FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. TIMOTHY PIERCE HENRY (CRD No. 4782869), Respondent.	Expedited Proceeding No. ARB220023 STAR No. 20220774120 Hearing Officer–DRS **EXPEDITED DECISION** April 13, 2023

Respondent failed to pay an arbitration award and failed to prove that he had a bona fide inability to pay or make a meaningful payment toward the award. Respondent is therefore suspended from associating with any FINRA member in any capacity.

Appearances

For the Complainant: Michael Manning, Esq., and Jennifer L. Crawford, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Louis M. Ciavarra, Esq., Bowditch & Dewey, LLP

DECISION

I. Introduction

Respondent Timothy Pierce Henry, a registered representative, failed to pay a FINRA arbitration award entered against him in favor of his former employer, a FINRA member firm. As a result, FINRA sent Respondent a notice informing him that he would be suspended from associating with any FINRA member firm. Respondent initially stayed the impending suspension by requesting a state court to vacate the award. The court denied his request, and Respondent was then required to pay the award. When he failed to do so, FINRA sent him another suspension notice. This time, Respondent stayed the imposition of the suspension by requesting a hearing with FINRA's Office of Hearing Officers and asserting the defense that he was financially unable to pay the award.

On February 23, 2023, I held a videoconference hearing during which Respondent attempted to prove his defense. He argued that he has been unable to either pay the award in full or make a meaningful payment toward satisfying it. FINRA's Department of Enforcement did not dispute that Respondent could not pay the award in full. But, Enforcement argued, since the

award was issued, he had—and still has—sufficient assets to pay at least a meaningful portion of it. After considering the evidence and the parties' arguments, I find that Respondent failed to prove his defense. I therefore suspend him from associating with any FINRA member firm in any capacity until he fully pays the award. I also order him to pay the costs of the hearing.

II. Findings of Fact and Conclusions of Law

A. Regulatory Framework

Under FINRA rules governing industry-related arbitrations, "[a]ll monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction."[1] If an associated person fails to comply with an arbitration award, then, under FINRA's By-Laws, FINRA may suspend the person "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."[2] FINRA Rule 9554 establishes an expedited procedure for FINRA, under certain circumstances, to suspend an associated person for not paying an arbitration award. That Rule authorizes FINRA to send a notice "stating that the failure to comply within 21 days of service of the notice will result in a suspension . . . from associating with any member."[3] The notice must specify the grounds for, and the effective date of, the suspension and must advise respondents of their right to file a written request for a hearing.[4]

Once served with a suspension notice, a respondent may request a hearing with FINRA's Office of Hearing Officers.[5] A hearing request stays the imposition of the suspension[6] and must specifically identify all defenses the person has to the suspension notice.[7] FINRA recognizes the following defenses: (1) the respondent has paid the arbitration award in full; (2) the arbitration parties have agreed to installment payments of the award, or have otherwise agreed to settle, and the respondent is not in default under the agreement; (3) a court has vacated the award; (4) a motion to vacate or modify the award is pending in a court; and (5) the respondent has a bankruptcy proceeding pending in United States Bankruptcy Court, or a Bankruptcy Court has discharged the award ("the Rule 9554 enumerated defenses").[8] A respondent may also assert a bona fide inability-to-pay an award issued in connection with an industry dispute.[9]

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[1] FINRA Rule 13904(j).

[2] FINRA By-Laws, Article VI, Section 3(b).

[3] FINRA Rule 9554(a).

[4] FINRA Rule 9554(c); *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *8–9 (Mar. 17, 2016).

[5] FINRA Rule 9554(e).

[6] FINRA Rule 9554(d).

[7] FINRA Rule 9554(e).

[8] *See* FINRA By-Laws, Article VI, Section 3(b); NASD Notice to Members 00-55, at 2 (Aug. 2000), https://www.finra.org/rules-guidance/notices/00-55.

