

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

	:	
DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Non-Summary Suspension
	:	Proceeding
	:	
v.	:	No. ARB010001
	:	
	:	Hearing Officer - AWH
	:	
	:	
	:	
	:	
	:	DECISION
Respondent.	:	
	:	July 26, 2001

Respondent failed to demonstrate a bona fide inability to pay the balance due under a settlement agreement to pay an arbitration award, or that the award was modified or vacated by a court. Respondent's registration suspended in accordance with Article VI, Section 3 of the NASD By-Laws and Procedural Rules 9510, *et seq.*

Appearances:

Cynthia A. Kittle, Esq., for the Department of Enforcement

_____, *pro se*

DECISION

Introduction

Pursuant to Rule 9513(a), the Regional Director of NASD Dispute Regulation, Inc., notified _____ ("_____" or "Respondent"), by letter dated December 19, 2000, that his registration would be suspended in accordance with Article VI, Section 3 of the NASD By-Laws and Rule 9510, *et seq.*, as a result of his failure to pay the full amount due under the terms of a settlement agreement for payment of an arbitration award. By letter

dated December 23, 2000, _____ requested a hearing pursuant to Rule 9514(a). On April 11, 2001, a hearing was held by telephone before the Hearing Officer (acting as a Panel under Rule 9514(b)). The Department of Enforcement filed its proposed findings of fact and conclusions of law on May 18, 2001. _____ filed his proposed findings of fact which were received on May 21, 2001.

Findings of Fact

Background

On or about July 18, 1987, _____ became registered with the National Association of Securities Dealers (“NASD”) as a General Securities Representative, and on or about May 12, 1989, as a General Securities Principal.¹ _____ has been registered with and employed by an NASD member from June 1987 through the present.

_____ and _____, were sued by J.D. (“Claimant”) in the Superior Court of the State of Arizona in and for the County of Maricopa. The matter was referred for arbitration, and on or about February 2, 1994, an NASD arbitration proceeding was commenced by J.D. against _____, and _____. NASD Arbitration No. 94-00508 (“Arbitration Proceeding”).² On or about October 31, 1994, _____ filed both his Answer

¹ Joint Stipulation of Facts, ¶ 1.

² Joint Stipulation of Facts, ¶ 2. On November 30, 1993, _____ was dismissed without prejudice from the state court suit. Exh. R-1. However, although the complete history of the suit was not introduced into this record, _____ had to have been brought back into the suit because, as discussed later, he participated in the arbitration, entered into a settlement agreement, and is bound by the judgment of the state court confirming the arbitration award against him.

to all causes of action in the Arbitration Proceeding, and his Submission Agreement, dated October 27, 1994, pursuant to NASD Rule 10302.³

In connection with the Arbitration Proceeding, on or about June 12, 1995, the NASD arbitration panel rendered an Arbitration Decision and Award (“Award”) in favor of Claimant and against _____, and _____, jointly and severally, in the amount of \$365,029.00, as an award of compensatory damages, plus interest thereon at the rate of 10% per annum, to accrue from the date of the Award until paid.⁴ On or about June 15, 1995, the NASD provided, and _____ received, notice of the Award, which was confirmed by judgment of the Arizona state court with _____’ approval.⁵

Two years later, Claimant and _____ entered into a settlement agreement (“Settlement Agreement”). On or about August 4, 1997, _____ agreed to pay, and Claimant agreed to accept in full payment of the Award, a principal amount of \$100,000, plus simple interest of ten percent per annum thereon, according to the following payment terms: \$5,000 on September 30, 1997; 36 consecutive monthly payments of not less than \$1,000 each; and a final balloon payment on September 30, 2000, of the entire then-remaining balance and any accrued interest.⁶

³ Joint Stipulation of Facts, ¶ 3.

⁴ Joint Stipulation of Facts, ¶ 4; Exh. C-2. The Joint Stipulation of Facts erroneously indicates the amount of the Award as \$345,029.00. See Exh. C-2, page 4 of 12.

⁵ Joint Stipulation of Facts, ¶ 5; Exhs. C-2, C-19, C-20, R-8; Hearing Tr. 40:17-20; 41:6-8.

⁶ Joint Stipulation of Facts, ¶ 6; Exh. C-3. _____ introduced evidence that the state court action was again dismissed without prejudice against him on June 4, 1997. Exh. R-9. Without the entire history of that proceeding, it is not clear what the effect of that dismissal was. In any event, it is irrelevant to this case because the arbitration award was confirmed by that state court, and _____ agreed to make the payments at issue in this proceeding as part of the Settlement Agreement, dated August 4, 1997, two months after the purported dismissal order.

