

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Stephen Walter Pendergast
Roxbury, CT,

Respondent.

DECISION

Expedited Proceeding No. ARB240006

Dated: September 23, 2024

Respondent failed to pay fully an arbitration award and failed to establish a bona fide inability-to-pay defense. Held, effective 45 calendar days from the date of this decision, respondent is suspended from associating with any FINRA member in any capacity until he demonstrates that he has either: (1) paid the award in full; (2) entered into a fully executed, written settlement with the arbitration claimant and is in compliance with its terms; (3) petitioned for bankruptcy protection; or (4) shown that the award has been discharged in bankruptcy.

Appearances

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

For the Respondent: Stephen Walter Pendergast, Pro Se

Decision

This matter concerns an industry arbitration panel's issuance of an award against Stephen Walter Pendergast and his failure to pay the full amount of that award. In accordance with FINRA's rules, Pendergast was notified that he would be subject to a suspension of his association with any FINRA member in any capacity for failing to satisfy an award rendered against him in a FINRA arbitration. Pendergast requested a hearing and presented the defense that he had an inability to pay the arbitration award. The National Adjudicatory Council's Review Subcommittee ("Review Subcommittee") called this proceeding for review to examine the details of Pendergast's inability-to-pay defense.

After a review of the full record, including the arguments presented at the April 8, 2024 hearing and the parties' briefs, we find that Pendergast failed to comply with the arbitration award and failed to establish an available defense. As a result, effective 45 days from the date of this decision, Pendergast must either demonstrate that he paid the \$163,739.56 balance of the arbitration award, plus interest, or be suspended from associating with any FINRA member firm in any capacity.¹ If suspended, the suspension shall remain in effect until Pendergast demonstrates that he has either: (1) paid the arbitration award in full; (2) entered into a fully executed, written settlement with the arbitration claimant and is in compliance with its terms; (3) petitioned for bankruptcy protection; or (4) shown that the arbitration award has been discharged in bankruptcy.

I. Background and Facts

Pendergast first became registered with FINRA in 1987. Since November 2017, he has been associated with RBC Capital Markets, LLC ("RBC"), as a general securities representative.² Prior to RBC, Pendergast was associated with Wells Fargo Clearing Services, LLC ("Wells Fargo"), a FINRA member firm, from December 2008 to November 2017.

On January 9, 2023, an award was entered in an arbitration proceeding against Pendergast regarding monies he owed on promissory notes to Wells Fargo ("Award").³ The arbitration panel awarded Wells Fargo \$536,651 in compensatory damages (inclusive of pre-award interest from November 29, 2017, through November 29, 2022) and interest on the unpaid principal balance "at the contract rate" through and including the date the Award is paid in full.

On January 11, 2023, FINRA served the Award on Pendergast by notice directed to his counsel. That same day, FINRA sent Pendergast, through his counsel, additional notice of the Award which stated, among other things, that "FINRA rules provide that all monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction or unless the award provides otherwise." On February 10, 2023, Pendergast filed a petition to vacate the Award.⁴

¹ For ease of read, this decision hereinafter states all monetary figures in rounded dollars.

² Pendergast also is a registered investment adviser representative at RBC.

³ *Wells Fargo Clearing Services, LLC v. Stephen Walter Pendergast*, FINRA Dispute Resolution Services Arbitration Case No. 18-04156, www.finra.org/sites/default/files/aa_documents/18-04156.pdf.

⁴ Ultimately, a year later, after the case was removed to a federal court, the U.S. District Court for the District of Connecticut denied Pendergast's petition to vacate the Award by order dated January 12, 2024, and ordered a judgment in favor of Wells Fargo in the amount of the Award, plus eight percent interest, resulting in a total of \$579,701, as of January 12, 2024. *See Pendergast v. Wells Fargo Clearing SVCS, LLC*, No. 3:23-CV-00259, 2024 U.S. Dist. LEXIS 7074 (D. Conn. Jan. 12, 2024).

