

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

REGULATORY OPERATIONS,

Complainant,

v.

MATTHEW GRADY
(CRD No. 4362567),

Respondent.

Expedited Proceeding
No. ARB170025

STAR No. 20170543574

Hearing Officer– DRS

EXPEDITED DECISION

December 14, 2017

Respondent failed to pay an arbitration award and failed to demonstrate he has a bona fide inability to pay the award. Respondent's registration is therefore suspended until he pays the award and hearing costs.

Appearances

For the Complainant: Ann-Marie Mason, Esq., Meredith MacVicar, Esq., and Sora Lee, Esq.,
Regulatory Operations, Financial Industry Regulatory Authority.

For the Respondent: Craig Kuglar, Esq., The Law Office of Craig Kuglar, LLC.

DECISION

I. Introduction

Matthew Grady, formerly a registered representative with a FINRA member firm, failed to pay a FINRA arbitration award he owed to that firm. As a result, FINRA notified Grady that it intended to suspend him from association with any FINRA member firm. Asserting the recognized defense of bona fide inability to pay the award, Grady requested a hearing to prevent his suspension. At the hearing, Grady failed to prove his defense; the evidence revealed that Grady could afford to make some meaningful payment toward the award. Accordingly, for the reasons explained below, I suspend him from associating with any member firm in any capacity until he pays the award and the costs of the hearing.

II. 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

Once served with a suspension notice, a respondent may request a hearing to assert defenses to the FINRA action.⁴ FINRA recognizes several defenses to a suspension notice: (1) the arbitration award has been paid in full; (2) the parties have agreed to installment payments of the award, or have otherwise agreed to settle, and the respondent is not in default of the settlement; (3) the award has been vacated by a court; (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.⁵

A respondent may also assert a bona fide inability to pay an award issued in connection with an industry dispute.⁶ “To prevail on an inability-to-pay defense, a respondent must demonstrate that he is unable to make some meaningful payment toward the award from available assets or income.”⁷ This defense “may be rejected if it appears that the defendant is capable of reducing his living expenses, has the ability to divert funds from other expenditures to pay the settlement of the award, could borrow the funds, or could make some meaningful payment toward the settlement of the award from available assets or income, even if he could not pay the full amount of the award settlement.”⁸ Further, the respondent “must establish that at no

¹ FINRA Rule 13904(j).

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

³ FINRA Rule 9554(a).

⁴ FINRA Rule 9554(e).

⁵ NASD Notice to Members 00-55, 2000 NASD LEXIS 63, at *5-6 (Aug. 10, 2000) (setting forth defenses under FINRA Rule 9554); *see also* Article VI, Section 3(b) of FINRA’s By-Laws.

⁶ *See, e.g., William J. Gallagher*, 56 S.E.C. 163 (2003); *see also* Order Approving Proposed Rule Change Relating to FINRA Rule 9554 to Eliminate Explicitly the Inability-to-Pay Defense in the Expedited Proceedings Context, 2010 SEC LEXIS 1800, at *3 (recognizing that bona fide inability to pay is a defense in an expedited proceeding) (June 2, 2010); *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *16 n. 21, (Mar. 17, 2016) (“A claim of inability to pay is not a defense for awards involving a customer.”) (internal quotation marks omitted).

⁷ *Michael Albert DiPietro*, 2016 SEC LEXIS 1036, at *16 n. 22 (quoting *Dep’t of Enforcement v. Respondent*, No. ARB010032, at 3 (Mar. 15, 2002)) (internal quotations omitted).

⁸ *Dep’t of Enforcement v. Respondent*, OHO Redacted Decision ARB010001, at 11 (July 26, 2001) (redacted) (citing *DBCC No. 7 v. Escalator Securities, Inc.* No. C07930034, 1998 NASD Discip. LEXIS 21, at *13 (NBCC Feb. 19, 1998); *DBCC No. 8 v. Miguel Angel Cruz*, No. C8A930048, 1997 NASD Discip. LEXIS 62, at *106

time after the award became due did he have the ability to pay all or any meaningful amount of the award,” not just that at “some later time his assets were insufficient to pay the award.”⁹

III. Findings of Fact

Grady began his employment in the securities industry in 1995 when he joined an investment advisory firm.¹⁰ He became registered with a FINRA member firm in 2011 as a general securities representative.¹¹ Currently, Grady is not associated or registered with a FINRA member firm¹² but owns a state-registered investment advisory firm, Millstone Wealth Partners, LLC.¹³

From September 2011 through January 2015, Grady was associated and registered as a general securities representative with Barclays Capital Inc.¹⁴ While at Barclays, he entered into a promissory note agreement with the firm for \$900,000.¹⁵ After Grady left Barclays, the firm filed a FINRA arbitration claim against him alleging breach of that note agreement.¹⁶ On March 29, 2017, a FINRA arbitration panel issued an award in favor of Barclays against Grady in the net amount of \$461,111.38 (“Award”).¹⁷ On that date, FINRA notified Grady of the Award and that if he did not pay it within 30 days, FINRA could suspend his registration.¹⁸

Grady did not satisfy the Award. Nor did he: (1) enter into a fully executed, written settlement agreement to pay the Award;¹⁹ (2) file for bankruptcy protection;²⁰ or (3) file a motion to vacate the Award.²¹ “I have not satisfied the award due to financial hardship,” Grady

(NBCC Oct. 31, 1997)); *see also Michael Albert DiPietro*, 2016 SEC LEXIS 1036, at *16 n. 22 (citing *Dep’t of Enforcement v. Respondent*, OHO Redacted Decision ARB010001, at 11).

