

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

REGULATORY OPERATIONS,

Complainant,

v.

████████████████████
(CRD No. ██████████),

Respondent.

Expedited Proceeding
No. ARB160009

STAR No. 20160490787

Hearing Officer-RES

Respondent ██████████ did not pay an arbitration award and, by not producing sufficient documentation, failed to meet his burden of proving his *bona fide* inability to pay the award. Also, the evidence shows that he could make some meaningful payment toward the award even if he is unable to pay the full award. The Hearing Officer suspends Respondent from associating with any FINRA member firm in any capacity until he produces sufficient documentary evidence to FINRA showing: (1) the award has been paid in full; (2) the Respondent and the arbitration creditor have agreed to settle the matter; or (3) the Respondent has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the award.

Appearances

For the Complainant: Deon McNeil-Lambkin, Esq., Ann-Marie Mason, Esq., Department of Regulatory Operations, Financial Industry Regulatory Authority

Respondent ██████████ represented himself

Decision

I. Introduction

A respondent in an expedited proceeding for alleged failure to pay a FINRA arbitration award has the burden of proving any defense he raises, including a *bona fide* inability to pay. To meet that burden, the respondent must produce a specific set of comprehensive documents, including documents requested by FINRA's Department of Regulatory Operations ("Reg Ops"). The respondent must also show he does not have the means to pay a meaningful portion of his arbitration award.

On February 12, 2016, FINRA's Office of Dispute Resolution ("Dispute Resolution") notified Respondent [REDACTED] that, under FINRA Rule 9554, his registration would be suspended effective March 4, 2016, because he had not paid an arbitration award.¹ On March 1, 2016, [REDACTED] timely filed a request for a hearing and claimed a *bona fide* inability to pay the award.² On June 6, 2016, the parties presented their cases in a hearing by telephone before the Hearing Officer.³

[REDACTED] concedes he has not paid any portion of the arbitration award. He contends he is financially unable to do so. Reg Ops argues he fails to meet his burden of proving *bona fide* inability because he has not produced all the financial information requested by Reg Ops and he has adequate resources to pay a meaningful portion of the award.

After the hearing and a review of the record, the Hearing Officer finds that [REDACTED] did not meet his burden of proving a *bona fide* inability to pay the award. Effective immediately, [REDACTED] is suspended from associating with any member firm in any capacity until he produces sufficient documentary evidence to FINRA showing: (1) the award has been paid in full; (2) [REDACTED] and the arbitration creditor have agreed to settle the matter; or (3) [REDACTED] has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the award.

II. Legal Standards And Findings Of Fact

A. [REDACTED]'s Background

[REDACTED] first entered the securities industry in 1999.⁴ He was associated in a registered capacity with Advisors Asset Management, Inc. from September 2010 through February 2014.⁵ From March through December 2014, he was associated in a registered capacity with Halen Capital, Inc. ("Halen"), the arbitration creditor.⁶ He was associated in a registered capacity with SWBC Investment Company from May to August 2015.⁷ Since August 2015, he has not been associated with any FINRA member firm.⁸

B. Procedural Background

On March 27, 2015, Halen filed an arbitration claim against [REDACTED] with FINRA Dispute Resolution (FINRA Arbitration No. 15-00763) alleging he had not paid a balance due on

¹ Joint Exhibit ("JX") 5.

² JX-6.

³ The hearing transcript is cited "Tr." followed by the page number.

⁴ JX-1, at 7.

⁵ *Id.* at 6.

⁶ JX-1, at 6; Tr. 37.

⁷ JX-1, at 8; Tr. 38.

