

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

LESLIE GEORGE MARKUS, JR.
(CRD No. 2688964),

Respondent.

Expedited Proceeding

No. ARB210008

STAR No. 20210709929

Hearing Officer–DDM

EXPEDITED DECISION

August 17, 2021

Respondent failed to pay an arbitration award and failed to prove that he has a bona fide inability to pay the award. Respondent is suspended from associating with any FINRA member firm in any capacity.

Appearances

For the Complainant: Michael Manning, Esq., and Loyd Gattis, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Leslie George Markus, Jr., pro se

DECISION

I. Introduction

Respondent Leslie George Markus, Jr. failed to pay a FINRA arbitration award he owes to FINRA member firm, Ameriprise Financial Services, LLC (“Ameriprise”). As a result, FINRA sent Markus a Notice of Suspension pursuant to FINRA Rule 9554, notifying him that FINRA would suspend him from associating with any FINRA member firm unless he paid the award or asserted a valid defense for nonpayment. Markus stayed the suspension by timely filing a request for a hearing and asserting an inability-to-pay defense.

Markus failed to prove his defense, however, because he failed to show that he could not have made a meaningful payment toward the award. In fact, on the day that FINRA issued its notice to suspend him for failing to pay the award, Markus held in his bank account an amount that constituted almost 40 percent of the amount of the award. Markus is therefore suspended from associating with any FINRA member firm in any capacity.

II. Findings of Fact and Conclusions of Law

A. Background

Markus currently works as an investment advisor representative registered with the Commonwealth of Pennsylvania.¹ He primarily sells annuities and life insurance.² He is not currently registered with a FINRA member firm.³

From October 1995 to September 2018, Markus was registered with FINRA.⁴ He worked for eight different FINRA member firms over that time.⁵ This matter arises from an arbitration between Markus and one of those eight FINRA member firms, Ameriprise, which sought to enforce the terms of a settlement agreement relating to unpaid promissory notes.⁶ On February 11, 2021, a FINRA arbitration panel ruled that Markus must pay Ameriprise slightly more than \$165,000, plus interest (“the Award”).⁷ On the day after the arbitration panel’s ruling, FINRA notified Markus of the Award and told him that if he did not pay it within 30 days, FINRA could suspend his registration.⁸

Markus did not satisfy the Award, enter into a fully executed, written settlement agreement to pay the Award, file for bankruptcy protection, or timely file a motion to vacate the Award.⁹ As a result, FINRA served Markus with a Notice of Suspension notifying him that his registration would be suspended for failing to pay the Award.¹⁰ The Notice of Suspension also stated that Markus could request a hearing, which would stay the effective date of the suspension.¹¹

Markus timely filed a request for a hearing and claimed a bona fide inability to pay the Award.¹² He participated in a hearing held by videoconference.

¹ Hearing Transcript (“Tr.”) 82; Joint Exhibit (“JX-”) 1, at 2.

² Tr. 82.

³ Tr. 82; JX-1, at 1-2.

⁴ JX-1, at 2.

⁵ JX-1, at 2.

⁶ JX-2, at 1-2.

⁷ JX-2, at 2; Stipulations (“Stip.”) ¶¶ 2-4.

⁸ Stip. ¶¶ 6-9; JX-3; JX-4.

⁹ Stip. ¶¶ 16-17.

¹⁰ Stip. ¶¶ 10-12; JX-6. FINRA has jurisdiction over Markus for this proceeding because it was instituted within two years of the Award. *See* Article V, Section 4(b) of FINRA’s By-Laws.

¹¹ JX-6, at 1.

¹² Stip. ¶ 15.

B. Inability-to-Pay Standard

FINRA Rule 9554 provides a procedural mechanism for FINRA to address unpaid arbitration awards on an expedited basis. The rule authorizes FINRA to start an expedited proceeding by issuing a written notice that specifies the grounds for, and the effective date of, the suspension of an individual who has not satisfied an arbitration award. The notice also advises the respondent of his right to file a written request for a hearing.

