCHWARTZ: I mean just more for his compensation.

THE COURT: Oh, well --

MR. RADTKE: I can wait until the end of this case, Judge. That's fine with me.

THE COURT: As long as you're okay with that. I think he's worried -- you know what happens if there isn't enough -- if the administrative expenses or something happens to get so large it has to be pro rata, you have to return things. I kind of agree with him. If he can hold out and he doesn't have to do too much work, he

probably just wants to see how this falls out. But I could see so much money being churned here. You know, Mr. Schwartz may not be spending much because he's representing himself. And so far he's doing okay, with a little help from the court. Because, I mean, I'll admit, I mean, I just saw this case on a consumer debt and it was a little bit different than what you guys decided to use, so I wanted to raise it and bring it to everyone's attention. I think I sort of agreed to some extent, so take a hard at look at it. Lawyers are always finding ways around things, the facts are different. But, like I say, the facts are different on your side too, the mere loss of a job to me is not the same as the pulling of a license.

MR. SCHWARTZ: So the matter still comes back to the issue of stay. Matters are going on, continuing to go on in state court which could moot the effectiveness of any appeal.

THE COURT: On collection actions?

MR. KING: Judge, all we are doing right now, there's no collection action going on. We're just seeking to confirm the arbitration award. He has opposed that. He's tried to get it dismissed. All that would happen is it turns into a judgment.

We cannot do anything until there is a judgment in the case.

MR. SCHWARTZ: Once there's a judgment, he can go after--

THE COURT: Right. Well, the problem is I'd like for them to stand down until we have a hearing, but I really -- until I issue a stay, I have no control over that. I'm sorry. That's -- and it's not a simple issue on this thing, this irreparable harm thing. You have the burden of proof. And, you know, I find it to be a really difficult thing. It seems to me like Finra has options. So I have to get into Finra's head?

And I actually believe that right now, and you can change my mind, that if Finra was going to yank his license, I think I would issue a stay. Okay? So I don't know, they might say okay, the bankruptcy's dismissed, there's no stay, but he tried to avail himself of that, he is appealing, maybe reinstatement. So we're not going to do anything.

MR. KING: And settlement is one of the options as well before Finra, Judge, that protects his license.

MR. SCHWARTZ: Which we've attempted to try to put it out there.

THE COURT: Yeah, I don't know what people's settlement demands are, though. Saying I tried to settle, it's rough because I don't know if people offer a dollar or something meaningful or what their demands are. I understand there's efforts here. I don't know. I don't know what's going on between Barclays and Mr. Schwartz, but it seems to me something's there. But I could be wrong, because I just don't think people are totally behaving rationally. It has to be on both sides. I mean, you've got a lot to lose here too, Mr. Schwartz.

MR. SCHWARTZ: Yes.

THE COURT: All right. So what do we do now? Do we start discovery? I'll be here until the 18th. Well, you want to come on the 17th, grant any 2004 motions? You have to get that -- and I think we should -- everybody needs to get going. And I know Mr. Schwartz is anxious to have some decision on the stay. We can have a little more time if everybody would stand down.

MR. SCHWARTZ: With an agreement to stand down?

MR. KING: I have to talk to the client, Judge. It's not my decision.

THE COURT: You know, otherwise I'm

going to have to really expedite the hearing and not give people enough time to -- I mean, it depends on Mr. Schwartz. I mean, if he says okay, I can wait until then. But if you guys won't stand down so that we can have everybody prepared and come into the hearing with --

MR. SCHWARTZ: If they can't stand down --

THE COURT: Is there such a thing as a temporary stay? What I'm trying to do is do something because you may have a time limit.

You may have a time limit.

And I'm trying to protect the bank as well. You may have to move forward because of some particular time limit, I don't know, now the case has been dismissed. But I don't know if there's a -- I suppose I could probably stay it.