⁸ Tr. 38.

a contract executed with Halen.⁹ [REDACTED] appeared in the arbitration hearing by telephone.¹⁰ On December 10, 2015, the FINRA Dispute Resolution Arbitrator rendered an award in favor of Halen and against [REDACTED] in the amount of \$11,370.22 (the “Award”).¹¹ [REDACTED] did not move to vacate the Award, did not pay any portion of the Award, and did not make an effort to reach out to Halen to settle the Award.¹²

On February 12, 2016, Dispute Resolution issued the Notice of Suspension informing [REDACTED] that the suspension would be effective on March 4, 2016.¹³ The notice stated that the suspension would continue until [REDACTED] produced documentary evidence showing he satisfied one of the recognized defenses to suspension.¹⁴ The notice also stated he could request a hearing before the FINRA Office of Hearing Officers and a timely request would stay the effective date of the suspension.¹⁵ On March 1, 2016, [REDACTED] requested a hearing, stating his defense was a *bona fide* inability to pay.¹⁶

C. Inability To Pay Standard

FINRA’s arbitration process and applicable rules are designed “to provide a mechanism for the speedy resolution of disputes among members, their employees, and the public.”¹⁷ To ensure the payment of arbitration awards, FINRA promulgated rules—in particular, FINRA Rule 9554—to allow for expedited suspension proceedings against members, associated persons, and formerly associated persons who have allegedly failed to pay.¹⁸ FINRA Rule 9554(a) provides:

If a member, person associated with a member or person subject to FINRA’s jurisdiction fails to comply with an arbitration award ... FINRA staff may provide

⁹ JX-2, at 1.

¹⁰ Tr. 42.

¹¹ JX-2, at 2; Tr. 41.

¹² Tr. 23, 45, 49, 50. [REDACTED] testifies that “I wanted to put in a motion to vacate, but I would have to do it in state court, and I didn’t have the funds to pay for all of that, an attorney and all the filing and such.” Tr. 49.

¹³ JX-5; Tr. 46-48.

¹⁴ JX-5, at 1. For the recognized defenses, see page 4 *infra*.

¹⁵ JX-5, at 1.

¹⁶ JX-6; Tr. 48-49.

¹⁷ *Regulatory Operations v. DiPietro*, (ARB140066) (June 8, 2015), at 3, finra.org/sites/default/files/OHO_9550Expedited_DePietro_ARB140066_0_0.pdf (quoting *Herbert Garrett Frey*, 53 S.E.C. 146, 153 (1997); *Eric M. Diehm*, 51 S.E.C. 938, 939, (1994)). *Accord Dep’t of Enforcement v. Respondent*, (ARB060031) (Apr. 16, 2007), at 4, finra.org/sites/default/files/OHODecision/p038228_0_0.pdf (same); *Dep’t of Enforcement v. Respondent*, (ARB040037) (Mar. 2, 2005), at 3, finra.org/sites/default/files/OHODecision/p038234_0_0.pdf (same).

¹⁸ FINRA By-Laws, Art. VI, Sec. 3(b); FINRA Rule 9550 *et seq.* *Accord William J. Gallagher*, 56 S.E.C. 163, 171 (2003) (“Honoring arbitration awards is essential to the functioning of the NASD arbitration system.”); *Richard R. Pendleton*, 53 S.E.C. 675, 679 (1998) (“[w]e have repeatedly stated that the NASD arbitration system provides a speedy mechanism for settling disputes, which the NASD may foster by taking prompt action against those who fail ... to honor arbitration awards”); NASD Notice to Members 04-57, 2004 NASD LEXIS 90 (Aug. 2004); NASD Notice to Members 00-55, 2000 NASD LEXIS 63 (Aug. 2000).

written notice to such member or person stating that the failure to comply within 21 days of service of the notice will result in a suspension or cancellation of membership or a suspension from associating with any member.

FINRA Rule 9554(a) implements Article VI, Section 3(b) of the FINRA By-Laws, which provides for the suspension of any associated person who does not pay an arbitration award:

The Corporation after 15 days notice in writing, may suspend or cancel the membership of any member or suspend from association with any member any person, for failure to comply with an award of arbitrators properly rendered pursuant to the Corporation's Rules.