⁹ *Dep’t of Enforcement v. Tretiak*, No. C02980085, 2000 NASD Discip. LEXIS 35, at *20 (OHO March 10, 2000), *aff’d*, 2001 NASD Discip. LEXIS 1 (NAC Jan. 23, 2001), *aff’d*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653 (Mar. 19, 2003).

¹⁰ JX-1, at 7; Tr. 53–54.

¹¹ JX-1, at 5–6.

¹² Stipulations ¶ 12 (“Stip. ¶ ___”); JX-1, at 3.

¹³ Stip. ¶ 15; Tr. 57.

¹⁴ JX-1, at 4.

¹⁵ Tr. 55, 76.

¹⁶ JX-2, at 1. The proceeding was entitled *Barclays Capital Inc. v. Matthew Grady*, FINRA Dispute Resolution Arbitration Case No. 15-01468. Stip. ¶ 1.

¹⁷ Stip. ¶ 1; JX-2. The arbitration panel awarded Barclays approximately \$561,111.38 in compensatory damages, plus fees. This amount, however, was offset by an award of \$100,000.00 in favor of Grady, resulting in a net amount of \$461,111.38 due and payable to Barclays. Stip. ¶ 1; JX-2, at 3.

¹⁸ Stip. ¶ 2; JX-4; JX-5.

¹⁹ Stip. ¶ 26.

²⁰ Stip. ¶ 27.

²¹ Stip. ¶ 28.

explained to FINRA in an April 28, 2017 email.²² “I am not ignoring the award and I have been in constant communication with Barclays and their counsel regarding my financial hardship.” He added, “Specifically, I am attempting to work out a satisfactory payment plan.”²³ Indeed, Grady tried to reach an agreement with Barclays to pay the Award.²⁴ On the same day he sent that email to FINRA, he sent a settlement proposal to Barclays’ counsel and attached a check in the amount of \$1,000.²⁵ Barclays rejected the proposal, however, and informed FINRA that it was unwilling to extend the Award-payment deadline.²⁶ The firm did not cash the check.

So, on May 2, 2017, FINRA sent Grady a notice under FINRA Rule 9554 (“Suspension Notice”).²⁷ The Suspension Notice informed Grady that because he had not complied with the Award, he would be suspended from association with FINRA member firms on May 23, 2017, unless he demonstrated that he: (1) had paid the Award in full; (2) entered into a fully-executed, written settlement agreement with respect to it, with which he was current; (3) timely filed an action to vacate or modify the Award, which motion had not been denied; or (4) filed for bankruptcy protection, and the Award had not been deemed non-dischargeable.²⁸ The Suspension Notice also advised Grady that he had the right to request a hearing “to assert any of the Rule 9554 defenses,” adding that “a bona fide inability to pay the award may also be a factor in determining whether any sanction for failure to pay the award is excessive or oppressive.”²⁹

After receiving the Suspension Notice, Grady continued to try and reach a settlement with Barclays. On May 19, 2017, Grady offered an installment plan with an upfront payment of \$150,000 to be paid no later than September 1, 2017, with the remainder due under the Award no later than December 31, 2018.³⁰ Barclays did not accept the offer, however, and instead made a counter offer³¹ that Grady rejected.

On May 22, 2017, unable to reach a settlement with Barclays, Grady timely filed a hearing request that, under FINRA rules, stayed the effective date of his suspension under the Suspension Notice.³² In his hearing request, Grady stated that he sought a hearing “to assert my

²² Stip. ¶ 3; JX-6 at 2.

²³ Stip. ¶ 3; JX-6, at 2; *see also* Tr. 63.

²⁴ Tr. 63.

²⁵ Stip. ¶ 4.

²⁶ Stip. ¶¶ 4–5; JX-47; CX-16; JX-6.

²⁷ Stip. ¶ 6. Grady was properly served with the notice. Stip. ¶ 6; JX-7.

²⁸ Stip. ¶ 6; JX-7.

²⁹ JX-7, at 1.

³⁰ Stip. ¶ 7.

³¹ Stip. ¶ 7.

³² Stip. ¶ 8. *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).

