

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOSEPH MICHAEL SHIMKO, JR.  
(CRD No. 4611093),

Respondent.

Expedited Proceeding  
No. ARB200002

STAR No. 20200653076

Hearing Officer–LOM

**EXPEDITED DECISION**

September 15, 2020

**Respondent failed to pay an industry arbitration award and failed to prove that he has a bona fide inability to pay the award. Respondent’s registration is therefore suspended.**

*Appearances*

For the Complainant: John Sheehan, Esq., and Carolyn Craig, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Pro se.

**DECISION**

**I. Introduction**

This proceeding arises from the failure of Respondent, Joseph M. Shimko, Jr., (“Respondent” or “Shimko”), to pay an arbitration award issued in a dispute between him and his former FINRA member firm. In response to a Notice of Suspension pursuant to FINRA Rule 9554 for failure to pay the award, Shimko asserted as a defense that he had a bona fide inability to pay the award. Shimko stayed the suspension by timely filing a request for hearing.

A one-day hearing was held at which Shimko testified and presented documentary evidence to support his claimed inability to pay.

Shimko did not produce documentary evidence necessary to evaluate his alleged inability to pay, even after being given extra time and ordered to produce specific documents critical to the analysis. Among other things, he did not produce his 2019 personal income tax return. He also did not produce financial statements that he and his wife used to obtain \$735,000 in

mortgage loans for a new house they bought less than two months before the arbitration award was issued. Nor did Shimko produce the financial statements the couple used to obtain more than \$100,000 in installment loans a few weeks after the award was issued. These financial statements would have provided objective evidence that was not created for purposes of presenting Shimko's inability-to-pay defense in this proceeding.

In any case, the documentary evidence Shimko did produce contradicted his defense.<sup>1</sup> The evidence shows that, at the time the arbitration award was issued, Shimko and his wife had substantial assets and income. The couple had an estimated gross income in 2019 of \$800,000. At a minimum, he had the ability to marshal resources to make a meaningful payment toward satisfaction of the award, if not payment in full. He used \$100,000 that the couple borrowed shortly after the award was issued for home improvements and other purposes. After the arbitration award was issued, Shimko also made discretionary purchases in call options. In addition, he prepaid the first mortgage on his new house for a year and made prepayments on his home's second mortgage and two new car leases. By using funds for other purposes and making prepayments on his mortgages and car loans, Shimko made those funds unavailable to pay the arbitration award. He did so by choice, not necessity.

Shimko produced incomplete brokerage account statements that were reorganized in a way that concealed that pages were missing. The gaps in the production did not appear to be inadvertent. When some missing pages from the brokerage statements were called to his attention, Shimko said he had produced everything and suggested that only a couple of pages of meaningless "financial language" might be missing. The incomplete production and unconvincing explanation cast doubt on Shimko's credibility and the reliability of the documentary evidence he presented.

Shimko had the burden to prove his inability to pay the arbitration award. He failed to meet his burden.

The suspension from associating with any FINRA member in any capacity will become effective as of the date of this decision. The suspension will remain in effect unless and until Shimko produces to FINRA documentary evidence sufficient to establish one of the other recognized defenses to a suspension for failure to pay an arbitration award as set forth below in the Conclusion and Order.

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<sup>1</sup> Shimko produced documents to Enforcement, and then the parties together submitted 134 joint exhibits, which were all admitted into the record. The exhibits are referred to by the prefix "JX" and a unique identifying number. The parties also stipulated to certain facts. Each stipulation is referred to by the abbreviation "Stip." and a unique identifying number. Shimko was the only person who testified at the hearing. His testimony is referred to by the abbreviation for transcript, "Tr." and the page number.

## **II. Findings of Fact and Conclusions of Law**

### **A. FINRA Has Jurisdiction**

FINRA has jurisdiction to bring this proceeding because Shimko is currently registered through another FINRA member, Merrill Lynch, Pierce, Fenner & Smith, Inc. (“Merrill”).<sup>2</sup> Under Article V, Section 4(b) of FINRA’s By-Laws, FINRA retains jurisdiction over a registered person for two years after the termination, revocation, or cancellation of that person’s registration.<sup>3</sup> Shimko admits that he is subject to FINRA’s jurisdiction.<sup>4</sup>

### **B. An Arbitration Award Was Entered Against Respondent and Respondent Requested a Hearing**

Shimko joined Merrill after voluntarily resigning from Wells Fargo Clearing Services, LLC d/b/a Wells Fargo Advisors (“Wells Fargo”), a FINRA-registered broker-dealer firm, at the end of June 2017.<sup>5</sup> At the time of his resignation, he owed Wells Fargo more than \$400,000 on two promissory notes.<sup>6</sup> Because the termination of Shimko’s employment relationship with Wells Fargo constituted a default under the terms of the promissory notes, the entire amount became due, plus interest.<sup>7</sup>

Shimko did not pay the money he owed to Wells Fargo at the time of his departure,<sup>8</sup> despite receiving a \$1.2 million loan from Merrill on June 29, 2017, the same day that he officially left Wells Fargo.<sup>9</sup> He also received a second loan from Merrill in March 2018, during the pendency of Wells Fargo’s arbitration claim, of approximately \$395,000.<sup>10</sup> Shimko testified that he invested the \$1.6 million he received from Merrill in the securities market and, ultimately, lost most of it.<sup>11</sup>

Shimko’s failure to pay what he owed on the promissory notes led Wells Fargo to file a claim in January 2018 in FINRA’s arbitration forum.<sup>12</sup> An arbitration hearing was held on

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<sup>2</sup> Shimko’s record in the Central Registration Depository (“CRD”) shows that he is currently employed by Merrill. Stip. ¶ 15; JX-134, at 13.

<sup>3</sup> Stip. ¶ 14.

<sup>4</sup> *Id.*

<sup>5</sup> JX-3, at 2; JX-102; JX-134, at 20.

<sup>6</sup> JX-3, at 6.

<sup>7</sup> JX-1, at 1; JX-2, at 1; JX-3, at 4-5, 11, 15, 30.

<sup>8</sup> JX-3, at 30-35; Tr. 48-50.

<sup>9</sup> Stip. ¶ 56; JX-102, at 1-5; JX-134, at 5.

<sup>10</sup> Stip. ¶ 57; JX-104; JX-105.

<sup>11</sup> Tr. 47-48, 74, 77.

<sup>12</sup> JX-3, at 6-7; Tr. 48.

September 10-11, 2019.<sup>13</sup> Wells Fargo was successful, and an arbitration award was issued on September 17, 2019, against Respondent.<sup>14</sup> The arbitration panel awarded Wells Fargo compensatory damages of \$474,955.20 (principal and prejudgment interest), and attorneys' fees of \$61,970.18, for a total award of close to \$537,000.<sup>15</sup> FINRA served Shimko (through counsel) with the arbitration panel's decision that same day and informed him that he was obligated to pay the arbitration award within 30 days. The notice specified that the 30-day period would end on October 17, 2019.<sup>16</sup> FINRA staff further informed Shimko of his right to seek to vacate the award in a court of competent jurisdiction.<sup>17</sup>

Shimko did not pay the arbitration award. On October 17, 2019, the day by which he should otherwise have paid the award, he filed a motion to vacate it with a court of competent jurisdiction. The court denied his motion to vacate two months later, on December 27, 2019,<sup>18</sup> which made the debt immediately due. On January 7, 2020, FINRA properly served him with a Notice of Suspension pursuant to FINRA Rule 9554. That Notice provided that the suspension would become effective unless Shimko paid the arbitration award within 21 days or timely requested a hearing asserting one of the recognized defenses.<sup>19</sup>

Shimko timely filed a request for a hearing on January 16, 2020, asserting that he had a bona fide inability to pay.<sup>20</sup> That request stayed the suspension.

