SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 81784 / September 29, 2017

Admin. Proc. File No. 3-17752

In the Matter of the Application of

MICHAEL DAVID SCHWARTZ

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF FINRA ACTION

Registered securities association suspended associated person of member firm because of his failure to satisfy an arbitration award. *Held*, application for review is *dismissed*.

APPEARANCES:

Michael David Schwartz, pro se.

Alan Lawhead and *Jennifer Brooks* for Financial Industry Regulatory Authority, Inc.

Appeal filed: December 27, 2016
Last brief received: March 22, 2017

Michael David Schwartz, formerly a registered representative with FINRA member firm Barclays Capital Inc., seeks review of a FINRA decision suspending him from association with any FINRA member firm for not paying an arbitration award he owed to Barclays. Schwartz does not dispute that he has not paid the award in full, but he contends that he met a recognized defense to nonpayment—that he entered into a settlement agreement with Barclays concerning the award and is current on his obligations thereunder. Schwartz also contends that FINRA's proceedings were unfair. Based on our independent review of the record, we find that Schwartz's contentions are meritless. Accordingly, we dismiss his application for review.

I. Background

Schwartz joined Barclays as a registered representative in October 2010. At that time, Barclays loaned Schwartz $400,000 and agreed to forgive the loan "in equal installments on the

first through seventh anniversaries of his start date." But Barclays fired Schwartz in May 2012, leaving approximately $340,000 of the original loan amount unforgiven.

Schwartz did not repay the loan balance to Barclays, and Barclays filed an arbitration claim against him with FINRA. After a hearing, a FINRA Dispute Resolution Panel ordered Schwartz to pay Barclays $568,568, which included the loan balance, interest, and attorneys' fees (the "Award"). Two days after the Award was entered in September 2013, Schwartz's counsel properly received notice of the Award and of Schwartz's obligation to pay it within 30 days.

Schwartz did not pay the Award or file an action in federal court to vacate it. Schwartz filed for bankruptcy, but the bankruptcy court dismissed his petition on September 16, 2014 without discharging the Award. The decision of the bankruptcy court was affirmed by the U.S. Court of Appeals for the Seventh Circuit on August 24, 2015.[1]

On April 21, 2016, FINRA instituted expedited proceedings under Rule 9554 of its Code of Procedure by serving Schwartz with a suspension notice. The notice stated that FINRA would suspend Schwartz from association with any member firm on May 12, 2016, based on his failure to comply with the Award, unless he demonstrated before that date that he met one of four defenses: that he paid the Award in full; entered into a settlement agreement concerning the Award and his obligations thereunder were current; timely filed an action to vacate or modify the Award and such motion had not been denied; or filed for bankruptcy protection and the award had not been deemed by a federal court to be non-dischargeable.[2] The notice also stated that Schwartz could request a hearing, which would stay the effective date of the suspension.[3]

Schwartz requested a hearing, which occurred in September 2016. On December 1, 2016, the Hearing Officer issued a decision finding that Schwartz had not paid the Award in full or established his defense that he had entered into a settlement agreement with Barclays that settled the Award. As a result, the Hearing Officer suspended Schwartz until he "produces sufficient documentary evidence to FINRA showing: (1) the Award has been paid in full; (2) he and the arbitration creditor have agreed to settle the matter; or (3) he has filed a petition in the United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award." Schwartz then filed this appeal.

II. Analysis

Section 19(f) of the Securities Exchange Act of 1934 governs our review of a self-regulatory organization ("SRO") action imposing an indefinite suspension contingent on the

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1 *In re Schwartz*, 799 F.3d 760, 765 (7th Cir. 2015).

2 *See NASD Notice to Members 00-55*, 2000 WL 1375123, at *2 (Aug. 10, 2000) (setting forth defenses under Rule 9554); *see also* Article VI, Section 3(b) of FINRA's By-Laws.