Rule 9554 defenses including a bona fide inability to pay.”³³ One week later, Grady sent Barclays a second check in the amount of \$1,000, which Barclays did not cash.³⁴ Afterward, Grady never sent Barclays any additional payments.³⁵

Negotiations between the parties continued in July and August 2017.³⁶ Among other things, Grady sent a revised repayment proposal to Barclays’ counsel. That proposal offered annual lump sum payments of \$50,000 starting in November 2017,³⁷ along with monthly installment payments through November 2023.³⁸ Barclays did not accept this proposal,³⁹ and the parties did not reach a settlement.

Accordingly, I held a telephonic hearing in this expedited proceeding on September 6, 2017. Grady was the only witness.⁴⁰ Although Grady’s hearing request broadly asserted his “Rule 9554 defenses including a bona fide inability to pay,” at the hearing, he only attempted to prove a bona fide inability to pay defense.⁴¹

Many of the essential facts in this case are undisputed. The key issue is whether Grady established that he lacked sufficient assets or income to make some meaningful payment toward the Award, including by reducing his current use of income for other expenses, or selling or borrowing against available assets. The parties offered evidence regarding, among other things, Grady’s assets, liabilities, net worth, income, expenses, and his disposable income/excess monthly income.⁴² Based on that evidence, the parties prepared and submitted balance sheets and

³³ Letter dated May 22, 2017 from Matthew Grady to Courtney Reynolds, Case Administrator, FINRA Office of Hearing Officers, containing a hearing request.

³⁴ Stip. ¶ 9; Tr. 68, 72.

³⁵ Tr. 68.

³⁶ Stip. ¶¶ 10–11.

³⁷ Tr. 73.

³⁸ Stip. ¶ 11. The source of the funds for the first \$50,000 payment, according to Grady, would be the \$78,000 in proceeds he received from the sale of the family home. Tr. 73; Stip. ¶ 22.

³⁹ Stip. ¶ 11.

⁴⁰ During the hearing on September 6, the parties requested the opportunity to file briefs and made certain recommendations, which I considered. I adopted their briefing recommendations regarding filing deadlines and page limits. Also, with no objection by the parties, I ordered the briefs to serve in lieu of closing arguments. *See* Order Governing Briefing (Sept. 7, 2017). The last brief was filed on September 29, 2017.

⁴¹ Grady had the burden of proving his inability to pay defense. *Michael Albert DiPietro*, 2016 SEC LEXIS 1036, at *16.

⁴² The evidence yields, at best, a reasonable approximation of Grady’s financial situation at the time of the hearing because all of the evidence is not “as of” the same date and is not current through the date of the hearing. For example, as to assets, the account information submitted in this proceeding includes account statements covering different time periods, each of which ended several months before the hearing. *See* JX-22, at 24; JX-23, at 24 (through May 31, 2017); CX-18, at 34, 36 (through June 30, 2017); CX-3, at 1 (through July 14, 2017); CX-5, at 9 (through July 21, 2017); CX-4, at 3 (through July 31, 2017). The same is true of the account statements showing certain liabilities. *See* JX-36, at 14 (through April 1, 2017); JX-38, at 4 (through June 29, 2017); CX-6, at 16 (through July 9, 2017); CX-11, at 4 (through July 12, 2017); CX-10, at 5 (through July 14, 2017); CX-8, at 7

monthly cash flow charts. Grady argues that the evidence proved he has a negative net worth and monthly expenses that exceed his monthly income, leaving him unable to pay the Award in full and only able to make payments on an installment basis. Regulatory Operations (“RegOps”) views the evidence differently. While it does not dispute that Grady cannot immediately pay the Award in full, RegOps maintains that Grady has sufficient available assets and income to make some meaningful payment toward the Award and, therefore, he failed to establish his bona fide inability to pay defense.

I begin by reviewing the evidence of Grady’s assets to determine whether he proved they are insufficient for him to make some meaningful payment toward the Award.

A. Grady has Sufficient Available Assets to Make Some Meaningful Payment Toward the Award

The balance sheet Grady prepared reflects assets of \$300,632.91; liabilities of \$638,004.37; and a negative net worth of \$337,371.46.⁴³ It lists as his largest assets: “Checking/Savings” of \$114,632.91 and his 100% ownership interest in Millstone, which he valued at \$150,000.⁴⁴ The remainder of Grady’s assets, based on the balance sheet, consists of \$10,000 in personal property, and his automobile, which he valued at \$26,000.⁴⁵ According to the balance sheet, Grady’s largest liability is the Award (\$461,111.38). RegOps disputes Grady’s calculations and offered an alternative balance sheet showing that Grady has higher assets (\$311,330.36); lower liabilities (\$165,268.01); and a positive net worth (\$143,062.35).⁴⁶ (The balance sheet RegOps prepared contains several computational errors: the assets itemized on the balance sheet properly total \$311,330.03, not \$311,330.36; the itemized liabilities correctly amount to \$165,667.19, not \$165,268.01; and, as a result, the net worth figure, based on subtracting liabilities from assets, should be \$145,662.84, not \$143,062.35. These errors do not materially impact my determination of whether Grady established his bona fide inability to pay defense).