[9] *See, e.g., William J. Gallagher*, Exchange Act Release No. 47501, 2003 SEC LEXIS 599 (Mar. 14, 2003); *see also* SR-FINRA-2010-014, Order Approving Proposed Rule Change Relating to FINRA Rule 9554 to Eliminate

B. An Arbitration Award is Rendered Against Respondent

Respondent entered the securities industry in 2003[10] and became registered with a FINRA member firm the next year.[11] From April 2011 until December 2015, he was associated with Credit Suisse Securities (USA) LLC ("Credit Suisse"), where he was registered as a general securities representative.[12] Upon leaving Credit Suisse, he joined Wells Fargo Clearing Services, LLC ("Wells Fargo"), where he remains registered with FINRA through his association with that firm.[13]

In 2011, Respondent received a forgivable loan from Credit Suisse.[14] When he left the firm in 2015, an amount remained owing on the loan.[15] Over five years later, in March 2021, Credit Suisse filed a demand for arbitration.[16] On February 17, 2022, after an evidentiary hearing, an arbitration panel entered an award against Respondent in favor of Credit Suisse in the amount of $690,700 (the "Award").[17] The Award is comprised of damages, interest, and loan arrears balance.[18]

The next day, February 18, 2022, FINRA served the Award on Respondent (the "Award Service Letter").[19] The Award Service Letter notified Respondent that FINRA Rules provide that all monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction or unless the award provides otherwise. Also on February 18, FINRA sent Respondent another notice of the Award which likewise reminded him of the deadline for paying the Award or moving to vacate it.[20] Respondent, however, did not pay the Award.

Explicitly the Inability-to-Pay Defense in the Expedited Proceedings Context, Exchange Act Release No. 62211, 2010 SEC LEXIS 1800, 75 Fed. Reg. 32525 (June 2, 2010) (approving change to FINRA Rule 9554 making the defense of inability to pay an arbitration award unavailable to a respondent when the award is issued in favor of public customers and recognizing that bona fide inability to pay is a defense in an expedited proceeding involving an industry arbitration award).

[10] Joint Exhibit ("JX-__") 1, at 2.; Hearing Transcript ("Tr.") 63.

[11] JX-1, at 6; Tr. 63.

[12] JX-1, at 2, 4–6; Tr. 64–65.

[13] Stipulations ("Stip.") ¶ 1; JX-1, at 2.

[14] Tr. 64–65.

[15] Tr. 66.

[16] Tr. 67–68.

[17] Stip. ¶¶ 3–4; JX-2, at 2. All monetary amounts in this decision are rounded to the nearest hundred dollars.

[18] Stip. ¶ 4; JX-2, at 2.

[19] Stip. ¶ 6; JX-3.

[20] Stip. ¶ 8; JX-4.

C. FINRA Seeks to Suspend Respondent for Not Paying the Award

1. The March 2022 Suspension Notice

On March 24, 2022, FINRA sent Respondent a suspension notice under FINRA Rule 9554 ("March 2022 Suspension Notice").[21] The March 2022 Suspension Notice informed Respondent that he would be suspended on April 14, 2022, unless he demonstrated that he had taken one of several specified actions in the Rule 9554 enumerated defenses. The March 2022 Suspension Notice also informed Respondent that he could stay the effective date of the suspension if he timely requested a hearing before the FINRA Office of Hearing Officers to assert the Rule 9554 enumerated defenses or assert the defense that he is financially unable to pay the Award.[22]

On March 24, after receiving the March 2022 Suspension Notice, Respondent provided FINRA with a copy of a motion to vacate the Award he filed in state court in the Commonwealth of Massachusetts two days earlier ("Motion to Vacate").[23] As a result, FINRA stayed suspension proceedings.[24] Six months later, on September 29, 2022, the court denied the Motion to Vacate.[25] At that point, Respondent was required to pay the Award immediately.[26]

2. The December 2022 Suspension Notice

Nearly three months passed. Then, on December 15, 2022, FINRA Dispute Resolution Services notified Respondent's counsel that it was aware that the court had denied the Motion to Vacate and asked him if Respondent had satisfied the Award.[27] Respondent's counsel replied that the Award had not been satisfied, claiming that Respondent was unable to pay it.[28]

On December 16, 2022, FINRA sent Respondent a notice of intent to suspend his association with member firms under FINRA Rule 9554, effective on January 6, 2023 (the "December 2022 Suspension Notice").[29] Like the March 2022 Suspension Notice, this notice also informed Respondent that he was entitled to request a hearing and could stay the imposition of the suspension by asserting one of the Rule 9554 enumerated defenses or an inability-to-pay

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[21] Stip. ¶ 10; JX-5. Respondent was properly served with the March 2022 Notice of Suspension. Stip. ¶¶ 11, 13.

