

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

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DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondents.

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Non-Summary Suspension Proceeding  
No. ARB980026

Hearing Officer - Andrew H. Perkins

**DECISION**

June 1, 1999

*Digest*

The Office of Dispute Resolution of NASD Regulation, Inc. (the "ODR"), pursuant to Rule 9513(a), notified Respondents \_\_\_\_\_ and \_\_\_\_\_ (collectively the "\_\_\_\_\_") that their registrations would be suspended, in accordance with Article VI, Section 3 of the NASD By-Laws and Rule 9510 et seq., for failing to pay an arbitration award. The \_\_\_\_\_ requested a hearing, pursuant to Rule 9514(a), at which they argued that they are financially unable to pay the award. The Hearing Officer, sitting as the Hearing Panel pursuant to Rule 9514(b), held that \_\_\_\_\_ and \_\_\_\_\_ registrations should be suspended because they failed to demonstrate a bona fide inability to pay the arbitration award.

*Appearances*

Joy H. Hansler, Esq., Regional Counsel, Los Angeles, California, and Rory C. Flynn, Chief Litigation Counsel, Washington, DC, for the Department of Enforcement.

\_\_\_\_\_, Esq., San Diego, California, for \_\_\_\_\_ and \_\_\_\_\_.

**DECISION**

**Introduction**

By letters of November 11 and November 16, 1998, written in accordance with Article VI, Section 3 of the NASD By-Laws and Rules 9150, et seq., the ODR notified \_\_\_\_\_ that her registration was subject to suspension for non-payment of the award rendered on or about June 9, 1998, in NASD Arbitration No. 96-02372.<sup>1</sup> On November 18, 1998, the Office of Hearing Officers received \_\_\_\_\_ and \_\_\_\_\_'s request for a hearing. In their joint request, the \_\_\_\_\_ asserted that they did not have the financial ability to pay the award in one lump sum, and, therefore they should not be suspended.

A hearing was held, by telephone, on January 6, 1999, at which the \_\_\_\_\_ introduced 17 exhibits, including a Personal Disclosure of Assets and Financial Information Form ("Personal Disclosure Form") and a Business Disclosure of Assets and Financial Information Form ("Business Disclosure Form"), which forms were pre-marked as Ex. C7. The Department of Enforcement ("Enforcement") introduced six exhibits and called both of the Respondents as witnesses.

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<sup>1</sup> Ex. C6. References to the evidence are as follows: References to the hearing transcript are cited as "Tr." Enforcement's exhibit references are "Ex. C[number]," and Respondents' exhibit references are "Ex. R[number]."

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Following the hearing, the Hearing Officer determined that the ODR had not sent \_\_\_\_\_ notice of this proceeding pursuant to Rule 9513(a). Accordingly, the Hearing Officer held a conference with counsel for the Parties on March 1, 1999, to give them the opportunity to address this issue. Respondent's counsel indicated that at the time he filed the hearing request on behalf of his clients he was unaware that the ODR had only served \_\_\_\_\_ with notice of this proceeding. Counsel for Enforcement indicated that she became aware of the issue before the hearing but concluded that \_\_\_\_\_ consented to the proceeding by joining his wife in requesting a hearing. For this reason, Counsel for Enforcement did not bring the issue to the Hearing Officer's attention.

The Hearing Officer found that notice of the proceeding pursuant to Rule 9513(a) was jurisdictional and not subject to waiver. Accordingly, by order dated March 5, 1999, the Hearing Officer directed Enforcement to serve \_\_\_\_\_ with proper notice of this proceeding if it intended to proceed against him. On March 9, 1999, Enforcement served \_\_\_\_\_ with such notice, and, on March 10, 1999, it filed a copy of the notice with the Office of Hearing Officers. On March 15, 1999, \_\_\_\_\_ filed a second request for hearing and a declaration verifying the accuracy of the evidence submitted during the hearing on January 6, 1999. He also asked that his request for a hearing be treated as having been filed *nunc pro tunc* to avoid the expense of another hearing.

On March 18, 1999, the Hearing Officer entered an order treating the March 9, 1999, notice and \_\_\_\_\_ March 15, 1999, request for a hearing as having been filed *nunc pro tunc* as of November 18, 1998. Further, the Hearing Officer found that an additional hearing was unnecessary. \_\_\_\_\_ had fully participated during the hearing on January 6, 1999, and he indicated that he wanted to avoid the expense of a second hearing.

