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November 3, 2020

VIA EMAIL

Vanessa A. Countryman
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Washington, D.C. 20549-1090
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**Re: In the Matter of the Application of Daniel Paul Motherway
Administrative Proceeding No. 3-19897**

Dear Ms. Countryman:

Enclosed please find FINRA's Brief in Opposition to the Application for Review for the above-referenced matter.

Sincerely,

/s/ Gary Dernelle

Gary Dernelle

cc: Daniel Paul Motherway

[REDACTED]
Marietta, GA [REDACTED]
[REDACTED]

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

In the Matter of the Application of

Daniel Paul Motherway

For Review of Action Taken by

FINRA

Administrative Proceeding File No. 3-19897

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION1

II. BACKGROUND2

III. ARGUMENT5

 A. FINRA’s Action Is Grounded in Fact.....5

 B. Motherway Failed to Prove a Bona Fide Inability to Pay the
 Arbitration Award.....6

 C. FINRA Acted in Accordance with Its Rules.....11

 D. FINRA Applied Rule 9554 Consistent with the Purposes of the
 Exchange Act13

IV. CONCLUSION.....14

TABLE OF AUTHORITIES

PAGE(S)

COMMISSION DECISIONS AND RELEASES

<i>Eric M. Diehm</i> , 51 S.E.C. 938 (1994).....	13
<i>Michael Albert DiPietro</i> , Exchange Act Release No. 77398,..... 2016 SEC LEXIS 1036 (Mar. 17, 2016)	4, 6, 10, 13, 14
<i>William J. Gallagher</i> , 56 S.E.C. 163 (2003).....	5, 8, 10, 13, 14
<i>Keith D. Geary</i> , Exchange Act Release No. 80322, 2017 SEC LEXIS 995 (Mar. 28, 2017)	8
<i>Philip A. Lehman</i> , Exchange Act Release No. 54660,..... 2006 SEC LEXIS 2498 (Oct. 27, 2006)	9
<i>William J. Murphy</i> , Exchange Act Release No. 69923,..... 2013 SEC LEXIS 1933 (July 2, 2013)	8
<i>John G. Pearce</i> , 52 S.E.C. 796 (1996).....	10
<i>Michael David Schwartz</i> , Exchange Act Release No. 81784, 2017 SEC LEXIS 3111 (Sept. 29, 2017)	12, 13
<i>Keith Patrick Sequeira</i> , Exchange Act Release No. 85231, 2019 SEC LEXIS 286 (Mar. 1, 2019)	5
<i>Robert Tretiak</i> , 56 S.E.C. 209 (2003)	8

FINRA/NASD DECISIONS

<i>DBCC v. Spalletta</i> , Complaint No. C3A920010,..... 1993 NASD Discip. LEXIS 279 (NASD NBCC Jan. 7, 1993)	11
<i>DBCC v. Zipper</i> , Complaint No. C07910138, 1994 NASD Discip. LEXIS 194 (NASD NBCC Oct. 31, 1994)	11

FEDERAL RULES AND GUIDELINES

15 U.S.C. § 78o.....	13
----------------------	----

15 U.S.C. § 78s5

FINRA/NASD RELEASES

NASD Notice to Members 00-55, 2000 NASD LEXIS 63 (Aug. 2000).....3

FINRA BY-LAWS AND RULES

FINRA By-Laws, Article VI, Sec. 3(b)3

FINRA Rule 139043

FINRA Rule 95543, 4, 11

FINRA Rule 955912

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In the Matter of the Application of

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FINRA’S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

I. INTRODUCTION

This appeal finds its origin in a simple, undisputed fact—Daniel Paul Motherway (“Motherway”) failed to pay an arbitration award due to the FINRA member firm with which he was previously registered. Because of this failure, and as FINRA Rule 9554 authorizes, FINRA commenced expedited proceedings that, at their core, have as their purpose encouraging the payment of such awards. These proceedings ended with an inescapable conclusion. Motherway, who has not satisfied any part of the arbitration award or established a valid defense for not paying it, is indefinitely suspended from association with any FINRA member.