3 *See* FINRA Rule 9559(c)(1) (stating that a timely request for a hearing stays the effectiveness of a suspension notice in a Rule 9554 expedited proceeding)..

payment of an arbitration award.[4] It requires that we dismiss an appeal of an SRO's action if we find that the specific grounds on which the SRO based its action exist in fact; that the SRO's action was in accordance with its rules; and that those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[5] As explained below, we find that FINRA's action meets this standard and, accordingly, dismiss Schwartz's appeal.[6]

A. The specific grounds for the suspension exist in fact.

We find that the specific grounds on which FINRA based the suspension exist in fact. It is undisputed that Schwartz was required to pay an Award of $568,568 within 30 days of receiving notice of the Award.[7] It is also undisputed that three of the four Rule 9554 defenses are not available to Schwartz: he has not paid the Award in full or filed a motion to have it modified or vacated by a court, and a bankruptcy court dismissed his bankruptcy petition without discharging the Award.[8] Schwartz contends that he satisfied the remaining defense because he entered into a settlement agreement with Barclays that settled the Award in full.[9] We disagree.

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[4] *See, e.g., Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *2 (Mar. 17, 2016) (reviewing FINRA's imposition of indefinite suspension contingent on payment of arbitration award); *William J. Gallagher*, Exchange Act Release No. 47501, 2003 WL 1125378, at *1 (Mar. 14, 2003) (reviewing NASD's imposition of indefinite suspension contingent on payment of arbitration award).

[5] 15 U.S.C. § 78s(f). Section 19(f) also requires that the action not impose an undue burden on competition. Schwartz does not claim, and we see no basis for concluding, that his suspension imposes an unnecessary or inappropriate burden on competition.

[6] We review Schwartz's suspension under Section 19(f) because it is not a final disciplinary sanction. *See* Exchange Act Section 19(e), 15 U.S.C. § 78s(e). Rather, "the main goal" of indefinite suspensions that terminate on the payment of the arbitration award "is to encourage respondents to comply with the law or previously imposed [arbitration] awards, not to sanction them for past misconduct." *Order Approving Proposed Rule Change Relating to FINRA Rule 9554*, Exchange Act Release No. 62211, 2010 WL 2233764, at *2 (June 2, 2010).

[7] *See* FINRA Rules 12904(j), 13904(j) (stating that "monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction").

[8] Schwartz initially asserted, and then withdrew, a defense of inability to pay before the Hearing Officer; he has not asserted that defense in this appeal.

[9] Schwartz attached fifteen exhibits to his brief in support of his application for review. We construe Schwartz's attachment of the exhibits to his brief as a motion to adduce additional evidence under Rule of Practice 452. *See* 17 C.F.R. § 201.452. Under Rule 452, Schwartz must establish "that there were reasonable grounds for failure to adduce such evidence previously and that the additional evidence is material." *Guang Lu*, Exchange Act Release No. 51047, 2005 WL 106888, at *8 n.44 (Jan. 14, 2005). One of the exhibits is the affidavit of Barclays's counsel discussed in detail below; it was introduced before the Hearing Officer and is already part of the certified record we have reviewed in this proceeding. With respect to the other fourteen exhibits,

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1. Schwartz did not enter into a settlement that settled the Award in full.

In construing a contract under Illinois law, which governs the proffered settlement agreement, the intent of the parties to the contract is determined from "the contract language alone" if "there is no ambiguity in" that language.[10] A contract term is ambiguous only if "the language is reasonably or fairly susceptible to more than one construction."[11] "If, after considering the language of an agreement, a court determines that the document is ambiguous, the court may then look beyond the agreement to ascertain the intent of the parties."[12] The settlement agreement's language is not ambiguous: the agreement concerns the disposition of certain of Schwartz's assets—restricted stock, a vehicle, and real property—that Barclays located in an Illinois state court proceeding to obtain a final judgment to confirm and enforce the Award. It does not settle the Award in full.