During the period October 1, 1997, through August 28, 2000, Claimant received and accepted from _____ one payment of \$6,000, and thirty-five payments of \$1,000 each.⁷ On or about September 30, 2000, _____ failed to make the balloon payment for the then remaining balance and accrued interest, and has not made such payment at any time thereafter.⁸ The balance remaining due pursuant to the Settlement Agreement is approximately \$87,290.21.⁹

Prior to September 30, 2000, Claimant and _____ engaged in further settlement negotiations;¹⁰ however, Claimant and _____ have not entered into a further settlement agreement.¹¹ _____ has not paid the full amount due and owing to Claimant pursuant to the Award;¹² he has not made a motion to vacate or modify the Award;¹³ he does not have pending in a U.S. Bankruptcy Court a petition pursuant to Title 11 of the United States Code; nor has the Award been discharged by a U.S. Bankruptcy Court.¹⁴

⁷ Joint Stipulation of Facts, ¶ 7.

⁸ Joint Stipulation of Facts, ¶ 8; Hearing Tr. 19:13-14.

⁹ Exh. C-4 at 27 of 27; Hearing Tr. 19:8-14.

¹⁰ Joint Stipulation of Facts, ¶ 9. In connection with the further settlement discussions that took place in 2000, Claimant's attorney, _____, first wrote to _____ in January 2000 to remind him that the \$80,000 plus interest balloon payment was due on September 1, 2000. Exh. C-4 at 16 of 27; Hearing Tr. 22-23. Receiving no reply, _____ wrote _____ again in June 2000. Exh. C-4 at 17 of 27; Hearing Tr. 23:19-22. When he responded, _____ represented to _____ that he had no assets with which he could make the \$80,000 balloon payment and that he could not afford to pay more than \$1,000 per month against the balance owed pursuant to the Settlement Agreement. Exh. C-4 at 18 of 27; Exh. C-4 at 21 of 27; Exh. C-4 at 25 of 27; Exh. C-4 at 26 of 27; Hearing Tr. 26:17-25 – 27:1-8. _____ adheres to this position. Hearing Tr. 82:2-6; 83:11-14; 87:4-9.

¹¹ *Id.*

¹² Joint Stipulation of Facts, ¶ 10.

¹³ Joint Stipulation of Facts, ¶ 11.

¹⁴ Joint Stipulation of Facts, ¶ 12.

' Financial Condition

1. Financial Disclosure

As a defense, claims that he is unable to pay the amount due under the terms of the Settlement Agreement.¹⁵ Accordingly, on February 1, 2001, pursuant to the Pre-Hearing Conference Order, Enforcement requested that provide a Financial Disclosure Form. He provided such a Financial Disclosure Form on March 16, 2001.¹⁶ However, finding that the disclosures were inadequate, on March 16, 2001, Enforcement again requested that he provide complete documentation, including credit card statements and bank and brokerage account statements.¹⁷ In addition, was further ordered by the Hearing Officer to produce all relevant documents.¹⁸ provided two additional submissions of financial disclosures.¹⁹ They consist of single pages of three recent credit card statements,²⁰ the loan application for a second mortgage,²¹ the purchase/lease agreements for two automobiles,²² and a loan agreement for a 30-foot boat.²³ failed to produce any other documentation concerning his credit card expenditures, payments, or balances,²⁴ or his bank or brokerage accounts from the time the Award was rendered to the present.²⁵

¹⁵ Hearing Tr. 82:2-6; 83:11-17.

¹⁶ Exh. C-7.

¹⁷ Exh. C-8.

¹⁸ Pre-Hearing Tr. 13-14.

¹⁹ Exhs. C-9 and C-12.

²⁰ Exh. C-9 at 2 of 3; Exh. C-12 at 42 of 54; Exh. C-12 at 43 of 54.

²¹ Exh. C-12.

²² *Id.*

²³ *Id.*

²⁴ While asserts that he does not possess complete credit card records, Pre-Hearing Tr. 11:9-10, his assertion is belied by his submission of a summary of all 2000 credit card expenses, Exh. C-7 at 16 of 74, and his testimony that he reviewed his credit card statements in the course of preparing his Financial Disclosure.

