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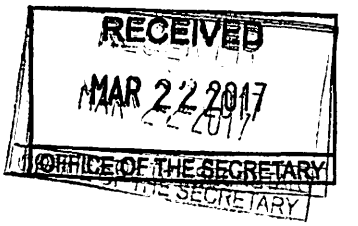

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Michael David Schwartz

For Review of Disciplinary Action Taken by

FINRA

File No. 3-17752

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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I. INTRODUCTION

Applicant Michael David Schwartz has appealed a December 1, 2016 FINRA expedited decision suspending him from associating with any FINRA member firm in any capacity for his failure to pay an arbitration award. Schwartz concedes that he has not paid in full a $568,568 arbitration award against him, and in favor of Barclays Capital Inc. ("Barclays"), issued more than three years ago. After an evidentiary hearing, a FINRA Hearing Officer correctly found that Schwartz, who had argued that he settled the award with Barclays, did not meet his burden to prove that the settlement eliminated his obligation to pay the award in full. Accordingly, the Hearing Officer suspended Schwartz's registration with FINRA until he pays the award in full, provides sufficient documentary evidence that he and Barclays have agreed to a complete

settlement of the award, or he files a bankruptcy petition or demonstrates that the award has been discharged by a bankruptcy court. (RP 879.)[1]

The record amply demonstrates that FINRA acted in accordance with its rules by suspending Schwartz when he failed to pay in full the sizable arbitration award against him for more than three years. Schwartz failed to prove his defense that he settled the award with Barclays. The Hearing Officer correctly interpreted the proffered settlement agreement to concern only certain of Schwartz's assets, and otherwise preserved Barclays's right to Schwartz's full satisfaction of the award.

On appeal, Schwartz sets forth no basis for setting aside the Hearing Officer's order. In an effort to avoid all responsibility, Schwartz misconstrues the settlement documents by ignoring key provisions that preserve Barclays's ongoing right to recovery of the arbitration award and impermissibly collaterally attacking the award. Schwartz denounces FINRA's expedited proceedings and the underlying arbitration as unfair, relying on his self-serving and unsupportable statements as the basis for much of his arguments. But the bases underlying the Hearing Officer's findings are fully supported and incontrovertible. Although Schwartz levels numerous meritless allegations against FINRA, the reality surrounding FINRA's action is straightforward and without controversy. FINRA acted in accordance with its regulatory authority and duties to enforce the arbitration award that Schwartz refuses to pay. Because the record fully establishes the Hearing Officer's findings and supports the suspension order, the Commission should dismiss Schwartz's application for review.

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[1] "RP" refers to the record page number in the certified record filed with the Commission in this case.

II. BACKGROUND

A. Schwartz's Association with and Loan from Barclays

Schwartz was a general securities representative with Barclays beginning in October 2010. (RP 672.) Barclays loaned Schwartz $400,000 and "promised to forgive the loan in equal installments on the first through seventh anniversaries of his start date." (RP 770.) Barclays, however, terminated Schwartz's employment in May 2012, for failing to meet performance expectations. (RP 672.) Upon his termination, the unforgiven loan principal (about $340,000) became "immediately due and owing," but Schwartz refused to pay. (RP 770.) It is Schwartz's refusal to repay Barclays that became the subject of the underlying arbitration proceeding here. (RP 687-88, 770-71.)

B. Schwartz's Failure to Pay an Arbitration Award and the Proceedings Below

Barclays filed an arbitration claim against Schwartz on July 2, 2012. (RP 687.) Barclays alleged that Schwartz failed to repay the promissory note to the firm. (RP 687-88.) Schwartz contested Barclays's arbitration claim in a FINRA Dispute Resolution hearing. (RP 688.) On September 19, 2013, a FINRA Dispute Resolution Panel ruled against Schwartz and awarded Barclays $568,568.[2] (RP 517-18, 690.)

FINRA served Schwartz with a suspension notice for failure to pay the award on April 21, 2016. (RP 521-22, 563, 705-06.) FINRA's notice advised Schwartz that his registration would be suspended on May 12, 2016, unless, before that date, he had demonstrated to FINRA

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[2] Because of accrued interest and attorneys' fees, the value of the award, and the amount that Schwartz is obligated to pay Barclays, has increased. (RP 519, 566-67, 631.)

that he met one of the four defenses set forth in FINRA Rule 9554.[3] (RP 705.) The suspension notice also advised Schwartz that he could request a hearing, which would stay the effectiveness of the suspension. (RP 705.)

Schwartz requested a hearing, which occurred in September 2016, and initially asserted as a defense an inability to pay the award. (RP 711.) He later withdrew his inability to pay defense, asserting instead that he had settled with Barclays and therefore satisfied the award. (RP 564, 713.) During the hearing, the Hearing Officer permitted Schwartz wide latitude as a pro se respondent to present evidence, including during his own testimony and cross-examination of other witnesses. (RP 523-35, 538-606, 634-42, 647, 656-63.) Other than testifying on his own behalf, Schwartz declined to call any witnesses in support of his case or to present any of the documents that he now belatedly relies upon and attaches as exhibits to his brief.[4] (RP 468, 606-07.) After hearing all of the evidence, the Hearing Officer imposed a suspension under Rule 9554, finding that Schwartz failed to prove his asserted defense—settlement of the award with Barclays. (RP 876-78, 879.)