A respondent may assert certain limited defenses for failure to pay an award in an expedited proceeding under FINRA Rule 9554. These include (1) the respondent has paid the award in full; (2) the parties have agreed to settle, and the respondent is not in default of the terms of the settlement agreement; (3) the award has been vacated by a court; (4) a motion to vacate or modify the award is pending in a court of competent jurisdiction; and (5) the respondent has a bankruptcy petition pending in U.S. Bankruptcy Court, or a U.S. Bankruptcy Court has discharged the award.¹³ In an arbitration not involving public customers, a respondent may also assert a bona fide inability to pay the arbitration award.¹⁴

As the respondent, Markus bears the burden of establishing a bona fide inability to pay.¹⁵ The SEC has stated 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.”¹⁶ FINRA also has a right to make a searching inquiry into a respondent’s assertion of inability to pay.¹⁷

To establish an inability-to-pay defense, Markus must show more than a current lack of funds on hand to pay the Award in full. 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.”¹⁸ Merely showing serious financial distress or that it would be hard or painful to pay an arbitration award does not establish the defense.¹⁹ Instead, a respondent must show that at no time after the award became due was

¹³ FINRA By-Laws, Art. VI, Sec. 3(b); NASD Notice to Members 00-55, at 2 (Aug. 2000), <http://www.finra.org/rules-guidance/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.

¹⁴ *William J. Gallagher*, Exchange Act Release No. 47501, 2003 SEC LEXIS 599 (Mar. 14, 2003).

¹⁵ *Id.* at *9.

¹⁶ *Bruce M. Zipper*, Exchange Act Release No. 33376, 1993 SEC LEXIS 3525, at *8 (Dec. 23, 1993).

¹⁷ *Robert Tretiak*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653, at *17 (Mar. 19, 2003).

¹⁸ *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*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653 (Mar. 19, 2003).

¹⁹ *Dep’t of Enforcement v. Shimko*, No. ARB200002, 2020 FINRA Discip. LEXIS 41, at *12 (OHO Sept. 15, 2020).

he able to make a meaningful contribution toward the award from available assets or income,²⁰ or by reducing living expenses,²¹ borrowing funds,²² diverting funds from other expenditures,²³ or otherwise.²⁴ Finally, an inability-to-pay defense may fail when the evidence provided by a respondent is insufficient or incomplete.²⁵

C. Markus Failed to Prove an Inability to Pay

Markus had the burden to prove that he could not make any meaningful payment toward the Award from the assets and income available to him. He did not meet that burden. Instead, shortly after the Award was issued, Markus had sufficient money in his bank account to make a meaningful payment to Ameriprise.

On March 19, 2021, FINRA served Markus with a Notice of Suspension because he had failed to pay the Award.²⁶ That same day, Markus deposited slightly more than \$62,000 into his bank account, bringing his bank balance to almost \$64,000.²⁷ In total, during March 2021, Markus deposited almost \$70,000 into his bank account, and at month-end he had a balance of almost \$52,000.²⁸ Between the date of the Award and April 27, 2021, the last day for which Markus provided bank statements, he received almost \$81,000 in commissions²⁹ and deposited almost \$77,000 into his bank account³⁰ – almost half of the Award amount. During that same time, he withdrew around \$33,000 from his bank account,³¹ and at the end of April 2021, he had a cash balance in his account of around \$45,000³² – more than a quarter of the Award amount.

Markus argues that this is a misleading picture of his financial situation. He attributes \$62,000 of the commissions during that period to a life insurance policy he sold to his son, which

²⁰ *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *16 (Mar. 17, 2016); *Dep't of Enforcement v. Malatesta*, No. ARB200025, 2021 FINRA Discip. LEXIS 1, at *3 (OHO Jan. 13, 2021).

²¹ *Dep't of Enforcement v. Motherway*, No. ARB200006, 2020 FINRA Discip. LEXIS 39, at *4 (OHO June 30, 2020).

²² *Id.*

²³ *Tretiak*, 2000 NASD Discip. LEXIS 35, at *20.

²⁴ *Motherway*, 2020 FINRA Discip. LEXIS 39, at *4.

²⁵ *Gallagher*, 2003 SEC LEXIS 599, at *9.

²⁶ JX-6.

²⁷ Stip. ¶ 25; JX-13, at 16.

²⁸ JX-20.

²⁹ Stip. ¶ 24.

³⁰ Tr. 43-44; JX-20.

³¹ Tr. 43-44; JX-20.