1. Assets

The parties agree that Grady has at least \$300,000 in assets. But RegOps’s assessment of Grady’s total assets is higher by \$10,697.45 than Grady’s computation. This is because Grady did not list among his assets: (1) funds held in a joint savings account in the name of his wife and Grady’s adult son (\$9,985.85);⁴⁷ (2) funds held in a joint savings account in the name of his wife

(through July 15, 2017); CX-9, at 4 (through July 18, 2017); CX-12, at 5 (through July 23, 2017); CX-7, at 12 (through July 26, 2017).

⁴³ RX-3, at 1.

⁴⁴ RX-3, at 1.

⁴⁵ Grady provided no evidence of the car’s value. On the balance sheet, he explained that he listed the car “at a high value just under what is owed.” RX-3, at 1 n.4.

⁴⁶ CX-19, at 1.

⁴⁷ CX-18, at 36.

and minor son (\$107.67);⁴⁸ (3) the value of his IRA (\$176.59);⁴⁹ and (4) the value of a brokerage account held jointly with his wife (\$427.01).⁵⁰ The record does not reflect why Grady did not include these accounts in his assets calculation, especially given that he included a checking account held solely in his wife's name. Still, it is unclear that funds held in his wife's joint accounts with the two children should be included in calculating Grady's assets available to pay the Award.

In any event, as noted above, by his own calculations, Grady has substantial assets in checking/savings accounts totaling at least \$114,632.91.⁵¹ And he has another valuable asset that can be converted to cash: Millstone. While Grady's ownership interest in Millstone is an illiquid asset, Grady estimated that he could reap approximately \$132,000 to \$150,000 (after tax) from its sale.⁵² Nevertheless, he has not formally explored selling Millstone⁵³ even though: (1) he admitted that he could potentially sell the business;⁵⁴ (2) nothing prevented him from selling it "other than the fact that if I sell it, I won't generate enough cash to repay the [Award.];"⁵⁵ and (3) he made a settlement offer to Barclays predicated, in part, on the sale of Millstone.⁵⁶

As to why he has not tried to sell Millstone, Grady claims that doing so will "result in the loss of all of his future earnings."⁵⁷ I do not credit this unsupported assertion. It is not apparent why Grady would have no future earnings if he sold Millstone. For example, Grady did not explain why he would be unable to obtain other employment after selling Millstone. In fact, he testified that starting another advisory firm or working for another broker-dealer would "certainly" be "options."⁵⁸ He also testified that he may be able to structure the terms of the sale of Millstone to include his continued employment post-sale.⁵⁹ In sum, I consider Millstone a

⁴⁸ CX-18, at 34. On the balance sheet prepared by RegOps, this account's balance is shown as \$107.67, which was the beginning balance as of March 31, 2017. The June 30, 2017 ending balance was \$107.70.

⁴⁹ JX-22, at 24.

⁵⁰ JX-23, at 24.

⁵¹ Grady does not dispute that he can draw upon at least a portion of those funds to pay toward the Award. He represents that he obtained \$78,000 from the sale of his house, which was deposited into a savings account, and that he planned to use those funds and future earnings to continue paying the firm in accordance with his proposed payment schedule. Respondent's Hearing Brief, at 6; JX-44, at 1; CX-5, at 4. Those proceeds remain in the account. Tr. 66, 102.

⁵² Tr. 97, 143, 151. Based on his testimony, it appears this is an after-tax estimate, as Grady offered \$150,000 as a lump-sum upfront settlement payment. Also, Grady estimated that his business could sell for \$220,000 on a pre-tax basis. Tr. 71, 94, 149. Grady clarified, however, that he would not likely receive all these proceeds at one time but would probably receive a 50% up-front payment with the remainder to be paid later, over time. Tr. 108, 143.

⁵³ Tr. 70-71, 109; JX-13, at 1.

⁵⁴ Tr. 107.

⁵⁵ Tr. 106-07.

⁵⁶ Tr. 97, JX-13, at 1; Stip. ¶ 7.

⁵⁷ Respondent's Hearing Brief at 1.

⁵⁸ Tr. 110-11, 147-48.

⁵⁹ Tr. 152-53.

valuable asset that should be included in determining whether he has sufficient available assets from which he could make some meaningful payment toward the Award.

In evaluating whether Grady's assets are sufficient to pay some meaningful portion of the Award, I consider them in relation to his liabilities, which I discuss next.

2. Liabilities

While the parties' assessment of Grady's assets varies by approximately \$11,000, the difference between their respective valuations of his liabilities is substantial; Grady's assessment is higher by approximately \$470,000. The reasons are twofold: Grady included the Award among his liabilities; RegOps did not. Also, Grady derived his list of liabilities from a joint exhibit, an undated list of "Outstanding Liabilities" ("joint exhibit");⁶⁰ RegOps instead relied on account statements for information about Grady's liabilities, which, in some instances, contained lower amounts than those reflected on the joint exhibit.