2. Assets and Liabilities

_____ owns a house in Scottsdale, Arizona. It has three bedrooms, a three-car garage, and a pool.²⁶ His house is encumbered by a first mortgage in the amount of \$287,000.²⁷ In February 2000, _____ further encumbered the house with a second mortgage in the amount of \$150,000,²⁸ for a total indebtedness of approximately \$437,000.²⁹ In February 2000, _____' house was appraised for \$510,000,³⁰ and presently is worth at least that amount.³¹ Therefore, _____' equity position in his house is at least \$73,000.

In February 2000, _____ used the proceeds of the second mortgage on his house to pay off a prior second mortgage in the amount of \$97,427, which previously was taken out to pay off credit card bills.³² He applied \$44,407 of the proceeds of the second mortgage to pay off four separate credit card balances.³³ Because the credit cards charged high interest rates, he applied the proceeds of the second mortgage to paying off credit card balances rather than paying Claimant.³⁴ Nevertheless, _____ personally received an additional \$8,166 from the second mortgage proceeds.³⁵

Hearing Tr. 65:4-8. _____' assertion is further belied by his careful notations regarding payment on each of the credit card statements he submitted. See Exh. C-9 at 2 of 3; Exh. C-12 at 42 of 54; Exh. C-12 at 43 of 54. Moreover, _____ admits that he is in possession of at least one year's credit card records, Pre-Hearing Tr. 11:10-12, but failed and refused to produce the records despite repeated requests by Enforcement.

²⁵ See Exh. C-7, C-9, and C12; Pre-Hearing Tr. 4-16.

²⁶ Hearing Tr. 73:4-6.

²⁷ Exh. C-7 at 13 of 74; Hearing Tr. 48:16-18.

²⁸ Exh. C-7 at 14 of 74; Exh. C-9 at 3 of 3; Hearing Tr. 48:22-25.

²⁹ Hearing Tr. 49:1-3.

³⁰ Exh. C-12 at 36 of 54.

³¹ Hearing Tr. 48:11-15.

³² Exh. C-12 at 25 of 54; Hearing Tr. 49-51.

³³ *Id.*; Hearing Tr. 51.

³⁴ Hearing Tr. 50-51.

³⁵ Exh. C-12 at 25 of 54; Hearing Tr. 51-52.

On November 4, 2000, _____ paid \$50,000 for a 2000 Cadillac Sedan DeVille.³⁶ In connection with this purchase, he traded-in his 1995 Cadillac, which had a net value of at least \$6,300.³⁷ _____ identifies both the asset value and the liability on the 2000 Cadillac as \$43,000,³⁸ although he provides no documentation to support these assertions. In June 2000, _____ also leased a 1998 Cadillac, in which he holds no equity.³⁹

_____ also owns a 1989 Sun Runner 318 Classic boat, which is moored at the Marriott Marina in San Diego, California.⁴⁰ The boat is 30 feet long, 11½ feet wide, and has two outboard engines with 260 horsepower.⁴¹ The boat is in fair condition and has no mechanical problems.⁴² _____ has kept the boat at the Marriott Marina in San Diego, California since 1994.⁴³ To buy the boat, he took out a purchase money loan in the amount of \$32,000 on May 19, 1993.⁴⁴ Without obtaining an appraisal, he estimated the current value of the boat at \$15,000.⁴⁵ According to the National Automobile Dealers Association (“NADA”) appraisal of _____’ boat, the boat is worth between \$20,335 and \$29,755.⁴⁶ While _____ indicated that he is still making payments on the boat,⁴⁷ his liability schedule does not reflect any remaining indebtedness,⁴⁸ and he provided no documentation to support his assertion that the boat is encumbered.

³⁶ Exh. C-12 at 3-4 of 54; Hearing Tr. 54-56.

³⁷ Exh. C-12 at 3-4 of 54; Hearing Tr. 57.

³⁸ Exh. C-7 at 12 of 74 and 13 of 74, respectively.

³⁹ Exh. C-12 at 1-2 of 54; Hearing Tr. 57-58.

⁴⁰ Exhs. C-7 at 12 of 74 and C11; Hearing Tr. 59-61.

⁴¹ *Id.*

⁴² Hearing Tr. 74-75.

⁴³ Hearing Tr. 61:14-21.

⁴⁴ Exh. C-12 at 47-54 of 54,

⁴⁵ Hearing Tr. 74

⁴⁶ Exh. C-13 at 8 of 10.