Indeed, the preamble to the settlement agreement states that its purpose is limited to the settlement of "all disputes, claims and actions arising from the Citations" Barclays issued to discover and prohibit the disposition of Schwartz's assets noted above. It assigns the restricted stock to Barclays and the vehicle and real property to Schwartz. The agreement then explicitly preserves Barclays's right to collect future amounts from Schwartz until he satisfies the final judgment in the state court action that confirmed the Award and Barclays's ability to enforce it.

Paragraph 6 states that "[n]othing in this agreement shall prohibit Barclays from perfecting a lawful garnishment of any [of Schwartz's] future wages." Paragraph 7 states that "nothing in the [agreement] shall be understood . . . as a waiver . . . of Barclays'[s] right to lawfully collect from [Schwartz's] future income and/or assets he may acquire 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 [Schwartz] becomes vacated." Finally, a stipulation attached as Exhibit 1 to the settlement agreement states that, "[s]ubject to the terms of the settlement agreement . . . , this stipulation shall not be construed as waiving any right of Barclays to full satisfaction of the final judgment . . . including Barclays'[s] right . . . to take any action to collect from Schwartz's future income and/or assets." Schwartz and Barclays executed and filed the stipulation in court, as required under Paragraph 2 of the settlement agreement. Thus, we find that the only reasonable construction of the settlement agreement's language (including the stipulation) is that the settlement agreement did not settle the Award in full.

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we have reviewed them and find that they were either available at the time of the FINRA hearing with no valid reason for the failure to adduce them then, immaterial to this proceeding, or both. On that basis, we deny Schwartz's motion to adduce them.

10 *Haisma v. Edgar*, 578 N.E.2d 163, 168 (Ill. Ct. App. 1991).

11 *Tishman Midwest Mgmt. Corp. v. Wayne Jarvis, Ltd.*, 500 N.E.2d 431, 434 (Ill. Ct. App. 1986).

12 *Hillenbrand v. Meyer Med. Grp., S.C.*, 682 N.E.2d 101, 104 (Ill. Ct. App. 1997).

2. Schwartz's claims about the language of the settlement agreement do not establish that the settlement agreement settled the Award in full.

Schwartz contends that we should not rely on the stipulation because it "is entirely separate from, and outside the four corners of, the [s]ettlement [a]greement," and "was related to only certain limited portions of the [s]ettlement [a]greement . . . that addressed the Citation Proceeding." But the stipulation was attached as Exhibit 1 and the parties agreed to execute it in Paragraph 2; therefore, it was part of the settlement agreement. In any event, even if it was not we would find that the settlement agreement was not ambiguous and did not settle the Award in full based on its other language. And even if we assumed further that the settlement agreement was ambiguous without the stipulation, we would find that the stipulation was extrinsic evidence demonstrating conclusively that the parties did not intend to settle the Award in full.

Schwartz also highlights six provisions in the settlement agreement that he believes supports his view that the agreement settled the Award in full. He asserts that two provisions, Paragraph 4 and Paragraph 7, show that the settlement agreement is not limited to the disposition of the assets covered by the Citations. Paragraph 4 states that Schwartz "agree[d] to waive . . . any right to appeal" an order in a "related interpleader lawsuit" brought by the trustee from Schwartz's bankruptcy proceeding. Paragraph 7 contemplates that the judgment could be vacated in another proceeding. Neither provision indicates that the settlement agreement settled the Award in full. Indeed, as discussed above, Paragraph 7 states the opposite.

No more helpful to Schwartz is Paragraph 11. That paragraph states that the parties "agree to waive any right to oppose the provisions of [the settlement agreement] being enforced against them." Although Schwartz claims that this provision gives him the right to enforce the settlement agreement and "utilize [it] as an acceptable defense to suspension, per Rule 9554," Paragraph 11 does not stand for the latter proposition.

