

UNITED STATES OF AMERICA
BEFORE THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION



In the Matter of the Application of

SCOTTSDALE CAPITAL ADVISORS
CORPORATION, JOHN J. HURRY, TIMOTHY B.
DIBLASI, AND D. MICHAEL CRUZ

For Review of Disciplinary Action Taken by FINRA

**PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO
INTRODUCE ADDITIONAL EVIDENCE AND INCORPORATED MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT**

I. INTRODUCTION

FINRA's opposition to Petitioners' request for leave to introduce new evidence is consistent with the theme of its approach to this case—ignore undeniable facts that interfere with FINRA's ability to achieve its desired result. This “ends justify the means” approach is inconsistent with the role of a self-regulatory organization, which should be focused on the proper application of the law to demonstrated facts. The Commission should not permit FINRA to keep ignoring how the law applies to the facts.

In connection with this motion, Petitioners have met the requirements of Commission Rule of Practice 452 by demonstrating that Dr. Johnson's expert report is material and that its proposed submission is timely. Thus, the Commission should grant Petitioners' motion.

II. DR. JOHNSON'S EXPERT REPORT IS MATERIAL

The expert report prepared by Dr. Dennis L. Johnson, Ph.D “assesses Ruzicka's credibility as a witness”¹ and therefore speaks directly to the reliability of his on-the-record testimony (“OTR”). Evidence that speaks to the credibility of a witness is necessarily material. *See, e.g., Russo Sec., Inc.*, SEC Release No. 44186, 2001 WL 379064, at *2 n.10 (Apr. 17, 2001) (suggesting that new evidence casting doubt on the factfinder's credibility determinations is admissible under Rule of Practice 452).

FINRA ignores this basic principle and instead tries to invent its own standard by referencing a single 57-year-old case to argue that Dr. Johnson's expert report should be excluded because it does not, in and of itself, “*prove* that the NAC erred in considering Ruzicka's on-the-

¹ FINRA Opp. Br. at 4.

record testimony.”² FINRA misstates both the standard for materiality and the purpose of the proposed new evidence. Proposed new evidence need not prove or disprove a particular point to be material. Rather, as explained in Petitioners’ opening brief on this issue, relevance is the touchstone of materiality, and evidence is relevant if it makes the existence of a fact more or less probable. *See, e.g., William H. Mathis*, Release No. 333, 1989 WL 376611, *2 (July 3, 1989) (citing Federal Rule of Evidence, Rule 401, in determining that “relevant evidence is that evidence having any tendency to make the existence of any consequential fact to be determined more probable or less probable than it would be without the evidence.”); *Eric J. Weiss*, SEC Release No. 69177, 2013 WL 1122496, at *9 (Mar. 19, 2013) (declining to admit additional evidence in part because it did not deal with the “relevant” issues on which FINRA based its conclusions). Dr. Johnson’s expert report, the impetus of which was based upon new information, is meant to assist the Commission in assessing the credibility and reliability of Mr. Ruzicka’s OTR and is to be considered alongside the other previously existing evidence. As such, it is relevant to an important issue in this case and therefore is material for purposes of Commission Rule of Practice 452.

The Commission is generally permitted to rely upon a lower panel’s credibility determinations when those determinations are based on “*hearing the witnesses’ testimony and observing their demeanor.*” *See, e.g., Anthony Tricarico*, 51 S.E.C. 457, 460 (May 24, 1993) (emphasis added). That is not the case here. The Hearing Panel was unable to observe Mr. Ruzicka’s demeanor because he did not testify at the hearing.³ Thus, the Commission is not at an informational disadvantage compared to the Hearing Panel in assessing the reliability and

² FINRA Opp. Br. at 3 (emphasis added) (citing *Richard A. Holman*, 40 S.E.C. 870, 874 (1961) for the proposition that the proposed new evidence must “materially affect the outcome of the proceedings”).

³ FINRA attempts to discredit Dr. Johnson’s report because he “did not observe Ruzicka directly,” while ignoring that the same is true for the Hearing Panel and the NAC.

at *2 n.5 (NAC Jan. 23, 2001) (admitting evidence that was “not available for presentation to the Hearing Officer” because it was created after the hearing).

IV. CONCLUSION

Dr. Johnson’s expert report is material to the Commissions’ determination of both the credibility of a key witness who did not testify at the hearing and the reliability of that witness’s OTR. Petitioners’ have further shown that Dr. Johnson’s expert report was promptly obtained to directly address points the NAC raised in its decision regarding Mr. Ruzicka’s [REDACTED]. For the foregoing reasons, Petitioners respectfully request that the Commission grant their motion for leave to introduce Dr. Johnson’s expert report.

Dated: October 16, 2018

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Kevin J. Harnisch", written over a horizontal line.

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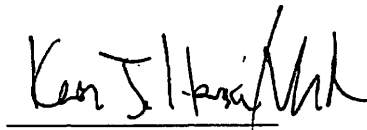
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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2018, I caused the foregoing to be served by courier on the following:

The Office of the Secretary
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A handwritten signature in black ink, appearing to read "Kevin J. Harnisch", written over a horizontal line.

Kevin J. Harnisch