⁴⁷ Exh. C-7 at 15 of 74; Hearing Tr. 66:19-25.

⁴⁸ Exh. C-7 at 6 of 74; Exh. C-7 at 13-14 of 74.

In his initial Financial Disclosure Form, _____ reported ownership of a brokerage account and stated its value at \$4,000.⁴⁹ Subsequently, he testified that the brokerage account is his wife's separate property.⁵⁰ _____ produced no documents that evidence the brokerage account or its ownership.⁵¹ He also reported ownership of a bank account,⁵² but states that he has no cash.⁵³ As with the brokerage account statements, he provided no current or historical bank account statements,⁵⁴ despite repeated requests for them by Enforcement.⁵⁵ _____ identified no other significant assets.

With respect to liabilities, _____ asserts that he has substantial credit card debt, in addition to his home mortgages and the car loan noted above.⁵⁶ However, his specific assertions regarding credit card debt are inconsistent. In his Financial Disclosure submissions, he identifies his credit card debt variously as \$16,000.00,⁵⁷ and \$19,511.00.⁵⁸ In contrast, other evidence he submitted, which consists merely of a single page from each of the three accounts, suggests that, as of February 2001, he owes \$6,690.99 on a Bank of America MasterCard,⁵⁹ \$12,560.65 on an America Online Visa card,⁶⁰ and \$7,299.50 on a Citibank Platinum Select card,⁶¹ for a total of \$26,551.14. In addition, while _____ failed to produce any supporting evidence, he also noted an additional credit card debt in the

⁴⁹ Exh. C-7 at 5 of 74 [Listed Securities, \$4,000]; Exh. C-7 at 12 of 74.

⁵⁰ Hearing Tr. 46-47.

⁵¹ See Exhs. C-7, C-9, and C-12.

⁵² Exh. C-7 at 12 of 74.

⁵³ Exh. C-7 at 5 of 74.

⁵⁴ See Exhs. C-7, C-9, and C-12.

⁵⁵ Exh. C-7 at 3 of 74 and 1-2 of 74; Exh. C-8; Pre-Hearing Tr. 4-16.

⁵⁶ Exh. C-7 at 13 of 74.

⁵⁷ Exh. C-7 at 6 of 74.

⁵⁸ Exh. C-7 at 13 of 74.

⁵⁹ Exh. C-9 at 2 of 3.

⁶⁰ Exh. C-12 at 42 of 54.

⁶¹ Exh. C-12 at 43 of 54.

amount of \$4,503.00 to First Card.⁶² He also asserts that he has had to accumulate additional substantial credit card debt since the Award was rendered in order to provide basic living expenses for himself and his wife.⁶³ However, as noted above, despite admitting that he possessed the relevant records,⁶⁴ he failed to produce sufficient evidence to enable the Hearing Officer to evaluate the true extent of his liabilities.

3. Income and Expenses

_____ has been gainfully employed in the securities industry since entry of the Award.⁶⁵ His tax return documents demonstrate that since entry of the Award, he has received income in the following amounts: 1995: \$188,284⁶⁶; 1996: \$160,997⁶⁷; 1997: \$95,358⁶⁸; 1998: \$113,006⁶⁹; 1999: \$172,576⁷⁰; and 2000: \$194,159⁷¹. These records also demonstrate that since entry of the Award, he received tax refunds in the amounts of \$9,875 in 1997; \$12,616 in 1998; and \$15,851 in 1999,⁷² for a total of \$38,342. Although he had not prepared his tax return as of the April 11, 2001, hearing, he expects to receive a refund for tax year 2000.⁷³

⁶² Exh. C-7 at 13 of 74.

⁶³ Hearing Tr. 50.

⁶⁴ Pre-Hearing Tr. 11:10-12.

⁶⁵ Exh. C-1 at 4 of 29.

⁶⁶ Exh. C-7 at 38 of 74; Hearing Tr. 67:11-14.

⁶⁷ Exh. C-7 at 29 of 74; Hearing Tr. 67:20-23.

⁶⁸ Exh. C-7 at 19 of 74; Hearing Tr. 68:5-7.

⁶⁹ Exh. C-7 at 47 of 74; Hearing Tr. 68:11-14.

⁷⁰ Exh. C-7 at 59 of 74; Hearing Tr. 68:15-18.

⁷¹ Exh. C-7 at 70 of 74; Hearing Tr. 69:24-25; 70:1.