The final three provisions Schwartz cites are the preamble and Paragraphs 14 and 15. As discussed above, the preamble states that the settlement agreement's purpose is limited to the settlement of "all disputes, claims and actions arising from the Citations" Barclays issued to discover and prohibit the disposition of certain of Schwartz's assets. Paragraph 14 states that Schwartz and Barclays "represent and acknowledge that, in executing this Agreement, they have not relied upon any representation or statement not set forth herein, and the parties each represents that they have had adequate opportunity to have the provisions and such agreement reviewed and approved by legal counsel." And Paragraph 15 states that the agreement "sets forth the entire agreement between [Schwartz] and Barclays with respect to the subject matter set forth herein, and fully supersedes any and all prior agreements or understandings between [Schwartz] and Barclays pertaining to such subject matter." None of these provisions can be reasonably construed as eliminating Schwartz's obligation to pay the Award in full.

3. Schwartz's remaining contentions fail.

Schwartz makes three other contentions that do not rely on the language of the settlement agreement. First, he contends that because he received FINRA's suspension notice before signing the settlement agreement "there would have been no point in" signing the agreement unless he could use it as a defense to nonpayment of the Award. But there are many conceivable

reasons that Schwartz would have signed the settlement agreement, including for Schwartz to retain ownership of his vehicle and real property and reduce litigation expenses.

Second, Schwartz contends that "Barclays has not argued, or even suggested, that the [s]ettlement [a]greement is anything other than what [he] has argued." This is irrelevant. Barclays was not a party to the Rule 9554 proceeding and could not have disputed Schwartz's arguments therein.[13] Similarly irrelevant is Schwartz's contention that, because Barclays drafted the settlement agreement, we must resolve any ambiguity in it against Barclays in accordance with the "contra proferentem" rule of construction. This is a rule of "last resort" that Illinois state courts apply when extrinsic evidence fails to resolve an ambiguity in a contract.[14] We need not apply that rule here because the settlement agreement is not ambiguous.

Finally, Schwartz contends that even if the settlement agreement did not settle the Award in full he need only have entered into a settlement agreement with Barclays generally to have a complete Rule 9554 defense. But the defense based on a settlement contemplates that the parties to the arbitration award "have agreed to installment payments of *the amount awarded* or have otherwise agreed to settle *the action*."[15] This contemplates a full, not partial, settlement.

B. The suspension was in accordance with FINRA's rules.

We find that the suspension was in accordance with FINRA's Rules. FINRA Rule 9554 provides for expedited proceedings to suspend from association with a member firm an associated person who has failed to comply with an arbitration award. The rule 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. It is also undisputed that after Schwartz requested a hearing FINRA permitted him to participate in the hearing by telephone, to testify on his own behalf, to cross-examine witnesses, and to introduce evidence—all in compliance with FINRA's rules. The Hearing Officer determined to indefinitely suspend Schwartz until he paid the Award, settled the matter with Barclays, filed a petition in the United States Bankruptcy Court, or a United States Bankruptcy Court discharged the debt representing the Award. The Hearing Officer based the suspension on his finding that Schwartz had failed to comply with the Award and had no valid basis for his nonpayment—a permissible basis for imposing such a suspension under FINRA's rules. On these bases, we find that FINRA acted in accordance with its rules.

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[13] We note that Barclays's outside counsel, who handled the Illinois state court proceeding, also participated in the Rule 9554 proceeding as a fact witness and not in his capacity as a representative of Barclays. The outside counsel signed an affidavit stating that "[a]t no time did Barclays . . . contemplate or intend . . . the [s]ettlement [a]greement to be a settlement of the [j]udgment or the Award," and he testified similarly at the hearing. Our decision, however, does not rely on the outside counsel's affidavit or testimony, as discussed further below.

[14] *City of Chicago v. Dickey*, 497 N.E.2d 390, 393-94 (Ill. Ct. App. 1986).