Motherway requests that the Securities and Exchange Commission (“Commission”) review FINRA’s action. Upon the conclusion of that review, the Commission should dismiss Motherway’s application for review. FINRA’s action comports fully with the statutory standard of review set forth in the Securities Exchange Act of 1934 (“Exchange Act”).

First, the bases for FINRA’s action exist in fact. Motherway does not dispute that he has not paid the subject arbitration award, and he has not raised any viable defense for his nonpayment of the award. Second, FINRA acted in accordance with its rules by notifying Motherway of its intention to suspend him and affording him an opportunity to be heard as to why FINRA should not do so. Finally, FINRA’s action, which motivates Motherway to pay the arbitration award, advances the public interest and protects investors, consistent with the purposes of the Exchange Act.

Motherway’s appeal rests on a single issue—whether he has proven a bona fide inability to pay the arbitration award. As a FINRA Hearing Officer found, and the record of FINRA’s action attests, the answer to that question is, plainly, no. Motherway disclosed to FINRA substantial household assets and income that were available to him and would allow him to make some meaningful payment towards the arbitration award. For these reasons, the Commission should affirm FINRA’s action and Motherway’s indefinite suspension from the securities industry.

II. BACKGROUND

Motherway registered as a general securities representative and general securities principal at FINRA member UBS Financial Services, Inc. (“UBS”), from November 2015 to July 2017.¹ RP 248. After it terminated him, UBS filed with FINRA’s Office of Dispute Resolution an arbitration claim that alleged Motherway breached a promissory note. RP 224. On January 7,

¹ “RP” refers to the record page numbers of the certified record that FINRA filed with the Commission on August 12, 2020. Motherway has not associated with a FINRA member since July 11, 2019. RP 48, 247. He does not dispute, however, that he was subject to FINRA’s jurisdiction for purposes of the FINRA action under review. RP 48.

2020, after a hearing, an arbitration panel awarded UBS \$1,012,729.65 in compensatory damages, plus interest, as well as \$132,637.76 in attorneys' fees, late fees, and costs. RP 47, 226.

FINRA served Motherway with a copy of the arbitration award on the day it was issued. RP 47, 231-32. FINRA also informed him in writing that he was obligated to pay the award within 30 days.² RP 47, 231. Motherway, however, did not pay the award within the 30-day deadline. RP 47, 235, 237. Accordingly, on February 7, 2020, FINRA served Motherway with written notice that it intended to suspend him from association with any FINRA member through an expedited proceeding initiated under FINRA Rule 9554.³ RP 47-48, 237-38. FINRA's suspension notice stated that, because Motherway failed to pay the arbitration award, FINRA would suspend him on February 28, 2020, unless by that date he paid the award in full, demonstrated a valid defense for nonpayment, or requested that FINRA's Office of Hearing Officers grant him a hearing under FINRA Rule 9559.⁴ RP 237.

² FINRA's Code of Arbitration Procedure for Industry Disputes requires that any monetary award be paid within 30 days of receipt, unless a motion to vacate has been filed with a court of competent jurisdiction. *See* FINRA Rule 13904(j).

³ FINRA Rule 9554(a) permits FINRA staff to provide written notice to an associated person who fails to pay an arbitration award that failure to comply with the award, within 21 days after service of the suspension notice, will result in a suspension from association with any FINRA member.

⁴ The defenses available for nonpayment of an arbitration award, which FINRA listed in the suspension notice, are limited to: (1) a fully-executed, written settlement of the arbitration claim with which the respondent is current; (2) a timely filed motion to vacate or modify the award that has not been denied; or (3) a pending petition or a discharge of the award in bankruptcy court. *See* FINRA By-Laws Art. VI, Sec. 3(b) (permitting FINRA to suspend any person from association for not paying an arbitration award when a motion to vacate or modify the award has not been made or denied, or for failure to comply with a written, executed settlement); *NASD Notice to Members 00-55*, 2000 NASD LEXIS 63, at *5-6 (Aug. 2000) (setting forth valid defenses for nonpayment of arbitration awards); RP 237.