MR. KING: I mean, I could talk to the client, Judge. We could probably reach some type of agreement. This is -- it's -- converting to a judgment is simply -- should have been an uncontested matter. He didn't object to the arbitration award within 90 days. I would suggest to the client --

THE COURT: The problem that I see down the road, one of the reasons why he's fighting,

and it's exactly what he said in his brief, because you folks said he should have to post a bond for appeal. And he pointed out that you guys didn't have a judgment yet, and that that technically wasn't a requirement. Now I didn't research that or check to see.

MR. KING: Yeah, but, Judge, I think the cases that we cited are pretty clear that even if we were trying to collect, which --

THE COURT: Well, but wait. Wait. He's making a distinction, he's saying you've got this arbitration award with Finra, but it hasn't been confirmed yet so it really isn't a judgment. Okay?

MR. SCHWARTZ: That's correct.

THE COURT: So, I mean, I don't know the answer to that. But I could certainly see why he might be fighting it, because if he's trying to stay this thing, I'd be doing the same thing if I wanted to get a stay here and I wasn't in a position to post a bond.

If I have to have an expedited hearing when I get back, I'll have it, but maybe the parties won't be ready.

MR. KING: But that's an option also, Judge. If he's required to post a bond, it protects

us and we don't need to move forward with collection. That's the whole purpose of a supersedes bond.

MR. SCHWARTZ: Debtor has no means, so...

THE COURT: If he's required.

MR. KING: Correct.

THE COURT: That's the issue.

MR. KING: But I'm saying that's another option to Mr. Schwartz and the court. And it's not something he's offered up here either.

THE COURT: I get it, but he may or may not have the funds. But you don't have a judgment yet. You have an arbitration award you're trying to get confirmed. I'm only explaining why I think he's trying to stop it. It makes sense strategically. You may be able to come back and say -- I didn't read your cases about the supersedes bond. I know the general requirements. I know the requirement here in the local rules if there's a judgment and what have you. There's a local rule requirement if there's a judgment, that if he does come in with a bond, it's stayed. I have to stay it. Which is another option. That's what counsel pointed out. If you could somehow come up with a bond, you could get this stayed. I don't know what they

charge. I mean -- and the bond, our local rule sets the amount too. And I don't remember exactly what it is. I don't think it's three times. I think it's just the amount.

MR. RADTKE: I'm not sure, Judge.

THE COURT: Without looking at it lately, I think it's just the amount of the debt with a little -- I could be wrong. You know, you can get those things for a percentage. Of course, as we all know, if he posted a bond and he loses, then he's going to be paying the full amount of the debt to the bonding company. So I don't think -- I think he probably would not want a stay versus that, he just takes his chances --

MR. SCHWARTZ: I have no means to secure a bond.

THE COURT: The trustee's got his money. He has his bonus. Okay? So we need to set a status. But like I said, try to get your motions, any discovery you want to get started, try to get it done before I leave because I'm going to grant -- you know, I'm familiar with the case. I'd rather you be before me than an emergency judge. And I don't think those are emergencies.

MR. SCHWARTZ: Are we talking about

irreparable harm or are we also going to --

THE COURT: We're talking about everything. Get everything going. There's going to be one hearing, Mr. Schwartz. We'll separate the things out, but this is for the benefit of everybody.

MR. KING: You said motions for the 2004 by the 16th, Judge, next Tuesday?

THE COURT: Yes, because you want to get them before me to get the process started. I'm going to be gone for two-and-a-half weeks.

MR. KING: I'm actually going to be out of the country myself, Judge, from the 13th through the 27th.

THE COURT: Well, you can come before then.

MR. KING: That's what I'm saying, we'll get it in by the 16th so it will be done before you leave.

THE COURT: And I'll be granting, you know, unless something's crazy, obviously I don't think that will be the case, I'll be granting those motions. So get the process started.

What's happening in state court, trying to get it confirmed? I can't do much about that. I mean, I could have a hearing today and

decide whether to give you a stay or not, but you've got the burden of proof on irreparable harm. And I'm throwing out these questions and telling you that you're the one that has to convince me it's going to happen. So that's tough, you know. And I will tell you this, that even if you don't get your stay, I will certify this appeal up to the Seventh Circuit. So you will skip a level.