The matter was set for a hearing, and, in preparation for it, FINRA's Department of Enforcement ("Enforcement") sought information regarding Respondent's asserted inability to pay. After five extensions of time to permit the collection of information about Respondent's financial situation, the hearing commenced on June 30, 2020. By agreement of the parties, the hearing was held by videoconference.

After the first day of hearing, I held the record open for Shimko to submit additional documents to support his defense.<sup>21</sup> On July 1, 2020, I issued an Order specifying the documents

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<sup>13</sup> JX-5, at 4; Tr. 48-49.

<sup>14</sup> Stip. ¶ 1; JX-5, at 2-3; Tr. 49.

<sup>15</sup> Stip. ¶ 1; JX-5, at 2-3.

<sup>16</sup> JX-6, at 1; Tr. 49.

<sup>17</sup> JX-7, at 2.

<sup>18</sup> Stips. ¶¶ 4-9; JX-10; JX-11; JX-12; Tr. 49-50. Shimko filed an appeal from the court order denying his motion to vacate, but he later voluntarily withdrew the appeal. Stips. ¶¶ 8-9; JX-13; JX-14.

<sup>19</sup> Stip. ¶ 7; JX-15.

<sup>20</sup> Stip. ¶ 10; JX-16.

<sup>21</sup> Tr. 197-202.

he was required to provide and setting July 20, 2020, as the deadline. I also scheduled a second day of hearing for July 27, 2020, to take additional testimony.<sup>22</sup>

The deadline for filing and serving the additional documents passed. Shimko submitted no additional documents. Nor did he contact the Office of Hearing Officers to request more time or explain his failure to comply with the July 1 Order. In an Order issued on July 24, 2020, I closed the documentary record and cancelled the second day of evidentiary hearing. In a separate Order, however, I gave the parties an opportunity to present closing arguments. I set closing arguments for a telephone conference on July 27, 2020, the day on which the second day of hearing had originally been scheduled. Shimko did not appear at the telephone conference. Enforcement presented its closing argument. With that, I closed the record.

### **C. Absent a Valid Defense, Respondent Is Required to Pay the Arbitration Award**

Absent a valid defense, Shimko is required to pay the arbitration award. FINRA's Code of Arbitration Procedure, which is embodied in the Series 12000 rules for customer disputes and the Series 13000 rules for industry disputes, governs arbitrations in FINRA's forum. With respect to an industry dispute such as the one between Shimko and Wells Fargo, FINRA Rule 13904(j) provides: "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." But once a motion to vacate has been denied, the obligation to pay is immediate; and FINRA is authorized to commence a suspension proceeding if payment is not forthcoming.<sup>23</sup> The Securities and Exchange Commission ("SEC") has declared: "Honoring arbitration awards is essential to the functioning of the [FINRA] arbitration system."<sup>24</sup>

FINRA Rule 9554 provides an enforcement mechanism to compel compliance with the obligation to pay an arbitration award. Rule 9554 authorizes FINRA staff to provide written notice to an associated person who fails to pay an arbitration award that he will be suspended from association with any member if he fails to comply within 21 days of service of the notice. FINRA Rules 9554 and 9559 further provide for an expedited hearing process on a proposed suspension due to a failure to pay an arbitration award. A person served with notice of a proposed suspension may file a request for a hearing before the effective date of the suspension, which stays the suspension. When a respondent requests a hearing, Rule 9554(e) states that he "must set forth with specificity any and all defenses."<sup>25</sup>

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<sup>22</sup> Order Requiring Supplemental Submissions and Scheduling Additional Hearing ("July 1 Order").

<sup>23</sup> *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at \*11 (Mar. 17, 2016) (FINRA not required to delay suspension proceeding by an appeal of a decision denying a motion to vacate).

<sup>24</sup> *William J. Gallagher*, 56 S.E.C. 163, 171 (2003).

<sup>25</sup> The requirement to comply with the obligation to pay an arbitration award is clear from the interlocking nature of Rule 13904(j) and the rules for enforcing compliance. Moreover, FINRA Rule 0140 specifies that FINRA's rules apply to all FINRA member firms and their associated persons—which includes the rules governing arbitration—

#### D. Respondent Asserts a Bona Fide Inability to Pay

There are a limited number of recognized defenses to a suspension for failure to pay an arbitration award.<sup>26</sup> Shimko asserts one of those defenses—a bona fide inability to pay.<sup>27</sup> This defense is only available in connection with an arbitration award issued in a dispute between industry members. In 2010, the inability-to-pay defense was expressly eliminated where an arbitration award resolves a dispute between a customer and an industry member.<sup>28</sup>

The elimination of the inability-to-pay defense in connection with customer disputes signals the importance of requiring that securities industry participants comply with their obligation to pay arbitration awards. Allowing a person to continue working in the securities industry when that person has failed to honor his or her obligation to pay an arbitration award is not lightly done, because it undermines the fair functioning of the arbitration process.<sup>29</sup> The failure to comply with FINRA’s rules and to fulfill one’s financial obligations also raises serious concerns about a person’s ability to comply in the future, and whether customers and other

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and Article V, Section 2 of FINRA’s By-Laws requires that a registered person agree to comply with FINRA’s rules in order to become registered.

<sup>26</sup> FINRA By-Laws, Art. VI, Sec. 3(b); NASD Notice to Members 00-55, at 2 (Aug. 2000), <http://www.finra.org/industry/notices/00-55>; *Dep’t of Enforcement v. Respondent*, OHO Redacted Decision ARB060031, at 4-5 (Apr. 16, 2007), [http://www.finra.org/sites/default/files/OHODecision/p038228\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p038228_0_0.pdf). See, e.g., *Regulatory Operations v. Grady*, Expedited Proceeding No. ARB 170025, 2017 FINRA Discip. LEXIS 51, at \*2 (OHO Dec. 14, 2017) (“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. A respondent may also assert a bona fide inability to pay an award issued in connection with an industry dispute.”).

<sup>27</sup> Stips. ¶¶ 115, 116; Tr. 50 (he has not filed for bankruptcy, has not reached any kind of settlement with Wells Fargo, and has not paid anything toward satisfaction of the arbitration award). When asked whether he had attempted to file for bankruptcy, he said, “Not yet.” Tr. 50.

<sup>28</sup> Order Approving Proposed Rule Change Relating to FINRA Rule 9554 to Eliminate Explicitly the Inability-to-Pay Defense in the Expedited Proceedings Context, SEC Release No. 62211, 2010 SEC LEXIS 1800, at \*3 (June 2, 2010); *DiPietro*, 2016 SEC LEXIS 1036, at \*16, n.21 (“A claim of inability to pay is not a defense for awards involving a customer.”) (internal quotation marks omitted).

<sup>29</sup> *Gallagher*, 56 S.E.C. at 171.

securities industry participants may be at risk when dealing with that person.<sup>30</sup> Accordingly, FINRA is entitled to make a searching inquiry into a respondent's assertion of inability to pay.<sup>31</sup>

### **E. Respondent Has the Burden to Prove a Bona Fide Inability to Pay**

When a respondent asserts a bona fide inability to pay an arbitration award, the burden is on the respondent to prove his inability to pay.<sup>32</sup> The SEC has explained that “[b]ecause the scope of [a respondent’s] assets is peculiarly within [his] knowledge ... [the respondent] should properly bear the burden of adducing evidence with respect to those assets.”<sup>33</sup>

To establish a bona fide inability to pay, a respondent must prove that he was unable to pay the award or make any meaningful payment on it at any time since the award was issued. A respondent on notice of the obligation to pay an arbitration award cannot dissipate assets in the immediate aftermath of the arbitration proceeding, and thereby render himself unable to pay what he owes when he later receives a Notice of Suspension. He “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”—not just that at “some later time his assets were insufficient to pay the award.”<sup>34</sup>

The inability-to-pay 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.”<sup>35</sup> A respondent is expected to take active measures to pay an arbitration award.