[22] JX-5, at 1.

[23] Stip. ¶ 14; JX-6.

[24] Stip. ¶ 14.

[25] Stip. ¶ 16.

[26] *See* NASD Notice to Members 00-55 n.5 (specifying that "[a]n award must be paid immediately when a court denies a motion to vacate or modify the award, absent a court order staying compliance with the award").

[27] Stip. ¶ 17; JX-7.

[28] Stip. ¶ 18; JX-7, at 6.

[29] Stip. ¶ 20; JX-8.

defense.[30] On December 27, 2022, Respondent filed a request for hearing. The request, which stayed the effectiveness of the December 2022 Suspension Notice,[31] asserted the defense of financial inability to pay the Award.[32]

D. The Inability-to-Pay Defense

Respondents asserting an inability-to-pay defense assume the burden of proof and must document fully their financial circumstances,[33] including their assets and liabilities.[34] "Merely showing serious financial distress or that it would be hard or painful to pay an arbitration award does not establish the defense."[35] "To satisfy their burden of proof, respondents must show that since the issuance of the award, they have been unable to pay the full amount and 'unable to make some meaningful payment toward the award from available assets or income . . . .'"[36]

This defense may be rejected if the respondent could reduce living expenses, divert funds from other expenditures or borrow funds to pay the award, or could make some meaningful payment toward it from available assets or income, even if the respondent could not pay the full amount.[37] The defense also fails if the respondent's evidence of financial condition is insufficient or incomplete.[38]

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[30] JX-8, at 1. Respondent timely received actual notice of the December 2022 Suspension Notice and waived any defense regarding service of it. Stip. ¶¶ 21, 23.

[31] FINRA Rule 9559(c)(1) (stating that a timely request for a hearing stays the effectiveness of a notice of suspension in a Rule 9554 expedited proceeding); *cf.* FINRA Rule 9554(d) (stating, among other things, that the suspension in a suspension notice "shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.").

[32] Respondent asserted no other defenses. He has not paid any part of the Award, entered into a fully executed written settlement agreement with Credit Suisse, or filed for bankruptcy protection. Stip. ¶ 24.

[33] *Robert Tretiak*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653, at *12 n.16 (Mar. 19, 2003).

[34] *Bruce M. Zipper*, Exchange Act Release No. 33376, 1993 SEC LEXIS 3525, at *8 (Dec. 23, 1993).

[35] *Dep't of Enforcement v. Markus*, No. ARB210008, 2021 FINRA Discip. LEXIS 17, at *4–5 (OHO Aug. 17, 2021); *see also Dep't of Enforcement v. Shimko*, No. ARB200002, 2020 FINRA Discip. LEXIS 41, at *12 (OHO Sept. 15, 2020).

[36] *Dep't of Enforcement v. Stofleth*, No. ARB210015, 2022 FINRA Discip. LEXIS 1, at *5 (OHO Jan. 3, 2022) (quoting *DiPietro*, 2016 SEC LEXIS 1036, at *16 n.22); *see also Dep't of Enforcement v. D'Alonzo*, No. ARB210010, 2021 FINRA Discip. LEXIS 30, at *4 (OHO Oct. 21, 2021), *appeal docketed*, No. 3-20682 (SEC Dec. 1, 2021). *But see Markus*, 2021 FINRA Discip. LEXIS 17, at *4 (explaining that a respondent "must establish that at no time after the award became due did he have the ability to pay all or any meaningful amount of the award, . . .") (internal quotation marks omitted); *see also Dep't of Enforcement v. Malatesta*, No. ARB200025, 2021 FINRA Discip. LEXIS 1, at *3–4 (OHO Jan. 13, 2021). Applying either formulation, Respondent failed to establish his defense.

[37] *Dep't of Enforcement v. Helbling*, No. ARB210004, 2021 FINRA Discip. LEXIS 14, at *5 (OHO July 23, 2021); *see also DiPietro*, 2016 SEC LEXIS 1036, at *16 n.22, 19.