A respondent in a suspension proceeding may assert the following defenses: (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 petition pending in United States Bankruptcy Court, or a Bankruptcy Court has discharged the award.¹⁹ The respondent also may assert a *bona fide* inability to pay an award rendered in an industry dispute, as ██████ does here.²⁰

The respondent has the burden to prove his *bona fide* inability to pay an award.²¹ The Securities and Exchange Commission reasons that “[b]ecause the scope of [the respondent’s] assets is peculiarly within [his] knowledge, [the respondent] should properly bear the burden of adducing evidence with respect to those assets.”²² FINRA is entitled to make a searching inquiry into the respondent’s inability to pay.²³ In fact, the respondent may be subject to a default if he does not comply with an order of the Hearing Officer “requiring production of information to support any defense to the notice or petition that respondent has raised.”²⁴

D. ██████’s Financial Condition

1. FINRA’s Inquiries

On March 2, 2016, Reg Ops requested that ██████ submit a detailed financial disclosure statement showing his *bona fide* inability to pay the Award.²⁵ In response, ██████ provided

¹⁹ NASD Notice to Members 00-55, 2000 NASD LEXIS 63, at *5-6 (listing the defenses). *Accord Dep’t of Enforcement v. Respondent*, (ARB060031) (Apr. 16, 2007), at 4-5, finra.org/sites/default/files/OHODecision/p038228_0_0.pdf.

²⁰ See, e.g., *William J. Gallagher*, 56 S.E.C. 163 (2003).

²¹ OHO Order EXP15-02 (ARB150039) (Dec. 18, 2015), at 3-4, finra.org/sites/default/files/OHO_EXP15-02_ARB150039_0.pdf; OHO Order EXP15-03 (ARB150048) (Dec. 3, 2015), at 4, finra.org/sites/default/files/OHO_EXP15-03_ARB150048_0.pdf. *Accord Robert Tretiak*, 56 S.E.C. 209, 220, (2003) (“[i]t is well settled that a respondent bears the burden of demonstrating his or her inability to pay”).

²² *Bruce M. Zipper*, 51 S.E.C. 928, 931 (1993).

²³ *Robert Tretiak*, 56 S.E.C. 209, 220; *Daniel Joseph Avant*, 52 S.E.C. 442, 446 (1995).

²⁴ FINRA Rule 9559(m).

²⁵ JX-7.

information about his financial condition.²⁶ Among other things, he produced: (1) monthly account statements from his business checking account (opened in December 2015); (2) monthly account statements from his personal checking account from January 2016 to the present; (3) monthly account statements from his mortgage for the months of February and April 2016; and (4) monthly account statements for his credit card account from September 2015 to the present.²⁷ On April 19, 2016, Reg Ops sent ██████ an email informing him the information he had submitted was insufficient to enable Reg Ops to complete its analysis.²⁸ Reg Ops requested that ██████ read the original financial disclosure statement carefully and supply all information requested.²⁹

On May 4, 2016, Reg Ops sent a second email to ██████, requesting that he produce documentation of his wife's income, assets, and liabilities, and information about his efforts to sell a Lexus RX330 motor vehicle he owned.³⁰ On May 23, 2016, Reg Ops sent a third email to ██████, requesting production of account statements for his Individual Retirement Accounts ("IRAs") and a description of efforts he had made to settle the Award.³¹ The next day, ██████ replied to Reg Ops stating, among other things: "I have not made any efforts to pay the settlement agreement as I do not have the funds to make an arrangement."³² He produced his IRA account statements from January 2014 through December 2015.³³ He did not produce much information about his wife's financial condition because, he testifies, "I did not know that all this had anything to do with her."³⁴ In the hearing, Reg Ops expressed considerable dissatisfaction with the completeness of ██████'s production of financial information.³⁵

2. ██████'s Income

██████ is a married man in his forties with two children from a previous marriage. He has child support obligations for at least one of them.³⁶ In the past seven months, he has begun his own business as a real estate appraiser: ██████ Real Estate Services.³⁷ He does not work with anyone else in this business.³⁸ According to ██████ federal income tax returns, his income from wages, tips, and salaries was: \$133,815 in 2013 (when he was employed by

²⁶ JX-8; Tr. 51-53.

²⁷ JX-12; JX-13; JX-14; JX-19.

²⁸ JX-9, at 1.

²⁹ *Id.*

³⁰ JX-22.

³¹ JX-29.

³² JX-30, at 1.

³³ JX-31; JX-32; JX-33.

³⁴ Tr. 65.