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. Offsetting Grady's liabilities against his assets is relevant to whether Grady has any assets available to pay the Award. Including the Award in that calculation, however, results in a misleadingly lower valuation of assets available for that purpose. So, I do not include the Award among Grady's liabilities.

For most of the other liabilities listed by the parties, the differences between RegOps's and Grady's valuations are minimal. But the combined difference for two of his liabilities—Grady's car loan balance and his Marriott Rewards/Chase credit card account balance—amounts to \$10,910.86. I find RegOps's valuation of these two liabilities more accurate as it is based on more recent documentation. Grady lists the amount outstanding on his car loan as \$26,175, while RegOps' lists a lower number: \$23,574. RegOps's figure comes from an account statement listing the payoff amount as "good through" June 29, 2017;⁶¹ Grady's number, based off the joint exhibit,⁶² is likely less recent by the very fact that it is higher. As to the Marriott Rewards/Chase credit card balance, Grady lists it as \$10,423. This amount, identified on the joint exhibit, is apparently derived from an account statement whose billing period ended on June 14, 2017. By contrast, RegOps lists the indebtedness as \$2,113.14, based on an account statement through July 14, 2017.⁶³ RegOps's figure is more recent, and thus more accurate.

In conclusion, for the purpose of calculating Grady's total liabilities, I rely on the valuation of the individual liabilities on the balance sheet prepared by RegOps, as it excludes the Award and because certain listed liabilities are based on more recent records than those relied upon by Grady.

⁶⁰ JX-37.

⁶¹ JX-38, at 4.

⁶² JX-37.

⁶³ CX-10, at 5.

3. Net Worth

Based on the above-referenced valuation of assets and liabilities, I find that Grady has an approximate positive net worth of \$136,000 to \$146,000, depending on whether the accounts held in the name of his wife and their children are included among his assets. Moreover, even based on Grady's own assessment of his assets and liabilities (excluding the Award), he has a positive net worth of approximately \$124,000.

Therefore, in light of Grady's significant assets and positive net worth, I find that Grady has not proven that he has had, or presently has, insufficient available assets to make some meaningful payment toward the Award. For this reason, alone, his defense fails. But, as discussed below, he also has sufficient income to make some meaningful payment toward the Award.

B. Grady has Sufficient Income to Make Some Meaningful Payment Toward the Award

1. Income

In addition to having significant assets, Grady has also had significant steady income for the past several years. He and his wife reported the following adjusted gross income on their federal tax returns: \$415,595 (2014),⁶⁴ \$216,282 (2015),⁶⁵ and \$249,311 (2016).⁶⁶ In terms of recent gross income, Grady and his wife had aggregate gross income of approximately \$188,440.13 (or \$31,406.69 per month) during the first six months of 2017.⁶⁷

This income notwithstanding, Grady maintains that his monthly expenses exceed his monthly income by \$6,316.74.⁶⁸ The monthly cash flow chart he prepared lists expenses totaling \$20,790.42 and income of \$14,473.68.⁶⁹ By contrast, the current monthly cash flow chart prepared by RegOps shows expenses totaling \$12,292.87, net after-tax monthly income of \$27,691.36,⁷⁰ and excess monthly income of \$15,398.49.⁷¹

The differences between the parties' figures stem mainly from the different calculation methodologies they used. After reviewing their approaches, I find that each is flawed. As a threshold matter, even though the parties stipulated that Grady's current monthly personal and

⁶⁴ JX-15, at 1; Stip. ¶13.

⁶⁵ JX-16, at 1; Stip. ¶14.

⁶⁶ JX-17, at 7; Stip. ¶17.

⁶⁷ During the first six months of 2017, Millstone generated gross revenue of approximately \$104,000 (\$17,333 per month), while Grady's wife earned gross pay of \$84,440.13 (\$14,073.36 per month); Tr. 68-69, 82-83; JX-20, at 12; Stip. ¶ 20, and net pay of \$61,352 (\$10,225.33 per month). Stip. ¶ 19. Through the date of the hearing, Millstone had received approximately \$159,000 in gross revenue in 2017 (\$26,500 per month). Tr. 83; Stip. ¶ 20.

⁶⁸ RX-3, at 2.

⁶⁹ RX-3, at 2.

⁷⁰ CX-19, at 2.

⁷¹ CX-19, at 2.

business expenses total \$16,620,⁷² neither party used that number in calculating whether Grady had excess monthly income. Also, Grady testified that he expected Millstone to generate revenues in 2017 similar to 2016, and that his wife's 2017 earnings would be similar to what she earned in 2016.⁷³ Yet, neither RegOps, which does not dispute this testimony,⁷⁴ nor Grady, based their income calculations on that estimate.