Shimko complains that Wells Fargo refused an offer he made to it for less than full satisfaction, and suggests that he could not make a meaningful payment because Wells Fargo

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<sup>30</sup> As FINRA said in proposing to eliminate the inability-to-pay defense in customer disputes, “The ability to work in the securities industry carries with it, among other things, an obligation to comply with the federal securities laws, FINRA rules, and orders imposed by the disciplinary and arbitration processes. Allowing 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.” Proposed Rule Change Relating to FINRA Rule 9554 to Eliminate Explicitly the Inability-to-Pay Defense in the Expedited Proceedings Context, 75 Fed. Reg. 21686, SR-FINRA-2010-014 (Mar. 31, 2010), *adopted by* Order Approving Proposed Rule Change, SEC Release No. 62211, 2010 SEC LEXIS 1800 (June 2, 2010).

<sup>31</sup> *Robert Tretiak*, 56 S.E.C. 209, 220 (2003).

<sup>32</sup> *Gallagher*, 56 S.E.C. at 169.

<sup>33</sup> *Bruce M. Zipper*, 51 S.E.C. 928, 931 (1993).

<sup>34</sup> *Dep’t of Enforcement v. Tretiak*, No. C02980085, 2000 NASD Discip. LEXIS 35, at \*20 (OHO Mar. 10, 2000), *aff’d*, 2001 NASD Discip. LEXIS 1 (NAC Jan. 23, 2001), *aff’d*, 56 S.E.C 2009.

<sup>35</sup> *Dep’t of Enforcement v. Respondent*, OHO Redacted Decision ARB010001, at 11 (July 26, 2001) [finra.org/sites/default/files/OHODecision/p006655\\_0\\_0\\_pdf](http://finra.org/sites/default/files/OHODecision/p006655_0_0_pdf) (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 (NBCC Oct. 31, 1997)); *see also DiPietro*, 2016 SEC LEXIS 1036, at \*16 n.22 (citing *Dep’t of Enforcement v. Respondent*, OHO Redacted Decision ARB010001, at 11).

would not accept his offer.<sup>36</sup> He asked, “How is one supposed to make a payment when the other side doesn’t agree to anything?”<sup>37</sup>

The issue is whether a respondent had an *ability* to make a meaningful payment, not whether he has actually made a meaningful payment. A respondent may have the ability to make a meaningful payment even if the successful arbitration claimant refuses to accept anything less than full satisfaction. Wells Fargo’s refusal to accept less than full payment has no bearing on whether Shimko had at any time after the issuance of the award an *ability* to pay.

Thus, proof of a bona fide inability to pay involves proof of three critical elements:

1. An inability to pay *at any time* after the arbitration award was issued;
2. An inability to make *a meaningful payment* on the award, even if the entire award cannot be satisfied; and
3. An inability *to marshal any resources* to make the payment by redeploying or selling assets, decreasing other expenses, or borrowing the funds.

Notably, even serious financial distress is not enough to prove an inability to pay.<sup>38</sup> That it would be difficult or painful to pay an arbitration award is not the same as a bona fide inability to pay.

## **F. Respondent Failed to Prove His Defense**

### **1. Shimko Feared the Possibility of a Bad Outcome in Arbitration**

Wells Fargo filed its arbitration claim in January of 2018. Shimko had to know at that time that there was a possibility he would be ordered in arbitration to pay back the money his former firm had loaned him. He admits, “[Y]es, I owe Wells Fargo cash.”<sup>39</sup>

Shimko feared the possibility of a bad outcome in the arbitration proceeding. During this proceeding, he testified that a colleague who had been subpoenaed to appear at the arbitration hearing told him at the beginning of August that the hearing was scheduled to begin on September 10, 2019. This surprised him. He said that he had thought the hearing would not be until early February 2021.<sup>40</sup> He thought about “the consequences” of a possible “negative outcome” in the arbitration hearing, and he claimed, “that is when I really started losing my

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<sup>36</sup> Tr. 32, 184-85.

<sup>37</sup> Tr. 67, 184.

<sup>38</sup> *Regulatory Operations v. Gimblet*, No. ARB160009, 2016 FINRA Discip. LEXIS 45, at \*17 (OHO Aug. 22, 2016).

<sup>39</sup> Tr. 44.

<sup>40</sup> Tr. 29-30, 43-44, 66-67, 189. Shimko blamed his attorney for not telling him about the date set for the hearing. Tr. 44. “[T]his court case was coming up much faster than anticipated.” Tr. 44.



marbles.”<sup>41</sup> He said that “those couple months from August to October were very challenging....”<sup>42</sup>

Shimko said that from the point he learned in early August that the arbitration hearing was imminent, he “began developing symptoms of panic disorder.”<sup>43</sup> He said that he was later “confirmed” to have a panic disorder.<sup>44</sup> In October 2019, a month after the arbitration award was issued, he went on short-term disability leave from Merrill for this disorder. That leave has been converted to long-term disability leave.<sup>45</sup>

Shimko testified that, after he learned that the arbitration hearing was only six weeks away, his decision-making was affected by his panic disorder and anxiety. He said that the disorder caused him to do a lot of things that were financially risky and not helpful to his situation.<sup>46</sup> For example, from July through September 2019, he said he “really ramped up the risk” in his brokerage accounts.<sup>47</sup> “I think my nonqualified accounts were like 800 some odd thousand dollars before the options trading and then it went to 50 something thousand....”<sup>48</sup> He called these transactions “unfortunate investments.”<sup>49</sup> He said “in the matter of a couple of months due to some very bad and poor decision[-]making that was a lot to do about the issues that I had realized that this court case was coming up much faster than anticipated.”<sup>50</sup> He termed his investment losses as “[q]uite catastrophic.”<sup>51</sup>

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<sup>41</sup> Tr. 189.

<sup>42</sup> Tr. 46.

<sup>43</sup> Tr. 30. Shimko discussed his panic disorder as a critical component of his defense, as though it explained or excused his failure to pay the arbitration award. He blamed his conduct from July onwards on his disorder and panic attacks. While some of the records relating to his disorder were redacted by Enforcement out of privacy concerns (JX-65; JX-66), Shimko spoke freely about it. Tr. 30, 37, 68, 121, 188.

<sup>44</sup> Tr. 30; JX-65; JX-66. The redacted medical records do not provide the exact diagnosis.

<sup>45</sup> Stip. ¶ 16; JX-65; JX-66. Since going on disability, Shimko has not been making payments on his loans from Merrill. Tr. 135-36.

<sup>46</sup> Tr. 30, 188.

<sup>47</sup> Tr. 46, 187-88.

<sup>48</sup> Tr. 189.

<sup>49</sup> Tr. 46.

<sup>50</sup> Tr. 43-44.

<sup>51</sup> Tr. 46. Shimko claimed that he engaged in risky trading and lost approximately \$1.4 million in the securities market. Tr. 42-44. He portrayed his investments as unfortunate, and largely as a result of his panic disorder. Tr. 43-48; 188-90. He testified that before July or August 2019, his brokerage accounts had been more a mix of equities and other securities, but, after he learned the arbitration hearing was only six weeks away, he made more risky investments. Tr. 68, 74-75, 189-90.