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[3] The suspension notice provided the four enumerated defenses under FINRA Rule 9554: (1) payment of the award in full; (2) entry into a settlement of the award with the arbitration claimant and the obligations thereunder were current; (3) a timely filed action to vacate or modify the award, which has not been denied; or (4) bankruptcy proceedings. (RP 705); *see also NASD Notice to Members 00-55*, 2000 NASD LEXIS 63, at *5-6 (Aug. 2000) (setting forth available defenses). A respondent who fails to pay an award to a FINRA member firm may also assert a bona fide inability to pay an award. *See Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *16 & n.21 (Mar. 17, 2016) (evaluating inability to pay defense for awards not involving customers). Three of the enumerated defenses under Rule 9554 were not available to Schwartz at the time of the hearing. Schwartz has not paid the award in full. (RP 564, 630.) Schwartz failed to file an action to vacate the award. (RP 703.) And although Schwartz filed for bankruptcy, the bankruptcy court dismissed his petition without discharging the award. (RP 562-63, 757-58, 768.)

[4] During the hearing, Schwartz sought only to introduce certain email correspondence and the settlement agreement, which were admitted already as FINRA Exhibits CX-4 and CX-18. (RP 606-07.)

C. The Proceedings Before the Commission

On December 27, 2016, Schwartz filed with the Commission a motion for stay and application for review. (RP 881-86.) FINRA opposed Schwartz's motion for stay. (RP 901-14.) The Commission, on January 13, 2017, denied Schwartz's motion for stay, finding that he failed to meet his burden to prove that a stay was warranted. *Michael David Schwartz*, Exchange Act Release No. 79798, 2017 SEC LEXIS 139, at *1-10 (Jan. 13, 2017). In denying the stay request, the Commission, in part, determined that Schwartz failed to address his likelihood of success on the merits other than his opinion that FINRA "should have backed away from" its intent to suspend Schwartz after learning of his settlement with Barclays and that he disagreed with the suspension order.

As the Commission preliminarily found, the Hearing Officer correctly interpreted the settlement agreement and related documents to apply to certain of Schwartz's assets and otherwise preserved Barclays's right to full satisfaction of the award. *Id.* at *4-5. The Commission's preliminary findings are fully supported by the terms of the settlement documents. (*See* RP 779-82, 851-57, 859-60.) And, Schwartz's ongoing erroneously narrow interpretation of these documents must fail here too. In keeping with the importance of the arbitration process, Schwartz should remain suspended until he satisfies the award or meets one of the other available defenses under FINRA Rule 9554.

III. ARGUMENT

Schwartz has not paid the award nor has he established any available defense to his nonpayment. The Commission should sustain FINRA's suspension of Schwartz because his refusal to pay has no factual or legal merit. The Commission should keep the suspension in

place to "honor[]" and "enhance[] the effectiveness of the arbitration process." *See DiPietro*, 2016 SEC LEXIS 1036, at *23 (internal quotation marks omitted).

Contrary to Schwartz's assertion that FINRA's expedited proceeding represents coerced prosecutorial conduct, the facts and the law establish otherwise. Consistent with FINRA's By-Laws, FINRA commenced this action after receiving notice that Schwartz had failed to pay a "properly rendered" arbitration award, and it therefore undoubtedly represents a legitimate exercise of FINRA's regulatory authority. *See* Article VI, Section 3(b) of FINRA's By-Laws. Schwartz's self-described status as a "whistleblower" is irrelevant to a determination of the issues before the Commission in this appeal. FINRA afforded Schwartz a fair process through which he could defend his failure to pay the award. The Commission, on the basis of the written record before it, should render a decision upholding FINRA's action and the suspension it imposed on Schwartz for his failure to pay.

A. The Commission's Standard to Review Schwartz's Suspension

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

with the purpose of the Exchange Act. *See DiPietro*, 2016 SEC LEXIS 1036, at *7-9 (finding specific grounds exist in fact for suspending respondent when respondent refused to pay in full an arbitration award, and FINRA acted in harmony with its rules and the Exchange Act).

Schwartz's only relevant defense to the requirement that he pay the award is without evidentiary support. He has not met his burden of proving that he settled the award with Barclays, obviating his need to pay the significant balance of the award and the accrued interest that remain outstanding. The Hearing Officer's interpretation of the settlement documents is entirely correct.

Schwartz's other arguments likewise fail and provide him with no relief from his suspension. Schwartz, at every turn, contests aspects of the underlying award and the fairness of the arbitration and expedited proceedings. Such collateral attacks of arbitrations awards are impermissible according to a plethora of Commission precedent. *See, e.g.*, *id.* at *13-14 & n.18 ("An arbitration award cannot be collaterally attacked by a respondent in an FINRA expedited proceeding, and in the face of a confirmed award, such arguments do not furnish a basis to avoid payment."); *Robert Tretiak*, 56 S.E.C. 209, 221 (2003) ("As we have stated on numerous occasions, an applicant may not collaterally attack an arbitration award in a disciplinary proceeding for failure to pay that award."); *Herbert Garrett Frey*, 53 S.E.C. 146, 150 & n.7 (1997) ("[A]n applicant may not collaterally attack an arbitration award in a disciplinary proceeding for failure to pay that award."). Moreover, FINRA provided Schwartz with the fair procedures that he was due under its rules and the Exchange Act. The Commission should reject Schwartz's efforts to distract from the core issue that he has not paid the award and that FINRA properly suspended him for nonpayment.

B. The Specific Grounds upon Which FINRA Based Its Action Against Schwartz Exist in Fact

The evidence in the record shows that the specific grounds upon which FINRA suspended Schwartz exist in fact. Schwartz has not paid the significant balance of the award. Moreover, Schwartz has offered no evidence or argument to support a finding that overcomes the Hearing Officer's sound determination that Schwartz failed to meet his burden to show that the settlement with Barclays satisfies the award in full.

