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

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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  
Administrative Proceeding File No. 3-18612

**FINRA'S OPPOSITION TO  
APPLICANTS' MOTION TO ADDUCE ADDITIONAL EVIDENCE**

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Scottsdale Capital Advisors Corporation, John J. Hurry, Timothy B. DiBlasi, and D. Michael Cruz (collectively, the "Applicants") request that the Commission admit an expert report (the "Johnson Report") relating to Gregory Ruzicka.<sup>1</sup> The Commission should deny the Applicants' motion to adduce additional evidence and decline to admit the Johnson Report.

Rule 452 of the Commission's Rules of Practice states, among other things, that the "Commission may accept or hear additional evidence . . . as appropriate." 17 C.F.R. § 201.452. A motion under Rule 452 must "show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." *Id.* The

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<sup>1</sup> In late-2013, Hurry hired Ruzicka to manage the day-to-day operations of Cayman Securities Clearing and Trading, Ltd., SECZ, the foreign broker-dealer that acted as the customer in the unregistered securities sales that are the subject of this appeal. Ruzicka remained with Cayman Securities until October 2014.

On May 27, 2015, Ruzicka appeared for on-the-record testimony in Irvine, California. Ruzicka's on-the-record testimony focused on his employment with Cayman Securities and his interactions with Hurry.

moving party carries the burden to meet each of the requirements under Rule 452. *See e.g., 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).

The Commission should not admit the Johnson Report because the report is based on a review of documents relating to Ruzicka. Johnson did not observe Ruzicka directly. The Commission should not admit the Johnson Report because the Applicants failed to offer their expert opinion in the proceedings before the NAC. The Commission also should not admit the Johnson Report because the report expresses opinions about Ruzicka’s trustworthiness, notes inconsistencies in Ruzicka’s testimony, and assesses Ruzicka’s credibility – issues that lie within the province of a finder-of-fact, not an expert witness. Finally, the Commission should not admit the Johnson Report because the report is based on several documents that are not in the record. Accordingly, the Commission should deny the Applicants’ motion to adduce additional evidence and decline to admit the Johnson Report.

**A. The Johnson Report Is Not Material**

As an initial matter, the Applicants have not demonstrated that the Johnson Report is material. Rule 452 requires a distinctive demonstration that the additional evidence applicants seek to admit will “materially affect the outcome of the proceedings.” *Richard A. Holman*, 40 S.E.C. 870, 874 (1961). The Johnson Report will not materially affect the outcome of the Applicants’ appeal.

The Johnson Report does not state a professional opinion that Ruzicka was incompetent to give on-the-record testimony in 2015. Nor could it, because Dr. Johnson did not conduct a mental status examination and has not made a psychiatric diagnoses of Ruzicka, in either 2015 or

2018. Instead, the Johnson Report purports to identify a “progression of degradation of personal stability, reliability and trustworthiness.” This statement, however, fails to identify a date on which Ruzicka became untrustworthy or incompetent. As the Johnson Report itself cautions, “[t]his report is a qualitative evaluation of relevant documents . . . . [t]he limitation is that there was no opportunity for a direct, quantitative assessment of [ ] Ruzicka.” The Commission should deny the Applicants’ request to admit the Johnson Report because it does not prove that the NAC erred in considering Ruzicka’s on-the-record testimony. Consequently, the Johnson Report is not material.

**B. The Applicants Fail to Demonstrate Reasonable Grounds for Failing to Introduce the Johnson Report Before the NAC**

Second, the Applicants have not demonstrated that reasonable grounds exist for their failure to introduce this evidence previously. Although the Applicants placed the reliability of Ruzicka’s on-the-record testimony squarely at issue before the NAC, they failed to obtain an expert opinion or enter that expert opinion in the proceedings before the NAC.

Before the NAC, the Applicants argued that Ruzicka’s on-the-record testimony constituted unreliable hearsay, and, in support of their argument, the Applicants sought to introduce: (1) “court records from the Superior Court of California – County of Orange . . . . [that] . . . . reflect that [ ] Ruzicka was charged with the felony offense of second-degree robbery;” and (2) court records that evidence that the California Superior Court determined that Ruzicka was “a ‘mentally incompetent person’ under [the] California Penal Code.”

It was evident, even in the proceedings before the NAC, that the Applicants sought to undercut Ruzicka’s on-the-record testimony from May 2015 based on the Superior Court of California’s findings concerning his mental competency to stand trial on criminal charges in June 2018. Having lost that argument before the NAC, however, the Applicants now seek to repackage their faulty argument about Ruzicka’s on-the-record testimony before the

Commission. The basis for the Johnson Report was available to the Applicants at the time of their appeal before the NAC, and the Commission should reject the Applicants' last-ditch attempts to discredit Ruzicka's on-the-record testimony.

**C. The Commission Should Not Admit the Johnson Report Because It Improperly Assesses Ruzicka's Credibility and Relies on Extra-Record Documents**

Third, the Commission should not admit the Johnson Report because the report assesses Ruzicka's credibility as a witness, and credibility determinations are within the province of a finder-of-fact, not an expert witness. *See Wilson v. Muckala*, 303 F.3d 1207 (10th Cir. 2002) (stating that the "credibility of witness testimony . . . is not an appropriate subject for expert testimony"); *US v. Toledo*, 985 F.2d 1462, 1470 (10th Cir. 1993) (stating that the "credibility of witnesses is generally not an appropriate subject for expert testimony" because it "usurps the critical function" of the finder-of-fact). The Commission should reject the Johnson Report because the report improperly expresses opinions about Ruzicka's trustworthiness, notes inconsistencies in Ruzicka's testimony, and assesses Ruzicka's credibility. Applicants' counsel could have argued these points to the finder-of-fact; an expert witness may not state them as an opinion.

Finally, the Commission should reject the Johnson Report because the report cites to evidence and events that are not in the record on appeal before the Commission. For example, the Johnson Report cites to: (1) 95 pages of "Ruzicka's Criminal History, The Superior Court of California, County of Orange, 2005-2018 (case summaries and court transcripts);" (2) "Ruzicka[']s . . . arrests both before and after the [on-the-record testimony] of May 27[], 2015;" (3) a "disciplinary review (not ending in suspension) via the State Bar Court in 2010 related to a 'DWI with prior within [10] years;" (4) 61 pages of unspecified emails dated between March 31, 2015 and May 26, 2015; and (5) Ruzicka's on-the-record testimony on April 1, 2015, April

15, 2015, and May 27, 2015.<sup>2</sup> The Johnson Report's reliance on extra-record documents, which have not been authenticated, makes the foundation of the Johnson Report wholly unreliable.

\* \* \*

The Applicants have failed to meet their burden under Rule 452. They have not established the materiality of the Johnson Report. Nor have they adequately explained their failure to present an expert report previously. The Commission should deny Applicants' motion to adduce additional evidence and decline to admit the Johnson Report into the record for this appeal.

Respectfully Submitted,



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<sup>2</sup> Only Ruzicka's on-the-record testimony from May 27, 2015 is in the record, and that is the only Ruzicka testimony on which the NAC relied.