Shimko’s testimony regarding his investments was not completely accurate. The Merrill brokerage statements he produced show a pattern of options trading that started long before July-August 2019. The March 2019 statement shows that Shimko repeatedly bought call options of a single company, Cleveland-Cliffs Inc. (“CLF”), starting at least as early as December 2018, and that he consistently lost money on the call options in the succeeding months. JX-75, at 3-8. Steadily through 2019, the options either expired or Shimko sold them for a minor profit or a loss. JX-

## 2. Shimko Did Not Want to Alter His Lifestyle

Shimko did not want to tighten his proverbial belt in order to pay the arbitration award entered against him. Despite the pendency of the arbitration proceeding and the obvious potential that he could be ordered to pay back the loan from Wells Fargo, he and his wife bought a new and more expensive house at the end of July 2019. They put a deposit on the house in January 2018, the same month Wells Fargo filed its arbitration claim.<sup>52</sup> Shimko indicated that he was under pressure, because his wife “wants a lot of things.”<sup>53</sup>

In October 2019, after the arbitration award was issued and he had an obligation to pay the award, Shimko prepaid the first mortgage on the new house for a year, until October 2020,<sup>54</sup> and prepaid the second mortgage on the house through April 2020.<sup>55</sup> These prepayments totaled approximately \$55,000.<sup>56</sup> As discussed below, he made other prepayments, as well. His purpose was to allay his anxiety.<sup>57</sup> He explained, “I ...ended up prepaying the mortgages because I didn’t want anything to happen, have to tell to my kids and wife sorry, the party is over, you know, I lost everything. We can’t live here any longer.”<sup>58</sup>

## 3. Shimko Claims to Have a Negative Net Worth

Shimko claims that he and his wife have a negative net worth and their monthly income does not cover their monthly expenses. He provided a financial statement summarizing his financial status as of May 24, 2020, which was his primary evidence in support of his inability-to-pay defense.<sup>59</sup> He calculated a negative net worth of almost (\$1.6 million), including the

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75. That trading generated a short-term capital loss in 2019 of (\$1,434,051). JX-75, at 176. Shimko traded almost nothing else but CLF options, and he added cash to his account in order to do it. Tr. 69-71; JX-133. Even after the arbitration award was issued, and Shimko knew he owed money to Wells Fargo, on September 26, 27, and 30, 2019, Shimko purchased more CLF options for \$9,464, exhausting the remaining value in the account that held the options. Tr. 77-78; JX-75, at 113-14. He did so even though he realized losses on CLF call options that same month of more than \$60,000. JX-75, at 115-16.

The pattern of buying CLF options and then losing money on them does not look merely risky and ill-advised; it looks plainly doomed—as a securities professional like Shimko reasonably should know. The repeated trading in CLF call options throughout 2019 cannot be explained as the impulsive product of a panic attack. It looks purposeful, although the purpose cannot be fathomed from this record. As discussed below, Shimko did not produce complete brokerage statements. The strange trading in CLF options and the lack of complete brokerage records make it difficult to find that Shimko has been fully honest about his securities holdings and trading.

<sup>52</sup> Stips. ¶¶ 63-67; JX-113; JX-114; Tr. 195.

<sup>53</sup> Tr. 189.

<sup>54</sup> Stip. ¶ 68; JX-64; JX-120; Tr. 120.

<sup>55</sup> Stip. ¶ 69.

<sup>56</sup> Stips. ¶¶ 68, 69; JX-63; Tr. 119-120.

<sup>57</sup> Tr. 120-21.

<sup>58</sup> Tr. 196-97.

<sup>59</sup> Tr. 34-48; JX-62.

roughly half-million dollars owed on the arbitration award. He did not include the money he owes Merrill in that calculation.<sup>60</sup> He estimates that he and his wife will have \$172,000 in income in 2020.<sup>61</sup> As discussed further below, his wife has interests in three businesses that were a source of substantial income in 2019. He claims that his wife has closed her businesses for now, and that the businesses have no assets that could be sold.<sup>62</sup> For a while, his wife worked as a part-time preschool teacher earning roughly \$10,000 a year, but she is no longer doing that.<sup>63</sup> He is on long-term disability from Merrill and brings in less money than before he went on disability.<sup>64</sup> Although he acknowledges that he owes money to Wells Fargo, Shimko said, “[T]here’s also a lot of outstanding debt as well...along with negative cash flow now that I am not working and, of course, [I] can’t support my family.”<sup>65</sup> Shimko summed up the situation: “I ran out of money guys.”<sup>66</sup>

#### **4. Shimko Failed to Provide Documents Necessary to Support his Claimed Negative Net Worth and Inability to Pay**

Shimko failed to provide documents necessary to support his claim that he has a negative net worth and that he has an inability to pay the arbitration award. After he filed his request for a hearing on the Notice of Suspension, he was provided a financial statement form to complete. The form requested specific information and documents necessary to support a defense of inability to pay.<sup>67</sup> Shimko was given five extensions of time to gather and produce the documents specified by the financial statement form.<sup>68</sup> He did not provide documents specifically requested by the form that are critical to accurately assessing his ability to pay the arbitration award. And he failed to provide them even after he was given more time to do it.<sup>69</sup>

##### **a. 2019 Income Tax Return**

The financial statement form required Shimko to produce federal and state income tax returns for the preceding two years.<sup>70</sup> The form made clear that income attributable to a spouse should be included in the report of financial condition if a couple files a joint federal tax return.<sup>71</sup>

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<sup>60</sup> JX-62; Tr. 141-42.

<sup>61</sup> JX-62, at 4.

<sup>62</sup> Tr. 42, 190-92.

<sup>63</sup> Tr. 41.

<sup>64</sup> Tr. 31, 37-38.

<sup>65</sup> Tr. 44.

<sup>66</sup> Tr. 45.

<sup>67</sup> JX-17.

<sup>68</sup> JX-18; JX-22.

<sup>69</sup> July 1 Order.

<sup>70</sup> JX-17, at 13.

<sup>71</sup> JX-17, at 10 n.4.

Shimko and his wife filed a joint federal tax return for the 2017 and 2018 tax years. He produced at least a portion of those returns. The partial 2018 return suggests that Shimko had substantial assets in 2018, and those assets cannot be fully traced from the records he produced in this proceeding.<sup>72</sup>

By the time of the hearing, the due date for filing 2019 federal income tax returns was less than three weeks away. To understand Shimko's financial condition in 2019, I directed him to produce his 2019 tax return a few days after the filing deadline and held the record open to receive it.<sup>73</sup> Shimko did not produce the couple's 2019 income tax return.

Shimko's failure to produce the couple's joint income tax return for 2019 makes it impossible to properly analyze and verify his financial condition in 2019. Shimko's estimates of income prepared for purposes of this proceeding are insufficiently reliable.

#### **b. Bank Statements and Financial Records of Wife's Businesses**

The financial statement form required Shimko to identify all assets he or his wife owned or in which either of them had a beneficial interest, directly or indirectly.<sup>74</sup> "[T]he SEC and FINRA have repeatedly looked for a full picture of financial resources available to the respondent to decide whether that respondent has a true inability to pay. Adjudicators have looked to a respondent's combined family income, including income and assets held by a spouse, as well as whether a respondent could borrow money from family members, 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."<sup>75</sup>

Shimko's wife is an indirect owner of 25% of two medical supply businesses, Landmark Medical LLC ("Landmark") and Decision One Health LLC ("Decision One"). She holds her interest in these businesses through a consulting firm called Zapico Consulting Group, Inc. ("Zapico Consulting") of which she owns 100%.<sup>76</sup>

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<sup>72</sup> JX-67; JX-68; Stips. ¶¶ 20, 21, 22. The amended return for 2018 refers to attached Merrill statements showing that Shimko engaged in securities transactions in two accounts that resulted in total proceeds, respectively, of \$1,956,008 and \$5,217,587 for the year. After an adjustment to the cost basis originally reported to the IRS, Shimko reported a net short-term capital gain of \$46,744. The income tax form said "See Stmt" for the details in each account of what was acquired and sold, and when. Shimko did not produce the Merrill statements that would have been attached to the income tax return and would have provided the details of the transactions. JX-68, at 8. When asked about what appeared to be \$7 million in securities transactions in 2018, Shimko said the brokerage accounts never had a balance that high. He said they had at one point just over \$2 million in value. Tr. 186-87. He produced no records that would corroborate his testimony about the balance in his brokerage accounts in 2018 or that would explain what happened to the \$7 million in proceeds from securities transactions in 2018.

<sup>73</sup> Tr. 180-82, 197-98; July 1 Order.

<sup>74</sup> JX-17, at 7.