³² JX-20.

he describes as a “one time windfall” and an “outlier.”³³ He points out that he has substantial credit card debt – about \$86,000 as of May 2021³⁴ -- and testified that six of his 10 credit cards have been closed for nonpayment.³⁵ He does not own a home.³⁶ He does not have a retirement account.³⁷ He does not have personal health insurance.³⁸ He did not pay federal income taxes in 2018 and 2019,³⁹ and did not pay state taxes in 2018, 2019, or 2020.⁴⁰ He describes his last six years as “eking out a hardscrabble spartan type of existence.”⁴¹

Even so, Markus failed to prove that he could not make a meaningful payment toward the Award. In particular, he failed to show that his bank balances and income since the Award were aberrational. In his Statement of Financial Condition (“Statement”), for example, Markus estimated his annual income for 2020 as \$64,400.⁴² But his Form 1099s show that he earned more than twice that amount in income in 2020.⁴³ Markus tried to explain the discrepancy by asserting that he listed in the Statement only his net income, less business expenses, most of which were attributable to seminars.⁴⁴ He listed no seminar expenses on his Statement, however.⁴⁵ And over the last 12 months, he deposited into his bank account more than three times what he claimed as his income for 2020 in his Statement.⁴⁶ Indeed, Markus’s deposits over the last 12 months were nearly double what Markus estimated as his monthly expenses in his Statement for that same period.⁴⁷ As for 2021, Markus estimated his income in his Statement as

³³ Tr. 36.

³⁴ Tr. 35; JX-19.

³⁵ Tr. 108. This testimony is corroborated by his credit card statements. *See* JX-16, at 7 (“Account cancelled”), 13 (“Your account is closed and no longer available for use.”), 15 (“Your account is closed and no longer available for use.”).

³⁶ Tr. 38.

³⁷ Tr. 38.

³⁸ Tr. 38.

³⁹ Tr. 64.

⁴⁰ Tr. 65.

⁴¹ Tr. 17.

⁴² JX-15, at 3.

⁴³ Stip. ¶ 26; JX-14.

⁴⁴ Tr. 48-49.

⁴⁵ JX-15, at 5. Markus testified that he thought that the Statement required him to list only personal expenses, not business expenses. Tr. 48-49.

⁴⁶ JX-20.

⁴⁷ *Compare* JX-20 (more than \$199,000 in deposits over the prior 12 months) *with* JX-15, at 5 (estimated monthly expenses of \$8,625 for the prior 12 months).

\$66,000.⁴⁸ Yet he deposited more than that amount into his bank account in just the two and a half months since the Award.⁴⁹

Markus also failed to prove that his liabilities rendered him incapable of making a meaningful payment toward the Award. Markus listed only two liabilities in his Statement. The first is substantial credit card debt, almost \$90,000.⁵⁰ But Markus has been paying that credit card debt, reducing it over time.⁵¹ And he included those credit card payments as monthly expenses in his Statement, and those monthly expenses were only about half of what he deposited into his bank account over the last 12 months.⁵²

As his second liability, Markus listed \$30,000 as unpaid federal, state, and local taxes for 2018 to 2020.⁵³ And he listed over \$1,000 in monthly expenses attributable to taxes.⁵⁴ At the hearing, Markus described how he could “roughly compute”⁵⁵ his tax liability:

I think my estimate was a reasonable estimation based upon my 2018 return, my 2020 estimated [return], and extrapolating that into state and local, and then really just estimating what penalties and interest might also have accumulated, which I was given very little direction on by those three entities [federal, state, and local].⁵⁶

As part of this process, Markus testified, he contacted the company that collects taxes for his township to find out what penalties and interest he owes.⁵⁷ According to Markus, the company told him that they could not provide him with an answer until he filed his taxes.⁵⁸ In fact, Markus admitted that he “wouldn’t know how to compute” the interest or penalties that he owed on his unpaid taxes.⁵⁹ Yet he maintained that his estimated tax liability was accurate.⁶⁰

⁴⁸ JX-15, at 3.

⁴⁹ JX-20.

⁵⁰ JX-15.

⁵¹ Tr. 17-18.

⁵² JX-20.

⁵³ JX-15, at 2.

⁵⁴ JX-15, at 5.

⁵⁵ Tr. 67.

⁵⁶ Tr. 72-73.

⁵⁷ Tr. 74.

⁵⁸ Tr. 76.

⁵⁹ Tr. 73; *see also* Tr. 67 (“I cannot compute the interest or the penalties on that.”).

⁶⁰ Tr. 73.

But I cannot accept Markus's estimate as reliable or accurate. He has not made and is not making monthly payments for unpaid taxes.⁶¹ As of the hearing, he had not filed his federal tax returns for 2019 or 2020.⁶² He had not filed state tax returns for 2018, 2019, or 2020.⁶³ He has received no demands for payment from the Internal Revenue Service or Commonwealth of Pennsylvania for unpaid taxes.⁶⁴ He did not introduce any documents into evidence at the hearing to support his claim of an unpaid tax liability, despite repeated requests by Enforcement to produce them.⁶⁵ At this point, it is simply unclear how much Markus will owe in unpaid taxes, or on what terms he will have to pay them.