Now, I don't have any control over whether they take it, but they have been pretty much taking things where there's disagreement among the bankruptcy judges and it's certified. So that will at least give you a little bit of relief if you don't get what you want.

So, let's set a status. When do you guys want to come back?

MR. KING: If we have the discovery motions presumably granted no later than the 16th, 30 days for discovery, Judge? I mean, that's to get the subpoenas out.

THE COURT: It's going to be hard to get people with subpoenas to respond.

MR. KING: Plus it's the holidays.

THE COURT: You're probably still going to have, especially with the holidays, you're

probably still going to have issues.

MR. SCHWARTZ: Is there nothing we can do to --

THE COURT: I don't know how I have any authority to stop it. I wish they would stand down. I have indicated my preference to the bank. I wish they would stand down so we could get this hearing done without -- because what it's going to do is it's going to force me to have to have a hearing very quickly. I would prefer to be ready. I think you all would prefer to be ready. I think I can do no more than just give my preference. I don't have any legal basis.

MR. SCHWARTZ: I guess my question to the court is because we are currently dismissed, am I still currently in the time period to file my appeal.

THE COURT: You're still okay because I haven't awarded fees yet.

MR. SCHWARTZ: Does that -- does stay pending appeal -- I guess put the cart before the horse.

THE COURT: Yeah.

MR. SCHWARTZ: And the whole issue of irreparable harm, we're arguing about it? That's going to happen.

THE COURT: That's right. I'm sorry, but that's -- you know, I cannot -- you have -- if I had to rule today, Mr. Schwartz, you would not get your stay because I can't figure out what would actually happen to you, and you have the burden of proof. So while I understand you don't like this time period, I'm trying to explain if we have an elevated, quick hearing, it's your burden and it has to come down to that for me because I can't tell what Finra would do.

I'm not convinced that your license would be pulled. You have to convince me of that. And they're saying even if that's the case, it's not irreparable harm. And I'm telling them I'm not sure I agree with that.

MR. KING: Judge, perhaps we could condition something on some kind of notice from Finra because Finra's known about this for three months. They've known the case has been dismissed for three months. He's served them with copies of everything he's given to this court. Finra is well aware of what's going on. Finra can't suspend his license without --

THE COURT: Well, you know, if you guys could go to Finra and get Finra to hold off

until it's finally decided, we don't need to have a hearing.

MR. KING: What I was going to suggest, Judge, Finra isn't going to do anything summarily. We're going to get notice of anything they're going to do. And if we get notice from something that Finra's going to do something, then we can address it at that time whether we can just agree to stand down, maybe the stay goes in place, maybe not. But Finra is not doing anything, Judge.

MR. SCHWARTZ: Because we're still within the rule for defense.

MR. KING: Which means that nothing's going to happen then on appeal.

THE COURT: Well, I don't know. He's got a motion for stay right now. That's another good point, though, could there be a way that the two of you work together and talk to Finra and see if they would stand down during the course of --

MR. KING: Absolutely, Judge.

THE COURT: Then I wouldn't have to give the stay. And I know you might not like that because they can move forward on the judgment. But my -- I'm sorry, but they're right on the law about just proceeding to collect a judgment is not

irreparable harm. So your point is your license pull with me, that's what's irreparable harm. If Finra says we're not going to do anything until this appeal is finally decided, you're probably not going to get your stay. But you're going to get to go up and have it decided.

MR. SCHWARTZ: Except for the point that then they will have a judgment and I will be unable to get the bond.

THE COURT: Right. And I just told you -- well, you don't need a bond if you don't have a stay pending appeal.

MR. KING: Judge, we will contact Finra and say we do not want this gentleman's license suspended. That's not in our best interest. We want to stay the status quo on this. That's the last thing we want.

THE COURT: I think you need to -- you know, I'm not even sure because when one thinks about it -- I hate you guys let me be his lawyer. I don't want to enter my appearance on behalf of Mr. Schwartz. I'm just trying to be rhetorical back and forth here.

But, you know, it's not an appeal from a judgment. This is not an appeal from a judgment, a

money judgment. This is an appeal from a dismissal of a bankruptcy. So it may not require a supersedeas bond, one way or another.