<sup>75</sup> *Dep't of Enforcement v. Motherway*, No. ARB200006, 2020 FINRA Discip. LEXIS 20, at \*8 (OHO June 30, 2020) (internal quotations and citations omitted).

<sup>76</sup> Tr. 80-81, 83, 92-93.

These businesses were the source of substantial income for the couple in 2019. Shimko produced monthly bank statements for Zapico Consulting for February 1, 2019, through January 31, 2020.<sup>77</sup> They show that Zapico Consulting received a total of \$635,871 from Landmark and Decision One in just three months of 2019, from February through April.<sup>78</sup> Shimko vaguely claimed that his wife netted less than that after expenses,<sup>79</sup> but he produced no documentation to corroborate his testimony.

The financial statement required Shimko to identify all brokerage and bank accounts that he or his wife owned or controlled, or in which he or his wife had a beneficial interest. He also was required to produce the monthly statements for all such financial accounts for the past 12 months.<sup>80</sup> He testified that his wife had access to the bank account for Landmark.<sup>81</sup> Although Shimko produced bank statements for Zapico Consulting, he produced no bank statements or other financial records for Landmark or Decision One. At the hearing, I requested those statements and financial records,<sup>82</sup> and Shimko appeared willing to provide them.<sup>83</sup> However, Shimko never produced the documents.

The missing information is critical to understanding the couple's financial condition. This is particularly so because Shimko claims that in October 2019, only a month after the arbitration award was issued, and about the time Shimko left work to go on disability leave, his wife shut down or dissolved her businesses.<sup>84</sup> He claims she went from earning several hundred thousand dollars a year to working as a part-time preschool teacher for \$10,000 a year.<sup>85</sup> When asked to explain why his wife voluntarily ceased income-generating activity at the same time he went on disability with a reduced income, Shimko claimed it was because the medical companies had employed a billing company that made too many mistakes.<sup>86</sup>

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<sup>77</sup> JX-73.

<sup>78</sup> JX-73, at 1, 5, 9.

<sup>79</sup> Tr. 83-87. Although the bank records show that Shimko's wife received \$635,871 from the medical supply businesses in just three months of 2019, he stipulated that her income from her businesses that year was less. Stip. ¶ 25 (\$457,763.12). He testified that the deposits in his wife's bank account were different from the "K-1 distributions" that came out of her business bank account and into the couple's joint bank account as income. Tr. 168-69. But he produced no Schedule K-1 forms for the businesses or any other documents to corroborate his testimony.

<sup>80</sup> JX-17, at 9.

<sup>81</sup> Tr. 90.

<sup>82</sup> Tr. 177-79.

<sup>83</sup> Tr. 177-78.

<sup>84</sup> Shimko provided a record from the Florida Division of Corporations website for Landmark that showed that Landmark was incorporated in May 2018 and voluntarily dissolved October 29, 2019. JX-131; Tr. 94-95. He provided no documentation of the dissolution of Decision One. Zapico Consulting still exists, but he claims its operations have been suspended. Tr. 192.

<sup>85</sup> Tr. 41-42, 143-44.

<sup>86</sup> Tr. 78-79, 96-97, 190-92.

Shimko's explanation for his wife shutting down her businesses is not credible. It would not be rational for her to shut down income-producing businesses just as Shimko went on disability and reduced his income. As discussed below, they also had just a few months prior taken on almost \$735,000 in mortgage debt for a new house, thereby increasing their need for income.

Shimko was also asked whether his wife's businesses had assets that could be sold or used to obtain a loan. He said no.<sup>87</sup> He provided no documentation to show the value of the businesses. It is difficult to believe that businesses capable of generating more than \$600,000 in income in three months (February, March, and April 2019) had no value six months later when the arbitration award was issued.

Shimko testified that his wife's consulting firm is currently dormant, but it could be revived in the future.<sup>88</sup> It appears that she could generate income but has chosen to suspend operations.

A substantial source of income for Shimko and his wife apparently has dried up, at least temporarily, but the facts and circumstances are murky. The missing bank statements and financial records for his wife's businesses make it impossible to evaluate Shimko's financial condition accurately in the period after the arbitration award.<sup>89</sup>

### **c. Loan Documentation**

The financial statement form required Shimko to produce any financial statement prepared by him or on his behalf during the last two years, such as a financial statement that is provided to a bank to secure a loan.<sup>90</sup> On July 30, 2019, approximately six weeks before the arbitration hearing, Shimko and his wife closed on their new house. In connection with that purchase they secured a first mortgage of approximately \$484,000 and a second mortgage of \$250,000, for a total of almost \$735,000 in mortgage debt.<sup>91</sup> They had to have provided the banks that lent them the money evidence of their financial condition and ability to repay the loans. I held the record open and set a deadline for Shimko to produce the financial statements he and his wife provided the banks.<sup>92</sup> He did not produce them.

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<sup>87</sup> Tr. 42, 92-93, 97-100.

<sup>88</sup> Tr. 192.

<sup>89</sup> On Shimko's joint 2018 amended income tax form, he and his wife did not describe her as a business owner or consultant. Her occupation was listed as homemaker. JX-68, at 2.

<sup>90</sup> JX-17, at 13.

<sup>91</sup> JX-109; JX-113; JX-115.

<sup>92</sup> July 1 Order.

A month after the arbitration award was issued, Shimko and his wife also obtained two loans totaling more than \$100,000.<sup>93</sup> He was required to produce the financial statements the couple used to obtain those loans, and I held the record open for him to do that.<sup>94</sup> He did not produce them.

The failure to produce the loan documents leads me to reject Shimko's inability-to-pay defense. Those loan documents would provide a more accurate and objective picture of his financial condition around the time of the arbitration award than his rough estimates of his assets and liabilities that are not supported by reliable financial documentation.

## **5. Shimko and His Wife Had Substantial Income and Assets**

Separately, I find that Shimko and his wife had substantial income and assets at the time the arbitration award was issued. They had resources to draw upon to pay the award or, at least, to make a meaningful payment toward satisfaction of it.

### **a. Brokerage Portfolio**

When Shimko left Wells Fargo and joined Merrill, he received two forgivable loans totaling almost \$1.6 million dollars. On June 29, 2017, the same day that Shimko officially left Wells Fargo, Merrill loaned him \$1,209,180 at an interest rate of 2.25% to be repaid in monthly payments of \$12,697.54 until 2026.<sup>95</sup> In March 2018, Merrill loaned Shimko another \$394,999 at an interest rate of 2.65% to be repaid monthly in installments of \$4,570.64 until 2026.<sup>96</sup> Payments on the loans were deducted from Respondent's non-salary compensation until he left work and went on disability leave in October 2019.<sup>97</sup> Depending on the outcome of this proceeding regarding his potential suspension from the securities industry, the outstanding amount still owing on the loans from Merrill may become due.<sup>98</sup>

To explain what happened to the funds he borrowed from Merrill, Shimko said that he invested in the securities market and lost the majority of the money, around \$1.4 million.<sup>99</sup> He produced brokerage account records showing that his portfolio in four accounts at Merrill had a value of roughly \$800,000 on February 28, 2019, but less than \$60,000 at the end of September

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<sup>93</sup> JX-99; JX-101.

<sup>94</sup> July 1 Order.

<sup>95</sup> Stip. ¶ 56; JX-102; JX-103.

<sup>96</sup> Stip. ¶ 57; JX-104; JX-105.

<sup>97</sup> Tr. 135-39.

<sup>98</sup> Tr. 37.

<sup>99</sup> Tr. 42-43, 69.

2019.<sup>100</sup> He did not produce documents that would show the entire history of his handling of the money he received from Merrill.