[15] *NASD Notice to Members 00-55*, 2000 WL 1375123, at *2 (emphasis added).

C. The FINRA rules at issue are, and were applied in a manner, consistent with the purposes of the Exchange Act.

We find that the FINRA rules at issue are consistent with the purposes of the Exchange Act. Exchange Act Section 15A(b)(6) requires that FINRA's rules be designed to protect investors and the public interest.[16] We have said that allowing "members or their associated persons that fail to pay arbitration awards to remain in the securities industry presents regulatory risks."[17] As a result, Rule 9554 "further[s] FINRA's investor protection mandate by promoting a fair and efficient process for taking action to encourage members and associated persons to pay arbitration awards."[18] "The payment of arbitration awards and the facilitation of the arbitration process, in general, will assist in the protection of investors and further the public interest."[19]

We also find that FINRA's application of Rule 9554 to Schwartz was consistent with these purposes. "Honoring arbitration awards is essential to the functioning of the [FINRA] arbitration system," and requiring "associated persons to abide by arbitration awards enhances the effectiveness of the arbitration process."[20] Schwartz has harmed the prevailing arbitration claimant (Barclays) by causing it not only to wait for satisfaction of the Award but also to enforce the Award through litigation. Conditionally suspending Schwartz from association with FINRA members gives him an incentive to pay the award. And "[i]nducing him to pay the award through suspension of his [FINRA] membership furthers the public interest and the protection of investors."[21]

Schwartz contends that, in both the Rule 9554 proceeding and the underlying arbitration proceeding, FINRA violated the fairness requirements in Exchange Act Section 15A(b)(8) and the whistleblower protections in the Sarbanes-Oxley Act and Dodd-Frank Act. According to Schwartz, FINRA colluded with Barclays to retaliate against him for reporting certain unspecified conduct at Barclays "that he believed to be fraudulent" to the Commission and other authorities. We reject this contention because Schwartz has not supported it with evidence of misconduct by FINRA specific to either of his proceedings. Rather, he refers to news articles that he claims show that FINRA has retaliated against whistleblowers to protect member firms in the past, and that FINRA is biased generally toward member firms in deciding arbitration disputes. Schwartz's generalized speculation is insufficient to support his claim that both the Rule 9554 proceeding and the underlying arbitration proceeding were procedurally improper.

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16 15 U.S.C. 78*o*-3(b)(6).

17 *Order Approving Proposed Rule Change Relating to FINRA Rule 9554*, 2010 WL 2233764, at *2

18 *Id*. at *3.

19 *Order Granting Approval of Proposed Rule Change Relating to Suspension or Cancellation of Membership or Registration for Failure to Comply with Arbitration Awards*, Exchange Act Release No. 31763, 1993 WL 25192, at *3 (Jan. 26, 1993).

20 *Gallagher*, 2003 WL 1125378, at *4.

21 *Id*.

Schwartz also contends that FINRA acted in bad faith because it instituted the Rule 9554 proceeding in contravention of its statement in an email to him approximately one month earlier that it would institute a proceeding "upon [the] request of" Barclays and that it had "not received such a request." But after FINRA sent this email, and before it instituted the proceeding, Barclays's outside counsel emailed FINRA that "the [A]ward remains unpaid." Indeed, Schwartz himself argues that FINRA colluded with Barclays's outside counsel "to bring the expedited proceeding." We note that communications between FINRA and the prevailing party in arbitration before the institution of Rule 9554 proceedings are a standard part of the process for enforcing awards.[22] In any event, we find that Schwartz's failure to pay the Award provided FINRA with a basis for instituting the Rule 9554 proceeding.[23]