* * * *

At the hearing, Markus was asked why he could not use his substantial bank account balance to make a meaningful payment toward the Award. After all, he had about \$64,000 in his bank account when FINRA issued the Notice of Suspension in March 2021, and around \$45,000 at the end of April 2021, the last month for which his bank statements were available. And just in the roughly two-and-a-half-month period after the Award, he deposited nearly enough cash to pay off about half of the Award.

His answer was revealing. "I don't think I had enough of a cushion," he testified.⁶⁶ "There's no other cushion in my life," he added.⁶⁷

Markus's desire for a cushion is understandable. But it does not relieve him of his obligation to make a meaningful payment toward the Award. It is not enough for Markus to show that his financial condition is poor, or that it would be painful for him to make a meaningful payment toward the Award.⁶⁸ Nor can he simply prioritize paying other expenses in full over the Award, especially when, like with his unpaid taxes, the amount and terms of payment are uncertain. Because Markus had sufficient funds after the Award to make a meaningful payment toward the Award, he failed to prove an inability-to-pay defense.

⁶¹ Tr. 88.

⁶² Tr. 64, 66.

⁶³ Tr. 64-65.

⁶⁴ Tr. 65-66.

⁶⁵ Tr. 66-68; JX-8; JX-9; JX-10.

⁶⁶ Tr. 89.

⁶⁷ Tr. 89.

⁶⁸ *Shimko*, 2020 FINRA Discip. LEXIS 41, at *12; *Regulatory Operations v. Gimblet*, No. ARB160009, 2016 FINRA Discip. LEXIS 45, at *17 (OHO Aug. 22, 2016).

III. Sanctions

The FINRA arbitration system cannot function if FINRA’s associated persons ignore the awards.⁶⁹ An associated person who fails to pay an arbitration award “presents regulatory risks and is unfair to harmed customers.”⁷⁰ Markus has harmed Ameriprise, which, while not a customer, has nonetheless had to wait for satisfaction of the Award, or to receive at least some meaningful portion of it. A conditional suspension gives an associated person incentive to pay the arbitration award.⁷¹ I therefore find it appropriate to suspend Markus from association with any FINRA member firm.

IV. Order

Under FINRA Rule 9559(n), a Hearing Officer “may approve, modify or withdraw any and all sanctions, requirements, restrictions or limitations imposed by the notice and . . . may also impose any other fitting sanction . . . and may impose costs.” Under Article VI, Section 3(b) of FINRA’s By-Laws and FINRA Rule 9559(n), I suspend Markus from associating with any FINRA member firm in any capacity, effective upon the issuance of this Decision. The suspension will remain in effect until he produces sufficient documentary evidence to FINRA showing that (1) the Award has been paid in full; (2) Markus and Ameriprise have agreed to settle the matter, and Markus is current on the settlement; or (3) Markus has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award. Upon such showing, the suspension will automatically terminate.⁷²

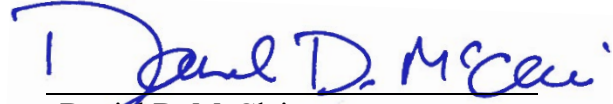
⁶⁹ *Michael David Schwartz*, Exchange Act Release No. 81784, 2017 SEC LEXIS 3111, at *18 (Sept. 29, 2017).

⁷⁰ SR-FINRA-2010-014, Order Approving Proposed Rule Change Relating to FINRA Rule 9554, Exchange Act Release No. 62211, 75 Fed. Reg. 32525 (June 8, 2010).

⁷¹ *Schwartz*, 2017 SEC LEXIS 3111, at *18.

⁷² Markus must also pay the costs of the hearing before the suspension terminates.

Markus is also **ORDERED** to pay FINRA costs of \$1,824.36, which include an administrative fee of \$750 and the hearing transcript cost of \$1,074.36. These costs are due and payable upon the issuance of this Decision.⁷³



Daniel D. McClain
Hearing Officer

Copies to:

Leslie G. Markus, Jr. (via email, overnight courier, and first-class mail)
Michael Manning, Esq. (via email)
Loyd Gattis, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

⁷³ I considered and rejected without discussion all other arguments by the parties.