At the end of July 2019, only six weeks before the arbitration hearing was scheduled to begin, Shimko's brokerage portfolio in the four Merrill accounts contained assets valued at \$611,285.<sup>101</sup> Nearly \$320,000 of it was in "Cash/Money Accounts."<sup>102</sup> By the end of August 2019, the portfolio had diminished in value, but it still was substantial. On August 30, 2019, Shimko's portfolio retained a net value of \$444,275.<sup>103</sup>

According to the summary of the four Merrill brokerage accounts that appears in connection with Shimko's primary account (an account ending in #1338), during August 2019 the accounts received \$528,002 in electronic transfers. Shimko transferred \$252,002 in electronic transfer debits out of the brokerage accounts.<sup>104</sup> Shimko failed to provide the complete brokerage statements, as discussed below. The detail on transactions in account #1338 was consistently missing. As a result, it is not possible to reliably track the flow of cash in and out of Shimko's accounts.

At any rate, the incomplete brokerage statement for August 2019 shows that Shimko was able to access and direct large amounts of cash just a month before the arbitration hearing. Up until the end of August, Shimko's accounts had substantial cash flow. From January through August 2019, his accounts received \$1,071,295 in electronic transfers. During the same period, he transferred out of the brokerage accounts a total of \$472,465 by electronic transfer.<sup>105</sup>

#### **b. Income**

In addition to the large amount of money Shimko received in loans from Merrill in 2017 and 2018, Shimko and his wife had substantial income in those years. In 2017, the couple reported adjusted gross income on their joint tax return of \$228,692,<sup>106</sup> and, in 2018, they reported adjusted gross income of \$417,678.<sup>107</sup>

In 2019, the year the arbitration award was issued, the couple's income was even higher. Shimko provided a pay stub from Merrill that showed he earned \$390,948 in 2019.<sup>108</sup> He stipulated that his wife received a total of \$457,763 in 2019 from the two medical supply

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<sup>100</sup> JX-77, at 1, 31.

<sup>101</sup> JX-77, at 19.

<sup>102</sup> JX-77, at 21.

<sup>103</sup> JX-77, at 25, 31.

<sup>104</sup> JX-77, at 27.

<sup>105</sup> JX-77, at 33.

<sup>106</sup> Stip. ¶ 20; JX-67.

<sup>107</sup> Stip. ¶ 21; JX-68.

<sup>108</sup> Stip. ¶ 24; JX-69.



businesses of which she was an indirect 25% owner.<sup>109</sup> Shimko said that the money his wife received from the medical supply businesses was distributed to her consulting firm, which was a “past-through” entity.<sup>110</sup> The consulting firm’s bank statements, as noted above, show that it received approximately \$635,000 from the two medical supply businesses in the three months from February 2019 through April 2019.<sup>111</sup> Shimko vaguely suggested that business expenses had to be taken into account when ascertaining his wife’s business income.<sup>112</sup> He had estimated on his financial statement a lower amount of income (around \$400,000) from his wife’s consulting company in 2019.<sup>113</sup> He produced no records from his wife’s businesses that would permit analysis of their business expenses. Shimko estimated in May 2020 that he and his wife had a total joint income in 2019 of \$800,000.<sup>114</sup>

Although Shimko was ordered to produce his 2019 income tax return after the filing deadline, he did not. His estimate of income for purposes of this proceeding is insufficient to establish his financial condition.

Even using Shimko’s estimate of his and his wife’s gross income in 2019, however—the estimate of \$800,000—it is apparent that the couple’s 2019 income was sufficient to pay, or make a meaningful payment on, the arbitration award. The SEC has affirmed FINRA’s rejection of an inability-to-pay defense where the respondent had sufficient gross income in one year to pay an award and yet did not use any of that income to pay it.<sup>115</sup>

### **c. Cash from Sale of Previous Residence**

About six weeks before the arbitration award was issued, on July 30, 2019, Shimko and his wife sold their home for \$610,000, netting them a profit of \$203,640.<sup>116</sup> If they had stayed in the house, it is apparent they would have had substantial equity against which they could have borrowed to pay the arbitration award.

Even though the couple simultaneously bought another, more expensive home, they still retained enough money from the sale of the old house to make a meaningful payment on the award that was issued six weeks later. They financed most of the cost of the new home and retained roughly \$140,000 of the profit on the old home. The purchase price of the new house was \$934,414. Shimko and his wife took out a first mortgage for roughly \$484,000 and a second mortgage for \$250,000. They had previously paid a deposit in January 2018 of \$158,000. The

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<sup>109</sup> Stip. ¶ 25; JX-73.

<sup>110</sup> Tr. 82, 86-87.

<sup>111</sup> JX-73, at 1, 5, 9.

<sup>112</sup> Tr. 86-87.

<sup>113</sup> JX- 62, at 4.

<sup>114</sup> Tr. 142-43; JX-62.

<sup>115</sup> *DiPietro*, 2016 SEC LEXIS 1036, at \*18.

<sup>116</sup> Stips. ¶¶ 61, 62, 63; JX-114.

settlement document summarizing closing costs for the purchase of the new house shows that the couple only had to pay \$59,117.62 cash at closing.<sup>117</sup> Shimko used none of the profit from the sale of his old house toward satisfaction of the arbitration award.

#### **d. Value of Current Residence**

As just noted, Shimko and his wife purchased their new home on July 30, 2019, for a sale price of \$934,414 and roughly \$60,000 in closing costs.<sup>118</sup> They invested more money in the new house shortly after the purchase. For example, they put in a home entertainment system that cost approximately \$22,000,<sup>119</sup> bought a couch for \$5,000,<sup>120</sup> spent \$11,000 on closet design and installation,<sup>121</sup> spent more than \$11,000 on window blinds,<sup>122</sup> and bought a poker table for \$2,300.<sup>123</sup> At the hearing, Shimko estimated the value of the couple's household furniture and goods at \$65,000.<sup>124</sup> The estimate seems low considering that these few new purchases total more than \$50,000. Zillow, a real estate website, estimates that the house had a higher value in spring 2020 than when they purchased it. Zillow estimated the house had a value as of May 29, 2020, of approximately \$970,108.<sup>125</sup> Shimko has made no effort to use the equity on his new home to borrow funds to pay the arbitration award. As discussed below, he believes his credit rating is so low that no one would lend him money.

#### **e. Vehicles**

In October 2019, after the arbitration award was issued, Shimko and his wife leased two new cars, one in his wife's name and the other in the name of her consulting firm. They traded in their two old cars for \$39,500.<sup>126</sup>

#### **f. Cash in Bank Accounts on December 31, 2019**

After Shimko's motion to vacate the arbitration award was denied on December 27, 2019, he was obligated to pay the award. On December 31, 2019, he and his wife had cash in

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<sup>117</sup> Stips. ¶¶ 64, 65, 66, 67; JX-113, at 3; JX-115; JX-116; Tr. 55-56.

<sup>118</sup> JX-113, at 1.

<sup>119</sup> Tr. 64-66.

<sup>120</sup> Tr. 61.

<sup>121</sup> Tr. 66.

<sup>122</sup> Tr. 66.

<sup>123</sup> Tr. 61, 67.

<sup>124</sup> JX-91, at 2-3; Tr. 60-61.

<sup>125</sup> JX-123. Shimko disputed the accuracy of Zillow reports. Tr. 57-58. While Zillow is only an estimate of value, it is an estimate prepared on an objective basis, without the purpose of supporting Shimko's inability-to-pay defense, and Shimko failed to offer a reliable alternate valuation.

<sup>126</sup> Tr. 128-29.

their bank accounts totaling approximately \$80,000. Shimko did not apply any of that money toward payment of the award.<sup>127</sup>

## **6. Shimko Allocated Assets to Other Purposes Instead of Paying the Arbitration Award**

Shimko received notice on September 17, 2019, of his obligation to pay the arbitration award within thirty days. Despite receiving that notice, he channeled funds elsewhere, making a variety of discretionary payments that he did not have to make. Choosing to allocate funds to discretionary expenses instead of paying down the balance of an arbitration award is inconsistent with my finding an inability to pay the award.<sup>128</sup>

- On September 25, 2019, a few days after the arbitration award was issued, Shimko completely paid off a line of credit he had from Merrill in connection with his brokerage accounts. He made the payment of \$307,636.24 from funds in one of his Merrill Lynch brokerage accounts.<sup>129</sup> He had used that line of credit in January 2018 for the deposit on his new house.<sup>130</sup> But he did not use the line of credit to make a payment on the arbitration award.

