

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

REGULATORY OPERATIONS,

Complainant,

v.

RESPONDENT

Respondent.

Expedited Proceeding
No. ARB150048

STAR No. 20150472194

Hearing Officer - LOM

**ORDER GRANTING COMPLAINANT'S MOTION
FOR AN ORDER PURSUANT TO RULE 9559(m) AND
DEEMING SEPTEMBER 15, 2015 NOTICE OF SUSPENSION
FINAL FINRA ACTION**

I. INTRODUCTION

On December 2, 2015, Complainant filed a Motion for an Order pursuant to FINRA Rule 9559(m).¹ Respondent has failed to comply with two Orders requiring him to produce information to support his asserted defense of a *bona fide* inability to pay an arbitration award against him. Accordingly, the Hearing Officer **GRANTS** Complainant's Motion, finds that Respondent has abandoned his defense and waived his opportunity for a hearing, and cancels the hearing scheduled for December 3, 2015. The Notice of Suspension issued to Respondent on September 15, 2015, pursuant to FINRA Rule 9554, is deemed to be final FINRA action.

II. DISCUSSION

A. Arbitration Award Against Respondent

On July 17, 2015, Respondent was served with an arbitration award against him. The arbitration panel found him liable to pay \$12,500 in compensatory damages. The arbitration panel also assessed certain fees and costs against him.²

B. Notice Of Suspension And Request For Hearing

¹ Complainant's Motion is titled "Motion For An Order Pursuant To Rule 9559(m) Deeming Notice Of Suspension To Be Final FINRA Action [And] Finding That Respondent Has Abandoned His Defense And Waived His Opportunity For A Hearing." The exhibits attached to the Motion are referred to here by the prefix "Ex." and the identifying number, as in "Ex. 1."

² Ex. 3.

On September 15, 2015, Complainant issued to Respondent a Notice of Suspension informing him of FINRA's intent to suspend him from associating with any FINRA member pursuant to FINRA Rule 9554 for failure to pay the July 17, 2015, arbitration award.³ On October 5, 2015, Respondent filed a request for hearing on the matter, asserting as a defense that he had a *bona fide* inability to pay the arbitration award.⁴

C. Orders To Provide Evidence In Support Of Defense

On October 8, 2015, in response to Respondent's request for a hearing, the Hearing Officer issued an Order setting a hearing in this matter for November 4, 2015. The Order further required Complainant to send to Respondent the standard FINRA financial disclosure statement so that he could complete it and provide the financial information necessary to support his defense. The Order also set forth a schedule for Respondent to complete the production of the financial information necessary to support his defense. The Order warned that any failure to comply could be deemed an abandonment of Respondent's defenses and a waiver of any opportunity for a hearing, in which case the Notice of Suspension would be deemed to be final FINRA action.⁵

Complainant complied with its responsibilities under the October 8, 2015 Order. It sent Respondent the standard disclosure statement by overnight courier and regular mail the same day as the Order.⁶

Prior to the November 4, 2015, hearing date, Respondent requested an extension of time to complete his financial submission. Complainant did not oppose the request. On October 28, 2015, the Hearing Officer issued another Order rescheduling the hearing for December 3, 2015, and setting out a new schedule for completing the production of information. The October 28, 2015 Order again warned that a failure to comply could, ultimately, lead to a ruling deeming the Notice of Suspension to be final FINRA action.⁷

D. Respondent's Failure To Comply With The Orders

Respondent has had two months to provide the financial information required by the two Orders. He has failed to comply. He also has demonstrated that he has no intention of complying.

To the extent that Respondent has provided information, it is insufficient to establish a *bona fide* defense of inability to pay. In fact, he has withheld and purposefully concealed information necessary to make a meaningful evaluation of his financial situation.

³ Ex. 4.

⁴ Ex. 5.

⁵ Ex. 1.

⁶ Ex. 6.

⁷ Ex. 2.

For example, although he was asked to identify any business entity in which either he or his wife had an interest, Respondent failed to identify a business that generated \$24,000 to \$25,000 in yearly net profit, as reported on his and his wife's joint federal income tax returns for 2013 and 2014. Complainant raised questions about the business income on the tax returns, including the nature and value of the interest in the business and the amount of any income generated so far in 2015. Such information is necessary to determine if Respondent has income from which he could pay the arbitration award or an asset that could be sold in order to do so. Complainant has resisted providing any more information regarding the business, apparently on the theory that it is owned by his wife and daughter and has nothing to do with him.⁸