Motherway timely requested a hearing, which stayed the effective date of his suspension.⁵ RP 48, 243. In his hearing request, Motherway claimed a bona fide inability to pay as the sole justification for his failure to satisfy the arbitration award.⁶ RP 243.

A FINRA Hearing Officer held a telephonic hearing on May 8, 2010. RP 111-222. Motherway participated in the hearing and testified. RP 111-222. The Hearing Officer issued a decision on June 30, 2020, finding Motherway had not paid the arbitration award in full or established a recognized defense for his nonpayment. RP 473-81. Specifically, the Hearing Officer found Motherway failed to carry his burden of establishing a bona fide inability to pay the award because he had enough assets and income available to make a meaningful payment towards the award. RP 476-80. The Hearing Officer therefore suspended Motherway indefinitely from association with any FINRA member.⁷ RP 480-81. Motherway subsequently filed a timely application requesting that the Commission review FINRA's action. RP 485-87.

⁵ FINRA Rule 9554(d) states that a suspension referenced in a notice issued by FINRA staff under Rule 9554 shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to FINRA Rule 9559.

⁶ FINRA's suspension notice advised Motherway that any hearing request he submitted must, as required by FINRA Rule 9554(e), "set forth with specificity" "any and all defenses" to FINRA's action. RP 238. An associated person who fails to pay an arbitration award not involving a customer may assert an inability to pay the award as a defense. *See Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *16 & n.21 (Mar. 17, 2016) (evaluating the merits of an inability-to-pay defense for an arbitration award not involving a customer).

⁷ The Hearing Officer's decision stated that Motherway's suspension would continue until he provided FINRA with documentary evidence that he had: (1) paid the award fully; (2) settled with the arbitration claimant and complied with the settlement's terms; or (3) filed a petition for bankruptcy protection or obtained a discharge in bankruptcy court. RP 480-81.

III. ARGUMENT

The Commission reviews FINRA action imposing an indefinite suspension for the failure to pay an arbitration award under Section 19(f) of the Exchange Act. *William J. Gallagher*, 56 S.E.C. 163, 166 (2003). Section 19(f) of the Exchange Act requires the Commission to dismiss Motherway's appeal if it finds that: (1) the specific grounds on which FINRA based its action exist in fact; (2) the action was taken in accordance with FINRA's rules; and (3) those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.⁸ *See* 15 U.S.C. § 78s(f). FINRA's action comports fully with this standard. Accordingly, the Commission should dismiss Motherway's application for review.

A. FINRA's Action Is Grounded in Fact

The specific grounds for Motherway's indefinite suspension exist in fact. There is no question that Motherway was required to pay an arbitration award of more than \$1 million to UBS, the FINRA member with which Motherway was previously registered. RP 47. There is also no dispute that Motherway has not paid any part of the award. RP 48. As to possible defenses, he has not settled with the arbitration claimant, moved to vacate or modify the arbitration award in court, or sought any protections in bankruptcy. RP 48. The record therefore supports fully FINRA's action to suspend Motherway indefinitely under FINRA Rule 9554. *See Keith Patrick Sequeira*, Exchange Act Release No. 85231, 2019 SEC LEXIS 286, at *17 (Mar.

⁸ Section 19(f) of the Exchange Act also requires that FINRA's action not impose any burden on competition that is not necessary or appropriate to further the Exchange Act's purposes. *See* 15 U.S.C. § 78s(f). Motherway does not assert, and there is no evidence to support, that his indefinite suspension imposes an unnecessary or inappropriate competitive burden.