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After a review of the entire record, the Hearing Officer finds that the \_\_\_\_\_ failed to establish a valid defense to their failure to pay the arbitration award. Accordingly, \_\_\_\_\_'s and \_\_\_\_\_'s registrations are hereby suspended until one or the both of them provide documentary evidence to NASD Regulation, Inc. showing the existence of one or more events, as specified in this Decision, that would allow for reinstatement.

### **Facts**

\_\_\_\_\_ and \_\_\_\_\_ worked for Financial Network Investment Corporation (“\_\_\_\_”) from 1987 to 1992.<sup>2</sup> In 1997, \_\_\_\_ filed an arbitration claim (NASD Arbitration No. 96-02372) against them seeking indemnification from a claim brought by a former customer.<sup>3</sup> On or about June 9, 1998, an arbitration panel found \_\_\_\_\_ and \_\_\_\_\_ jointly and severally liable to \_\_\_\_ in the sum of \$35,000.<sup>4</sup> By letter of October 30, 1998, \_\_\_\_'s attorneys informed the ODR that the \_\_\_\_\_ refused to pay the award.<sup>5</sup> Based upon this letter, NASD Regulation, Inc. initiated this non-summary suspension proceeding.

The \_\_\_\_\_ did not contest their failure to pay the award within 30 days of its receipt.<sup>6</sup> Rather, they asserted that their failure to do so should be excused due to their financial inability to pay the award in full. In support of this claim, they introduced personal and business financial disclosure forms with supporting documents, including their US Individual Income Tax Return for 1997.<sup>7</sup> They also

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<sup>2</sup> Exs C1 and C2.

<sup>3</sup> Ex. R15, ¶ 1.

<sup>4</sup> Ex. C3.

<sup>5</sup> Ex. C5.

<sup>6</sup> Joint Stipulations, Stipulations as to Facts ¶ 5.

<sup>7</sup> Ex. C6 and Ex. R1.

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submitted evidence that they attempted to negotiate a payment plan, but \_\_\_\_ was unwilling to accept periodic payments.<sup>8</sup>

The evidence shows that \_\_\_\_\_ was employed by \_\_\_\_\_, Inc. from January 1995 to July 1998, at which time he was terminated by \_\_\_\_\_ and suspended by the NASD.<sup>9</sup> \_\_\_\_\_ was employed by United Pacific from January 1995 to November 1998, when \_\_\_\_\_ was acquired by \_\_\_\_\_ Corporation.<sup>10</sup> She is currently employed by \_\_\_\_\_.

In addition to his employment as a registered representative, \_\_\_\_\_ is a registered investment advisor. He conducts this business as a sole proprietorship under the name \_\_\_\_\_ and Associates (“\_\_\_\_\_”).<sup>11</sup>

The evidence further shows that both \_\_\_\_\_ deposit all of their earnings into \_\_\_\_\_.<sup>12</sup> The Business Disclosure Form reflects that \_\_\_\_\_ received approximately \$269,000 between January 1 and December 11, 1998, and approximately \$272,000 for the same period in 1997.<sup>13</sup> The evidence further shows that between January 1 and December 11, 1998, the \_\_\_\_\_ withdrew \$140,100 from \_\_\_\_\_ to pay their personal expenses.<sup>14</sup> Instead of paying themselves a salary, they withdraw money from \_\_\_\_\_ as they need it. Thus, their expenses match their reported personal income.

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<sup>8</sup> Ex. R15, ¶¶ 5-6.

<sup>9</sup> Ex. C1. Mr. \_\_\_\_\_ suspension on an unrelated matter ran from July 20, 1998, to January 19, 1999.

<sup>10</sup> Ex. C2.

<sup>11</sup> Tr. 21.

<sup>12</sup> Tr. 36.

<sup>13</sup> Ex. C7, at 19.

<sup>14</sup> Ex. C7, at 4.

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The \_\_\_\_\_' Personal Disclosure Form reveals that they have an approximate negative net worth of \$3,344, assuming that \_\_\_\_\_ is valued at \$100,000. Their personal residence is valued at \$240,000 and is subject to three liens totaling \$243,000. They also own two automobiles and other personal property worth \$48,000 and have an individual retirement account in \_\_\_\_\_'s name worth \$12,800. They show that they have no money in any other accounts and no cash on hand.<sup>15</sup>

The Business Disclosure Form for \_\_\_\_\_ reflects that the business has a negative net worth of \$76,000. The only assets listed for the business are \$5,000 in cash and furniture valued at \$10,000.<sup>16</sup> However, no value was given for either accounts receivable or work in progress, and no explanation was offered for this omission.