FINRA Rule 13904(j) provides that all monetary arbitration awards be paid within 30 days of receipt of the award unless a motion to vacate is filed. Article VI, Section 3 of FINRA's By-Laws provides that an associated person's membership may be suspended or canceled for failure to pay an arbitration award when a timely motion to vacate has not been made or when "such a motion has been denied." Schwartz did not seek to vacate the award. (RP 703.) Schwartz also did not pay the award within 30 days. (RP 562.) He instead petitioned for bankruptcy, and the bankruptcy court dismissed his petition and did not discharge his debts.[5] (RP 562-63, 757-58, 768.) After dismissal of his bankruptcy, Schwartz continued to refuse to pay the award in full.

In defense of his nonpayment, Schwartz has contended throughout these proceedings that, although he has not paid the award in full, he and Barclays "entered into a fully-executed settlement agreement" for purposes of Rule 9554, which does not require full satisfaction of the award. (Br. at 5.) Rather, according to Schwartz, because he entered into a settlement agreement with Barclays generally, and is current under that agreement, he has a complete

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[5] The United States Court of Appeals for the Seventh Circuit affirmed the dismissal. (RP 770-78.)

defense to nonpayment under Rule 9554. (Br. at 5, *see* Br. at 13-17, 19-20.) Schwartz's application of the settlement defense for nonpayment under Rule 9554 is, however, nonsensical. Alternatively, Schwartz contends that the agreement applies to and settles the award. (Br. at 13-17, 19-20.) In support of his assertion that the agreement eliminated his obligation to pay the award in full, Schwartz relies upon only certain provisions in the settlement documents and conveniently ignores the express provisions that unambiguously preserve Barclays's right to full satisfaction of the award. (Br. at 14-16.) The settlement documents show that Schwartz and Barclays did not agree to settle the award and eliminate Schwartz's obligations under Rule 9554. *See NASD Notice to Members 00-55*, 2000 NASD LEXIS 63, at *5-6. The parties agreed to resolve only a supplemental proceeding disposing of certain of Schwartz's assets that he held at the time—not the award in full. (RP 626, 851.)

In the decision, the Hearing Officer correctly found that the May 2016 Confidential Settlement Agreement and Release ("Settlement") that Schwartz relies upon in support of his defense does not "explicitly say what effect, if any, it has on the Award." (RP 876; *see* RP 851-56.) Rather, the Hearing Officer found that the Settlement only disposed of certain of Schwartz's assets and assigned them to Barclays or to Schwartz. (RP 852-53, 876.) The Settlement was in response to Barclays filing a supplemental proceeding after a state-court confirmation of the arbitration award (a final judgment) was entered. (RP 543, 616-17, 779, 782.) The supplemental proceeding allowed Barclays to serve Citations upon Schwartz and any third parties in possession of Schwartz's assets. (RP 567-68, 616-17.)

Barclays issued Citations to Schwartz and three banks. (RP 568, 618.) Once Schwartz and the third parties received notice of the Citations, they were precluded from disposing of any of Schwartz's assets. (RP 618-19.) These assets included restricted stock, a vehicle, and certain

real property located in Michigan. (RP 619-20, 852-53.) Contrary to Schwartz's futile efforts to broaden the scope of the agreement to include the full award, the Settlement expressly states that it limits the scope of the agreement between Schwartz and Barclays "to resolve, terminate and settle all disputes, claims and actions arising from the *Citations*." (RP 851 (emphasis added).)

The Hearing Officer further correctly found that the Settlement did not terminate Barclays's right to recover the full amount of the award. Paragraph 6 of the Settlement provides for Barclays's garnishment of Schwartz's future wages. Paragraph 7, a provision titled "Non-waiver," permits Barclays's collection of the award from Schwartz's future income or assets "with a value in excess of $30,000, until the full, unpaid portion of its money judgment against [Schwartz] . . . is paid in full, or the money judgment against [Schwarz] becomes vacated." (RP 853-54, 877.)

In addition, the Hearing Officer found that Schwartz and Barclays contemporaneously also entered into a Stipulation and Agreed Order ("Stipulation") on May 18, 2016, which was submitted to the Circuit Court of Cook County, Illinois. (RP 859-60, 876.) The Stipulation expressly provides that Barclays is entitled to Schwartz's full satisfaction of the award: "Subject to the terms of the settlement agreement entered on May 17, 2016, this stipulation shall not be construed as waiving any right of Barclays to full satisfaction of the final judgment in Case No. 2014 CH 15180, including Barclays' right to any and, all unpaid interest or attorney's fees . . . or right to take any action to collect from Schwartz's future income and/or assets."[6] (RP 859.)

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[6] The final judgment described above was the state-court's confirmation of the arbitration award, a fact that Schwartz confirmed in his hearing testimony. (RP 543, 779, 782.)

Moreover, Schwartz's restricted interpretation of the settlement documents is impermissible under Illinois contract law.[7] The primary goal of contract construction is to give effect to the intentions of the parties at the time the contract was executed by examining the language the parties agreed upon.[8] *William Blair and Co., v. FI Liquidation Corp.*, 830 N.E.2d 760, 770 (Ill. App. Ct. 2005). Under Illinois law, an adjudicator "must construe the words of a contract within the context of the contract as a whole" and "must construe a contract according to its own language, not according to the parties' subjective constructions." *Id.* at 770.

The Hearing Officer rightly concluded that the controlling documents, the Settlement and Stipulation, reveal unambiguously that Barclays and Schwartz did not agree to settle the award. Instead, the Settlement covers only specified assets, not the award in full, and preserves Barclays's right to full satisfaction of the award. Thus, Barclays is permitted to attempt to collect the remaining award from Schwartz.[9] Schwartz therefore failed to meet his burden of

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[7] The Settlement at issue states that it will be construed in accordance with the law of the State of Illinois. (RP 855.)