Schwartz contends further that the Rule 9554 proceeding was unfair because Barclays's outside counsel invoked the attorney-client privilege when Schwartz cross-examined him at the hearing concerning Barclays's intent as to the settlement agreement, yet the outside counsel signed an affidavit for FINRA staff stating that Barclays did not intend the settlement agreement to settle the Award. According to Schwartz, either the outside counsel violated his attorney-client privilege when he signed the affidavit and FINRA staff "participate[d] in th[at] violation" or the outside counsel committed perjury at the hearing by invoking privilege. Schwartz also claims that the outside counsel committed perjury at the hearing when testifying about the bankruptcy proceeding. We find that these contentions do not establish that the proceeding was unfair because neither we nor the Hearing Officer have relied on the affidavit or testimony of Barclays' outside counsel. Schwartz is therefore unable to show prejudice to his case.[24]

Finally, Schwartz's challenges limited to the underlying arbitration proceeding are unavailing. He contends that Barclays's outside counsel engaged in misconduct "akin to jury tampering" in the arbitration proceeding because an arbitrator initially selected for the panel withdrew after the outside counsel joined his law firm and was replaced by an individual who knew Schwartz's former boss at Barclays. He also contends that he was libeled in a blog article by another colleague of Barclays's outside counsel at his new firm. We reject these contentions because Schwartz has not supported them. In any event, Schwartz "may not collaterally attack"

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[22] *See NASD Notice to Members 00-55*, 2000 WL 1375123, at *1 (stating that FINRA "will now specifically request prevailing claimants to notify the forum in writing when their awards have not been paid").

[23] *See* FINRA Rule 9554(a) (authorizing FINRA to institute expedited proceedings for failure to comply with an arbitration award).

[24] *See Ralph Joseph Presutti*, Exchange Act Release No. 37351, 1996 WL 384596, at *5 (June 24, 1996) (finding that the applicant was not prejudiced by the SRO's reliance on a second circuit decision because the Commission did not rely on that decision on appeal). We deny Schwartz's request that we review FINRA's denial of his "request that a FINRA attorney and a third-party witness be barred from appearing before FINRA, be barred from working for any FINRA [m]ember [f]irm, and be officially referred to [s]tate [a]ttorney [d]isciplinary [a]uthorities." Actions as to non-parties are not properly before us.

the underlying arbitration award because permitting that "tactic would subvert [FINRA's] procedures, which are designed to promote prompt payment of arbitration awards."[25]

III. Conclusion

In sum, we find that the specific grounds on which FINRA based its suspension exist in fact, that the suspension was imposed in accordance with FINRA's Rules, and that those Rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. Accordingly, we dismiss Schwartz's application for review.[26]

An appropriate order will issue.[27]

By the Commission (Chairman CLAYTON and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

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[25] *Robert Tretiak*, Exchange Act Release No. 47534, 2003 WL 1339182, at *5 (Mar. 19, 2003); *see also John G. Pearce*, Exchange Act Release No. 37217, 1996 WL 254675, at *2 (May 14, 1996) (rejecting applicant's attack on "the fairness of the underlying arbitration proceeding" because permitting "a party dissatisfied with an arbitral award to attack it collaterally for legal flaws in a subsequent disciplinary proceeding" for failure to pay that award "would subvert the salutary objective that the NASD's [arbitration] resolution seeks to promote"). The proper avenue would be a motion to vacate the Award in federal court.

[26] Schwartz also challenges, without explanation, the $2,206.50 in costs the Hearing Officer ordered that he pay FINRA. We find, however, that these costs were well within the Hearing Officer's authority to impose under FINRA Rule 9559(n)(4). *See generally Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *22 (Feb. 13, 2015) (finding that "FINRA acted well within its discretion" to "assess costs").

[27] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 81784 / September 29, 2017

Admin. Proc. File No. 3-17752

In the Matter of the Application of

MICHAEL DAVID SCHWARTZ

For Review of Action Taken by

FINRA

ORDER DISMISSING APPLICATION FOR REVIEW

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review filed by Michael David Schwartz be, and it hereby is, dismissed.

By the Commission.

Brent J. Fields
Secretary