⁷² See *supra* notes 70-74; Hearing Tr. 70:5-14.

⁷³ Hearing Tr. 70:15-17.

_____ submitted a statement of expenses on his Financial Disclosure Form.⁷⁴ Among other items, according to his summary documents, his annual automobile expenses for his two Cadillacs amount to \$21,339 for lease and loan payments, gas and oil, and insurance.⁷⁵ Boating expenses amount to \$9,726 annually for slip fees, maintenance, loan payments, and insurance.⁷⁶ He estimates his credit card minimum payments at \$150 per month for each of the three cards, or \$5,400 per year⁷⁷; his housing costs at \$4,740 per month or \$56,884 per year (including \$2,136 for lawn maintenance and \$2,880 for house maintenance)⁷⁸; and his utilities cost at \$648.66 per month, or \$7,784 per year.⁷⁹ While he states that his total 2000 expenses were \$209,116, his estimates of expenses for his house, utilities, and leased vehicle amount only to approximately \$78,068. _____ also indicates that he charges all his food expenses on his credit cards.⁸⁰ However, he provided no evidence that supports or documents the amount of expense or his assertion that all food expenses are charged to credit cards.⁸¹

Discussion

_____ raises as a defense his purported inability to comply with the terms of the Settlement Agreement. Respondents in non-summary suspension proceedings bear the burden of establishing their *bona fide* inability to pay a settlement of an arbitration award

⁷⁴ Exh. C-7 at 8 of 74; Exh. C-7 at 15-16 of 74.

⁷⁵ Exh. C-7 at 15-16 of 74; Hearing Tr. 65-66.

⁷⁶ Exh. C-7 at 15-16 of 74; Hearing Tr. 66:12-21. _____ testified that his lease payments on the 1998 Cadillac are \$8000 per year, which he takes as a business deduction on his tax return. Hearing Tr. 65:14-22.

⁷⁷ Hearing Tr. 63:9-25 to 64:1-5.

⁷⁸ Exh. C-7 at 15 of 74.

⁷⁹ *Id.*

⁸⁰ Exh. C-7 at 8 of 74; Pre-Hearing Tr. 10:18-25 to 11:1-9.

⁸¹ The only credit card statement that _____ submitted, Exh. C-12 at 42 of 54, reflects some purchases at grocery stores in Lahaina, Hawaii, which presumably are vacation expenses along with the other charges reflected on the statement.

where such inability is raised as a defense to suspension of their registration for failure to pay the settlement of the award.⁸² Respondents appropriately bear this burden because their ability to pay is a matter peculiarly within their knowledge.⁸³ When they raise the defense, the NASD is entitled to make a searching inquiry into their assertions.⁸⁴

To meet this burden, a respondent must show more than a current lack of funds on hand to pay the settlement of the award in full. An inability to pay defense may be rejected if it appears that the respondent 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.⁸⁵

Here, _____ has failed to satisfy his burden of proof. The record demonstrates that _____ has both the assets and the income to comply with the terms of the Settlement Agreement and/or make substantial payments to Claimant.

_____ has significant assets at his disposal to apply towards his obligations to Claimant. He has, in his three-car-garage home with a pool, at least \$73,000 in equity available to satisfy his approximately \$87,300 obligation arising out of the Settlement

⁸² See *Bruce M. Zipper*, Exchange Act Release No. 33376, 51 S.E.C. 928, 1993 SEC LEXIS 3525 at *8 (Dec. 23, 1993) (“Because the scope of his assets is peculiarly with Zipper’s knowledge, we think Zipper should properly bear the burden of adducing evidence with respect to those assets.”).

⁸³ *Id.*

⁸⁴ *Daniel Joseph Avant*, Exchange Act Release No. 36423, 52 S.E.C. 442, 1995 SEC LEXIS 2816, at *11 (Oct. 26, 1995); *Zipper*, 1993 SEC LEXIS 3525, at *8.