## **Discussion**

A respondent in a non-summary suspension proceeding bears the burden of establishing his bona fide inability to pay an arbitration award where such inability is raised as a defense to suspension of the respondent's registration for failure to pay the award.<sup>17</sup> An inability to pay defense may be rejected if it appears that the respondent has the ability to divert funds from other expenditures to pay the award, or could borrow the funds, or could make some meaningful payment toward the award from available assets or income, even if he could not pay the full award.<sup>18</sup>

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<sup>15</sup> Ex. C7, at 2.

<sup>16</sup> Ex. C7, at 10.

<sup>17</sup> See In re: Bruce M. Zipper, Exchange Act Release No. 33376, 55 S.E.C. Docket 2002 (Dec. 23, 1993) ("Because the scope of his assets is particularly with Zipper's knowledge, we think Zipper should properly bear the burden of adducing evidence with respect to those assets.").

<sup>18</sup> District Business Conduct Committee for District No. 7 v. Escalator Securities, Inc., Complaint No. C07930034 (NBCC Feb. 19, 1998); District Business Conduct Committee for District No. 8 v. Miguel Angel Cruz, Complaint No. C8A930048 (NBCC Oct. 31, 1997); Herbert Garrett Frey, Exchange Act Release No. 39007 (Sept. 3, 1997); Michael H. Novick, Exchange Act Release No. 37503, 62 S.E.C. Docket 1129 (July 31, 1996); District Business Conduct Committee for District No. 7 v. Bruce M. Zipper, Complaint No. C07910138 (NBCC Oct. 31, 1994), aff'd, Exchange Act Release No. 35606, 58 S.E.C. Docket 235 (April 17, 1995).

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Here, the \_\_\_\_\_ failed to satisfy their burden of proof. The evidence shows that they have assets available to make larger payments than the \$500 per month they proposed to \_\_\_\_\_. At a minimum, they could have liquidated or borrowed against \_\_\_\_\_'s IRA and paid \_\_\_\_\_ the \$12,800 in the account. In addition, they choose to contribute nearly \$8,000 to charity in 1998.<sup>19</sup> Diverting these funds would have enabled them to offer approximately \$600 more per month to the payment of the award.

Finally, the Hearing Officer finds much of the \_\_\_\_\_' evidence to be insufficient and unreliable. Their testimony and documents contain material omissions and inaccuracies. For example, in her affidavit, \_\_\_\_\_ states that their net worth is approximately a negative \$96,000.<sup>20</sup> The Personal Disclosure Form, however, shows a negative net worth of only a few thousand dollars assuming \_\_\_\_\_'s business is valued at \$100,000. Further, they failed to explain or verify their valuation of \_\_\_\_\_, which they show with a negative worth of \$76,000 on the Business Disclosure Form. \_\_\_\_\_ further asserts in her affidavit that her husband's earnings virtually have been eliminated by his suspension from registration with the NASD, but their evidence shows no such decrease from 1997 to 1998. Moreover, because they have chosen to intermingle many of their business and personal expenses, it is impossible to ascertain their validity and necessity. This deficiency is worsened by the fact that they round off their monthly credit card payments to equal the amount they consider to be available in the \_\_\_\_\_ account. By doing so, they limit the degree to which the Hearing Officer can judge their ability to divert further assets to the payment of the award. Thus, they

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<sup>19</sup> Ex. C7, at 4, 18.

<sup>20</sup> Ex. R15, ¶ 4.

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have not eliminated the possibility that some of the \$36,000 they applied to credit card payments in 1998 could have been deferred in favor of payments toward the arbitration award.

Accordingly, it is hereby ordered, pursuant to Article VI, Section 3 of the NASD By-Laws and Rule 9514(g), that \_\_\_\_\_'s and \_\_\_\_\_'s registrations shall be suspended effective as of the date of the issuance of the Decision.<sup>21</sup> Such suspensions shall continue as to each of them until NASD Regulation is provided documentary evidence showing: (1) the award is paid in full; (2) \_\_\_\_\_ has entered into a settlement agreement with the Respondent seeking reinstatement; or (3) the Respondent seeking reinstatement has filed a bankruptcy petition in a United States Bankruptcy Court or that the debt has been discharged by a United States Bankruptcy Court.<sup>22</sup>

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Andrew H. Perkins  
Hearing Officer

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<sup>21</sup> The Hearing Officer considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.

<sup>22</sup> The time for the \_\_\_\_\_ to have filed a petition for a court to modify or vacate the award has passed.