[8] Schwartz and Patrick King, outside counsel representing Barclays in the arbitration and related proceedings against Schwartz, both testified that the contents of the settlement documents were fully negotiated by both parties. (RP 604, 625-26, 644-46; Br. at 20.) While Schwartz at one point portrays himself as having "uneven bargaining ability," he later admits that he engaged in "weeks of negotiation over the language in the [Settlement] document." (Br. at 20.) During those negotiations, Schwartz had suggested revisions to the majority of the paragraphs. (RP 625-26, 644-46.)

[9] In addition, King, who represented Barclays throughout the arbitration and related proceedings against Schwartz, provided relevant testimony related to the Settlement and Stipulation and further supports the Hearing Officer's interpretation of the settlement documents. King testified that Schwartz's argument that he and Barclays fully settled the award was "directly contravened by [the] express provisions" in the settlement documents. (RP 632; *see* RP 627-31). King testified that the Settlement was limited to resolving how to allocate the assets that Schwartz held at the time. (RP 626, 645-46.) King identified the multiple provisions in the settlement documents that directly contradict Schwartz's assertion that the parties settled the award. (RP 627-29.) Schwartz also was permitted the opportunity to cross-examine King on

[Footnote continued on next page]

proving a settlement of the award under Rule 9554. (RP 874, 876, 878.) Schwartz has set forth no evidence that overcomes the Hearing Officer's findings. The specific grounds upon which FINRA based its decision to suspend Schwartz exist in fact.

C. FINRA Suspended Schwartz in Accordance with Its Rules for His Failure to Satisfy the Award

FINRA acted in accordance with its rules when initiating expedited proceedings against Schwartz for his failure to satisfy the award and suspending him. FINRA Rule 9554 provides the procedures for suspending an associated person for failing to comply with an arbitration award. FINRA's action against Schwartz began after it learned that the bankruptcy court dismissed Schwartz's petition and the Seventh Circuit affirmed that dismissal. (RP 562-63, 757-58, 768, 770-78.)

FINRA issued the suspension notice dated April 21, 2016, pursuant to FINRA Rule 9554(a). (RP 521-22, 563, 705-06.) The suspension notice informed Schwartz that the suspension would be effective on May 12, 2016. (RP 705.) The notice also informed Schwartz that he was entitled to a hearing. (RP 705.) Schwartz filed a timely request for a hearing, and ultimately asserted that he settled the award with Barclays as his defense for nonpayment. (RP 564, 711, 713.) The Hearing Officer allowed Schwartz to participate in the hearing by telephone. (RP 463-665.) Schwartz testified on his own behalf, cross-examined witnesses, and had the opportunity to introduce evidence. (*Id.*) The Hearing Officer imposed the suspension

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[cont'd]

these points. (RP 634-42.) King's testimony directly contravenes Schwartz's baseless claim that "Barclays has not argued, or even suggested, that the Settlement Agreement is anything other than what Schwartz has argued." (Br. at 16.)

after Schwartz failed to prove that he settled the award with Barclays. (RP 877-79.) FINRA acted in accordance with its rules at each step of the proceedings.

D. FINRA Provided Schwartz with a Fair Expedited Proceeding

The Commission should reject Schwartz's unsupported assertions that FINRA's expedited proceedings were unfair. (Br. at 5, 8, 21-23.) Schwartz received the "fair procedure" that the Exchange Act requires here, including notice of the suspension and an opportunity to be heard. *See* 15 U.S.C. § 78o-3(b)(8), (h)(1)-(2) (requiring that self-regulatory organizations provide fair procedures); *Cf. David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *27-28 & n.34 (July 27, 2015) (explaining that Exchange Act fairness protections require FINRA to bring specific charges, notify such person of the charges, provide an opportunity to defend against the charges, and keep a record of the proceeding). As Article VI, Section 3(b) of FINRA's By-Laws states:

> The Corporation after 15 days notice in writing, may suspend or cancel the membership of any member or suspend from association with any member any person, for failure to comply with an award of arbitrators properly rendered pursuant to the Corporation's Rules, where a timely motion to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied, or for failure to comply with a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the Corporation's Rules.

In conjunction with FINRA's By-Laws, FINRA Rule 9554 provides for expedited proceedings to suspend association with a member firm for failure to comply with an arbitration award.

FINRA Rule 9554 authorizes FINRA to initiate the proceedings by issuing a written notice that specifies the grounds for, and the effective date of, the suspension, and advises the respondent of his right to file a written request for a hearing. It is undisputed that FINRA's written notice to Schwartz complied with these requirements and was properly served. (RP 521-

22, 563, 705-06.) In addition, after Schwartz requested a hearing, FINRA complied with the applicable hearing procedures under FINRA Rule 9559. Schwartz has provided no basis upon which to conclude that FINRA deviated from its procedural safeguards in this case.

Instead, Schwartz's appeal is rife with a hollow argument that his failure to pay the award should be excused because FINRA instituted this proceeding in collusion with Barclays and in retaliation for his "whistleblower" activities. (Br. at 9, 21-25.) Schwartz's self-described "whistleblower" status does not, as he suggests, provide him with a defense to FINRA's action. *See, e.g.*, *Evansen*, 2015 SEC LEXIS 3080, at *43 ("[W]histleblowing does not provide [an applicant] with an affirmative defense or immunity from sanction for his own misconduct, and improper FINRA motives are not defenses to the underlying violations." (internal quotation marks omitted)); *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at *38 (Nov. 8, 2006) ("[T]hese provisions are not relevant with respect to this disciplinary proceeding and do not provide Sathianathan with an affirmative defense or immunity from sanction for his misconduct."), *aff'd*, 304 F. App'x 883 (D.C. Cir. 2008). FINRA's action in this case represents a legitimate exercise of its regulatory authority to enforce unpaid arbitration awards. *See* Article VI, Section 3(b) of FINRA's By-Laws; FINRA Rule 9554; *Gallagher*, 56 S.E.C. at 171; *cf. Birkelbach v. SEC*, 751 F.3d 472, 475 (7th Cir. 2014) ("FINRA is empowered to bring disciplinary actions and impose sanctions to enforce its members' compliance with federal securities laws, SEC regulations, and FINRA's own rules and regulations.").