1, 2019) (“FINRA rested its determination to suspend Sequeira under Rule 9554 on three findings: (1) the Award was entered, (2) Sequeira did not pay it, and (3) Sequeira failed to establish a defense for his failure to pay that is cognizable under FINRA Rule 9554.”), *aff’d*, 816 F. App’x 703 (3rd Cir. 2020).

B. Motherway Failed to Prove a Bona Fide Inability to Pay the Arbitration Award

Motherway bases his entire appeal in this case on a single claim. Specifically, he asserts FINRA’s Hearing Officer should have excused his failure to satisfy the arbitration award because of a bona fide inability to pay it. Applicant’s Br. at 1 (Oct. 2, 2020) (“My inability to pay defense should be supported by the SEC”). To prevail on this defense, Motherway must demonstrate an inability to make some meaningful payment toward the award from available assets or income, even if he could not pay the award in full.⁹ *See DiPietro*, 2016 SEC LEXIS 1036, at *16 & n.22. As the Hearing Officer found, and the record of FINRA’s action establishes, however, Motherway has not carried his burden of proof.

In advance of the hearing that Motherway requested, FINRA’s Office of Hearing Officers directed him to complete a FINRA-provided statement of financial condition form. RP 5-18. The form required that Motherway “[l]ist all assets owned by you, your spouse, or any other member of your household, directly or indirectly, and all assets which are subject to your or your spouse’s possession, enjoyment, or control, regardless of whether legal title or ownership is held by a relative, trustee, lessor, or any other intermediary.” RP 10. The form required also that

⁹ Motherway bears the burden of proving an inability-to-pay defense because his finances are a matter of his unique understanding. *See DiPietro*, 2016 SEC LEXIS 1036, at *16.

Motherway “[l]ist all money or other income received from any source on a monthly basis during the past 12 months, or since the date of the award, whichever period is longer, by you, your spouse, or any other member of your household.”¹⁰ RP 14.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] RP 274-75. Thus, as the Hearing Officer found, correctly, Motherway possessed

the ability to make some meaningful payment towards the arbitration award from the household assets and income available to him. RP 477.

Motherway does not dispute these figures, which he provided to FINRA after declaring them complete and accurate.¹³ Instead, he claims they provide a “gross misrepresentation” of his finances because the assets and sources of income he listed on the statement of financial

¹⁰ FINRA’s statement of financial condition form provided Motherway the opportunity to disclose also all household liabilities and monthly expenses. RP 11, 15.

¹¹ Motherway dated the completed form March 8, 2020. RP 271.

¹² Motherway estimated total household income for 2019 of \$404,384. RP 273.

¹³ Motherway declared under penalty of perjury that the financial information he provided to FINRA was true, correct, and complete. RP 276.

condition form include those of his wife, which he asserts the Hearing Officer was wrong to consider when evaluating his inability-to-pay defense.¹⁴ Applicant's Br. at 1, 2-3.

Motherway, however, is mistaken in the narrow view he takes of the assets and income available to him for the purpose of making some meaningful payment towards the arbitration award. As the Commission has long held, FINRA may conduct a searching and rigorous inquiry into the finances of any person who, like Motherway, asserts an inability-to-pay defense. *See Robert Tretiak*, 56 S.E.C. 209, 220 (2003) (“NASD is entitled to make a searching inquiry into any such claim.”); *Gallagher*, 56 S.E.C. at 169 (“[T]he Hearing Officer was entitled to make a rigorous inquiry into Gallagher’s claim that he was unable to pay the award.”). In this respect, the Commission recognizes FINRA’s authority to request that a person claiming an inability to pay verify that claim with substantive documentation, including by completing FINRA’s statement of financial condition form and providing supporting records. *See Keith D. Geary*, Exchange Act Release No. 80322, 2017 SEC LEXIS 995, at *43 (Mar. 28, 2017) (“‘[FINRA] is entitled to make a searching inquiry into any such claim,’ including by requiring appropriate documentation.”), *aff’d*, 727 F. App’x 504 (10th Cir. 2018); *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *110 (July 2, 2013) (finding respondent failed to meet his burden of establishing an inability to pay when he failed to provide information required by FINRA’s statement of financial condition form), *aff’d sub nom, Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