[38] *Gallagher*, 2003 SEC LEXIS 599, at *9–11.

E. Respondent's Inability-to-Pay Defense Fails

On February 23, 2023, I held a videoconference hearing in this expedited proceeding. Respondent was the sole witness. The documentary evidence consisted mainly of Respondent's Statement of Financial Condition as of February 10, 2023, made under penalty of perjury ("Financial Statement"),[39] and supporting documents. In evaluating Respondent's defense, I considered whether Respondent proved that he could not currently pay all or a meaningful portion of the Award from current assets or income. Next, I considered whether he proved he could not have done so at any earlier point in time since the Award was issued.

Respondent failed to show he cannot currently make at least a meaningful payment toward the Award. Respondent's Financial Statement reflects assets of approximately $352,400,[40] consisting primarily of cash in several financial institutions ($107,600);[41] IRA accounts for him and his wife ($131,200); two automobiles ($51,500),[42] both purchased before the Award was issued;[43] and securities ($27,000) owned by his wife.[44]

The Financial Statement shows liabilities totaling $1,101,900.[45] By far, Respondent's largest liabilities are the Award ($690,700)[46] and a forgivable loan he received from his current employer, Wells Fargo, when he joined the firm ($384,100).[47] While Respondent included the Award among his liabilities, the more useful analysis in evaluating his defense excludes the Award. Taking the Award into account "would result in a misleadingly lower valuation of net

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[39] JX-9.

[40] JX-9, at 1.

[41] JX-9, at 1, 5–6; Tr. 125. This figure includes the balance in the checking account of Respondent's wife. The Financial Statement dated February 10, 2023, reflects a $74,900 balance in that account. JX-9, at 5. It is appropriate to consider this account balance, along with her other assets, in evaluating Respondent's inability-to-pay defense. *See, e.g.*, *Dep't of Enforcement v. Motherway*, No. ARB200006, 2020 FINRA Discip. LEXIS 39, at *8 (OHO June 30, 2020), *application for review dismissed*, Exchange Act Release No. 97180, 2023 SEC LEXIS 753 (Mar. 21, 2023) (noting that when evaluating an inability-to-pay defense, adjudicators have considered, among other things, "income and assets held by a spouse, . . . whether a respondent could use his spouse's property as collateral for a loan, and whether a respondent's spouse could continue to work and generate income."). But it is unclear if the $74,900 figure is accurate as of February 10. The supporting bank statements do not reflect this balance figure. And the most recent interim bank statement for that account reflects a higher balance, $99,900, though at an earlier point, February 1. JX-11, at 14; Tr. 126–27. Even accepting the accuracy of the $74,900 figure as of February 10, Respondent failed to show he currently lacks the ability to make a meaningful payment toward the Award, as explained above.

[42] JX-9, at 1.

[43] Tr. 96.

[44] JX-9, at 1; Tr. 97–98.

[45] JX-9, at 2.

[46] JX-9, at 2.

[47] JX-9, at 2; Tr. 66, 100, 173. Respondent's remaining liabilities are much smaller: loans on two vehicles ($21,000) and credit card debt ($6,200). JX-9, at 2; Tr. 97, 99–100. He also identified attorneys' fees as a liability item but did not specify an amount. JX-9, at 2.

worth available for Respondent to make a meaningful contribution toward satisfaction of the Award."[48] Excluding the Award, Respondent has a negative net worth of $58,900.

Turning next to Respondent's income and expenses, since 2020, his monthly net income has been about $3,200, consisting of his compensation from Wells Fargo.[49] Respondent's current monthly expenses total approximately $16,600[50] and far exceed his monthly net compensation from Wells Fargo. In fact, his rent alone ($4,500)[51] exceeds that compensation by over a thousand dollars.[52] And there was no evidence that he could have appreciably reduced his monthly expenses.[53] Further, Respondent testified that because he does not currently earn enough to meet his monthly expenses, he has been using his accumulated cash to defray the difference.[54]

But negative cash flow, alone, does not establish an inability-to-pay defense.[55] And Respondent's household income is currently—or shortly will be—increasing because his wife

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[48] *See, e.g.*, *Dep't of Enforcement v. Lake*, No. ARB190024, 2019 FINRA Discip. LEXIS 48, at *8 n.41 (OHO Nov. 11, 2019) (citing *Regulatory Operations v. Grady*, No. ARB170025, 2017 FINRA Discip. LEXIS 51, at *18 (OHO Dec. 14, 2017) ("As to whether the Award should be included among Grady's liabilities, while Grady is correct that a net worth calculation should ordinarily include all liabilities, the more useful analysis in this case excludes the Award.")).