Shimko asserted that he could not have used the credit line to pay the arbitration award because he was required to keep value in the account as collateral for the credit line. By late September 2019, he had enough funds in the Merrill accounts pledged as collateral to pay off the credit line, but not a lot more. He testified that he did not want to keep paying interest on the credit line, so he paid it off.<sup>131</sup>

As discussed below, Shimko provided incomplete brokerage account statements, so it is not possible to assess the validity of his testimony regarding the credit line and whether he had other options rather than paying off the credit line. As noted above, in August 2019, the month before the arbitration proceeding, Shimko received by electronic transfer \$528,002 in cash in his brokerage accounts.<sup>132</sup> Roughly half of that was transferred out by the end of the month, but the incomplete nature of the records makes it impossible to ascertain precisely what happened to the money.

- On September 26, 27, and 30, 2019, Shimko purchased (in his Merrill brokerage account ending in #1j60) additional CLF call options at a total cost of

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<sup>127</sup> Tr. 51-55; JX-72; JX-73; JX-74.

<sup>128</sup> *DiPietro*, 2016 SEC LEXIS 1036, at \*19.

<sup>129</sup> JX-64; JX-75; JX-78; JX-133.

<sup>130</sup> Tr. 194-95.

<sup>131</sup> Tr. 70-74.

<sup>132</sup> JX-77, at 27.

\$9,464.80.<sup>133</sup> This was a discretionary purchase. Instead of buying CLF call options, Shimko could have contributed the money toward payment of the arbitration award. As discussed above in footnote 51, Shimko had already lost a substantial sum on purchases of CLF call options. But, for some unknown reason, he thought it better to continue losing money in CLF options than to contribute the money toward paying the arbitration award.

- On October 7, 2019, Shimko and his wife leased two new cars, one in his wife's name and one in the name of her consulting firm. They sold their old cars to the dealer for \$39,500.<sup>134</sup> Shimko testified that his wife drives both cars and that he rarely drives at all.<sup>135</sup> Instead of buying two new cars, he could have sold one of the old cars and applied the money toward satisfaction of the arbitration award.
- On October 9, 2019, Shimko made prepayments on the second mortgage on the new house to cover the mortgage through April 2020. The prepayments totaled approximately \$9,481.02.<sup>136</sup> Those monies could have been applied toward satisfaction of the arbitration award.
- On October 11 and 16, 2019, Shimko made prepayments on the first mortgage on the new house to cover the mortgage until October 1, 2020. The prepayments totaled approximately \$45,653.59.<sup>137</sup> Coupled with the prepayments on the second mortgage, Shimko prepaid a total of approximately \$55,000 on his mortgages for the new house. Those monies could have been applied toward satisfaction of the arbitration award.
- In January 2020, Shimko made prepayments on the vehicle leases for the two new cars the couple bought in October 2019. The prepayments totaled \$10,550.<sup>138</sup> Those monies could have been applied toward satisfaction of the arbitration award.
- From October 2019 through May 2020, Shimko and his wife increased their credit card debt until it totaled \$111,021.<sup>139</sup> With various credit cards, they paid for a number of discretionary purchases, including some of the home improvements

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<sup>133</sup> JX-75, at 113-14.

<sup>134</sup> JX-64; JX-106; JX-107.

<sup>135</sup> Tr. 129-30.

<sup>136</sup> Stip. ¶ 69; JX-121, at 4.

<sup>137</sup> Stip. ¶ 68; JX-120.

<sup>138</sup> JX-64; JX-73; Stip. ¶ 74.

<sup>139</sup> Tr. 130; JX-63, at 6.

mentioned above,<sup>140</sup> Botox procedures,<sup>141</sup> spa and nail treatments,<sup>142</sup> dance/cheer team member fees for a daughter,<sup>143</sup> a one-day trip to New Jersey and back to Florida for the purpose of seeing a football game,<sup>144</sup> and two out-of-town trips for dance/cheer competitions, where they spent money on hotels, food, and flights.<sup>145</sup> Shimko could have cut back on these expenses and applied the funds toward payment of the arbitration award.

- At some point, exactly when is not clear, Shimko also prepaid his Home Owners Association fees on the new house through November 2020.<sup>146</sup>

The SEC has affirmed FINRA’s rejection of an inability-to-pay defense in similar circumstances, where a respondent had made extra payments on his home mortgage to “reduce the principal,” along with other discretionary payments.<sup>147</sup> After becoming liable to pay an arbitration award, a respondent cannot choose to allocate resources instead for discretionary expenditures.

## **7. Shimko Could Have Borrowed Money to Pay the Arbitration Award**

An inability-to-pay defense may be rejected if it appears that a respondent could have borrowed funds to pay the arbitration award but failed to do so.<sup>148</sup> Here, Shimko argues that his credit is too poor to obtain a loan. He provided a credit rating report to support that claim. The report says his credit rating was 620 and “needs work.”<sup>149</sup> The credit report is dated April 8, 2020.<sup>150</sup> The credit report only represents a snapshot at the time it was issued, and that snapshot was taken after Shimko and his wife ran up more than \$100,000 in credit card debt. It does not demonstrate that Shimko’s credit was poor throughout the period since the issuance of the arbitration award.

In fact, to the contrary, Shimko had good credit at the time of the arbitration award. Less than two months before the award was issued, he borrowed approximately \$735,000 to finance

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<sup>140</sup> JX-82; JX-133.

<sup>141</sup> Tr. 131-32.

<sup>142</sup> Tr. 132.

<sup>143</sup> Tr. 132.

<sup>144</sup> Tr. 132-33.

<sup>145</sup> Tr. 133-34; JX-83.

<sup>146</sup> JX-63. The numbers on Shimko’s handwritten calculations of various prepayments do not correspond with the documentary evidence, because he used figures based on the date he did the calculations and not the amounts of the original prepayments. Tr. 119-20.

<sup>147</sup> *DiPietro*, 2016 SEC LEXIS 1036, at \*19.

<sup>148</sup> *Id.* at \*16, n.22.

<sup>149</sup> JX-70, at 1.

<sup>150</sup> JX-70, at 1.

his new house.<sup>151</sup> In the month after the arbitration award was issued, he borrowed more than \$100,000.<sup>152</sup> He testified that at some unspecified time his credit score was 824, but when he “ran my credit for my home, it was 709.”<sup>153</sup>

Despite the lower credit rating he provided in May 2020, Shimko has not shown that he is unable to obtain a line of credit or a loan using the equity in his new house. He 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. Shimko claims that he knew no one would give him a line of credit or a loan using his equity in his house.<sup>154</sup> His inaction shows an intention to avoid paying the award, not a bona fide inability to pay.<sup>155</sup>

## **8. Shimko Lacked Credibility, Because He Presented Incomplete Brokerage Statements**

Shimko lacked credibility, because he presented incomplete evidence in a manner designed to conceal information. Shimko received monthly brokerage account statements from Merrill. Each statement ran from one through 20 to 40 pages and covered activity in four accounts he held at Merrill. Instead of producing the full statements as they came from Merrill—which would have been easy, and which was the way that Enforcement requested that he produce the brokerage statements—Shimko “went into each individual account” and sent an individual PDF to Enforcement.<sup>156</sup> At first glance, it appeared that he had disclosed complete information with respect to each of the accounts, because there is an exhibit identified with each account.