When Pendergast learned of the Award on the evening of January 11, 2023, he told his then wife. According to Pendergast, his wife announced that she wanted a divorce and forbade him from using marital assets to pay the Award, including a house they jointly owned. The next month, on February 14, 2023, Pendergast's wife filed a claim for divorce in the State of Connecticut Superior Court. That same day, the court in the divorce proceeding issued an automatic court order precluding Pendergast and his wife from selling, transferring, exchanging, assigning, removing, or in any way disposing of "any property, except in the usual course of business or for customary and usual household expenses or reasonable attorney's fees" in connection with the divorce proceeding, absent the other party's written consent or a court order. These restrictions included mortgaging any property. According to Pendergast, his wife's divorce attorney told him that no money could be used without written consent.⁵ Pendergast added that his wife would not agree to applying for a second mortgage on their house or a home equity loan. Instead, around February 14, 2023, they listed their house for sale.

The following month, while Pendergast's application to vacate the Award was pending, Pendergast and Wells Fargo entered into a written Settlement Agreement and Release of the Award ("Wells Fargo settlement agreement"). The Wells Fargo settlement agreement, dated as of March 24, 2023, required that Pendergast make two payments as full and complete settlement of the Award: (1) \$138,000 by or before April 10, 2023; and (2) \$262,000 by or before June 10, 2023. The Wells Fargo settlement agreement also provided that a breach of any of its terms would give Wells Fargo the right to rescind the \$400,000 settlement amount and declare the full unpaid balance of the Award due and payable. Pendergast made the first payment of \$138,101 timely⁶ but not the second one and thus he defaulted.⁷

Pendergast testified that he planned to make the second payment under the Wells Fargo settlement agreement using his portion of the home sale proceeds. But by June 10, 2023, the due date for the second payment, the house had not yet sold. Pendergast testified that he applied for a second mortgage.⁸ But, according to Pendergast, the lender told him that he could not get a second mortgage or refinance the house until the house was off the market for six months. And

⁵ The automatic court order also forbade Pendergast and his wife from incurring unreasonable debts during the pendency of the divorce proceeding, including "further borrowing against any credit line secured by the family residence, further encumbering any assets, or unreasonably using credit cards or cash advances against credit cards."

⁶ Pendergast testified that his wife consented to him using the funds from two joint accounts to make the first payment, and he agreed to repay her approximately half of the money (or \$73,316) once their house sold.

⁷ Pendergast argues in his appellate brief that he paid Wells Fargo a total of \$408,271 toward the Award, which exceeded the agreed settlement amount. While that might be true, because Pendergast's second payment did not come until almost a year after he defaulted on the agreement, the second payment neither cured the breach nor constituted full satisfaction of the Award.

⁸ It is unclear from the record when and why Pendergast applied for a second mortgage given the restrictions in the automatic court order and his wife's refusal to encumber their home.

although Pendergast's wife had permitted him to utilize their joint funds for the first payment, she did not consent to accessing any additional funds in their remaining accounts to make another payment.

On January 4, 2024, Pendergast and his wife entered into an Amended Divorce Settlement Agreement ("divorce agreement"), and the divorce was finalized that month. Pendergast does not contend that the divorce agreement has prevented him from applying his individual assets toward payment of the Award. As of January 12, 2024, Pendergast owed \$433,911 on the Award, which included interest as of that date.

II. Procedural History

On February 7, 2024, FINRA notified Pendergast of its intent to suspend his association with any FINRA firm in any capacity, pursuant to FINRA Rule 9554(a), because he failed to comply fully with the Wells Fargo settlement agreement ("Suspension Notice").⁹ The Suspension Notice informed Pendergast that the suspension would take effect on February 28, 2024, unless he demonstrated that he: (1) cured, consistent with the settlement agreement, the alleged breach; (2) entered into a written amended agreement or a new written settlement agreement with the claimant, and his obligations thereunder are current; or (3) filed a petition in bankruptcy and the bankruptcy proceeding is pending, or the bankruptcy court has discharged the award or payment owed under the settlement agreement.

The Suspension Notice further informed Pendergast that: (1) he had a right to request a hearing before FINRA's Office of Hearing Officers to assert any of the defenses listed above or to claim as a defense a bona fide inability to pay the Award; (2) the hearing request had to be in writing and state all claimed defenses; and (3) the hearing request had to be filed with FINRA's Office of Hearing Officers before the effective date of the suspension. Lastly, the Suspension Notice stated that a timely filed hearing request would stay the suspension. On February 28, 2024, Pendergast requested a hearing timely, asserting that he had a bona fide inability to pay the balance of the Award.