[49] Tr. 86–87, 102, 113–14. Respondent's monthly income from Wells Fargo listed on the Financial Statement is approximately $9,100. JX-9, at 9; Tr. 101–02. But this figure includes what Respondent described as "phantom income" payments to him that were then used to repay the forgivable loan he had received from the firm. *See, e.g.*, JX-29, at 1–2; Tr. 101–02, 115–17. This offset reduced the actual, net monthly compensation he received to about $3,200. *See, e.g.,* JX-12, at 94; Tr. 87, 113–14. In other words, Respondent did not have use of this extra income, as it went back to the firm to pay off the loan. Enforcement did not dispute the accuracy of this net amount. Additionally, in December 2022, Respondent's wife started employment at an annual gross compensation of $60,000 per year. Tr. 82–83, 174. The record, however, does not reflect the amount of compensation, if any, she has received to date. Tr. 175.

[50] JX-9, at 11.

[51] JX-9, at 10; Tr. 105.

[52] In addition to rent, Respondent's current monthly expenses consist of attorneys/professional fees (approximately $3,700) incurred in connection with still-pending litigation brought by Credit Suisse to collect the Award; automobile loans and other auto-related costs ($1,900); food ($1,800); fees and charges (interest on credit cards) (approximately $1,700); shopping/clothing/home items ($1,000); medical/health ($800); utilities ($700); travel/gifts/donations/entertainment/cable ($400); and childcare ($300). JX-9, at 10–11; Tr. 69, 107–09.

[53] Enforcement argued that Respondent could have reduced his car expenses several ways, including paying off the loans, selling his cars, using the equity to pay down debt, and leasing replacement cars. Tr. 190, 227–28. Respondent admitted that he considered trying to cut his car expenses. But, he claimed, given the cost of new and used cars and car leases, adopting one of these alternatives would have been more expensive because car prices have increased. Tr. 184, 188–89. (He did not, however, actually look into leasing a car. Tr. 197). In any event, even if he had done so, "it does not appear that given the size of the Award, this expense reduction, alone, would generate sufficient expense savings to materially increase his ability to make some meaningful payment toward the Award." *Grady*, 2017 FINRA Discip. LEXIS 51, at *26 n.85.

[54] Tr. 196.

[55] *Cf. Malatesta*, 2021 FINRA Discip. Lexis 1, at *13–14 (rejecting inability-to-pay defense because, notwithstanding respondent's negative cash flow, he had a positive net worth at the time of the award, "some portion of which could have been used as a payment towards the Award.").

has begun a new job.[56] Moreover, Respondent did not explain why he cannot use the accumulated cash and his family's other assets to make a meaningful contribution toward the Award, while still using a portion of it for living expenses. This failure dooms his defense, especially given that it appears he can currently do so.

* * *

In addition to considering Respondent's current ability to pay the Award, I also assessed whether he was able to make a meaningful payment at any earlier time since it was issued. And I conclude he could have done so, based on his then-available assets.[57] At the time the Award was rendered, Respondent had accumulated substantial credit card debt.[58] To improve his finances, Respondent decided to sell his boat[59] and family residence.[60] He sold the boat in April 2022 and netted $14,200,[61] which he used to pay down outstanding credit card debt.[62] Those payments greatly exceeded the minimum payments required at that time.[63]

Six months after selling the boat, in October 2022, Respondent sold the family residence for $1.4 million[64] and moved his family into a rental home.[65] After paying off his mortgage and home equity loan from the sale proceeds,[66] Respondent received net cash proceeds of $363,200.[67] Then, over the next three months, he used $185,200 of those proceeds to substantially reduce his and his wife's credit card debt.[68] With one exception,[69] these payments

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[56] *See Motherway*, 2020 FINRA Discip. LEXIS 39, at *8 (taking into account whether a respondent's spouse could continue to work and generate income when considering an inability-to-pay defense); *cf. Retirement Surety, LLC*, Initial Decision Release No. 1392, 2019 SEC LEXIS 5372, at *27 (Dec. 20, 2019) (rejecting inability-to-pay defense to civil monetary penalty, noting that "it appears likely that his household income will increase . . . in the future" and "[h]e and his wife have not yet reached retirement age.").