Schwartz contends that FINRA acted in "bad faith" and has "unclean hands" because FINRA filed the action against him in contravention of what he contends were assurances from David Carey, an associate director of case administration for FINRA's Office of Dispute Resolution, that no such proceeding would be instituted unless Barclays requested it. (Br. at 21-

23.) Schwartz's argument fails on all levels to demonstrate unfairness during these proceedings. Schwartz cross-examined Carey during the hearing on this point and had an opportunity to present evidence, including the email correspondence that he now attaches to his brief as Exhibit 13 in support of his argument. (RP 525-31; Br. at 22.) Schwartz, during his cross-examination of Carey, referenced this email communication between the two in March 2016 in which Carey told Schwartz that FINRA "will reinstitute suspension proceedings against you for reward [sic] nonpayment upon request of the prevailing party." (RP 525-26.) Carey agreed that this sounded like something he might have said. (RP 526.) Schwartz, however, failed to offer the email into evidence at that time and seeks to do so now without the reasonable grounds necessary for adducing additional evidence. (RP 526-31); *see* SEC Rule of Practice 452, 17 C.F.R. § 201.452; *infra* Part III.F.

The relevant evidence shows that FINRA acted properly in bringing suspension proceedings against Schwartz after Carey contacted King, Barclays's outside counsel, in April 2016 to determine whether the award remained unpaid. (RP 703.) Consistent with its regulatory obligations, and as Carey testified, FINRA "energetically police[s] any unpaid awards." (RP 528, 703.) King confirmed for Carey that the award remained outstanding and unpaid by Schwartz. (RP 703.) FINRA therefore, acting pursuant to its By-Laws and rules, notified Schwartz in the April 21, 2016 suspension notice that he would be suspended on May 12, 2016, unless he produced documentary evidence showing that he satisfied one of the recognized defenses to suspension. (RP 705-06.)

Schwartz's challenges do not establish the slightest bit of misconduct by FINRA staff nor do they bear on the evidence supporting FINRA's action to suspend Schwartz for nonpayment of the award. FINRA acted fairly when initiating the expedited proceedings against Schwartz in its

effort to pursue an unpaid award.[10] The Commission previously has highlighted the important public policy for requiring the prompt payment of arbitration awards. "Requiring members or associated persons to abide by arbitration awards enhances the effectiveness of the arbitration process." *Gallagher*, 56 S.E.C. at 171. Indeed, "[h]onoring arbitration awards is essential to the functioning of the [FINRA] arbitration system." *Id.*

FINRA's Rule 9554 proceedings have been approved by the Commission as fair, and Schwartz had the opportunity to advocate for himself. *See DiPietro*, 2016 SEC LEXIS 1036, at *9 & n.10, 23. Schwartz was permitted to include exhibits in the record, but he failed to exercise that right and to offer any of the documents that he now attaches to his brief to the Commission. Schwartz also was accorded the right to testify on his own behalf and to cross-examine witnesses at the hearing. The Hearing Officer gave Schwartz great latitude in his questioning of witnesses and in his own testimony. The record indicates that the Hearing Officer was fair and, in many instances, gave Schwartz extra leeway. *See Rafael Pinchas*, 54 S.E.C. 331, 347 (1999) (rejecting respondent's claims of unfairness on the part of the Hearing Panel and NASD staff, noting that the Hearing Panel repeatedly gave the respondent "wide latitude" in questioning witnesses during the hearing). Schwartz appears to be basing much of his claims of unfairness on the

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[10] Contrary to Schwartz's misimpressions throughout these proceedings, FINRA did not "collude" with Barclays and neither was the firm a "party" to FINRA's Rule 9554 proceeding. Barclays was the recipient of the award after the arbitration proceeding, and FINRA initiated the Rule 9554 proceeding to encourage Schwartz's payment of that award. *See* Article VI, Section 3(b) of FINRA's By-Laws. The fact that FINRA staff called King as a fact witness who represented Barclays in the arbitration and related matters, and negotiated with Schwartz on Barclays's behalf, does not imply that FINRA was acting in concert with Barclays in these expedited proceeding against Schwartz. (RP 610-34.) Rather, FINRA, as described above, was acting pursuant to its regulatory authority under its rules and By-Laws to enforce an unpaid arbitration award. Moreover, Schwartz cross-examined King during the hearing in these proceedings, which provided Schwartz with an opportunity to question King on his theories. (RP 634-42.) Schwartz's unsupported assertions of unfairness provide no basis on which to overturn his suspension.