⁸⁵ *DBCC No. 7 v. Escalator Securities, Inc.* No. C07930034, 1998 NASD Discip. LEXIS 21, at *13 (NBCC Feb. 19, 1998) (“[T]he Firm must be required to demonstrate that the fine or award is so large in relation to its actual capital that it is unable to obtain the additional capital to pay the fine or award by, among other things, reducing expenses and salaries, raising capital, and/or borrowing money.”). *Escalator* at *12-13; *DBCC No. 8 v. Miguel Angel Cruz*, No. C8A930048, 1997 NASD Discip. LEXIS 62, at *106 (NBCC Oct. 31, 1997)(Holding that Cruz could not rely on the inability-to-pay defense because he could have diverted funds

Agreement. He owns a boat that is appraised for between \$20,000 and almost \$30,000. He owns a \$50,000 luxury automobile that was purchased in August 2000, using \$6,300 in equity on another luxury automobile - equity that could have been used to pay down the debt he owed Claimant. Finally, while he claims that \$4,000 in a brokerage account belongs to his wife, there is no documentary evidence upon which the Hearing Officer could conclude that he has no assets either in a brokerage or bank account. Notwithstanding his equity position since the date of the Settlement Agreement, _____ admits that he has never attempted to obtain a loan to meet his obligations to Claimant⁸⁶. However, as late as February 2000, he used \$141,834 of the then existing equity in his house to pay off credit card debt. There is no evidence to suggest what he did with the remaining \$8,166 of the home equity loan proceeds. Thus, the record demonstrates that, contrary to _____' assertions, he has sufficient assets to comply with the terms of the Settlement Agreement or to make substantial payments to Claimant.

Since the entry of the Award, _____ has had substantial income available to meet his obligations to Claimant. In five of the last six years, he reported six-figure incomes, topping out at \$194,159 in the year 2000. He claimed expenses of more than \$209,000 in 2000, but most of those expenses went to supporting a lifestyle to which he may have been accustomed, but which he enjoyed at Claimant's expense. Although he claimed an inability to pay Claimant an additional \$1,000 per month to satisfy his indebtedness to her,⁸⁷ he and his wife spent \$1,778 a month to drive luxury automobiles, almost \$420 a month on lawn and house maintenance, and \$810 a month on their boat which was moored at a marina in

from other unnecessary expenses, such as charitable contributions and a car lease, to pay the fine.). *Cruz* at 106.

⁸⁶ Exh. C-7 at 1 of 74; Hearing Tr. 44:8-22.

San Diego. A credit card statement shows a week of charges in Hawaii during February 2000. Those charges include expenses at golf shops and country clubs. Even assuming food expenses of \$600 a month, _____' total subsistence expenses are less than \$100,000 a year (\$78,068 for housing, utilities, and one leased automobile), far less than his almost \$200,000 gross income for 2000. Even without giving consideration to his payments on credits cards, which have been beyond the minimum required and could have been diverted to pay claimant, or to the substantial tax refund he anticipates from his 2000 tax return, it is clear that _____ has had substantial income available to meet his obligations to Claimant arising under the Award and the Settlement Agreement. His failure to pay Claimant arose as a result of his financial choices, and not out of any inability to pay the amount due and owing.

Much of the financial information submitted by _____ is unreliable and insufficient to demonstrate a bona fide inability to satisfy his obligation to Claimant. For example, there are discrepancies between his estimate of the value of his house and his boat, and the appraisals done by his mortgage company and the NADA. His statements alleging that credit card charges were for essential living expenses cannot be reconciled because of the paucity of those records and the contradictory evidence of luxury expenses in what little documentation found its way into the record.

_____ also failed to produce evidence that was originally requested by Enforcement, but is also necessary to enable the Hearing Officer properly to assess his financial status. That evidence would be crucial to any finding that he was, in fact, unable to satisfy his obligation to Claimant. He failed and refused to produce any bank or brokerage

⁸⁷ Exh. C-4 at 26 of 27.

account statements, or any meaningful documentation of credit card debt. Similarly, he failed to produce documents to support his assertion of an existing encumbrance on his boat, or on the asset value of his automobiles. The failure to provide such documentation undermines his ability to meet his burden of proving financial inability.

_____’ relevant prior disciplinary history also affects his credibility, particularly when it comes into question in a proceeding concerning the payment of an arbitration award. On October 2, 1991, the NASD filed a complaint (#3A910102) against him, alleging a violation of Article III, Section 1 of the Rules of Fair Practice by failing to pay a \$43,793 NASD arbitration award. The DBCC rendered a decision on February 14, 1992, in which _____ was censured, fined \$5,000 and costs, and given thirty days to pay the award. He failed to pay that award and was suspended on March 16, 1992. Acting on his appeal, on September 14, 1992, the NBCC affirmed the sanction, but held the suspension in abeyance for thirty days to allow _____ to perfect a settlement agreement. On October 14, 1992, he did so. On July 28, 1993, he paid the fine and costs portion of the sanction.⁸⁸