On April 8, 2024, a Hearing Officer appointed to the matter held a videoconference hearing. Pendergast participated in the hearing as the only witness.¹⁰ Pendergast argued and provided evidence demonstrating that he sold assets, borrowed money, reduced his expenses significantly, and had already made a meaningful payment towards reducing the Award. Pendergast also argued that he was unable to pay the balance of the Award in full. Enforcement did not dispute that Pendergast had made a meaningful payment towards satisfying the Award. Rather, Enforcement argued that the evidence shows that, since the Award was issued,

⁹ The parties have stipulated that, in accordance with FINRA Rule 9554(b), FINRA properly served the Suspension Notice on Pendergast by FedEx overnight delivery to his residence on February 8, 2024.

¹⁰ Before the hearing, the parties stipulated, among other things, that Pendergast "has not satisfied the Award, entered into a new or amended fully-executed, written settlement agreement with the arbitration claimant under which he is in compliance, or filed for bankruptcy protection."

Pendergast had sufficient assets and cash flow to either pay the entire Award or a significant portion of it, and thus his inability-to-pay defense fails.

After the hearing, on May 13, 2024, Pendergast filed a motion requesting to reopen the record and admit new evidence, which the Hearing Officer granted. The newly admitted evidence demonstrated that: (1) Pendergast closed on the sale of his home on May 8, 2024; (2) Pendergast received net proceeds of \$270,171 from the sale; (3) Pendergast wired the entire net proceeds the next day to Wells Fargo; (4) Wells Fargo acknowledged Pendergast's payment as a "reduction of the underlying debt;" and (5) Wells Fargo released and discharged the judgment lien it had placed on his property, stating that Pendergast's payment released "the Judgment Lien from the land, and is in reduction but not discharge of the underlying debt."¹¹ This payment to Wells Fargo reduced the outstanding balance of the Award to \$163,740, excluding interest.

Pursuant to FINRA Rule 9559(o)(1), the Hearing Officer provided a proposed written decision to the Review Subcommittee. And, in accordance with FINRA Rule 9559(q), the Review Subcommittee called this proceeding for review.¹² The parties were invited to submit briefs addressing the status of the Award balance, and whether Pendergast's forgivable loans from RBC and legal fees materially impacted his ability to make an additional meaningful payment toward satisfying the Award.

Based on our independent review of the full record, including the arguments presented by the parties at the hearing and the parties' briefs on appeal, we find that Pendergast has not demonstrated a bona fide inability to pay the Award.

III. Discussion

A. Legal Standard for the Inability-to-Pay Defense

"Honoring arbitration awards is essential to the functioning of the [FINRA] arbitration system," and "[r]equiring members or associated persons to abide by arbitration awards enhances the effectiveness of the arbitration process." *William J. Gallagher*, 56 S.E.C. 163, 171 (2003). FINRA rules governing industry-related arbitrations require that monetary awards be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. *See* FINRA Rule 13904(j). If an associated person fails to comply with an arbitration award, FINRA's By-Laws permit suspending the person from association with any member firm "where a timely motion to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied." FINRA By-Laws, Article VI, Section 3(b). FINRA also may suspend an associated person for not complying with a written, executed settlement agreement obtained in connection with an arbitration.

¹¹ While the wire transfer reflects that \$270,171 was wired to Wells Fargo, the release states that Wells Fargo executed it in consideration of the payment of \$270,157. The record does not explain the discrepancy between these two figures.

¹² Under FINRA's rules for expedited proceedings, this decision replaces the Hearing Officer's proposed decision, which the parties have not seen.

FINRA Rule 9554 provides an enforcement mechanism for Section 3(b) by authorizing expedited suspension proceedings against members and associated persons who have allegedly failed to comply with an arbitration award or settlement agreement related to an arbitration. Unlike disciplinary cases, expedited suspension proceedings are designed “to encourage respondents to comply with the law” and satisfy the arbitration award in full or take corrective action, “not to sanction them for past misconduct.” *Keith Patrick Sequeira*, Exchange Act Release No. 81786, 2017 SEC LEXIS 3105, at *13 & n.21 (Sept. 29, 2017) (citing *Order Approving Proposed Rule Change Relating to FINRA Rule 9554 to Eliminate Explicitly the Inability-to-Pay Defense in the Expedited Proceedings Context*, Exchange Act Release No. 62211, 2010 SEC LEXIS 1800, at *8 (June 2, 2010)).