³⁵ Tr. 27-28, 30-32, 55-57, 59-61, 64, 66, 73-76, 89-93, 99-101, 113-17, 119-20, 124-27.

³⁶ Tr. 19. The children are 13 and 22 years of age. Tr. 20.

³⁷ JX-12, at 2; Tr. 15, 38.

³⁸ Tr. 39.

Advisor Asset Management); \$34,722 in 2014 (when he was employed by Advisor Asset Management and then by Halen); and \$8,074 in 2015 (when he was employed by SWBC Investment Services and Momentum Appraisal Group).³⁹ In 2014, he began to withdraw money from his IRAs to pay his living expenses.⁴⁰ In that year, he withdrew \$107,973, of which \$80,000 was taxable.⁴¹ In 2015, he withdrew \$77,878.⁴² He testifies that he made the second IRA withdrawal because “I was below the poverty line last year in my income.”⁴³

██████ testifies that his real estate appraisal business is just starting and “I have to find new business, create business and do appraisals.”⁴⁴ As a result, “I’m barely scraping by.”⁴⁵ He estimates his gross income from the business is \$4,000 a month. This is a gross amount, which must be reduced to account for his business expenses and income tax liability.⁴⁶ His after-tax annual income is about \$24,000.⁴⁷ He does not have a source of income other than his work as an appraiser.⁴⁸ His wife “is a nail technician that works in a nail salon” and earns a gross income of about \$1,900 per month.⁴⁹ She is an independent contractor so that her gross income, like ██████’s, must be reduced for expenses and income taxes.⁵⁰

3. ██████’s Expenses

██████ is obligated to pay \$647 per month in child support for at least one of his children.⁵¹ His payments will continue for five years, and thereafter he must pay for college tuition.⁵² Monthly, he pays a mortgage of \$1,428 (which includes property taxes and insurance); electricity and water of \$160; internet and cable of \$160; food of \$300; clothing of \$100; motor vehicle insurance of \$141; and credit card payments of \$100.⁵³ He pays \$444 each month to

³⁹ JX-10, at 1-3, 9-10; JX-11, at 4. In February 2014, ██████ filed for bankruptcy. JX-1, at 13. The Hearing Officer assumes this bankruptcy is no longer pending.

⁴⁰ Tr. 20. When asked what he has done with the withdrawn money, ██████ testifies that “I have just been surviving off of it.” *Id.*

⁴¹ JX-11, at 20. *Cf.* JX-34, at 5; Tr. 95.

⁴² JX-24, at 9; JX-34, at 1, 3; Tr. 95-96.

⁴³ Tr. 96.

⁴⁴ Tr. 78.

⁴⁵ Tr. 13.

⁴⁶ Tr. 18. ██████ testifies that he is “[p]robably averaging about \$4,000 a month, but that is before taxes and expenses such as gross income and between [that] and software and licenses and continuing education and everything else, I probably get to keep about half of that.” *Id.*

⁴⁷ Tr. 18.

⁴⁸ Tr. 24-25.

⁴⁹ Tr. 72, 81.

⁵⁰ Tr. 79-80. ██████ testifies that his wife’s income is “not just a paycheck like you receive when you get money in your bank that is your money, it’s different.” *Id.* 80. ██████’s wife is an immigrant who has been in the United States for two years. *Id.* at 75. She does not own any assets. *Id.*

⁵¹ JX-8, at 1, 5; Tr. 18, 90, 92.

⁵² Tr. 19.

⁵³ JX-8, at 4-5; JX-18; Tr. 24, 86-90.

Santander Consumer USA, Inc. for the motor vehicle debt on a Dodge Ram 1500 and \$75 each month for the debt on the Lexus RX330.⁵⁴ He pays \$198 a month on a line of credit from Security Service Bank.⁵⁵ He paid \$28,639 in federal income taxes in 2013 and \$14,867 in 2014.⁵⁶ He did not pay his 2015 taxes, which are calculated to be \$11,031.⁵⁷ He and his wife do not have medical insurance.⁵⁸