Separately, on September 14, 1994, the NASD filed a complaint (#3A940038) against _____, again alleging violations of Article III, Section 1 of the Rules of Fair Practice, but this time because he provided inaccurate and misleading information to the NASD Staff in response to requests for information. On April 13, 1995, the DBCC censured _____, fined him \$10,000, and suspended him from associating with any member in any capacity for 30 days.⁸⁹ After the NBCC affirmed the findings and sanctions on October 24, 1995,⁹⁰

⁸⁸ Exh. C-1 at 28 of 29; Hearing Tr. 38-40.

⁸⁹ Joint Stipulation of Facts, ¶ 1. The disciplinary action arose from _____’ selling away activities and his misrepresentations to NASD Regulation Staff concerning his \$30,000 in compensation. See Exhs. C-21 and C-22. The customer involved in that disciplinary action appears to be the Claimant in this proceeding.

_____ appealed to the Securities and Exchange Commission (“SEC”), which affirmed the decision. _____ then appealed to the Ninth Circuit. In affirming the findings and sanctions as a result of its independent review, the Ninth Circuit held that _____ provided the NASD with inaccurate and misleading information and engaged in unethical behavior.⁹¹

It is clear from his past disciplinary history of failing to pay an arbitration award until faced with suspension, and of providing inaccurate and misleading information to the NASD, that _____ cannot be given the benefit of the doubt on any of his assertions, absent strong corroborating evidence. The burden of proof in this case is on him. He has failed to provide any necessary corroborating evidence, and thus he has clearly failed to meet that burden of proving an inability to pay the amount owing under the Settlement Agreement.

Finally, in his proposed findings of fact, and at various stages of this proceeding, _____ claimed that he was dismissed from the original state court action that led to the arbitration at issue⁹², and that therefore, “the award has been modified or vacated by a court.” That contention widely misses the mark. Regardless of what may have happened in the state court action that gave rise to the arbitration, there is no evidence that the Arbitration Award itself, which was entered against _____, has been modified or vacated by any court of record, or that _____ has filed any motion seeking to have the Award modified or vacated. Moreover, the most recent evidence bearing on the history of the arbitration is the Settlement Agreement, dated August 4, 1997, which specifically states that if “_____ defaults in any payment due ...[J.D.] shall be allowed to proceed to execute

⁹⁰ Exh. C-1 at 21-22 of 29; Exh. C-21.

upon the Judgment as if this Agreement had not been made.” There is no evidence of any state court action following the date _____ signed the Settlement Agreement, and therefore no evidence that the Award has been modified or vacated. Indeed, _____ stipulated that he has not made a motion to modify or vacate the Award.

Under NASD Procedural Rule 9514, the issues to be decided are narrow and generally limited to (1) whether the person has paid the award or complied fully with the settlement agreement; (2) whether the claimant has agreed to installment payments or has otherwise settled the matter; (3) whether the person has filed a timely motion to vacate or modify the arbitration award and such motion has not been denied, (4) whether the person has filed a petition in bankruptcy and the bankruptcy proceeding is pending, or the award or payment owed under the settlement agreement has been discharged by the bankruptcy court, and (5) whether the person is unable to pay the award.⁹³ Considering all the evidence of record, the Hearing Officer concludes that those five issues are clearly resolved in the negative.

Accordingly, it is hereby **ORDERED**, that pursuant to Article VI, section 3 of the NASD By-Laws and Rule 9514(g), _____’ registration shall be suspended effective as of the date of issuance of this Decision, and that such suspension shall continue until he provides documentary evidence to NASD Regulation showing: (1) that he has paid the full amount due under the Settlement Agreement to pay the Award; (2) Claimant has agreed to a modification of the Settlement Agreement or, (3) he has filed a bankruptcy petition in a

⁹¹ Exh. C-22.

⁹² See *supra* text accompanying notes 2, 6.

⁹³ *Order Granting Accelerated Approval to Proposed Rule Change by the NASD Relating to Cancellations and Suspensions for Failure to Comply with Arbitration Award*, Exchange Act Release No. 34-40026, 1998 SEC LEXIS 1154 (May 26, 1998).

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision ARB010001.

United States Bankruptcy Court or that the debt has been discharged by a United States Bankruptcy Court.

Alan W. Heifetz
Hearing Officer