In another example, Respondent did not produce complete monthly statements for financial and credit card accounts. Rather, he produced only the first page of the monthly statements for a credit union account and even those pages were redacted. Similarly, Respondent produced a single page of each monthly statement for three credit cards. The incomplete production makes it impossible to identify and evaluate the amount and sources of his income and the nature and amount of his expenditures. Complainant repeatedly requested complete statements and warned that a failure to produce them could result in the Notice of Suspension being deemed final FINRA action.⁹

In a third example, Respondent redacted or removed information on his paystub that would indicate where Respondent's paychecks are deposited. Without any correspondent bank account statements confirming such deposits, Complainant is unable to assess his total income and overall financial condition.¹⁰

The information provided also is sometimes inconsistent, giving rise to a concern that Respondent has misrepresented his financial position. For example, Respondent asserts that he and his wife own no vehicles. He says that they use vehicles lent by relatives.¹¹ Respondent produced a list of regular expenses, however, that includes car insurance.¹² Complainant asked for documentary evidence of the ownership of the vehicles he and his wife are borrowing, as well as information regarding the insurance policy. Respondent said he was unable to produce any information regarding car ownership because the unidentified relatives are traveling. Although asked to produce the two most recent and complete billing statements for the car insurance, he failed to do so. He also failed to provide a statement as to how he maintains vehicle insurance on vehicles he does not own.¹³

⁸ Exs. 9-11; Motion ¶¶ 9.

⁹ Exs. 12, 15, 16; Motion ¶¶ 10, 13-14.

¹⁰ Ex. 13, Motion ¶ 11.

¹¹ Ex. 9 (Answer sheet to 26 questions/requests).

¹² Ex. 16.

¹³ Ex. 11 ¶ 14.

This Expedited Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order EXP15-03 (ARB150048).

Respondent has made plain that he does not intend to produce the information required by the two Orders. He calls the inquiry a "witch hunt,"¹⁴ and says "[I] respectfully decline to allow you or anyone else to run shot over my families individual discretionary spending items."¹⁵ He also attacks the basis for the arbitration award.¹⁶

Late the afternoon before the scheduled hearing date, Respondent forwarded to the Office of Hearing Officers a copy of still further correspondence he sent to Complainant, apparently in lieu of the submissions he was required to make to the Office of Hearing Officers prior to the hearing. That correspondence confirms that Respondent does not intend to comply with the Orders. He asserts, for example, that he will not provide transactional details of his broker-dealer statements because "[i]t's simply not your business and isn't necessary...for this type of analysis."¹⁷ He concluded "[Y]ou've been given all the financial information anyone should need..."¹⁸

E. FINRA Rule 9559(m) Mandates That The Notice of Suspension Shall Be Deemed Final FINRA Action

FINRA Rule 9559(m) is clear, and it is mandatory. If a respondent fails to comply with an Order requiring the production of information to support a defense to a notice of suspension, then that failure "shall be considered an abandonment of the respondent's defense and waiver of any opportunity for a hearing." It further provides that the notice of suspension "shall be deemed to be final FINRA action."

The reason the Rule is mandatory is simple. In a case like this, where a respondent has failed to pay an arbitration award but asserts that he should be excused from paying because of an inability to pay, the burden of proof as to the respondent's defense rests on the respondent. If respondent fails to provide the information necessary to support the defense, then no hearing is required.

Respondent here argues that he has produced enough information and that it would be unreasonable to require him to produce more. That is patently untrue. The Motion makes clear that Respondent has withheld and concealed information necessary to evaluate his defense. Furthermore, it is not up to Respondent to judge the probative value of the information sought. It is the role of the Hearing Officer to evaluate the evidence, once Respondent has complied with his duty is to produce it. Finally, when a Respondent raises this defense, FINRA is "entitled to make a searching inquiry into any such claim."¹⁹ Mere assertions are not sufficient to establish the defense of inability to pay.

¹⁴ Ex. 17.

¹⁵ Ex. 16.

¹⁶ Ex. 14.

¹⁷ E-mail marked "Sent: Wednesday, December 02, 2015 4:32 PM."

¹⁸ E-mail marked "Sent: Wednesday, December 02, 2015 4:32 PM."

¹⁹ *Robert Tretiak*, 56 S.E.C. 209, 2003 SEC LEXIS 653, at *17 (March 19, 2003).

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III. CONCLUSION

For the foregoing reasons, Complainant's Motion is **GRANTED**. The Hearing Officer finds that Respondent has abandoned his defense and waived his opportunity for a hearing. The hearing scheduled for December 3, 2015, is cancelled. The Notice of Suspension issued to Respondent on September 15, 2015, pursuant to FINRA Rule 9554, is deemed to be final FINRA action.

SO ORDERED.

Lucinda O. McConathy
Hearing Officer

Dated: December 3, 2015