There are five recognized defenses to avoid suspension in an expedited proceeding for the failure to pay an arbitration award:

- (1) the respondent has paid the arbitration award in full;
- (2) the arbitration parties have agreed to installment payments of the award, or have otherwise agreed to settle, and the respondent is not in default under the agreement;
- (3) a court has vacated the award;
- (4) a motion to vacate or modify the award is pending in a court;
- and (5) the respondent has a bankruptcy proceeding pending in United States Bankruptcy Court, or a Bankruptcy Court has discharged the award.¹³

A bona fide inability to pay an arbitration award issued in connection with an industry dispute is another recognized defense.¹⁴ To prevail on an inability-to-pay defense, a respondent must demonstrate that he is unable to “make some meaningful payment toward the award from available assets and income.” *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *16 (Mar. 17, 2016). The burden of proof for a bona fide inability-to-pay defense rests solely on the respondent. *Daniel Paul Motherway*, Exchange Act Release No. 97180, 2023 SEC LEXIS 753, at *7 (Mar. 21, 2023) (finding that the party claiming an inability to pay bears the burden of proving the defense “[b]ecause the scope of his assets is peculiarly within [his] knowledge”). An inability-to-pay defense must be rejected where it is evident that a respondent could borrow against, or use available funds, to make meaningful payments even if the respondent is unable to pay the full amount due. *DiPietro*, 2016 SEC LEXIS 1036, at *20.

¹³ See *NASD Notice to Members 00-55*, 2000 NASD LEXIS 63, at *5-6 (Aug. 2000).

¹⁴ See *Order Approving Proposed Rule Change Relating to FINRA Rule 9554 to Eliminate Explicitly the Inability-to-Pay Defense in the Expedited Proceedings Context*, 2010 SEC LEXIS 1800 at *3 (approving proposed amendments to FINRA Rule 9554 to make the inability to pay an arbitration award defense unavailable to a respondent when the award favors a harmed customer and recognizing that a bona fide inability to pay is a defense in an expedited proceeding involving an industry arbitration award).

B. Pendergast Failed to Demonstrate His Inability to Pay the Award

Before the hearing, Pendergast completed a Statement of Financial Condition (“SFC”), dated March 9, 2024, that detailed his assets, liabilities, net worth, income, expenses and monthly cash flow. In addition to the SFC, Pendergast provided his tax returns, bank and financial account statements, and other supporting documentation to the Hearing Officer and Enforcement. To prove his inability-to-pay defense, Pendergast testified about his financial condition and was cross-examined.

When a respondent asserts an inability-to-pay defense, we conduct a rigorous, searching inquiry into their financial circumstances and require the respondent to be entirely forthcoming and provide complete and accurate information. *See DiPietro*, 2016 SEC LEXIS 1036, at *16; *see also Robert Tretiak*, 56 S.E.C. 209, 220 (2003). We find that Pendergast provided a complete and documented picture of his financial condition, and we therefore analyze the substance of his inability-to-pay defense. Based on the evidence in the record, we find that, notwithstanding his negative net worth, Pendergast had sufficient assets and positive cash flow to pay the entire outstanding balance of the Award or a meaningful portion of it.

1. Pendergast Established That He Had a Negative Net Worth

According to the SFC, as of March 9, 2024, Pendergast had assets valued at \$1,168,070. Pendergast’s largest asset listed on the SFC was a house that he and his ex-wife jointly owned, and each had a 50% interest (\$825,000). Pendergast listed the following other major assets: (1) a credit balance on credit cards (\$105,274); (2) an IRA (\$86,000);¹⁵ (3) deferred compensation (\$51,065); (3) a 401(k) (\$26,294); (4) cash (\$25,860); (5) an automobile (\$21,050); and (6) a bourbon and whiskey collection (\$20,000).