MR. KING: Judge, I'm sort of thinking outside the box. I mentioned earlier that one of the ways to keep Finra from suspending the license is a settlement. There may be a way we can reach a temporary settlement with respect to not moving forward on anything on appeal. Finra would have to keep his license in place. I mean, if there's a settlement agreement between the parties. We limit it to that narrow issue, don't suspend his license, that's part of our settlement agreement, while this case makes its way through the Seventh Circuit, wherever it's going. I think Finra would be bound by that. I think they'll do it without having a settlement agreement, but I think we can bind --

THE COURT: I would strongly encourage you to do that because you get to work with them on that. Because you have the burden of proof on this irreparable harm. And I think it's going to be difficult to do. You're not going to get irreparable harm based on the fact that they're going forward on their judgment. But I just think I gave you another argument, because I don't think my dismissal of your

bankruptcy is a money judgment, that the appeal law requires a bond. Okay? Ah, they may disagree. They may disagree, I don't know.

What do you think, Mr. Radtke?

MR. KING: It's a final order.

MR. RADTKE: Cases where I've appealed from a final order, I haven't put up a bond.

THE COURT: Right, because it's not like I enter a judgment in favor of Barclay's Bank in the amount of half a million dollars and that's being appealed. It's I dismissed the case. So I'm not sure a bond is required.

So I think that through our discussions, I think this would be a wonderful way to avoid -- now we may have to still do some 707(b) stuff, I don't know. We could talk about that, but this could go a long way if we could get Finra to stand down.

MR. KING: I still think it makes sense to address the 707(b) because I think you're right, spot on, the appellate court is not going to want to see part of this come up and the other part come up -- I don't think that's --

THE COURT: We could certainly cut out the messiest part of the hearing.

MR. KING: I agree.

THE COURT: Just so Mr. Schwartz understands.

Mr. Schwartz, I think you've got it. The only basis upon which you're going to get a stay is if I decide that you have proven your license is going to be yanked. It's not going to be because they are continuing in state court to get their judgment confirmed.

MR. SCHWARTZ: Understood.

THE COURT: While that's a worry to you, and I understand that, I think I just gave you an out on that.

MR. KING: Why don't we set the 16th for status as well, Judge? We'll do everything we can between now and the 16th to either get something from Finra in writing, even if it's just an email saying they're not going to do anything. I think that would go a long way towards allowing this court to determine how much time you need for the arguments, how much time we need. I think that would really -- that's sort of setting the course.

THE COURT: Can you both come back December 16th at 10:30?

MR. KING: I cannot, but Mr. Coleman

will.

MR. COLEMAN: I believe so.

THE COURT: Why don't we set it for 11:00?

We have something at 11:00?

Let's set it at 10:30. Hopefully you'll just be able to report something to me. And if not, we'll have to get a status date. But I think your discovery, go ahead and probably do your discovery. But I think Finra should understand, and I think that's a good -- talking like a lawyer, good leverage like, hey, we're about to take a bunch of discovery on you and ask your people your opinions about this. All that can be avoided if you just agree to stand down during the appeal.

MR. KING: I agree, Judge.

THE COURT: That might work. I think you need to try to work with -- if you can, Mr. Schwartz. I think it's in your best interest because what you really want, you don't want your license yanked until you get a hearing on the merits here.

MR. SCHWARTZ: Well, I'm not concerned about losing my licenses during the appeal process. I'm still within the rule 9554 defense during -- while I'm still in the appeals process.

THE COURT: But then you don't have any irreparable harm.

MR. SCHWARTZ: Activities going on outside court may moot that.

THE COURT: You kind of just talked yourself right into a box. What you just said is your license is not going to be yanked during the appeal, and that your only concern is that they're going forward. And I'm telling you that's not irreparable harm. After all this discussion, is that where we are?

I'll let you come back on the 16th before I rule this morning, but I think you just talked yourself out of the stay. You're telling me they won't yank your license during the appeal process. Check it again. I still think you all have to talk with Finra.