¹⁴ Motherway testified that, despite efforts to obtain employment, he has not worked since July 2019. RP 139-41. He also testified that he has zero assets of his own, no income, but greater than \$1 million in liabilities from credit card debt, back taxes, the arbitration award, and various arbitration-related fees and expenses. RP 134-38, 143-45.

FINRA's statement of financial condition form explicitly requires that a respondent disclose more than just his or her own assets or income. RP 10-18. It requires the respondent to also, among other things, list assets owned, and money or income received, by a spouse or any other member of the respondent's household. RP 10, 14. Such information provides a fuller picture of the financial resources available to pay an arbitration award or disciplinary sanction and whether a true inability to pay exists. *Cf. Philip A. Lehman*, Exchange Act Release No. 54660, 2006 SEC LEXIS 2498, at *31 (Oct. 27, 2006) ("Disclosure of a spouse's information may be useful in determining whether, and to what extent, such spouse's assets or liabilities offset the assets and liabilities of the individual submitting the sworn financial statement.").

Contrary to Motherway's assertion, it was entirely appropriate for FINRA's Hearing Officer to look beyond Motherway's assets and income, and to consider also the assets and income of his wife, when evaluating Motherway's claim that he possesses a bona fide inability to pay the arbitration award.

[REDACTED]

15

[REDACTED]

16

While the arbitration proceedings that led to the award at issue here were pending,

[REDACTED]

checking account so that he can pay bills and other expenses.¹⁷ RP 160-65. Motherway's wife also paid his attorney fees for the UBS arbitration claim. RP 172-73. Thus, as the Hearing Officer rightly concluded, the household assets and income that Motherway disclosed to FINRA provide a more complete picture of the funds that were, and are, available to him to satisfy the award.

Separately, the defense of inability-to-pay is unavailable to those who can borrow money to satisfy an arbitration award, either fully or in some meaningful part. *DiPietro*, 2016 SEC LEXIS 1036, at *20. As the Hearing Officer found, and the uncontroverted record evidence shows, Motherway had substantial household assets and income available to him which, even if not used to pay the arbitration award directly, could be borrowed against to make some meaningful payment towards the arbitration award. Yet, Motherway has provided no reliable evidence that he attempted to borrow funds from his wife or, for that matter, from anyone else.¹⁸ This breakdown ultimately proves fatal to his inability-to-pay defense. *See DiPietro*, 2016 SEC LEXIS 1036, at n.32 (“The Hearing Officer’s decision correctly concluded that DiPietro could borrow or otherwise obtain funds from his children to pay the award.”); *Gallagher*, 56 S.E.C. at 170 (“Gallagher submitted no evidence that he could not have borrowed against the home [he gave to his children], or otherwise, the necessary money to pay the arbitration award.”); *John G.*

¹⁷ During the three-month period prior to the arbitration award, Motherway's wife transferred at least \$13,150 to his checking account. RP 292-301.

¹⁸ In his appeal brief, Motherway claims that he “could not borrow the funds from anyone.” Applicant's Br. at 2. As his hearing testimony showed, however, this assessment of his ability to obtain a loan to pay the arbitration award is based on nothing more than his biased self-assessment of his own creditworthiness. RP 141-43. There is no evidence in the record, because Motherway presented none, that he made any effort to obtain a loan or otherwise leverage the substantial household assets and income he disclosed to FINRA to satisfy the arbitration award. RP 192-93, 480.