The SFC reflects liabilities totaling \$1,697,892, the largest of which included: (1) the amounts outstanding on forgivable loans from his current firm employer, RBC (\$727,172); (2) half the outstanding principal portion of the mortgage on the home he owned with his ex-wife (\$425,000); (3) the Award (\$398,651); (4) a loan payable to his ex-wife (\$73,316); (5) a 401(k) loan (\$41,619); and (6) 50% of the deferred compensation vested and due him, but payable to his wife (\$25,533). According to the SFC, Pendergast had a negative net worth (assets minus liabilities) of -\$529,822.

Upon careful consideration, we find that the SFC’s description of Pendergast’s assets, liabilities, and net worth did not accurately depict his financial condition at the time the SFC was submitted. We begin our analysis with Pendergast’s financial condition at the time of the hearing, which is when he had the burden to prove his defense and when Enforcement challenged that defense. We will later consider the subsequent sale of the Pendergast’s house and Pendergast’s partial payment to Wells Fargo.

First, we adjust Pendergast’s calculation of his assets. Pendergast identified a credit balance on his credit cards of \$105,274. But in fact, \$105,274 was the aggregate available credit

¹⁵ The parties stipulated and the record reflects that, as of February 29, 2024, the value of Pendergast’s IRA account was \$93,645.

on Pendergast's four credit cards. Thus, as Pendergast agreed at the hearing, the credit balance line item under assets should have been zero. In addition, Pendergast testified that no portion of the \$51,065 listed as vested deferred compensation has been, or would be available, to use toward payment of the Award until July 2024, when he is due a \$15,000 disbursement. And, per the divorce agreement, Pendergast was required to split half of that amount with his ex-wife. Notwithstanding the fact that July 2024 has come and past, we determine that those funds were not available at the time the Award was due or since the hearing and thus should have been excluded. Given these deductions, we calculate that Pendergast's available assets should have been valued at \$1,011,731 at the time the SFC was submitted.

Second, under liabilities, Pendergast included in the SFC, among other acceptable items, half of the deferred compensation that is payable to his wife (\$25,533), the balance then due to satisfy the Award (\$398,651), and FINRA arbitration fees (\$4,875). As previously discussed, because Pendergast's deferred compensation had not yet been attributable to his spouse when the SFC was submitted, we exclude the \$25,533 amount as a liability. Moreover, consistent with similar previous cases, we find that the more useful analysis is to exclude from Pendergast's liabilities the Award itself and the arbitration fees imposed to evaluate his ability to satisfy the Award. Otherwise, "[t]aking the Award into account would result in a misleadingly lower valuation of net worth available for [Pendergast] to make a meaningful contribution toward satisfaction of the Award." *Dep't of Enf't v. Henry*, Expedited Proceeding No. ARB220023, 2023 FINRA Discip. LEXIS 6, at *8-9 (FINRA Hearing Panel Apr. 13, 2023) (internal quotation marks omitted); *see also Dep't of Enf't v. Lake*, Expedited Proceeding No. ARB190024, 2019 FINRA Discip. LEXIS 48, at *9 n.41 (FINRA Hearing Panel Nov. 11, 2019); *Regul. Operations v. Grady*, Expedited Proceeding No. ARB190024, 2017 FINRA Discip. LEXIS 51, at *18 (FINRA Hearing Panel Dec. 14, 2017). We therefore assess that Pendergast's liabilities should have been valued at \$1,268,833 at the time the SFC was submitted.

We do, however, believe it was proper for Pendergast to include the total \$727,172 outstanding on two forgivable loans from RBC as a liability on the SFC. In its brief, Enforcement argues that we should disregard Pendergast's forgivable loans because his repayment obligation is based on a future event that might never happen. While that may be true, FINRA Rule 9554 does not limit the information that FINRA may consider in evaluating an inability-to-pay defense. And we see no basis for excluding this kind of liability here.¹⁶ *See, e.g., Lake*, 2019 FINRA Discip. LEXIS 48, at *9 (considering as liabilities in the SFC two promissory notes respondent owed to his employer member firm). In this case, not only has Pendergast paid taxes on the amounts forgiven, whether and when the outstanding principal balance of the loans becomes due and payable hinges on his continued employment as an