Hearing Officer ruling against him, but adverse rulings, without more, do not evidence unfairness. *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *62 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

Finally, the Commission's de novo review of the record assures that Schwartz was given a fair proceeding. *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *75-76 (May 27, 2011) (determining that the Commission's de novo review cures any potential unfairness that may have resulted during the FINRA proceedings), *aff'd*, 693 F.3d 251 (1st Cir. 2012). The Commission should reject Schwartz's unsubstantiated assertions of unfairness, which amount to nothing more than an unsuccessful attempt to distract from the only issue in this case: Schwartz has failed to prove that he and Barclays settled the award in full.[11] Thus, FINRA's suspension of him was appropriate under its rules.[12]

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[11] Schwartz's other related arguments are equally without merit. Schwartz contends King and FINRA staff acted unethically when FINRA staff filed a motion to dismiss with the Hearing Officer before the hearing on the ground that Schwartz had not asserted a valid defense to his nonpayment and by including an affidavit of King as an exhibit. (Br. at 4, 12, 16, 23; RP 285-86.) King's affidavit stated in part that "[a]t no time did Barclays Capital Inc. contemplate or intend that the Settlement Agreement to [sic] be a settlement of the Judgment or the Award." (RP 286.) There is no evidence of unethical conduct or prejudice to Schwartz here. *Cf. Evansen*, 2015 SEC LEXIS 3080, at *43. The Hearing Officer orally dismissed the motion without prejudice at the outset of the hearing in order to "hear the evidence in the hearing . . . and make a decision based on the complete record and based on Mr. Schwartz'[s] putting on his defense." (RP 472, *see* RP 487-88.) Schwartz's hearing on his defense to nonpayment proceeded in harmony with FINRA rules, and Schwartz was allowed to present evidence and cross-examine witnesses, including King. After reviewing all of the evidence, the Hearing Officer in his written decision formally denied FINRA's motion to dismiss. (RP 878.) Schwartz was not harmed by this ruling.

In addition, Schwartz filed a motion with the Hearing Officer arguing that action be taken against Barclays's outside counsel for breaching his attorney-client privilege to Barclays and against FINRA staff for "aiding and abetting the breach." Schwartz also lodged a complaint with FINRA's Office of the Ombudsman related to these same issues. (RP 863, 865-66.) The Ombudsman's Office "is an impartial, confidential and independent resource that works informally to assist in finding solutions to issues, or concerns" persons "may have with FINRA."

[Footnote continued on next page]

E. The Commission Should Reject Schwartz's Attempts to Collaterally Attack the Arbitration Award

Schwartz's series of unsupportable assertions of purported misdeeds of Barclays's counsel and FINRA's Regulatory Operations staff acting allegedly on Barclays's behalf amount to nothing more than an impermissible collateral attack on the underlying arbitration award. (Br. at 5, 9, 11, 21, 23, 25-26.) While Schwartz pronounces that he "does not seek to overturn the result of the arbitration award," he nonetheless attacks the award from all angles with spurious claims of jury tampering, blacklisting, retaliation, and libel, among others. (Br. at 24-26.) The Commission has repeatedly reaffirmed the well-established principal that an arbitration award cannot be collaterally attacked by a respondent in an expedited proceeding. *See DiPietro*, 2016 SEC LEXIS 1036, at *13; *Tretiak*, 56 S.E.C. at 221; *see also Richard R. Pendleton*, 53 S.E.C.

[cont'd]

See http://www.finra.org/about/office-ombudsman. The Hearing Officer initially deferred to the Ombudsman's Office to consider Schwartz's complaint. (RP 866.) After reviewing the hearing transcript in this matter, the Ombudsman's Office referred the matter back to the Hearing Officer. (RP 865-66, 867.) The Hearing Officer subsequently found Schwartz's motion without basis and denied it. (RP 869-70.) The Hearing Officer, after "re-reading the relevant portions of the record" found "no basis to grant" Schwartz's motion. (RP 870.) Indeed, as the Hearing Officer determined, "[n]either the record nor Schwartz'[s] motion establishes that [King] violated the attorney-client privilege or that counsel engaged in any other unethical conduct." (RP 870.) The Commission should give Schwartz's unmeritorious claims no weight.

[12] Schwartz argues that the Commission should review the $2,206.50 in administrative costs assessed by the Hearing Officer. (Br. at 4; RP 879.) The Hearing Officer fairly and appropriately assessed these costs upon Schwartz. FINRA Rule 8330 provides that a member or associated person bears the costs of the proceeding as the adjudicator "deems fair and appropriate under the circumstances." Schwartz did not prevail below, and therefore the Hearing Officer fairly assessed against Schwartz the costs associated with the hearing. *See Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *95 (Feb. 13, 2015) (finding that "FINRA acted well within its discretion" and was "entitled to assess costs"); *E. Magnus Oppenheim & Co.*, 58 S.E.C. 231, 243 (2005) (rejecting respondent's claim that it should not bear the administrative costs of the proceeding); *John M.W. Crute*, 53 S.E.C. 1112, 1116-17 (1998) (recognizing NASD's broad discretion to impose costs and upholding imposition of those costs), *aff'd*, 208 F.3d 1006 (5th Cir. 2008).

675, 678 (1998) (explaining that collateral attacks on arbitration awards have been "consistently rejected").

Schwartz also sets forth numerous grievances surrounding the fairness of the underlying arbitration proceeding. (Br. at 9, 11, 25-26.) The proper forum for Schwartz to challenge the arbitration award and proceeding was by filing a motion to vacate in the district court, which Schwartz did not do. (RP 703.) As the Commission recently explained in another appeal of a FINRA action suspending a respondent for nonpayment of an arbitration award, arguments undermining the award itself made in the face of a confirmed award are "irrelevant." *DiPietro*, 2016 SEC LEXIS 1036, at *13. "[S]uch arguments do not furnish a basis to avoid payment." *Id.*

The Commission repeatedly has emphasized the importance of prompt payment of arbitration awards and the necessary preclusion of collateral attacks. FINRA arbitrations provide a "mechanism for the speedy resolution of disputes." *David Joseph Avant*, 52 S.E.C. 442, 444 (1995). FINRA makes arbitration "effective and workable by requiring members either to honor an award" or be suspended. *Stix & Co., Inc.*, 46 S.E.C. 578, 580 (1976). Permitting a party to collaterally attack an arbitration award would subvert this important public policy in favor of arbitration. *See id.* (allowing collateral attacks would "subvert the salutary objective" of arbitration); *see also Tretiak*, 56 S.E.C. at 221 (stating that allowing collateral attacks would "subvert [FINRA's] procedures, which are designed to promote prompt payment of arbitration awards"); *Pendleton*, 53 S.E.C. at 678 (allowing collateral attacks would be "inconsistent with the Exchange Act policy in favor of finality and prompt payment of [FINRA] arbitration awards").