The parties' methodologies suffer from additional deficiencies. As to Grady's monthly expense calculation, first and foremost, it improperly includes a \$5,166.66 item—his largest purported expense—representing the amount Grady intends to pay to Barclays each month under a payment plan he proposed to the firm. But because Barclays rejected the repayment plan, this purported expense cannot properly be characterized as a monthly expense obligation.⁷⁵ Second, Grady incorrectly lists \$2,925 in rent-related expenses,⁷⁶ even though he is currently living rent-free with a friend.⁷⁷ And third, he overstated his insurance and office rent expenses, collectively, by \$405.89.⁷⁸

Grady's income calculation is also problematic. His monthly cash flow chart includes two sources of income: Millstone and his wife's employment. He includes "2016 Profit" of \$4,247.83 per month from Millstone.⁷⁹ This item, apparently derived from his 2016 federal tax return, reflects net profit, which is net of expenses.⁸⁰ But because Grady's chart includes certain business expenses under the expense column, offsetting them against a figure that is already net of expenses results in double counting certain business expenses.

RegOps's approach to calculating net income is unsound as well. RegOps subtracted from the Gradys' 2017 monthly gross income (\$31,406.69), the federal taxes they paid in 2016, prorated on a monthly basis (\$3,715.33),⁸¹ resulting in net monthly income of \$27,691.36. RegOps justified this approach by pointing to evidence that the Gradys' income is expected to be

⁷² Stip. ¶ 21; JX-36, at 1.

⁷³ Tr. 82–83; JX-19; JX-20; JX-18, at 2, 6.

⁷⁴ Indeed, RegOps relied on that testimony in estimating the Gradys' tax liability for 2017. CX-19, at 2.

⁷⁵ Respondent's Hearing Brief at 5.

⁷⁶ Rent or Mortgage (\$2,300); Electric (\$425) and Oil (\$200). RX-3, at 2.

⁷⁷ Tr. 85; CX-2, at 16; JX-14, at 12. Grady is only temporarily not paying for housing. Since June 2017, when Grady sold his house, he and his family have been living with a friend and are not paying rent and certain related expenses. Tr. 85; CX-2, at 16; JX-14, at 2. It is unclear how long that arrangement will continue. "I can't live with my friend indefinitely," he testified, and, currently, he is looking for rental housing. Tr. 85–86. It is reasonable to assume that at some point Grady will begin incurring housing and related costs.

⁷⁸ See CX-19, at 2 n.1 citing CX-2, at 17 (auto insurance); CX-19, at 2n.2 citing CX-2, at 17 (office rent). Eliminating the improperly-included/valued items from Grady's list of monthly expenses reduces Grady's monthly expense total to \$12,292.87. Deducting that expense total from what Grady claims is his monthly income (\$14,473.68), yields a positive monthly cash flow of approximately \$2,180.81. I do not, however, rely on this figure. As explained above, I find that Grady's excess monthly income is much higher than that.

⁷⁹ RX-3, at 2.

⁸⁰ JX-17, at 7, line 12; JX-17, at 10, line 29.

⁸¹ CX-19, at 2. Grady and his wife paid \$44,584 in federal taxes for 2016 on gross adjusted income of \$249,311 (or \$3,715.33, on a monthly basis). JX-18, at 6; JX-19, at 30.

similar in 2017 to what it was in 2016; therefore, RegOps asserts, the taxes would likely be similar, as well.⁸² Even so, the result is distorted because the Gradys' 2017 monthly gross income (based on six months of income) is not the same as their 2016 monthly gross income (based on the entire year). In 2016, the Gradys' monthly income was higher (\$34,883.08 per month).⁸³ In short, RegOps's approach mixes apples and oranges. I find that it is more accurate to deduct the Gradys' monthly 2016 taxes from their 2016 monthly income—not their 2017 monthly income—which yields an after-tax monthly income figure of approximately \$31,167.75.

2. Expenses and Excess Monthly Income

As discussed above, I do not adopt either RegOps's or Grady's assessment of Grady's monthly income, monthly expenses, or his excess monthly income, because their approaches are flawed. Instead, given Grady's undisputed testimony that he expects his and his wife's 2017 income to be similar to their 2016 income, I find that a more reasonable approach in determining whether Grady has sufficient income to make a meaningful payment toward the award is to deduct from the Gradys' 2016 after-tax monthly income of \$31,167.75, Grady's monthly personal and business expenses of \$16,620 (the amount stipulated to by the parties as representing Grady's monthly personal and business expenses).⁸⁴ Based on this calculation, Grady has approximately \$14,547.75 in excess monthly income. This excess income, by itself, and certainly in conjunction with Grady's assets, is sufficient for him to make some meaningful contribution toward the Award.⁸⁵

⁸² CX-19, at 2.