- JX-75 contains monthly account information for the account number ending #1j60 (CMA). The monthly statements cover from March 1, 2019, through March 31, 2020.
- JX-76 contains monthly information for the account number ending #2559 (Retirement) from March 1, 2019, through February 28, 2020.
- JX-77 contains a monthly summary of portfolio activity and value for all four accounts. Because the account number ending #1338 (CMA) was designated the Primary Account held by Shimko, the summary pages are identified by that account number. This collection of monthly summaries covers from March 1, 2019, through February 28, 2020.

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<sup>151</sup> Stips. ¶¶ 64, 65, 66, 67.

<sup>152</sup> JX-98; JX-99 (\$40,000 loan from LendingClub, dated October 8, 2019); JX-100; JX-101 (\$75,263.55 loan from LightStream, dated October 7, 2019).

<sup>153</sup> Tr. 59.

<sup>154</sup> Tr. 58-60.

<sup>155</sup> *Gimblet*, 2016 FINRA Discip. LEXIS 45, at \*18.

<sup>156</sup> Tr. 154-65.

- JX-78 contains monthly information for the account number ending #1678 (LMA) for March 1, 2019, through May 29, 2020. That account is a loan management account that kept track of Shimko’s borrowings and repayments on the line of credit he had with Merrill’s affiliate Bank of America, N.A.<sup>157</sup> It was collateralized by two pledged collateral accounts, #1j60 and #1338, the two Merrill CMA accounts.<sup>158</sup>

Upon more study, it is evident from the pagination of the monthly statements that Shimko separated and reorganized them to conceal information. Merrill provided a single monthly statement that aggregated information regarding the activity and value in all four accounts. Merrill’s statements first contain a summary snapshot of the portfolio at the beginning of the month and then at the end of the month. Then the Merrill statements provide transaction detail for the month for each of the four accounts in separate “chapters.” The summary indicates the page on which each “chapter” starts. To explain, each page of a given monthly statement is marked in the lower right-hand corner with the number of the particular page, but it is also marked with the total number of pages in the statement, *i.e.*, “6 of 46.”

JX-77, which is labeled with the number of Shimko’s primary account, #1338, appears to contain for almost every month the first five pages of the summary report on all four Merrill accounts. In most instances, however, JX-77 contains *only* the first five pages of the statement sent by Merrill. It contains no later specific detail regarding activity in account #1338. Twice, for the December 2019 and February 2020 statements, Shimko produced the detail of account activity for account #1338, but not the first five pages with the summary of information for all the accounts in the aggregate. And for June 2019, he produced no pages relating to account #1338, neither summary nor detail.<sup>159</sup> Only once did he produce a complete monthly statement, albeit in scattered pieces, the statement for January 2020.<sup>160</sup>

One can restore the combined monthly statements to their original order, as they came from Merrill. When one does, it is evident that the pages related to transaction activity in account #1338 are consistently missing. The summary pages indicate that the detail for account #1338 usually starts on one of the missing pages. For example, the March 2019 summary indicates that the detail for account #1338 starts on page 26 of the Merrill statement; however, page 26 is the start of the missing pages.<sup>161</sup> Similarly, the August 2019 summary indicates that the detail for account #1338 starts on page 31, but the missing pages start on page 31.<sup>162</sup> In fact, the detail for

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<sup>157</sup> JX-78, at 1.

<sup>158</sup> *E.g.*, JX-78, at 27 (Merrill brokerage statement, from June 29, 2019, to July 31, 2019).

<sup>159</sup> JX-77.

<sup>160</sup> JX-75, at 178-80; JX-76, at 41-44; JX-77, at 67-83; and JX-78, at 61-66.

<sup>161</sup> JX-77, at 2.

<sup>162</sup> JX-77, at 26.

account #1338 is missing from the March 2019 through November 2019 statements, and the summary is missing from the December 2019 statement.<sup>163</sup>

In the March 2020 statement, for the first time, account #1j60 is listed as the primary account, and the summary report covers just three accounts (#1j60, #2559, and #1678). Account #1338 is not mentioned. It had zero value at the end of February 2020.

In the April and May 2020 statements, all the summary information in the first five pages is missing, along with any transaction detail for accounts #1j60 and #2559. The only information provided is related to the credit line, which shows pledged collateral of two cents.<sup>164</sup> The pledged collateral accounts continue to be listed as accounts #1j60 and #1338.<sup>165</sup>

The brokerage statements are incomplete in ways that cast doubt on Shimko's candor in describing his financial condition. The gaps appear to have been systematic, not mere inadvertent lapses. In his testimony regarding the missing pages from the brokerage statements, Shimko insisted that he had sent Enforcement everything, and if "a couple pages" were missing they might have contained some meaningless "financial language."<sup>166</sup> Shimko's testimony regarding the missing pages cannot be credited. The incomplete brokerage statements raise the possibility that he "has chosen not to disclose certain assets to bolster his defense of an inability to pay."<sup>167</sup>

The possibility of missing assets is heightened when the incomplete brokerage statements are considered along with the incomplete 2018 tax return, and Shimko's failure to produce the 2019 income tax return, his wife's business records, and the financial statements used to obtain \$735,000 in mortgage loans and more than \$100,000 in installment loans.

It is impossible to know what the missing documents would show or why Shimko failed to produce them. But without them, Shimko's true financial position cannot be determined. Because Shimko bears the burden of proof, his failure to provide complete and reliable evidence of his inability to pay is fatal to his defense.<sup>168</sup>

### **III. Conclusion and Order**

Respondent Joseph M. Shimko, Jr., did not pay the arbitration award entered on September 17, 2019, and he failed to prove that he was unable to pay it—or make a meaningful payment on it—at any time after issuance of the award. Allowing Shimko to remain in the securities industry without paying the arbitration award would undermine the arbitration process

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<sup>163</sup> JX-77.

<sup>164</sup> JX-78, at 79, 85.

<sup>165</sup> JX-78, at 80, 86.

<sup>166</sup> Tr. 163-64.

<sup>167</sup> *Gimblet*, 2016 FINRA Discip. LEXIS 45, at \*17.

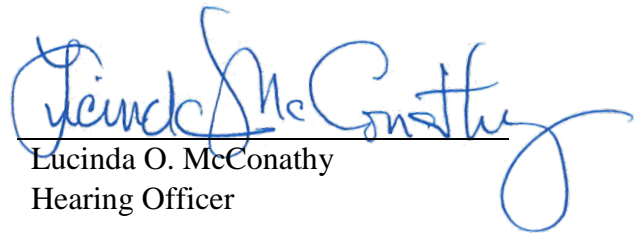
<sup>168</sup> *Id.*



and be unfair to the arbitration claimant to which he owes the money.<sup>169</sup> “Conditionally suspending [Shimko] from association with FINRA members gives him an incentive to pay the [a]ward. And inducing him to pay the award through suspension of his [FINRA] membership furthers the public interest and the protection of investors.”<sup>170</sup>

The previously noticed suspension from associating with any FINRA member in any capacity will become effective as of the date of this decision. The suspension will remain in effect unless and until Shimko produces to FINRA sufficient documentary evidence to show one of the following: (i) the arbitration award has been paid in full, including the attorneys’ fees he was ordered to pay; (ii) Respondent and his former member firm have agreed to settle the matter (and he is in compliance with the settlement terms); or (iii) Respondent has a petition pending in a United States Bankruptcy Court, or the debt has been discharged by a United States Bankruptcy Court.

Shimko is also required to pay the hearing costs of \$2,710.56, which include an administrative fee of \$750 and the hearing transcript cost of \$1,960.56. The costs are due and payable immediately upon the issuance of this decision.

  
Lucinda O. McConathy  
Hearing Officer

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<sup>169</sup> *DiPietro*, 2016 SEC LEXIS 1036, at \*23-24.

<sup>170</sup> *Michael David Schwartz*, Exchange Act Release No. 81784, 2017 SEC LEXIS 3111, at \*18 (Sept. 29, 2017) (internal quotation marks omitted) (quoting *Gallagher*, 56 S.E.C. at 171.).