Pearce, 52 S.E.C. 796, 797 (1996) (“Pearce . . . admitted that he made no attempt to secure a line of credit or obtain a loan to satisfy the award.”); *see also* *DBCC v. Zipper*, Complaint No. C07910138, 1994 NASD Discip. LEXIS 194, at *12 (NASD NBCC Oct. 31, 1994) (“Zipper . . . planned to borrow \$10,000 from his family to settle his tax obligation to the IRS, a debt which was incurred subsequent to the arbitration award. Zipper failed to present to the NASD any information as to why he could not or would not borrow to pay arbitration award.”), *aff’d*, 52 S.E.C. 240 (1995); *DBCC v. Spalletta*, Complaint No. C3A920010, 1993 NASD Discip. LEXIS 279, at *21-22 (NASD NBCC Jan. 7, 1993) (“We note that we have seen no evidence of any attempts made by Spalletta to obtain a loan to pay the award, and that his interest in the farm [which was in his wife’s name only] may be sufficient to support the farm’s use as collateral for such a loan.”).

Motherway has failed to carry his burden of proving that he possessed a bona fide inability to pay the arbitration award, which is the lone defense he asserts in support of his appeal. Because Motherway has not paid the arbitration award, or otherwise established a valid defense to FINRA’s action, the bases for FINRA’s action exist in fact.

C. FINRA Acted in Accordance with Its Rules

FINRA indefinitely suspended Motherway in accordance with its rules. FINRA Rule 9554 authorizes FINRA to bring expedited proceedings to suspend from association with a FINRA member any associated person who fails to pay an arbitration award. FINRA Rule 9554(a). The rule permits FINRA to initiate these proceedings by serving written notice that states the basis for FINRA’s action, when the action will take effect, what the respondent must do to avoid such action, and that the respondent may file with the Office of Hearing Officer’s a

written request for a hearing under FINRA Rule 9559. FINRA Rule 9554(a)-(c). There is no dispute that FINRA served Motherway with written notice that complied fully with these requirements. RP 47-48, 237-38, 239, 241-42.

There is also no dispute that, after Motherway timely requested a hearing, FINRA stayed the effective date of his suspension and followed the procedures related to hearings under FINRA Rule 9559. FINRA's Hearing Officer timely notified the parties of the hearing.¹⁹ See FINRA Rule 9559(g); RP 109. The Hearing Officer conducted the hearing telephonically, and a court reporter recorded the hearing and prepared a transcript. See FINRA Rule 9559(k); RP 111-222. The Hearing Officer timely prepared a proposed written decision that set forth findings of fact, conclusions of law, and a statement of the restrictions or limitations imposed on Motherway. See FINRA Rule 9559(o), (p); RP 471-72, 473-81. The Hearing Officer's decision was also provided to a Review Subcommittee of the NAC and issued as the final FINRA decision after the Review Subcommittee did not call the proposed decision for review. See FINRA Rule 9559(o), (p); RP 471-72, 473-81.

FINRA's proceedings were conducted as authorized by its rules. FINRA's Hearing Officer indefinitely suspended Motherway from association with any FINRA member after finding, with the benefit of a full hearing, that Motherway failed to satisfy the award and had not established a valid defense for his nonpayment—a permissible basis for such a suspension under FINRA rules. See *Michael David Schwartz*, Exchange Act Release No. 81784, 2017 SEC

¹⁹ FINRA Rule 9559 requires that a hearing be held within 30 days after a respondent who is the subject of a FINRA Rule 9554 suspension notice files a hearing request. FINRA Rule 9559(f). The parties in this case requested several extensions of the originally noticed hearing date, which was issued within 30 days of Motherway's hearing request. RP 5-20, 23-25, 27-28, 33-34, 37-38, 107.