[57] I reach the same conclusion using the "at no time after the award became due" standard. *See* n.36, above.

[58] Tr. 70–71.

[59] Tr. 84–85.

[60] Tr. 69, 71.

[61] Tr. 85; Supplemental Stipulations ("Supp. Stip.") ¶ 26.

[62] Supp. Stip. ¶ 27.

[63] The day after the boat sale closed, Respondent made two credit card payments totaling $12,000. One payment was in the amount of $5,000 on his American Express card. JX-24, at 37. The minimum required payment at that time was $1,300. Tr. 158; JX-24, at 28. The other payment was in the amount of $7,000 on his wife's American Express card. JX-25, at 39. At the time of this payment, the minimum payment due was $1,800. JX-25, at 28; Tr. 160. These two payments were likely made from the boat sale proceeds, according to Respondent. Tr. 160.

[64] Tr. 72.

[65] Tr. 73–74.

[66] Tr. 71, 106–07.

[67] Supp. Stip. ¶ 28.

[68] Supp. Stip. ¶¶ 29–32; Tr. 172–73.

[69] In December 2022, Respondent made a $20,600 payment, which equaled the minimum amount due. Supp. Stip. ¶ 32; JX-24, at 106; Tr. 169–70.

greatly exceeded the minimum required payments then due on the various credit cards.[70] In total, he made credit card payments exceeding the minimum required payments by $142,000.[71]

Respondent also used a portion of the sale proceeds for another purpose. After the Award was rendered, in addition to incurring credit card debt to help pay living expenses, he used $50,000 from his wife's IRA for that purpose.[72] According to Respondent, he had to repay these funds into the IRA within three years to avoid a penalty.[73] Following the home sale, and just before the three-year period expired, he repaid those funds to the IRA.[74]

Meanwhile, Respondent paid nothing toward the Award. He decided not to do so because he concluded that it would have been unwise without having reached a settlement agreement with Credit Suisse.[75] According to Respondent, Credit Suisse had demanded he pay the Award in full and was unwilling to negotiate a settlement.[76] So he did not want to make a partial payment and then have Credit Suisse find it unsatisfactory.[77] "[F]or me to just . . . randomly put a number on a check and give it to them didn't seem like the right idea,"[78] he said.

Moreover, according to Respondent, he had been using the credit cards to keep his family financially "afloat" and was reaching the credit limits on those cards.[79] "And I knew with the amount of debt I had, I couldn't just apply for another credit card and keep on increasing this debt," he said.[80] "I figured I could clean up what I could clean up. The highest interest rates, take care of that stuff to keep . . . us . . . in the game."[81] Respondent testified that the interest rates on

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[70] October 15 and 31, 2022—two payments totaling $35,000/$14,700 minimum payment due for November. Supp. Stip. ¶ 32; Tr. 166–67; JX-25, at 96. (The minimum payment due in early October was $8,200, but Respondent made the October payments after that deadline. JX-25, at 85).

October 31, 2022—$15,000 payment/$4,000 minimum payment due. Supp. Stip. ¶ 32; JX-24, at 79; Tr. 168.

January 9 and 25, 2023—two payments totaling $13,200/$300 minimum payment due. Supp. Stip. ¶ 32; Tr 171–72; JX-26, at 59.

January 24, 2023—three payments totaling $101,300: (1) $44,800 payment/$1,800 minimum payment due. Supp. Stip. ¶ 31; JX-25, at 138; Tr. 162; (2) $37,000 payment/$1,300 minimum payment due. Supp. Stip. ¶ 31; JX-24, at 130; and (3) $19,600 payment/$500 minimum payment due. Supp. Stip. ¶ 31; JX-27, at 60; Tr. 164–65.

[71] *See* n.70, above.

[72] Tr. 76–77.