MR. KING: I will contact them.

THE COURT: I hate when people who are representing themselves say stuff like that. Okay? I'm not going to stop the collection over there. Okay? See you on the 16th. Let's do it at 10:30.

MR. KING: Thank you so much, Your Honor.

MR. SCHWARTZ: Thank you, Your Honor.

MR. RADTKE: You'll carry the fee application along with that?

THE COURT: We'll keep carrying it.

(Which were all the proceedings had in the above-entitled cause, December 04, 2014, 10:30 a.m.)

I, JACKLEEN DE FINI, CSR, RPR, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.

Gmail Michael Schwartz [redacted]gmail.com>

[redacted] Retaliation

2 messages

Michael Schwartz [redacted]ail.com> Fri, Apr 22, 2016 at 9:32 AM
To: "Vo, Kristine" <Kristine.Vo@finra.org>, "Carey, David" <David.Carey@finra.org>
Cc: "Cook, Christopher" <Christopher.Cook@finra.org>, "Wegener, Ed" <Edward.Wegener@finra.org>, "Reynolds, Courtney" <Courtney.Reynolds@finra.org>, John Castiglione <John.Castiglione@ag.ny.gov>, "Shipley, John" <John.Shipley@bankofengland.co.uk>, "Roth, Julie" <julie.roth@ny.frb.org>, Whistle <Whistle@fca.org.uk>, PRA Whistle Blowing <PRAwhistleblowing@bankofengland.co.uk>, "O'Malley, Sean" <Sean.OMalley@ny.frb.org>, "Landy, Katherine" <katherine.landy@ny.frb.org>, "Paggi, Terry A." <PaggiT@sec.gov>

Ms. Vo,

As these documents are dated 1/16/15 and 4/9/15 (more than a year old), respectively, do you not find it the least bit odd as to the timing of these documents being forwarded to your attention?

As Messrs. Carey and Cook are aware, there are multiple ongoing investigations into the matters which I have brought forward, most of which being originated between 2/1/16 and 3/1/16. As has been known all along, this is not about money or my failure to perform. This has always been about retaliation and impugning my credibility as a [redacted] How exactly would Barclays expect to collect on the money judgment you reference below if I am unable to work in the only industry I know and have any experience in? This action is just the latest in a long string of [redacted] retaliation, which you have just allowed FINRA to play an enabling role in.

Regards,

Michael Schwartz

(312) 533-9111

From: Vo, Kristine [mailto:Kristine.Vo@finra.org]
Sent: Friday, April 22, 2016 9:45 AM
To: Michael Schwartz [redacted]gmail.com>; Carey, David <David.Carey@finra.org>
Cc: Cook, Christopher <Christopher.Cook@finra.org>; Wegener, Ed <Edward.Wegener@finra.org>; Reynolds, Courtney <Courtney.Reynolds@finra.org>
Subject: RE: 12-02453 Barclays Capital Inc. vs. Michael Schwartz

Dear Mr. Schwartz:

On April 11, Barclay's attorney forwarded the attached two orders entered by Judge Cohen of the Circuit Court of Cook County, IL confirming the award. Although you filed motions to dismiss the petition to confirm the award, those motions were denied. Moreover, the Court specifically noted that you never moved to vacate the award and would have no legal basis for doing so. (*See,* Mem & Op, Sec. III.). The second document is an Order entered by Judge Cohen granting Barclays certain interest and attorneys' fees in connection with its efforts to confirm the award including, but not limited to, successfully obtaining a dismissal of the bankruptcy proceeding though which Mr. Schwartz sought a discharge from his obligation to pay the arbitration award.