At every turn, Schwartz portrays himself as the ill-fated victim. The reality, however, reveals that Schwartz has impacted Barclays, the arbitration claimant, by forcing it to wait for

satisfaction of the award and by requiring it to pursue legal proceedings in Illinois court to collect the amount it is due.[13] *See Gallagher*, 56 S.E.C. at 171. Schwartz fails to recognize the importance of complying with an arbitration award. Inducing Schwartz to pay an arbitration award through suspension of his FINRA membership furthers the public interest and the protection of investors. *See id.* (explaining that inducing a respondent to pay an arbitration award through suspension of FINRA membership furthers the public interest and the protection of investors). In light of the importance of paying arbitration awards and consistent with its precedent, the Commission should reject Schwartz's attempts to collaterally attack the underlying arbitration proceedings and the award.

F. The Commission Should Decline to Admit the Exhibits Attached to Schwartz's Brief

Schwartz attached 15 exhibits to his brief in support of his petition for review filed with the Commission.[14] Schwartz's action is apparently based on Rule 452 of the Commission's

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[13] Notably, Barclays would be required to institute further supplemental proceedings to collect from Schwartz through garnishment or other means. (RP 603.)

[14] The exhibits are as follows:

Exhibit 1	Greiman, Rome & Greismeyer LLC Billing Document;
Exhibit 2	June 22, 2012 Email from Schwartz to Barclays's CEO Bob Diamond;
Exhibit 3	Schwartz Emails to SEC and UK Treasury Department;
Exhibit 4	July 2, 2012 Letter to Schwartz from Barclays's in-house counsel (responding to Exhibit 2);
Exhibit 5	June 28, 2012 Arbitration Submission Agreement;
Exhibit 6	July 2, 2012 Barclays's Statement of Claim, filed via outside counsel;
Exhibit 7	September 22, 2016 Financial-Planning.com news article;
Exhibit 8	February 28, 2013 Forbes.com news article;
Exhibit 9	February 1, 2017 Heritage Foundation editorial;
Exhibit 10	July 8, 2012 Bloomberg.com news article;
Exhibit 11	August 26, 2016 Affidavit of Patrick King;
Exhibit 12	December 4, 2014 Transcript of Schwartz's Bankruptcy Hearing;

[Footnote continued on next page]

Rules of Practice, which states that the "Commission may accept or hear additional evidence . . . as appropriate." 17 C.F.R. § 201.452. Under Rule 452, a party must establish "that there were reasonable grounds for failure to adduce such evidence previously" and "show with particularity that such additional evidence is material." *Id.* Schwartz fails to carry his significant burden under the rule. He provides no explanation for his failure to present this evidence previously, and he does not establish that his evidence is material to the issues raised in his appeal of FINRA's action.[15] The Commission should therefore decline to admit his additional evidence. *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *58 (Nov. 9, 2012) ("Tucker failed to satisfy either of these requirements and we therefore decline to admit them."); *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *56 n.60 (Feb. 10, 2012) ("We . . . decline to admit this new evidence.").

1. Schwartz Provides No Grounds for His Failure to Adduce Evidence Before the Hearing Officer

When Schwartz had the opportunity to present evidence and to testify at the hearing before the Hearing Officer, he declined to offer any of these documents.[16] (RP 606-07

[cont'd]

Exhibit 13	April 22, 2016 Schwartz – FINRA ODR Email Chain Re: Whistleblower Retaliation;
Exhibit 14	May 10, 2016 Schwartz – FINRA Ombudsman Email Chain;
Exhibit 15	August 28, 2015 BDlawcorner.com news article.

[15] In addition, Schwartz failed to follow the procedural requirements of SEC Rule of Practice 452 by filing a separate motion to adduce before the Commission.

[16] Exhibit 11 is an affidavit that FINRA staff attached to its motion to dismiss and was included in the certified record to the Commission as part of these proceedings before the Hearing Officer. (RP 285-86.) Exhibit 13 is email correspondence between Schwartz and Carey, associate director of case administration for FINRA's Office of Dispute Resolution, who testified at the hearing and was cross-examined by Schwartz. (RP 525-31.) The Commission should decline to admit Exhibit 13 because Schwartz failed to offer this evidence at the hearing

[Footnote continued on next page]

(confirming that he was not offering exhibits into evidence).) Schwartz does not explain his failure to adduce the additional evidence previously. This fact weighs against the Commission's consideration of these documents. *Edward J. Jakubik, Jr.*, Exchange Act Release No. 61541, 2010 SEC LEXIS 1014, at *9 n.13 (Feb. 18, 2010) ("His motion makes neither required showing.").