¹⁶ Contingent liabilities, like the forgivable loans in this case, are liabilities in which the amount repayable, if any, depends on the outcome of an uncertain future event. *See generally Topic no. 431, Canceled debt – Is it taxable or not?*, Internal Revenue Service, [https://www.irs.gov/taxtopics/tc431#:~:text=In%20general%2C%20you%20must%20report,Adjustments%20to%20Income%20PDF%20\)%%20if](https://www.irs.gov/taxtopics/tc431#:~:text=In%20general%2C%20you%20must%20report,Adjustments%20to%20Income%20PDF%20)%%20if) (last updated July 3, 2024) (explaining that "[i]f you borrow money and are legally obligated to repay a fixed or determinable amount at a future date, you have a debt").

associated person of RBC. For example, per the loan agreements, if RBC terminates Pendergast's employment "for any reason" while any amount of the outstanding balance of the loans remain, the loans accelerate, and Pendergast must repay the outstanding balance in full. The fact that Pendergast currently is employed by RBC does not negate his contractual obligation to repay the loans if his employment ends in the future.¹⁷

A recalculation of assets and liabilities in the SFC for the reasons discussed above shows that, at the time of the hearing, Pendergast had a negative net worth of approximately -\$257,102 (assets of \$1,011,731 minus liabilities of \$1,268,833).

In addition to the SFC, we considered the subsequent sale of the Pendergast's house and his partial payment to Wells Fargo. Before the hearing, the parties stipulated that the marital home was encumbered by a first mortgage by City National Bank, as mortgagee, and Pendergast and his ex-wife jointly owed an outstanding mortgage balance of \$850,000. The house went under contract for a purchase price of \$1.65 million (the net proceeds of which were to be equally divided between Pendergast and his ex-wife). The SFC reflects that Pendergast valued his interest in the house at half the contract price, \$825,000. At the hearing, Pendergast testified that he intended on using his half of the proceeds from the house sale to pay the Award. About a month after the hearing, on May 8, 2024, the house sold, netting Pendergast \$343,487 in proceeds from the sale after paying off the mortgage, taxes, and fees. Of that amount, Pendergast repaid his ex-wife \$73,316 in accordance with the terms of the divorce agreement and wired to Wells Fargo the remaining \$270,171. This payment, along with the \$138,000 Pendergast previously paid to Wells Fargo, significantly reduced the outstanding balance of the Award to \$163,740, excluding interest.

We need not recalculate Pendergast's net worth to account for these events because, as we discuss in the next two sections of this decision, Pendergast's negative net worth alone does not prove his inability-to-pay defense. Thus, we turn to our consideration of whether Pendergast had other resources and cash flow available to pay towards satisfying the Award. *See, e.g., Dep't of Enf't v. Helbling*, Expedited Proceeding No. ARB210004, 2021 FINRA Discip. LEXIS 14, at *6-12 (FINRA Hearing Panel July 23, 2021) (finding respondent, despite having a negative net worth and negative cash flow, had sufficient funds to pay nearly all the arbitration award or a significant portion of it and thus failed to establish an inability-to-pay defense).

2. Pendergast Had, but Failed to Use, Other Additional Available Resources to Pay the Award

Pendergast stipulated to, and provided documented evidence of, having additional resources accessible to him to pay if not all, at least a meaningful portion of, the outstanding balance of the Award. For example, as of February 29, 2024, Pendergast's IRAs had an aggregate value of \$93,645.¹⁸ Pendergast's two cash management accounts had an aggregate

¹⁷ Given our assessment, however, we conclude that the forgivable loans, even when factored into Pendergast's overall net worth, did not materially impact his financial ability to further reduce the balance of the Award.

¹⁸ *See supra* n.15.

value of \$25,860. Pendergast owns a bourbon and whiskey collection inventoried with an auction value of approximately \$20,000. And Pendergast conceded that he has an aggregate available credit on four credit cards that, as of March 29, 2024, exceeded \$100,000.¹⁹ To date, we see no evidence that, since the Award was issued, Pendergast has attempted to use any of these available resources toward satisfying the Award.