Best regards,

Kristine Vo

Specialist, Case Administration

FINRA Office of Dispute Resolution

One Liberty Plaza

165 Broadway, 27th Fl.

New York, NY 10006

Tel: (212) 858-4106

From: Michael Schwartz [redacted]gmail.com]
Sent: Friday, April 22, 2016 10:38 AM
To: Carey, David
Cc: Cook, Christopher; Vo, Kristine; Wegener, Ed; Reynolds, Courtney; Langley, Malia
Subject: 12-02453 Barclays Capital Inc. vs. Michael Schwartz
Importance: High

Mr. Carey,

In the message below you stated that FINRA would only re-institute suspension proceedings against me upon the request of Barclays, and that as of 3/10/16 Barclays had made no such request. Can you please provide the date upon which Barclays made such a request that my association with any FINRA member firm be terminated? I am today in receipt of correspondence from FINRA that my suspension will be effective on May 12, 2016.

This detail will be important in determining how I may proceed in responding.

Sincerely,

Michael Schwartz

(312) 533-9111

From: Carey, David [mailto:David.Carey@finra.org]
Sent: Thursday, March 10, 2016 12:43 PM
To: Michael Schwartz <[redacted]
Cc: Cook, Christopher <Christopher.Cook@finra.org>
Subject: 12-02453 Barclays Capital Inc. vs. Michael Schwartz

Dear Mr. Schwartz:

Thank you for your emails concerning your failure to pay the award issued against you in this case. As you know, Rule 9554 permits FINRA to suspend the registration of any firm or broker that fails to comply with a FINRA arbitration award. FINRA will stay suspension proceedings only when there is a valid legal basis for award nonpayment, including circumstances when brokers file for bankruptcy protection. In this matter, however, we understand that a court has recently dismissed your bankruptcy petition. 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.

In the meantime, we would strongly encourage you to seek a resolution of this matter with the prevailing party. Separately, and further to your request that FINRA investigate this matter, please be advised that we have copied Chris Cook of the FINRA Ombudsman's office above. I understand that you have already communicated with Mr. Cook.

You may also contact me if you should have further questions.

Very truly yours,

David Carey

Wegener, Ed <Edward.Wegener@finra.org> Fri, Apr 22, 2016 at 9:49 AM
To: Michael Schwartz <[redacted]

Your message

To: Wegener, Ed
Subject: [redacted]r Retaliation
Sent: Friday, April 22, 2016 11:32:04 AM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, April 22, 2016 11:48:37 AM (UTC-05:00) Eastern Time (US & Canada).

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Real Estate Advisor | LAW BLOG

Trying to Avoid Repaying a Forgivable Loan? No hiding in bankruptcy!

By Nathan Lamb on August 28, 2015

As an attorney that prosecutes non-payment of forgivable loan claims on behalf of BDs, I find these cases typically go one of two ways. In one case, the departed RR raises a series of frivolous counterclaims to try to get out from paying what is, on its face, usually a clear cut breach of contract and then the RR loses. In other cases, the departed-RR raises a series of frivolous counterclaims to try to get out from paying what is, on its face, usually a clear cut breach of contract claim, loses, AND then declares bankruptcy to try to get the debt owed to the BD discharged.

Bankruptcy is always a risk to any litigation and most firms appreciate that risk when filing a note claim. Sometimes the principle is worth enforcing even if the firm thinks the RR won't have sufficient funds to satisfy the judgment.

What if, though, the RR tries to make himself eligible for bankruptcy protection by spending at a rate that far exceeds his income and savings levels after an arbitration panel decides against him. Then, when the money is gone, he can declare bankruptcy thumbing his nose at the firm, right? Is the firm left with no recourse?

Saturday morning college football ESPN GameDay host Lee Corso has a famous catch-phrase that applies to this situation.

Not so fast, my friend!

Well, I'm not sure Barclays Capital Inc. would call its ex-RR, Michael Schwartz, a friend, but I think the concept is right.

This week, the 7th Circuit issued a decision affirming the dismissal of Mr. Schawartz's bankruptcy petition filed after Mr. Schwartz and his wife tried to spend their way into bankruptcy following an adverse arbitration award. The ruling sends a clear signal that manufacturing a bankruptcy to walk away from a forgivable loan won't work.

We here are particularly happy about the result because the case was handled by Ulmer & Berne partner, Pat King.

Well done Pat!

A full news story of detailing the case and decision can be found here: Chicago Daily Law Bulletin – High living dooms bankruptcy petition