⁸³The Gradys reported total income of \$276,109 for 2016 (\$23,009.08 per month). JX-17, at 7, line 22. This total income figure, however, includes Millstone income of \$50,974, which is net of expenses, JX-17, at 10, line 29. And, for the reasons stated above, I do not find this figure useful in computing excess monthly income as it would result in double counting certain expenses. Instead, I base the excess monthly income calculation by reference to the Gradys' 2016 monthly gross income and 2016 monthly taxes. For 2016, the Gradys reported \$222,117 in "wages, salaries, tips," JX-17, at 7, line 7, as well as \$196,480 in "gross receipts or sales" from Millstone. JX-17, at 10, line 1. This amounts to \$418,597 in gross income, or \$34,883.08 per month.

⁸⁴ Stip. ¶ 21.

⁸⁵ RegOps argues that Grady can reduce one of his expenses: his \$892.97 monthly car payment for one of his two cars, an Audi Q5. RegOps submits that this expense can be reduced by selling or trading the car and then either buying or leasing a less expensive one. RegOps Brief at 13–14; JX-36, at 1; RX-3, at 2; CX-19, at 2. By contrast, RegOps points out, his current monthly lease payment for his other car, a 2017 Toyota Highlander, is much lower: \$447.44. RegOps Brief at 14; JX-36, at 1. At the hearing, Grady testified that selling the Audi was not feasible, as it is currently worth less than the outstanding amount due on the loan, based on his review of Kelley Blue Book values. Tr. 112–14. But, as RegOps correctly observes, Grady provided no documentary support for his valuation of the car. I recognize that "[c]rediting the cost of an expensive vehicle against [Grady's] obligations would effectively encourage people in [Grady's] situation to spend extravagantly." See *Russell C. Schalk, Jr.*, Exchange Act Release No. 78898, 2016 SEC LEXIS 3584, at *8 (Sept. 21, 2016) (internal quotations omitted). But even if Grady were able to sell the car and buy or lease a less expensive one, 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.

C. Grady Failed to Show that He Cannot Borrow Funds to Make Some Meaningful Payment Toward the Award

“I have gone to SoFi, which is a big lender here in the United States and requested a \$100,000 personal loan,” Grady testified. “That is the maximum personal loan that they give out or approve.”⁸⁶ SoFi denied his request, as did another lender.⁸⁷ Grady also informed FINRA that he could not turn to friends or family for financial assistance: “We are not from wealthy families and we do not run in wealthy circles,” he wrote to FINRA.⁸⁸ “Our families do not have any wealth to assist us through a loan or gift.”⁸⁹

On the other hand, Grady’s July 28, 2017 credit report shows that: (1) 100% of his payments to his creditors were on time and he was not delinquent on any payments;⁹⁰ (2) his credit score is listed as 722 (an improvement of 12 points since March 12, 2017) and characterized as “good”;⁹¹ and (3) while he has used 73% of his “available credit,”⁹² he still has “\$16,493” of “available credit across all accounts.”⁹³ Also, earlier this year, prior to the Award, he opened a new credit card account with a credit limit of \$9,500 and obtained a new lease on a car.⁹⁴

Notably, Grady never sought to borrow smaller sums than \$100,000. “I need significantly more than that,” he explained.⁹⁵ But even borrowing smaller amounts would have enabled him to make some meaningful payment toward the Award.⁹⁶ (At a minimum, borrowing funds would have aided him in making a meaningful payment, when coupled with his available assets and income). In short, Grady failed to prove he could not borrow sufficient funds to have made some meaningful payment toward the Award.

D. Grady’s Claim that Barclays Prevented Him From Making a Meaningful Payment By Rejecting His Settlement Offer is Not a Defense

Grady argues that he tried to reach an agreement with Barclays on a repayment plan but the firm acted unreasonably by rejecting his proposals, not offering a counter proposal, and insisting on pre-conditions requiring him to make an “up front” payment higher than he can

⁸⁶ Tr. 69–70.

⁸⁷ Tr. 70; JX-12, at 15; JX-13, at 21–22; JX-14, at 13; JX-46 (Live Oak Bank informing Grady that they would be unable to make a business loan to him, although it does not appear that he formally applied for one).

⁸⁸ CX-2, at 25.

⁸⁹ JX-12, at 15.

⁹⁰ CX-14, at 1–2; Tr. 115.

⁹¹ CX-14, at 1.

⁹² CX-14, at 2.

⁹³ CX-14, at 3–4.

⁹⁴ Tr. 115–17; JX-12, at 11; JX-33; JX-39.

⁹⁵ Tr. 119.

⁹⁶ Tr. 122–24.

afford. He further argues that by not cashing the two \$1,000 checks he sent to the firm, Barclays prevented him “from making any meaningful payments toward the Award.” Nevertheless, he adds, “he will continue to send checks to Barclay’s [totaling \$62,000 per year] in according with a repayment plan based on his available cash and future income.”⁹⁷ “All we seek,” Grady’s lawyer explained at the hearing, “is that FINRA [refrain] from taking negative regulatory action against him so that he can continue to run his state-regulated advisory business which provides his income and is the only way that he has to repay the [Award] in full.”⁹⁸

These arguments do not constitute either a defense to the Suspension Notice or a basis for reducing a sanction. The issue here is not whether Grady has been prevented from making a meaningful payment, but whether he lacks the ability to make one. Also, attempting to pay \$2,000 toward the Award does not constitute a meaningful payment, given the size of the Award. But more fundamentally, Barclays was entitled to full payment of the Award within 30 days of issuance and was under no obligation to accept any installment settlement plan that Grady proposed.⁹⁹ It is not a recognized defense to a Suspension Notice that unless Grady is permitted to remain in the industry, he cannot afford to pay the Award under an installment plan the claimant rejected.