[73] Tr. 76. Respondent did not, however, quantify the amount of the penalty connected with withdrawing funds from his wife's IRA. Tr. 176–77.

[74] Supp. Stip. ¶ 33; Tr. 77–78.

[75] Tr. 197–98.

[76] Tr. 201.

[77] Tr. 195, 201–02.

[78] Tr. 202.

[79] Tr. 192–93.

[80] Tr. 202.

[81] Tr. 202–03.

the credit card debt were "astronomical"[82] and it would be a "huge burden" to carry two "monstrous debts over" his head. So he "figured" he "could take care of one and then deal with the other as best" he could.[83] "[M]y decision ultimately is to pay the credit cards and . . . then move on to my next battle and . . . figure out how I'm going to pay this back to Credit Suisse."[84]

Respondent went on to acknowledge, through counsel, that it was indisputable he "could have chosen to spend" the net house sale proceeds on the Award, rather than on his credit card debt, and made only minimum credit card payments.[85] But, he maintained, had Respondent done that, his financial situation would have worsened dramatically: (1) the Award still would have remained unsatisfied; (2) Credit Suisse still would have pursued collection from him;[86] (3) his credit card debt would have grown due to interest payments and because he needed to use the credit cards to pay expenses that exceeded his income;[87] (4) he would have been sued by the credit card companies; and (5) he would have run out of money and not been able to pay his rent or car payments.[88] In short, the argument concluded, Respondent was left "with no choice. Not a real one."[89]

I reject this grim characterization. Respondent's choice was voluntary—not illusory. The evidence showed that, after the sale of his boat and home, he was flush with hundreds of thousands of dollars in cash. These funds, coupled with other assets, enabled him to make a meaningful payment toward the Award. But he did not do so. Instead, because Respondent and Credit Suisse had not reached a settlement agreement, he elected to make payments—substantially more than the minimum amounts due—on his and his wife's credit cards to reduce their debt. Respondent, however, was not permitted to make payment of the Award contingent on a settlement agreement; Credit Suisse was entitled to full payment and was under no obligation to accept any installment settlement plan.[90] And "[a]fter becoming liable to pay an arbitration award, a respondent cannot choose to allocate resources instead for discretionary expenditures."[91] Thus, Respondent's "failure to pay down the Award results from his asset-allocation choices rather than a genuine inability to pay."[92] In sum, he failed to establish that he

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[82] Tr. 81.

[83] Tr. 81.

[84] Tr. 195–96.

[85] Tr. 236, 238.

[86] Tr. 236–37.

[87] Tr. 237–39.

[88] Tr. 249–50.

[89] Tr. 250.

[90] *Regulatory Operations v. Pincus*, No. ARB180031, 2019 FINRA Discip. LEXIS 7, at *21 (OHO Feb. 7, 2019).

[91] *Shimko*, 2020 FINRA Discip. LEXIS 41, at *34.

[92] *See, e.g., Helbling,* 2021 FINRA Discip. LEXIS 14, at *11 n.66 (citing *DiPietro*, 2016 SEC LEXIS 1036, at *19) (rejecting inability-to-pay defense when respondent's failure to pay arbitration award hinged on asset-allocation choices to pay discretionary expenses, including paying more than minimum amounts due on credit cards, instead of paying down the balance of the award); *see also Pincus*, 2019 FINRA Discip. LEXIS 7, at *8 (same).

has been unable to apply his assets—especially the home sale proceeds—to defray the Award. This failure is fatal to his defense.

So, collectively, are Respondent's other failures. He did not attempt to borrow funds to use to pay down the Award and provided no support for his testimony that he could not do so,[93] including borrowing against the equity in his home before he sold it.[94] Nor did Respondent show that he could not have obtained additional credit cards, increased his existing credit card debt—which he had reduced substantially—or obtained a cash advance on a credit card.[95]

III. Conclusion

Based on the testimony and documentary evidence presented at the hearing, I find that Respondent failed to satisfy the burden of proof required to establish his inability-to-pay defense. The evidence did not show that since the Award was issued, Respondent has been unable to either pay it in full or make a meaningful contribution toward satisfying it by: (1) using funds available to him from assets or income; (2) reducing expenses; (3) borrowing funds; or (4) converting assets to cash.