Indeed the time for Schwartz to present his defense has passed. *See John Montelbano*, 56 S.E.C. 76, 103 n.58 (2003) ("[I]t is a respondent's obligation . . . to marshal all the evidence in his defense."). His attempt to introduce new evidence seeks to ignore applicable FINRA procedures. The Commission promotes the development of the record in matters before the self-regulatory adjudicators that, like FINRA Hearing Officers, are "particularly suited to create it." *Jakubik*, 2010 SEC LEXIS 1014, at *15. "[T]he failure of a respondent to . . . adduce available evidence to meet the charges against him and show mitigating factors does not entitle him to have the proceedings reopened after the issuance of an adverse decision." *David T. Fleischman*, 43 S.E.C. 518, 522 (1967). Schwartz therefore should not be permitted to circumvent the procedural rules of FINRA and the Commission by attempting to introduce evidence at this late date.[17] *See Evansen*, 2015 SEC LEXIS 3080, at *53 n.66 ("Parties should develop the record

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[cont'd]

when he had ample opportunity and was questioning Carey on the precise information contained within the email—and appeared to be reading directly from it. *See supra* Part III.D; (RP 525-29). Schwartz moreover alludes to this fact in his brief to the Commission. (Br. at 22.)

[17] All but two of Schwartz's documents (Exhibits 7 and 9) were available before the hearing in this matter occurred on September 1, 2016. (RP 461.) Exhibits 7 and 9, which are publicly available articles from the Internet, are nonetheless immaterial to this appeal and should not be considered under Rule of Practice 452.

before the FINRA hearing panel rather than adducing it on appeal to the NAC or the Commission.").

2. Schwartz's Evidence Is Immaterial

Schwartz also does not establish that the evidence he seeks to adduce is material to the issues relevant in this appeal—whether Schwartz failed to prove a valid defense to nonpayment of the arbitration award thereby supporting the FINRA-imposed suspension. Rule 452 of the Commission's Rules of Practice requires a distinctive demonstration that the additional evidence Schwartz seeks to admit will "materially affect the outcome of the proceedings." *Richard A. Holman*, 40 S.E.C. 870, 874 (1961); *see also Thomas S. Foti*, 51 S.E.C. 217, 221 n.9 (1992) (rejecting additional evidence because it raised "collateral issues and matters of questionable relevance to the violations alleged"). Schwartz does not establish with particularity that his evidence is material to FINRA's findings that he failed to prove that he settled the award with Barclays and accordingly is suspended.[18] His evidence must therefore be excluded on this alternative ground. The exhibits he presents with his brief are not, as he claims, supportive of his irrelevant, unproven claims that Barclays's, through FINRA's action, retaliated against him for his efforts to uncover the wrongdoing of others. Nor do these documents evidence any unfairness in FINRA's proceedings.

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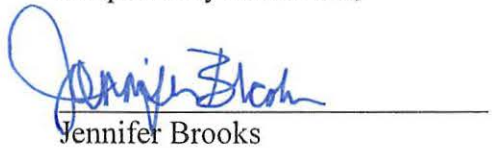
[18] Exhibits 1 through 6 relate to the underlying arbitration proceeding between Schwartz and Barclays. As discussed above, Schwartz is precluded from challenging the arbitration absent filing a motion to vacate it in district court. Exhibits 7 through 10 and Exhibit 15 are articles from the Internet related to other FINRA disciplinary actions, arbitrations, or the structure of FINRA as a self-regulatory organization. None of these documents is material to Schwartz's failure to pay the arbitration award in this matter. Exhibit 12 relates to Schwartz's bankruptcy petition, which was dismissed and has no bearing on his failure to pay the award now. Likewise, Exhibit 14 has no correlation to Schwartz's nonpayment and suspension because it relates to Schwartz's unsuccessful complaint made to FINRA's Office of the Ombudsman. (RP 867, 870 (explaining that the Ombudsman took no action on the complaint).)

Schwartz fails to meet his burden under Rule 452 of the Commission's Rules of Practice. He has not explained his failure to present the evidence previously, and he does not establish the materiality of the evidence. The Commission should decline to admit the evidence into the record for this matter. Although Schwartz seeks to tell a bleak story and cast himself as the hapless victim with immaterial documents, it does not distract from the reality that FINRA's action in this matter resulted from the legitimate exercise of FINRA's authority to enforce unpaid arbitration awards and to suspend Schwartz.

IV. CONCLUSION

The record establishes that Schwartz failed to pay an arbitration award and failed to prove that he settled the award with Barclays. The specific grounds for FINRA's decision to suspend Schwartz exist in fact. His suspension is in accordance with FINRA rules, which are consistent with the purposes of the Exchange Act. Schwartz's challenge to the fairness of FINRA's proceedings is unsound. Schwartz has provided no fact or argument that serves to undermine the propriety of FINRA's action or the suspension it imposed for Schwartz's nonpayment of the award that is due and owing to Barclays. The Commission should therefore reject Schwartz's application for review in its entirety.

Respectfully submitted,



Jennifer Brooks
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March 22, 2017

CERTIFICATE OF SERVICE

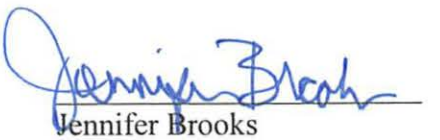
I, Jennifer Brooks, certify that on this 22nd day of March 2017, I caused a copy of the foregoing Brief of FINRA in Opposition to Application for Review, In the Matter of the Application of Michael David Schwartz, Administrative Proceeding File No. 3-17752 to be served by messenger on:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090

and via FedEx on:

Michael David Schwartz
8360 Dolfor Cove
Burr Ridge, IL 60527

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



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March 22, 2017

VIA MESSENGER

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090

RE: In the Matter of the Application for Review of Michael David Schwartz
Administrative Proceeding No. 3-17752

Dear Mr. Fields:

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

Please contact me at (202) 728-8083 if you have any questions.

Very truly yours,

Jennifer Brooks

Enclosures

cc: Michael David Schwartz (via FedEx)