E. Conclusion

I find that Grady failed to establish that he cannot pay some meaningful portion of the Award given his: (1) substantial assets in excess of liabilities; (2) significant steady income in excess of his monthly expenses; (3) failure to show that he cannot supplement his assets and income by borrowing; and (4) settlement proposals that show he was prepared to pay lump sum payments of \$50,000 or \$150,000 toward the Award by the fall of 2017.

IV. Conclusion of Law

In light of the above findings of fact, I conclude that Grady did not establish his asserted defense of bona fide inability to pay, on which he had the burden of proof.

V. Sanctions

“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,” according to the Securities and Exchange

⁹⁷ Respondent’s Hrg. Brief at 5; Tr. 42 (Grady’s counsel, in his opening statement, representing that Grady “is in a position to make a meaningful payment toward the award from his available assets and income consistent with the payment plan that he has been paying on even though Barclays has refused to cash his checks”).

⁹⁸ Tr. 43.

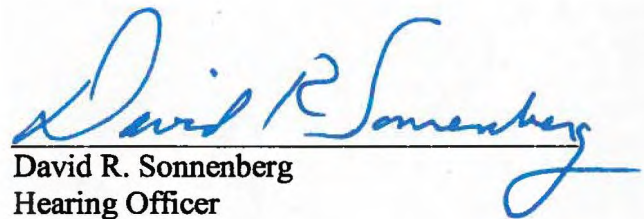
⁹⁹ See *Dep’t of Enforcement v. Tretiak*, Nos. C02990042, C02980085, 2001 NASD Discip. LEXIS 1, at *15, 17 (NAC Jan. 23, 2001), *aff’d*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653 (Mar. 19, 2003) (finding that respondent’s purported defense that he “had made a ‘good faith’ effort to settle” does not constitute a defense and noting that “[i]n any event, an arbitration claimant has no obligation to settle”); OHO Redacted Decision ARB980019, at 5–6 (Feb. 1, 1999) (rejecting as a defense that respondent had “attempted in ‘good faith’ to settle the matter,” adding that neither the respondent nor the Hearing Officer has the authority to order claimant to accept the respondent’s installment plan).

Commission.¹⁰⁰ “[A]llowing members or their associated persons that fail to pay arbitration awards to remain in the securities industry presents regulatory risks and is unfair to harmed customers.”¹⁰¹ Here, Grady has harmed the prevailing arbitration claimant (Barclays), which, though not a customer, has nonetheless had to wait for satisfaction of the Award (or to receive at least some meaningful portion of it). “Conditionally suspending [Grady] from association with FINRA members gives him an incentive to pay the award. And inducing him to pay the award through suspension of his [FINRA] membership furthers the public interest and the protection of investors.”¹⁰² Therefore, I find it appropriate to sanction Grady by suspending him from association with any FINRA member firm until he has paid the Award (and the costs of this proceeding).

VI. Order

Based on the above findings of fact and conclusion of law, and under Article VI, Section 3(b) of FINRA’s By-Laws and FINRA Rule 9559(n), Grady is **SUSPENDED** from associating with any member firm in any capacity, effective immediately. The suspension shall continue until Grady produces sufficient documentary evidence to FINRA showing: (1) the Award has been paid in full; (2) Grady and Barclays have agreed to settle the matter (and Grady is in compliance with the terms of the settlement); or (3) Grady has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award. Upon such showing, the suspension shall automatically terminate.

Further, Grady is **ORDERED** to pay FINRA costs of \$2084.46, which include an administrative fee of \$750 and hearing transcript costs of \$1334.46. These costs are due and payable upon the issuance of this Decision.¹⁰³



David R. Sonnenberg
Hearing Officer

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¹⁰⁰ *Michael David Schwartz*, Exchange Act Release No. 81784, 2017 SEC LEXIS 3111, at *18 (Sept. 29, 2017) (internal quotation marks omitted) (quoting *William J. Gallagher*, Exchange Act Release No. 47501, 2003 SEC LEXIS 599, at *15 (Mar. 14, 2003)).

¹⁰¹ Order Approving Proposed Rule Change Relating to FINRA Rule 9554, Release No. 34-62211, 2010 SEC LEXIS 1800, at *4 (Jun. 2, 2010).

¹⁰² *Michael David Schwartz*, 2017 SEC LEXIS 3111, at *18 (internal quotation marks omitted).

¹⁰³ I considered and rejected without discussion all other arguments by the parties.