4. ██████'s Liabilities

██████ owes \$134,146 in outstanding principal on the mortgage on his home.⁵⁹ He has loan balances of \$13,926 on the Dodge Ram and \$575 on the Lexus RX330.⁶⁰ His auto loan for the Dodge Ram has been turned over to a collection agency.⁶¹ He owes \$2,806 in credit card debt and is \$2,541 in arrears on his child support obligations.⁶² To induce ██████ to pay his child support, the State of Texas imposed a lien on his remaining IRA, which has \$9,529 in it.⁶³ ██████ testifies "that was my only emergency funds and, you know, there is a lien and levy on it so I can't access it."⁶⁴ He owes \$9,922 on his line of credit.⁶⁵ With regard to the line of credit, he testifies that since January 2016 "I had to dip into this as my emergency funds," so that it "is maxed" out.⁶⁶ He owes \$11,031 in 2015 back taxes to the Internal Revenue Service.⁶⁷ He says "my number one priority is to pay my child support and number two, pay IRS taxes, and number three, trying to get medical insurance."⁶⁸ As for the Award, ██████ testifies that "it's not a lot of

⁵⁴ JX-17, at 2, 6; Tr. 87-88.

⁵⁵ JX-26.

⁵⁶ JX-11, at 5, 21.

⁵⁷ JX-24, at 10.

⁵⁸ JX-25, at 1; Tr. 24. ██████ testifies that "I tried Obamacare, but it was too expensive. That was cancelled in March I think." Tr. 24.

⁵⁹ JX-8, at 1.

⁶⁰ JX-17, at 2. *Cf.* JX-8, at 1.

⁶¹ JX-17, at 1.

⁶² JX-8, at 1; JX-28, at 3; Tr. 13, 19, 91.

⁶³ Tr. 25, 91. Paying his past-due child support obligations is ██████'s "number one priority" because "I can go to jail for that." *Id.*

⁶⁴ Tr. 25. The notice of lien is dated May 13, 2016. JX-28, at 1. Without making a determination, the Hearing Officer notes ██████ may be required to amend his Form U4 to disclose the lien, in answer to Question 14M: "Do you have any unsatisfied judgments or liens against you?" *See* FINRA By-Laws, Art. V, Sec. 2(c); FINRA Rule 1122.

⁶⁵ JX-26.

⁶⁶ Tr. 104. From December 2015 to the time of the hearing, ██████ exhausted his line of credit because "I had to pay bills. I had to pay my mortgage and other bills." Tr. 78. *Accord Id.* at 83-84.

⁶⁷ JX-24, at 10; Tr. 13, 20, 82-83.

⁶⁸ Tr. 111.

money in the grand scheme of things, but it's money I don't have. I don't have the income right now."⁶⁹

5. ██████'s Assets

██████ main asset is his home, which he values at \$186,240.⁷⁰ Reg Ops has moved into evidence a Zillow.com estimate of \$214,341.⁷¹ Deducting the outstanding principal amount of the mortgage, ██████ has \$52,094 to \$80,195 equity in his home.⁷² His other assets are: the Dodge Ram, worth \$12,533; the Lexus RX330, worth \$5,187; an IRA, worth \$9,529; and a bank account with \$2,930 in it.⁷³ Because the Dodge Ram is subject to a \$13,926 lien, he testifies that "[o]ther than my home, I don't own anything worth over \$10,000."⁷⁴ He needs the Dodge Ram "for work and for my daily living."⁷⁵

III. Discussion

Although ██████ is in serious financial distress, he has not met his burden of proving a *bona fide* inability to pay the Award. The defense may be rejected if the respondent produces incomplete financial information.⁷⁶ Here, ██████ produced to Reg Ops little or no information about his wife's financial condition.⁷⁷ He did not provide complete monthly statements for the bank accounts under his control. He submitted a one-page screen shot of bank and investment accounts, but with no transaction history.⁷⁸ He did not provide Forms W-2 or 1099.⁷⁹ And he did not supply all the information Reg Ops requested in the financial disclosure statement. These lapses have made it difficult to determine whether he has chosen not to disclose certain assets to bolster his defense of an inability to pay. Because ██████ has the burden of proof, he must bear the consequences of any uncertainty caused by his failure to produce documents to Reg Ops.