At the hearing, Pendergast argued that his aggregate available credit should not be considered in determining his ability to pay the Award because, when the Award was issued, the divorce court ordered that neither he nor his wife “take on unreasonable credit card debt.” But once the divorce was final in January 2024, nothing prevented Pendergast from utilizing his available resources to pay the Award. Pendergast further argued that if he used his other assets and was still unable to pay the remainder of the Award in full, then he would lose his securities license and employment, and have no way of repaying his debts. Although anticipated financial distress may be Pendergast’s motive for his failure to pay the remainder of the Award, his apprehension about further action Wells Fargo or Enforcement may take is not sufficient to succeed on an inability-to-pay defense nor justifies his decision not to satisfy the Award.

To be clear, we do not intend in this decision to suggest *how* Pendergast should dispense his funds or resources to satisfy the Award. Nor do we opine on whether Pendergast has exhausted other defenses that might be available to him, such as filing a petition for bankruptcy in a U.S. Bankruptcy Court, to maintain his securities license while resolving any purported insolvency. *See, e.g., Order Approving Proposed Rule Change Relating to FINRA Rule 9554 to Eliminate Explicitly the Inability-to-Pay Defense in the Expedited Proceedings Context*, 2010 SEC LEXIS 1800 at *5-6 (distinguishing a federal bankruptcy court proceeding from an inability-to-pay defense in determining whether a respondent’s debt obligations should be legally discharged). Rather, the narrower question before us is whether the evidence demonstrates that Pendergast had the means to satisfy the Award or make meaningful payments “with funds that were available to him from any source.” *Motherway*, 2023 SEC LEXIS 753, at *8. The record indicates that he did.

3. Pendergast Had a Positive Cash Flow

We next turn to evaluating Pendergast’s monthly cash flow. Pendergast was employed at RBC the year before the Award was issued and has been employed at the firm since then. The SFC states that his annual income in 2022 was \$246,529. The next year, when the Award was issued, his annual income was \$227,638.²⁰ And for the first three months of 2024, his income was \$62,785. The SFC stated that, in the past 12 months, Pendergast received a total of \$16,388 per month in income and receipts. He computed this amount by taking his monthly pay from

¹⁹ *See infra* Section III.B.3 (finding that Pendergast has sufficient cash flow to service additional credit card debt for the foreseeable future).

²⁰ It is unclear from the record whether Pendergast’s reported figures in the SFC represent an adjusted gross or net income. According to Pendergast’s W-2 statements, which Pendergast testified he “relied on” to complete the SFC, his gross annual income for 2022 was \$303,359. In 2023, Pendergast’s gross annual income was \$324,148.

RBC, \$19,362, adding \$109 in interest from three accounts and then subtracting from it \$3,083 in capital losses incurred in two accounts. The capital losses figure represented losses over a 14-month period, totaling \$43,162, which he then divided by 14.

The SFC listed Pendergast's total monthly expenses and disbursements of \$17,982, over the same past 12 months. His largest monthly expenses were income taxes (\$8,705); mortgage payments (\$3,350);²¹ attorneys/professional fees (\$2,286); and utilities (\$2,084).²² Based on the SFC, Pendergast had a negative monthly cash flow of \$1,594 (total receipts minus total expenses and disbursements).

We find however that, while the SFC contains a line item for capital gains and losses, reducing Pendergast's income by \$3,083 of capital losses after already accounting for the decline in the value of his securities accounts leaves a misimpression about his financial condition. The SFC required that Pendergast list all money or other income he received over a specified period. And his capital losses did not reduce those amounts. It is therefore appropriate that we exclude his capital losses figure from his monthly cash flow calculations.

Enforcement argued that Pendergast's decisions to retain counsel to challenge the Award and pay associated fees, and to make payments on outstanding credit balances, were an inappropriate allocation of his resources. We find that Pendergast properly included in the SFC as monthly expenses his legal fees. Respondents, like Pendergast, are entitled to present a vigorous defense in arbitration proceedings and to be represented by legal counsel. *See N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *44 (May 8, 2015); *see also* FINRA Rule 13208(b). And the record, which is well-supported, provides no basis for us not to consider Pendergast's reasonable legal fees as material evidence of his ordinary expenses since the time the Award was issued.²³ *See, e.g., Henry*, 2023 FINRA Discip.