LEXIS 3111, at *16 (Sept. 29, 2017); *see also DiPietro*, 2016 SEC LEXIS 1036, at *10 (“This was consistent with FINRA Article VI, Section 3(b), and with NASD’s Notice to Members 00-55, which enumerated these ‘bases for nonpayment.’”). Motherway does not contend, and there is no evidence suggesting, that FINRA deviated from the procedural safeguards imposed under its rules or otherwise failed to provide him fair process in this case.²⁰

D. FINRA Applied Rule 9554 Consistent with the Purposes of the Exchange Act

FINRA Rule 9554 is consistent with the purposes of the Exchange Act, and FINRA applied the rule in a manner that matched those objectives in this case. Section 15A of the Exchange Act requires FINRA to design its rules, generally, to protect investors and the public interest. *See* 15 U.S.C. § 78o-3(b)(6). FINRA’s arbitration process provides an effective mechanism for the prompt resolution of disputes that involve FINRA members and their associated persons. *See Eric M. Diehm*, 51 S.E.C. 938, 939 (1994) (“The NASD’s arbitration procedure is designed to provide speedy dispute resolution for members, their employees, and the public.”). “Honoring arbitration awards is essential to the functioning of the [FINRA] arbitration system.” *Gallagher*, 56 S.E.C. at 171. Permitting FINRA members and associated persons to remain in the securities industry when they fail to satisfy arbitration awards presents an unmistakable regulatory risk. *See Schwartz*, 2017 SEC LEXIS 3111, at *17 (quoting *Order Approving Proposed Rule Change Relating to FINRA Rule 9554*, Exchange Act Release No. 62211, 2010 SEC LEXIS 1800, at *4 (June 2, 2010)). FINRA Rule 9554, which expressly

²⁰ The Exchange Act requires that FINRA provide fair proceedings. *See* 15 U.S.C. § 78o-3(h)(1).

authorizes FINRA to bring expedited actions to compel its members and their associated persons to pay arbitration awards promptly, therefore furthers the investor protection objectives of Section 15A of the Exchange Act. *See id.*

FINRA's action under FINRA Rule 9554 to indefinitely suspend Motherway is consistent with these objectives. His failure to satisfy the arbitration award harms his former member firm and undermines the FINRA arbitration process. *See Gallagher*, 56 S.E.C. at 171 ("Gallagher has harmed the arbitration claimants by forcing them to wait for an extended period of time to satisfy the award"). Encouraging Motherway to pay the award, by imposing an indefinite suspension on his ability to associate with a FINRA member, advances the public interest and protects investors, as Section 15A of the Exchange Act directs. *See DiPietro*, 2016 SEC LEXIS 1036, at *24 ("Conditional suspension of DiPietro's association with FINRA members furthers two central purposes of the Exchange Act—serving the public interest and the protection of investors."); *see also Gallagher*, 56 S.E.C. at 171 ("Inducing him to pay the award through suspension of his NASD membership furthers the public interest and the protection of investors.").

IV. CONCLUSION

The Commission should dismiss Motherway's application for review. FINRA's action comports fully with Section 19(f) of the Exchange Act. The bases for FINRA's action against Motherway are well grounded in fact. Motherway has not satisfied an arbitration award owed to the FINRA member with which he was previously registered, and he has not established a valid defense that would serve to excuse his nonpayment of the award. His lone defense, a bona fide inability to pay the award, fell flat. In suspending Motherway indefinitely, FINRA acted in

accordance with its rules and furthered the Exchange Act's objectives of protecting the public interest and investors. For these reasons, the Commission should affirm FINRA's action.

Respectfully submitted,

/s/ Gary Dernelle

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November 3, 2020

CERTIFICATE OF SERVICE

I, Gary Dernelle, certify that on this 3rd day of November 2020, I caused a copy of FINRA's Brief in Opposition to the Application for Review, in the *Matter of the Application for Review of Daniel Paul Motherway*, Administrative Proceeding No. 3-19897, to be served by electronic mail on:

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Room 10915
Washington, DC 20549-1090
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and

Daniel Paul Motherway

[REDACTED]
Marietta, GA [REDACTED]
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Respectfully submitted,

/s/ Gary Dernelle

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