⁶⁹ Tr. 23.

⁷⁰ JX-8, at 1.

⁷¹ Complainant's Exhibit ("CX") 1, at 1, 2, 8.

⁷² JX-8, at 1; CX-1, at 1, 2, 8; Tr. 14-15. ██████ testifies that this equity is protected by a State homestead exemption: "[T]o suggest that I refinance my home because I have equity, one, I can't because I haven't been self-employed [long] enough and two, that can't come off our home for debt. So I don't believe that is even legal." Tr. 106-07. While the Hearing Officer is no expert on State homestead exemptions, it appears that ██████ is correct. See *United States v. Rogers*, 461 U.S. 677, 684 ("in common with a large number of States, Texas establishes the family home or place of business as an enclave exempted from the reach of most creditors").

⁷³ JX-8, at 1; Tr. 102.

⁷⁴ Tr. 14.

⁷⁵ Tr. 84.

⁷⁶ See *William J. Gallagher*, 56 S.E.C. at 169 (rejecting inability-to-pay defense where the respondent's "'evidence' in this regard was both insufficient and concededly incomplete").

⁷⁷ Tr. 55-57, 59-61, 64-66.

⁷⁸ JX-27.

⁷⁹ Tr. 64.

There are additional reasons for rejecting ██████'s defense. He made no effort to borrow money to satisfy the Award. He did not use any of the funds withdrawn from his line of credit, any of the funds withdrawn from his IRA accounts, or any of the income he and his wife earned, to pay a portion of the Award.⁸⁰ An inability-to-pay defense may be rejected if "it appears that the respondent could borrow the funds, or could make some meaningful payment toward the award from available assets or income, even if he is unable to pay the full award."⁸¹ A meaningful contribution by ██████ would be 50 percent of the \$11,370.22 Award, with the rest to be paid off in six months to a year. Reg Ops suggests ██████ could make this 50-percent payment by selling his Lexus and setting aside some money from his and his wife's income.⁸² ██████, however, has not made any payment toward the Award. He has not had communications with Halen about compromising the Award or setting up a payment plan. His inactivity shows an intention to avoid paying the Award, not a *bona fide* inability to pay.

IV. Conclusion

The Hearing Officer finds, and the parties do not dispute, that ██████ has not paid any portion of the Award. ██████ did not establish any of the defenses permitted by FINRA rules or case law and, specifically, he did not prove the defense he asserted, a *bona fide* inability to pay, on which he had the burden of proof.

Under Article VI, Section 3(b) of FINRA's By-Laws and Rule 9559(n), ██████ is suspended from associating with any member firm in any capacity, effective immediately. The suspension shall continue until ██████ produces sufficient documentary evidence to FINRA showing: (1) the Award has been paid in full; (2) ██████ and Halen have agreed to settle the matter; or (3) ██████ has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award.

⁸⁰ Tr. 84.

⁸¹ *Dep't of Enforcement v. Respondent*, (ARB060031) (Apr. 16, 2007), at 9, finra.org/sites/default/files/HODDecision/p038228_0.pdf. *Accord Dep't of Enforcement v. Respondent*, (ARB040037) (Mar. 2, 2005), at 7-8, finra.org/sites/default/files/OHODDecision/p038234_0.pdf (same); *William J. Gallagher*, 56 S.E.C. at 170 ("the Hearing Officer was entitled to reject Gallagher's inability to pay defense given Gallagher's failure to show that he in fact lacks the funds to pay and that he has no ability to borrow the necessary monies").

⁸² Tr. 131.

██████████ is **ORDERED** to pay FINRA costs of \$1,759.53, which include an administrative fee of \$750 and hearing transcript costs of \$1,009.53.⁸³ These costs are due and payable immediately upon the issuance of this Decision.

SO ORDERED.


Richard E. Simpson
Hearing Officer

Dated: August 22, 2016

Copies to:

██████████ (via email and overnight mail)
Meredith A. MacVicar, Esq. (via email)
Deon McNeil Lambkin, Esq. (via email)
Ann-Marie Mason, Esq. (via email and first-class mail)

⁸³ The Hearing Officer has considered all the arguments made by the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.