FINRA issued Respondent a suspension notice under FINRA Rule 9554 for failure to pay the Award. FINRA Rule 9559(n)(1) permits a Hearing Officer wide discretion to "approve, modify or withdraw . . . sanctions . . . imposed by the notice" and to assess costs. "'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.'"[96] "Conditional suspension of [Respondent's] association with FINRA members gives him an incentive to pay the award . . . [and] furthers two central purposes of the Exchange Act—serving the public interest and the protection of investors."[97]

By contrast, letting Respondent "remain in the industry without paying the [A]ward, or meeting his burden to demonstrate a *bona fide* inability to pay the [A]ward would . . . undermine the

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[93] Tr. 175–76. *See Helbling,* 2021 FINRA Discip. LEXIS 14, at *11 n.63 (rejecting inability-to-pay defense when respondent failed to prove, among other things, that he could not borrow funds to pay a meaningful portion of the award) (citing *Regulatory Operations v. Fannin*, No. ARB170007, at 12 (OHO Aug. 25, 2017), https://www.finra.org/sites/default/files/OHO_Fannin_ARB170007_082517.pdf (rejecting inability-to-pay defense when respondent "provided no evidence of any attempt to borrow funds in order to satisfy the Award.")); *see also Shimko*, 2020 FINRA Discip. LEXIS 41, at *35 ("[Respondent] claimed that his credit was too bad and so he did not try, but this is insufficient to demonstrate an inability to obtain a loan.").

[94] Tr. 200. *Gallagher*, 2003 SEC LEXIS 599, at *11–12 (rejecting inability-to-pay defense where respondent failed to demonstrate that he could not borrow the necessary funds, including borrowing against his home).

[95] *See Pincus*, 2019 FINRA Discip. LEXIS 7, at *17–18 (rejecting inability-to-pay defense when, among other things, respondent failed to produce a credit report and provided no documentation supporting his claim that his applications had been denied for additional credit cards that had cash advances and for credit limit increases on his existing credit cards).

[96] *Daniel Paul Motherway*, Exchange Act Release No. 97180, 2023 SEC LEXIS 753, at *_ (Mar. 21, 2023) (quoting *Gallagher*, 2003 SEC LEXIS 599, at *13).

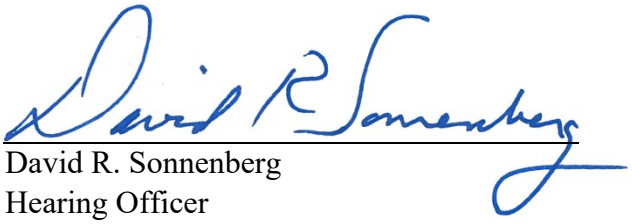
[97] *DiPietro*, 2016 SEC LEXIS 1036, at *24.

arbitration process."[98] Doing so "would also expose investors to an individual who has refused to accept the results of that process by failing to make any effort, meaningful or otherwise, towards paying the amounts he was found to owe, despite having agreed to do so when becoming a FINRA associated person."[99]

IV. Order

Based on the foregoing, and pursuant to Article VI, Section 3(b) of FINRA's By-Laws, and FINRA Rule 9559(n), I **SUSPEND** Respondent from associating with any FINRA member firm in any capacity, effective upon the issuance of this Decision. The suspension shall remain in effect until Respondent produces sufficient documentary evidence to FINRA that: (1) he has paid the Award in full; (2) he and Credit Suisse have entered into a fully executed, written settlement agreement relating to payment of the Award, and he is current in fulfilling his obligations under the settlement terms; or (3) he has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award. Upon Respondent making such a showing, the suspension will automatically terminate.

Respondent is also **ORDERED** to pay the costs of this proceeding, which include $1,923.14 for the hearing transcript plus a $750 administrative fee, for a total of $2,673.14.[100] These costs are due and payable upon the issuance of this Decision.[101]



David R. Sonnenberg
Hearing Officer

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Jennifer L. Crawford, Esq. (via email)

[98] *Motherway,* 2023 SEC LEXIS 753, at *_.

[99] *Id*. at *_.

[100] Respondent must pay the costs of the hearing before the suspension terminates.

[101] I considered and rejected without discussion all other arguments by the parties.