²¹ In the SFC, Pendergast also projected alimony payments of \$4,200 per month but did not include them in his monthly expenses, as those payments would not begin until the house was sold. According to Pendergast, after the house was sold, he would also incur rental and moving expenses. He did not, however, quantify the rental and moving expenses. The Review Subcommittee requested briefing for clarification on whether Pendergast has incurred these additional housing and alimony expenses. In his brief, Pendergast confirmed that he did not apply any funds towards moving expenses or rent and is currently residing with his mother. Pendergast did not provide any response about his alimony payments. We therefore do not consider any of these projected changes in his expenses in evaluating Pendergast's monthly cash flow.

²² The utilities figure listed in the SFC represented a 12-month average of utilities payments ranging from \$1,366 to \$3,357 per month. Presumably, this figure has decreased or been eliminated since his house sold in May 2024.

²³ Enforcement claims in its brief for the first time that Pendergast never provided documentation that he actually paid a portion of his legal fees. But the appropriate time and place for Enforcement to have raised that argument would have been at the hearing so that Pendergast could have an opportunity to testify on that issue. Enforcement further argues that, even if legal fees are not discretionary, Pendergast's legal fees in this matter are non-recurring

LEXIS 6, at *9 & n.52 (accepting respondent's stated monthly expenses, including his attorney's fees for still-pending litigation by his claimant firm, as evidence of whether he could make a meaningful contribution towards an arbitration award).

Moreover, we agree with Enforcement that making payments on the outstanding balance to creditors for more than the minimum amount required generally is viewed as an asset allocation choice that weighs against an inability-to-pay defense. *See, e.g., DiPietro*, 2016 SEC LEXIS 1035, at *19 (finding the inability-to-pay defense unavailable based on respondent's discretionary spending, including payments of more than the minimum on his credit cards and those of his adult children). But here, because Pendergast still has additional resources (including available credit) to pay a meaningful portion of the balance of the Award, we need not determine whether he would have been able to pay the Award at the time it was issued but for diverting payments to his other creditors.

Based on our evaluation of Pendergast's cash flow information provided in the SFC, after paying expenses, Pendergast has had, at a minimum, a positive monthly cash flow of \$1,489. This further demonstrates that Pendergast could have, but failed to, make meaningful payments towards satisfying the Award.

* * *

After considering the full record, we conclude that Pendergast has failed to satisfy the burden of proof required to establish a bona fide inability-to-pay defense. Pendergast's "duty to satisfy the [A]ward was absolute." *Tretiak*, 56 S.E.C. at 221. Yet, Pendergast did not establish that, in addition to the payments he already has made to towards the Award, he is unable to draw from other available resources to either fully satisfy or meaningfully contribute toward satisfying the Award. Accordingly, we find that FINRA properly issued Pendergast its suspension notice under FINRA Rule 9554 for his failure to pay the Award. We, however, recognize that this case is unique because Pendergast has made a good faith effort towards satisfying approximately 70 percent of the Award. Therefore, we grant Pendergast additional time to weigh his options and undertake the necessary financial arrangements to satisfy the Award before a suspension goes into effect.

[cont'd]

and should therefore not be factored into determining his future cash flow. Because we conclude that Pendergast otherwise has sufficient cash flow to continue to make meaningful payments toward the Award, we need not reopen the record for further evidence on this issue.

IV. Conclusion

Accordingly, effective 45 calendar days after issuance of this Decision, Pendergast is suspended from associating with any FINRA member firm in any capacity, unless he demonstrates that he paid the \$163,740 balance of the arbitration award, plus interest. If Pendergast timely files an application for review with the Securities and Exchange Commission and moves to stay the suspension, FINRA will delay its effectiveness until the Commission rules on Pendergast's motion to stay. If Pendergast is suspended, the suspension shall remain in effect, until he produces sufficient documentary evidence to FINRA that: (1) he has paid the Award in full; (2) he and the arbitration claimant have entered into a fully executed, written settlement agreement relating to satisfaction of the Award, and he is current in fulfilling his obligations under the settlement terms; or (3) he has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award. Upon Pendergast making such a showing, the suspension will automatically terminate. Additionally, we assess \$3,719.97 in hearing costs.

On Behalf of the National Adjudicatory Council,



Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary