

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

REGULATORY OPERATIONS,

Complainant,

v.

J-THADDEUS P. MCGAFFEY
(CRD No. 3263062),

Respondent.

Expedited Proceeding
No. ARB160047

STAR No. 20160516277

Hearing Officer—CC

EXPEDITED DECISION

March 16, 2017

Respondent failed to pay an industry arbitration award and failed to demonstrate that he had a *bona fide* inability to pay the award. Respondent is suspended from associating with any member firm in any capacity.

Appearances

For the Complainant: Deon McNeil-Lambkin, Esq., and Ann-Marie Mason, Esq.,
Department of Regulatory Operations, Financial Industry Regulatory Authority.

For the Respondent: J-Thaddeus P. McGaffey represented himself.

DECISION

I. Introduction

On September 27, 2016, FINRA’s Office of Dispute Resolution notified Respondent J-Thaddeus P. McGaffey (“McGaffey”) that his registration would be suspended effective October 18, 2016, because of his failure to pay an arbitration award.¹ On October 10, 2016, McGaffey timely filed a request for a hearing and claimed a *bona fide* inability to pay the arbitration award.²

On December 20, 2016, and January 5, 2017, the parties participated in a telephone hearing before the Hearing Officer.

¹ Complainant’s Exhibit (“CX”)-7.

² CX-8; December 8, 2016 Stipulation (“Stip.”) ¶ 4.

McGaffey concedes that he has not paid any portion of the arbitration award.³ He contends that he is financially unable to do so.⁴ The Department of Regulatory Operations argues that McGaffey failed to establish a *bona fide* inability to pay because he has not produced sufficient documentation to substantiate his claim.⁵

After consideration of the documents provided by McGaffey, I find that he failed to document his claim of a *bona fide* inability to pay. Accordingly, I suspend McGaffey from associating with any member firm in any capacity.

II. Findings of Fact and Conclusions of Law

A. Background

Respondent first entered the securities industry in 1999.⁶ Most recently, he was associated in a registered capacity with member firms Caitlin John, LLC (“Caitlin John”) from August 2014 through December 2015, and Waddell & Reed (“Waddell”) from May 2013 through August 2014.⁷

On May 12, 2015, Waddell filed an arbitration claim against McGaffey with FINRA Dispute Resolution (FINRA Arbitration No. 15-01086), alleging that McGaffey breached his employment contract by failing to repay a loan and advanced commissions upon his departure from Waddell.⁸ In November 2016, a FINRA Dispute Resolution arbitration panel rendered an award in favor of Waddell in the amount of approximately \$243,986 plus interest (“the Award”).⁹ McGaffey has not produced evidence of an order to vacate the Award or a pending motion to vacate the Award in a court of competent jurisdiction.¹⁰

³ Stip. ¶ 5.

⁴ Hearing Transcript (“Tr.”) 12.

⁵ Tr. 13-15.

⁶ CX-2, at 4; Tr. 16.

⁷ CX-2, at 3.

⁸ CX-3.

⁹ CX-3. Respondent stipulates that, on August 23, 2016, he received notice of the Award and his obligation under FINRA Rules to pay the Award within 30 days. Stip. ¶ 2; CX-4.

¹⁰ McGaffey claims in his October 10, 2016 request for hearing that he has “made many attempts to file a motion to vacate as provided under the Federal Arbitration Act ... however I have been unable to obtain written procedural guidance from FINRA nor has my legal counsel been able to determine the appropriate jurisdiction to file the motion in.” CX-8. The United States Code, 9 U.S.C. § 10, states in relevant part:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;

McGaffey has made no payments to Waddell towards satisfaction of the Award and has not filed a petition for bankruptcy protection.¹¹ Accordingly, FINRA’s Office of Dispute Resolution issued a notice of suspension pursuant to Rule 9554 on September 27, 2016.¹² McGaffey stipulates that FINRA properly served him with the suspension notice.¹³

B. Inability to Pay Standard

FINRA’s arbitration process and the Code of Arbitration Procedure are designed “to provide a mechanism for the speedy resolution of disputes among members, their employees, and the public.”¹⁴ To ensure compliance with arbitration awards, FINRA promulgated rules to allow for expedited proceedings against members, associated persons, and formerly associated persons for failing to abide by arbitration awards.¹⁵

A respondent in an expedited suspension proceeding under FINRA Rule 9554 may assert certain limited defenses, including: (1) the award has been paid in full; (2) the parties have agreed to installment payments of the amount awarded, or have otherwise agreed to settle the

-
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
 - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
- (c) The United States district court for the district wherein an award was made that was issued pursuant to Section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in Section 572 of title 5.

McGaffey has not offered any evidence or testimony to substantiate his claim that he endeavored to file a motion to vacate the Award or that such a motion is pending in any court. Thus, in this decision I address only McGaffey’s argument that he has a *bona fide* inability to pay the Award.

¹¹ Stip. ¶¶ 5, 6.

¹² Stip. ¶ 3; CX-7.

¹³ Stip. ¶ 3.

¹⁴ *Herbert Garrett Frey*, 53 S.E.C. 146, 153 (1997); *accord*, *Eric M. Diehm*, 51 S.E.C. 938, 939 (1994).

¹⁵ FINRA By-Laws, Article VI, Section 3(b) (stating that FINRA may, after 15 days’ notice in writing, suspend the registration of any person for failure to comply with an arbitration award where a timely motion to vacate or modify the award has not been made pursuant to applicable law or where such a motion has been denied); FINRA Rule 9550, *et seq.* (procedures for expedited proceedings). *See also* *Richard R. Pendleton*, 53 S.E.C. 675, 679 (1998) (“We have repeatedly stated that the NASD arbitration system provides a speedy mechanism for settling disputes, which the NASD may foster by taking prompt action against those who fail either to honor arbitration awards or to seek to have them set aside.”); NASD Notice to Members 04-57, 2004 NASD LEXIS 90 (Aug. 2004) (same).

action, and the respondent is not in default of the terms of the settlement agreement; (3) the award has been vacated by a court; (4) a motion to vacate or modify the award is pending in a court; and (5) the respondent has a bankruptcy petition pending in U.S. Bankruptcy Court, or a U.S. Bankruptcy Court has discharged the award.¹⁶ In addition, a respondent may assert a *bona fide* inability to pay the award.¹⁷

To prevail on an inability-to-pay defense, McGaffey must demonstrate that he is not able to make any meaningful payment toward satisfaction of the Award from available assets or income.¹⁸ “An inability to pay defense may be rejected if it appears that the respondent could 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 is unable to pay the full award.”¹⁹

Respondent bears the burden of establishing a *bona fide* inability to pay.²⁰ On this point, the Commission has stated that, “[b]ecause the scope of [a respondent’s] assets is peculiarly within [his] knowledge, we think [the respondent] should properly bear the burden of adducing evidence with respect to those assets.”²¹ Furthermore, FINRA is entitled to make a rigorous inquiry into a respondent’s assertion of inability to pay.²²

C. Respondent’s Financial Condition

1. FINRA’s Inquiries into McGaffey’s Financial Condition

On October 11, 2016, Regulatory Operations requested that McGaffey submit a detailed financial disclosure statement requiring him to respond to a set of questions and provide

¹⁶ FINRA By-Laws, Article VI, Section 3; NASD Notice to Members 00-55, 2000 NASD LEXIS 63, at *4 (Aug. 2000); *Dep’t of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB060031, at 4 (OHO Apr. 16, 2007), http://www.finra.org/sites/default/files/OHODecision/p038228_0_0.pdf.

¹⁷ *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *16 (Mar. 17, 2016); *William J. Gallagher*, 56 S.E.C. 163, 168-169 (2003).

¹⁸ *DiPietro*, 2016 SEC LEXIS 1036, at *16 (citations omitted).

¹⁹ *Dep’t of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB040037, at 7-8 (OHO Mar. 2, 2005), http://www.finra.org/sites/default/files/OHODecision/p038234_0.pdf.

²⁰ *DiPietro*, 2016 SEC LEXIS 1036, at *16; *Gallagher*, 56 S.E.C. 163, 168-169; *Frey*, 53 S.E.C. 146, 151.

²¹ *Bruce M. Zipper*, 51 S.E.C. 928, 931 (1993).

²² *DiPietro*, 2016 SEC LEXIS 1036, at *16 (“A FINRA Hearing Officer may make a ‘rigorous inquiry’ into a respondent’s claimed inability to pay.”); *Robert Tretiak*, 56 S.E.C. 209, 220 (2003) (“It is well settled that a respondent bears the burden of demonstrating his or her inability to pay, and that [FINRA] is entitled to make a searching inquiry into any such claim.”); *Gallagher*, 56 S.E.C. 163, 169 (“Gallagher had the burden of proof to establish his inability to pay the award, and the Hearing Officer was entitled to make a rigorous inquiry into Gallagher’s claim that he was unable to pay the award.”).

documentation to support each response.²³ Regulatory Operations advised McGaffey in the letter that he bore the burden of proving a *bona fide* inability to pay. On October 24, 2016, McGaffey responded.²⁴ While at first glance, his submission appears to attach supporting documentation, upon review, multiple items that McGaffey identifies as “attached” were not in fact attached to his submission. On October 31, 2016, Regulatory Operations emailed McGaffey and stated that the following items were identified as attached but not attached to his submission:

- W-2/1099 Forms for 2013 through 2015;
- Copies of extension requests for 2013 through 2015 federal income tax returns;
- Evidence of ownership and the value of a vehicle and vehicle loan;
- Definitive answers as to whether he has an IRA, Keogh, 401K, investment accounts or mutual funds, and life insurance policies;
- Two most recent billing statements for each monthly expense identified; and
- Evidence that his primary residence is in foreclosure.²⁵

On November 1, 2016, McGaffey responded and attached some additional documentation. As to other inquiries, he responded as follows:

- W-2/1099 Forms for 2013 through 2015 – “I will see if copies of these documents are available. If they are not I can sign off on a 4506-T for you to request copies.”
- Copies of extension requests for 2013 through 2015 federal income tax returns – “No copies exist – filing an extension is an automatic system and no paper copy exists.”
- Evidence of ownership and value of a vehicle and vehicle loan – “The vehicle loan is clearly notated on the credit report ... the value of a used car is highly subjective and most often just below what ever is owed on it. What method would you like submitted for a guess on the value?”²⁶

On November 1, 2016, Regulatory Operations requested additional information.²⁷ Regulatory Operations noted that the letter that McGaffey submitted to demonstrate that his primary residence was in foreclosure was addressed to McGaffey and “Debra Lynn McGaffey.” Regulatory Operations asked McGaffey to identify Debra Lynn McGaffey and, if she is a spouse, answer all financial disclosure questions as to her. Regulatory Operations also stated that pages from a document McGaffey identified as a credit report (that McGaffey attached to his initial response) are not sufficient to document his monthly expenses. Regulatory Operations stated that McGaffey’s claim to have been granted extensions for filing federal income tax returns for the

²³ CX-9.

²⁴ CX-10.

²⁵ CX-11.

²⁶ CX-12.

²⁷ CX-13.

past three years, without some documentation, was unconvincing. Regulatory Operations noted that McGaffey's Central Registration Depository ("CRD") record indicates he was employed from 1997 through July 2016, and requested W2 Forms, 1099s, paycheck stubs, commission statements, or other documentation to demonstrate his income.

On November 8, 2016, McGaffey responded that his wife, Debra Lynn McGaffey, does not work and has not worked for more than ten years.²⁸ McGaffey also indicated that he was attempting to obtain old 1099 Forms to produce to FINRA.

On November 17, 2016, Regulatory Operations advised McGaffey that he still had not produced the following items, as earlier requested by Regulatory Operations:

- Year-end account statements for 2014 and 2015 for his checking and savings accounts;
- W2 Forms and 1099 forms for 2013, 2014, and 2015;
- Federal and state income tax returns for the same years;
- Pay stubs and commission statements for the last six months during which he received either;
- Two most recent billing statements for each monthly expenditure;
- A list of dependents;
- A statement as to whether McGaffey can borrow funds;
- Information regarding items McGaffey claims to have sold to cover his family's daily living expenses; and
- Information regarding whether he and his spouse currently own Southfield, Michigan rental property ("Southfield Property") identified in CRD, but not previously disclosed by McGaffey.²⁹

McGaffey did not provide all of the requested information. Instead, on November 22, 2016, he produced 1099 income documents for 2015, 1099 income documents for 2011 and 2012, 2012 income tax returns, and two utility bills.³⁰ McGaffey stated that he was self-employed in 2015 and all years prior, and he therefore did not have paystubs. He claimed that his earnings were directly deposited and he no longer had access to electronic copies of earnings reports. McGaffey also stated that he supports himself, his wife, and two minor children. He stated that, when he had income, he provided his mother with \$1,000 per month to supplement her retirement and waived rental income from the Southfield Property, where he allowed his brother to reside rent free. He provided no documentation to support these claims. He indicated that he has since sold the Southfield Property to pay for "needed repairs" and "land taxes." He indicated that he expected to receive "a few thousand dollars" from the sale. He also stated that he has sold small items, such as art and jewelry, for income and has no documents to evidence the sales.

²⁸ CX-14.

²⁹ CX-15.

³⁰ CX-16.

Regulatory Operations corresponded with McGaffey to request further clarification and disclosure for several weeks up to the commencement of the December 20, 2016 hearing.³¹ Additionally, after the first day of hearing on December 20, 2016, I continued the hearing to January 5, 2017, to enable McGaffey to produce additional documentation.³²

2. McGaffey's Income

As of the conclusion of the hearing on January 5, 2017, McGaffey had not produced federal and state income tax returns for any year subsequent to 2012.³³ He also has not produced W2 forms, 1099 forms, or any proof of his income for 2013 and 2014.³⁴ He produced 1099 forms for 2011, 2012, and 2015.³⁵

McGaffey offered this explanation for his inability to produce documentation of his income in 2013 and 2014, years during which he admittedly worked:

There was an issue with the CPA. The [2012] tax return had actually not been filed, and I didn't find that until – I thought he had '12, '13, and '14 filed, but then it hadn't been. So I had a copy of the 2012, so I worked with the IRS and a tax attorney about the 2012 filing, and we are trying to track down the '13 and '14 tax records. So, no, there haven't been filings, but I am in regular communication with the IRS and with our tax attorney regarding the status of those returns.³⁶

McGaffey claimed that he had been granted extensions for filing his 2013, 2014, and 2015 federal income tax returns, but he was unable to produce proof of any such extensions because he obtained them electronically.³⁷ McGaffey testified that, since the end of 2013 or start

³¹ See CX-17; CX-18; CX-19; CX-39.

³² Tr. 132, 145-147.

³³ CX-22; CX-23. McGaffey testified that he has not filed a federal income tax return since filing his 2012 return. Tr. 53. He testified that he refinanced his primary residence in March 2015 using only his 2012 federal income tax return as evidence of his income. Tr. 181-183.

³⁴ Tr. 69-73. On October 24, 2016, McGaffey responded to Regulatory Operations' request for 2013, 2014, and 2015 W-2 and 1099 forms by indicating that they were "attached" to his response. CX-10. He did not in fact attach the documents, and on October 31, 2016, Regulatory Operations renewed its request for the documents. CX-12. This time, McGaffey responded, "I will see if copies of these documents are available. If they are not I can sign off on a 4506-T for you to request copies." CX-12, at 1.

³⁵ CX-21; CX-22.

³⁶ Tr. 53.

³⁷ Tr. 54-58. McGaffey was, however, able to produce proof of an extension that he had been granted electronically for filing his 2012 return. CX-23, at 28. McGaffey stated he personally requested an extension for the 2013 tax year and that his attorney requested extensions for the 2014 and 2015 tax years. Tr. 57-58. He testified that he had not asked his attorney for documentation related to tax years 2014 and 2015. Tr. 58.

of 2014, he had been working with a law firm to resolve his tax issues.³⁸ He stated that he paid the law firm a retainer at the commencement of each year to fund their work, but since losing his job in late 2015, he had not been able to pay a retainer.³⁹

Although McGaffey never produced his 1099 forms for 2013 and 2014, he testified that he provided them to the law firm he retained to resolve his tax issues.⁴⁰ When pressed as to why he never produced 1099 forms for 2013 and 2014 in this matter, he stated he does not have access to them because “they are in an office that [he does] not have access to anymore” because, in December 2015, Caitlin John cut off his access to their offices.⁴¹ McGaffey did not address whether he attempted to obtain copies from the lawyers to whom he previously had provided his 1099 forms.

McGaffey’s 2012 federal income tax return states that he was married filing jointly and has two minor children.⁴² McGaffey’s return was prepared by a certified public accountant, reported total income of \$44,284, adjusted gross income of \$31,825, listed McGaffey’s occupation as financial advisor, and listed his spouse’s occupation as senior sales analyst.⁴³ He showed a net profit of \$49,930 from his business and rental income of \$6,000.⁴⁴

McGaffey’s 1099 form for 2011 reported non-employee compensation of \$466,788.80.⁴⁵ McGaffey’s 1099 form for 2012 reported non-employee compensation of \$404,686.99.⁴⁶ McGaffey’s 1099 forms for 2015 reported non-employee compensation of approximately \$202,854.⁴⁷

McGaffey testified that his wife has not worked since his children were born, approximately ten years prior.⁴⁸ Regulatory Operations questioned why, if McGaffey’s spouse had not worked for ten years, McGaffey’s 2012 federal income tax return listed her occupation as “Senior Sales Analyst.”⁴⁹ McGaffey replied that the statement in his 2012 federal income tax return that his wife was a “Senior Sales Analyst” was a “carry over from her previous

³⁸ Tr. 59.

³⁹ Tr. 60-61.

⁴⁰ Tr. 64-65.

⁴¹ Tr. 164-165.

⁴² CX-23.

⁴³ CX-23.

⁴⁴ CX-23.

⁴⁵ CX-22, at 1.

⁴⁶ CX-22, at 2.

⁴⁷ CX-21.

⁴⁸ CX-17; Tr. 141.

⁴⁹ CX-18.

employment” (in the year 2006) and she is not employed.⁵⁰ He also testified that she is able to work.⁵¹

McGaffey disclosed that he worked for Caitlin John and its wholly owned registered investment advisor subsidiary, Elite Advisor Edge, in 2015. Caitlin John wrote life insurance policies through American General Life. McGaffey claimed that, in December 2015, Caitlin John wrote emails to all of his clients stating that he had retired and their accounts would be reassigned to another investment advisor. He stated that he did not work in 2016 because he was in the process of trying to move his licenses to another registered investment advisor.⁵² This notwithstanding, McGaffey has been licensed in Michigan to sell insurance continuously since August 1999, with only two eight to ten-day lapses, and he currently is approved to sell by several insurance companies.⁵³ Additionally, IDIC Financial, a life and annuity services insurance group, appointed him to sell insurance in the fall of 2016.⁵⁴ McGaffey did not disclose this affiliation voluntarily, but admitted it when questioned by Regulatory Operations, who discovered it on McGaffey’s website.⁵⁵ Since early 2016, he has owned Integrity Investment Solutions, LLC (“Integrity”), an approved and active registered investment advisory firm (“RIA”) in Michigan.⁵⁶ McGaffey insists he is unable to work because, although he is licensed to sell insurance and Integrity is approved as an RIA, Michigan “has not allowed [him] to move [his] licenses to Integrity.”⁵⁷ He offered no explanation for his affiliation with IDIC Financial or why he cannot generate income by selling insurance through this affiliation.

3. McGaffey’s Expenses and Liabilities

McGaffey’s living expenses are difficult to discern. He reported monthly expenses of approximately \$7,600, which included mortgage payments, real estate tax, property insurance, utilities, home maintenance, medical and dental costs, automobile loan payments, credit card payments, and payments to support individuals not living in the home.⁵⁸ McGaffey stated that

⁵⁰ CX-18, at 1.

⁵¹ Tr. 140-141.

⁵² CX-20; Tr. 73.

⁵³ CX-41; Tr. 74-77, 83.

⁵⁴ Tr. 85-90.

⁵⁵ CX-40; Tr. 85-90.

⁵⁶ CX-40, at 2; Tr. 79-82.

⁵⁷ Tr. 82. On July 19, 2016, the state of Michigan denied McGaffey’s registration as an investment advisor because, among other reasons, in January 2016, he falsely stated on his Michigan application for registration that he had not been the subject of an investment-related customer complaint that settled for more than \$15,000 on or after May 18, 2009. CX-31, at 2. McGaffey should have disclosed to Michigan that, in September 2014, he consented to findings that he improperly received a loan from a customer and agreed to pay restitution to the customer and a fine to FINRA. CX-2, at 18-19; CX-28. McGaffey claims that Michigan’s reasoning was incorrect. Tr. 95.

⁵⁸ CX-10, at 4-5.

these expenses are based on how he and his family lived when he was employed.⁵⁹ He testified that he could not produce the last two statements for his monthly expenses, as Regulatory Operations requested, because when he had funds, he paid all of his bills electronically, including his mortgage payment of \$1,100 per month, and does not receive paper statements.⁶⁰

In October 2016, Regulatory Operations requested copies of his two most recent mortgage statements, documentation related to a vehicle loan, year-end bank account statements for 2014 and 2015, the last two billing statements for all of his monthly expenses, and six months of credit card statements.⁶¹ In response, McGaffey stated “attached” to many of these requests. He did not, however, attach the requested documents. Instead, he attached a document that he identifies as a “credit report.”⁶² The document is dated October 24, 2016, has the name and logo of “Capital One” in the upper left corner, and McGaffey’s name in the upper right corner.⁶³ The first five pages of the report indicate that McGaffey opened three new lines of credit in the past two years.⁶⁴ McGaffey was not certain which accounts he opened recently. He assumed that one was his car loan, one was the mortgage on his primary residence, which he modified in March 2015, and one was an American Express card that he opened and closed.⁶⁵ McGaffey again offered no documentation to support these claims.

McGaffey stated that he sent the credit report in lieu of credit card statements.⁶⁶ He did not produce statements or print-outs of on-line reports that would show the dates and amounts of his purchases on the credit cards.⁶⁷ The credit report shows that he has two credit cards currently open, one for an on-line retailer with an outstanding balance of \$3,178 and another with an outstanding balance of \$3,937.⁶⁸ It does not show his credit limit on these cards, when he last used them, how he used them, or when he made his last payment. The “closed accounts” section of the report shows seven closed credit cards, only two of which have outstanding balances of

⁵⁹ Tr. 116, 139-140. For example, he stated that his expenses include the cost of health insurance, which he and his family no longer have. Tr. 139-140. He also included \$500 that he paid to his mother monthly to supplement her retirement income. He testified that the amount was actually \$1,000 per month, not \$500 as he wrote, and that he no longer pays that money because of his financial situation. Tr. 142-143.

⁶⁰ Tr. 110-113.

⁶¹ CX-10.

⁶² Tr. 103-106. McGaffey did not submit documents marked as Respondent’s Exhibits. I have marked the document that McGaffey identifies as a credit report, which contains 17 pages, as “RX-1.”

⁶³ RX-1. The document does not appear to include information for McGaffey’s wife. McGaffey testified that he obtained the report on line and free of charge from Capital One. Tr. 162.

⁶⁴ RX-1, at 3.

⁶⁵ Tr. 178-180.

⁶⁶ Tr. 118.

⁶⁷ Tr. 159-161.

⁶⁸ RX-1, at 4.

\$3,449 and \$5,625.⁶⁹ It does not show when the cards were closed, when McGaffey last used the cards, or his purchases. The last section of the report lists approximately 43 delinquent accounts, but does not indicate the balance owed, if any, on each of the accounts.⁷⁰ Each account listed includes a date, possibly when the account became delinquent, but it is unclear.⁷¹ Many of the listed dates are in the fall of 2016, possibly suggesting that McGaffey used credit for purchases in late 2016 or that he paid outstanding balances at that time.⁷²

McGaffey testified that he and his wife own one car.⁷³ The report shows that he owes \$17,418 on an automobile loan.⁷⁴ He testified that he last made a payment on the car loan in December 2016 by using a friend's credit card to make the payment.⁷⁵ The report also lists, in the closed account section, an automobile loan with a different lender for which the outstanding balance is \$19,171.⁷⁶ McGaffey did not address whether he previously owned a second car that he sold and, if so, how much money he received for the car.

McGaffey produced a gas bill that indicates he paid \$457.51 on "June 29" and that he owed \$137.58 (no year included).⁷⁷ He also produced an electric bill that states that he owed \$364.10 by November 18, 2016.⁷⁸ McGaffey testified that he paid the electric bill to avoid having the electricity turned off in his home.⁷⁹ He testified that he uses friends' and family members' credit cards, accepts gift cards from them, or sells personal items such as furniture, art, or jewelry to pay utility bills, purchase groceries for his family, and cover other necessary expenses.⁸⁰

⁶⁹ RX-1, at 9.

⁷⁰ RX-1, at 11-17.

⁷¹ RX-1, at 11-17.

⁷² The report also lists an unpaid medical bill of \$2,821, which McGaffey states he is disputing. RX-1, at 4; Tr. 159.

⁷³ Tr. 140-141.

⁷⁴ RX-1, at 4

⁷⁵ Tr. 170-171.

⁷⁶ RX-1, at 9.

⁷⁷ CX-27; Tr. 123.

⁷⁸ CX-27.

⁷⁹ Tr. 124.

⁸⁰ Tr. 116-117; 124-125. McGaffey produced bank account statements for the period of March 2016 through October 2016. They show two deposits of \$305 and \$350 from "PayPal," which McGaffey states are deposits of money for items that he has sold. Tr. 144. McGaffey refused to identify the friends and family members who have loaned him money or provide an estimate as to how much money he has borrowed to cover living expenses. Tr. 191-192.

On September 24, 2015, McGaffey entered into a FINRA Letter of Acceptance, Waiver, and Consent (“AWC”) in which he consented to sanctions of a three-month suspension, restitution of \$35,000 plus interest, and a deferred \$5,000 fine.⁸¹ McGaffey also consented to findings that he borrowed money from one of his customers in contravention of Waddell’s policies and without pre-approval.⁸²

At the hearing, McGaffey disputed CRD’s explanation of the AWC. He contended that the restitution order was basically a requirement that he continue to repay the loan, the loan was personal, not business in nature, and he would have to pay the \$5,000 fine only if he re-enters the securities industry. McGaffey provided no documentation to indicate whether he had paid the loan/restitution order, but he testified that a “majority of it is paid ...[p]robably 20,000, 25,000 that has already been paid.”⁸³

McGaffey stipulated to the existence and service of the Award in favor of Waddell.⁸⁴ The bases for the Award are a loan agreement, promissory note, and agreement to repay commission advances that McGaffey signed with Waddell in May 2013.⁸⁵ In March 2015, he also executed a settlement agreement with Waddell in which he agreed to a payment schedule to repay the outstanding amount on the loan of (\$232,001.75) plus commission advances of \$11,984.43 (totaling \$243,986).⁸⁶ Nonetheless, during the hearing, McGaffey argued that he signed the loan agreements under duress and as a result of fraud on the part of Waddell.⁸⁷

4. McGaffey’s Rental Property and Other Assets

On October 24, 2016, McGaffey submitted his first response to Regulatory Operations’ inquiries regarding his finances. In that submission, McGaffey responded to the request that he identify every interest that he has held in real property since January 1, 2014 as follows:

⁸¹ CX-2, at 18-19.

⁸² CX-2, at 18. CRD reported:

McGaffey obtained a \$35,000 personal loan from the customer, though the loan would not have been allowed under the firm’s procedures, and he did not seek or obtain prior written approval from the firm. The findings stated that less than two months later, McGaffey falsely certified on his firm’s questionnaire that he had no outstanding loans from customers and had not borrowed from a customer in the last twelve months. McGaffey failed to make payments on the loan as required, and did not make any payments until the customer negotiated an amended loan agreement through her attorney.

CX-2, at 18.

⁸³ Tr. 20-22.

⁸⁴ Stip. ¶ 1.

⁸⁵ CX-32; Tr. 96-97.

⁸⁶ CX-33; Tr. 98-99.

⁸⁷ Tr. 96.

The only property that I have interest in is my primary residence. Due to lack of employment this residence is currently pending foreclosure.⁸⁸

CRD, however, indicates that McGaffey owns the Southfield Property as rental property.⁸⁹ Regulatory Operations explored this inconsistency with McGaffey, and McGaffey stated that he recently sold the Southfield Property for \$30,000, less fees, expenses, and taxes, which was one-third of what he originally paid for it.⁹⁰ At the hearing, McGaffey claimed that ten years ago, he and his family moved from the Southfield Property to their current residence and rented the Southfield Property for \$1,000 per month for a few years.⁹¹ McGaffey stated that the tenants damaged the home and fell into arrears on rental payments. He stated that the property sat vacant until his brother moved into it approximately six years ago.⁹² McGaffey testified that his brother lived in the Southfield Property for approximately six years without paying rent.⁹³ McGaffey stated that his brother is currently employed, although he was not employed when he initially moved into the Southfield Property.⁹⁴ McGaffey testified that his reason for allowing his brother, who was capable of working, to live rent-free in the Southfield Property is “[y]ou take care of family.”⁹⁵ McGaffey’s claim that he earned no rental income since 2010 on the Southfield Property is contradicted by McGaffey’s 2012 federal income tax return, in which McGaffey reported that he received rental income of \$6,000 that year.⁹⁶

McGaffey testified that the Southfield Property is a three-bedroom, one-bathroom home that he originally listed for sale at \$70,000 in May 2016.⁹⁷ An on-line listing service valued the property at approximately \$65,267.⁹⁸ McGaffey disputed the accuracy of that estimate, but he has not submitted an appraisal of the property.⁹⁹

⁸⁸ CX-10, at 2.

⁸⁹ CX-2, at 6.

⁹⁰ CX-18, at 2.

⁹¹ CX-18, at 2; Tr. 27.

⁹² CX-18, at 2; Tr. 46.

⁹³ Tr. 46.

⁹⁴ Tr. 27-28.

⁹⁵ Tr. 46.

⁹⁶ CX-23, at 9; Tr. 46-48. McGaffey testified that his federal income tax return was inaccurate, and he knowingly allowed his accountant to include false information because the accountant advised him that the failure to report some rental income would result in an audit. Tr. 47-48.

⁹⁷ CX-37, at 4; Tr. 50-52.

⁹⁸ CX-37, at 1.

⁹⁹ Tr. 51-52. McGaffey confirmed that the following description from an on-line listing of the property is accurate:

The terms of McGaffey's recent sale of the Southfield Property are murky. McGaffey claims, initially without providing supporting documentation, that he sold the property for \$30,000.¹⁰⁰ Although the documents that McGaffey originally produced indicate that he transferred the property to someone else, the documents do not indicate the amount that he received for the property.¹⁰¹ In November 2016, McGaffey emailed Regulatory Operations advising that he would "get a copy of the [sales] agreement and send that."¹⁰² On day one of the hearing, McGaffey claimed inexplicably that he thought that Regulatory Operations already had a copy of the sales contract.¹⁰³ Regulatory Operations advised him that it had not received a sales contract from him.¹⁰⁴ McGaffey stated, "I can ask the title company to forward a copy."¹⁰⁵ Between the first and second hearing days, McGaffey submitted a land contract to substantiate his claim that he sold the Southfield Property for \$30,000.¹⁰⁶

McGaffey contends that his primary residence is in foreclosure, although he and his family continue to reside in the home. McGaffey has not produced mortgage documents, but he stated that his mortgage payment of \$1,100 per month has been in arrears since April 2016.¹⁰⁷ RX-1 shows an outstanding real estate loan of \$190,150, but does not indicate the monthly payment or when McGaffey went into arrears.¹⁰⁸ McGaffey conceded that he never attempted to print out documentation from his on-line mortgage account to substantiate his claim and did not request additional documentation from the lender.¹⁰⁹ McGaffey submitted an August 22, 2016

Great bungalow on quiet street in Southfield [Michigan]. This property features an updated kitchen w/a full complement of appliances, restored cabinets, granite countertops. New flooring and breakfast bar w/window to living room. Updated bathroom is complete w/large ceramic tile flooring/surround and updated plumbing.

CX-37, at 2; Tr. 43.

¹⁰⁰ Tr. 37. McGaffey testified that he used a portion of the funds to pay back taxes on the Southfield Property and the remainder to pay the mortgage on his primary residence. Tr. 38. McGaffey satisfied the mortgage on the Southfield Property in May 2005. CX-36.

¹⁰¹ See CX-34; CX-35.

¹⁰² CX-39, at 1.

¹⁰³ Tr. 42.

¹⁰⁴ Tr. 42.

¹⁰⁵ Tr. 43.

¹⁰⁶ McGaffey did not submit documents marked as Respondent's Exhibits. I have marked the land contract and McGaffey's cover page, a total of 6 pages, as "RX-2."

¹⁰⁷ Tr. 112, 189. He testified that he also separately paid real estate taxes of \$200 per month for his primary residence. Tr. 115. He produced a real estate tax bill for \$1,766.19 due in February 2016. CX-26. Additionally, he produced a home owner's insurance bill for \$1,172 that he paid in December 2015. CX-26; Tr. 122.

¹⁰⁸ RX-1, at 4.

¹⁰⁹ Tr. 186-187, 190.

letter from his lender stating that a foreclosure sale was scheduled for October 5, 2016.¹¹⁰ McGaffey testified that he nonetheless has been able to stay in the residence and is attempting to keep his home.¹¹¹

McGaffey states that he has no life insurance policies, brokerage accounts, IRAs, retirement accounts, 401k accounts, or other similar accounts.¹¹² He states that he has one joint bank account with his wife, for which he produced copies of statements for March 2016 through October 2016.¹¹³ The statements showed monthly ending balances of \$200 or less and minimal activity.¹¹⁴

D. Discussion

Based on the foregoing, I find that McGaffey failed to carry his burden of proving a *bona fide* inability to pay the Award.

First and foremost, McGaffey's responses and disclosures to Regulatory Operations cause me to question his credibility overall. McGaffey claims that his federal income tax returns for 2013, 2014, and 2015 are "under extension and review."¹¹⁵ Yet he is incredulous at the suggestion that he could or should produce documentation to demonstrate he was granted extensions.¹¹⁶ Equally mystifying is McGaffey's inability to produce any evidence of his income in 2013 and 2014, even though he claims to have given 1099 forms for those years to his attorney for use in preparing his tax returns, and he somehow substantiated his income sufficiently to refinance his house in March 2015.¹¹⁷

McGaffey's claims regarding his 1099 forms for 2013 and 2014 were ambiguous and inconsistent. In October 2016, he claimed to have attached his 1099 forms for 2013, 2014, and 2015 to an email to Regulatory Operations. In reality, he did not. Eventually, after much prodding, he submitted a copy of his 2015 1099 forms, but no others. During questioning at the hearing, McGaffey at first was evasive and would not directly answer the question of whether he

¹¹⁰ CX-25.

¹¹¹ Tr. 118, 135, 186-187.

¹¹² CX-10, at 3.

¹¹³ CX-24.

¹¹⁴ CX-24.

¹¹⁵ CX-10, at 2.

¹¹⁶ McGaffey stated that he secured an extension for 2013 and his lawyer secured extensions for 2014 and 2015. He did not address the possibility of his obtaining proof of the extensions from his lawyer. He also did not explain how and why his 2012 federal income tax return includes documentary proof of an extension request, yet he claims that such documentation is unavailable for the years 2013, 2014, and 2015.

¹¹⁷ McGaffey's claim that the lender was willing to rely solely on his 2012 income tax return strains credulity.

ever produced 1099 forms for 2013 and 2014.¹¹⁸ Then he testified that he gave his 1099 forms for 2013 and 2014 to his attorney to prepare his income tax returns. He never explained why he could not or would not request copies from the attorney. Later in the hearing, he testified that he did not have access to the 1099s because he had been excluded from Caitlin John's offices and therefore did not have access to the forms. McGaffey's answers shifted and changed throughout the course of this proceeding.

Examples abound of the difficulty in pinning down McGaffey's story. For example, he claims that his wife has not worked for ten years, but their joint 2012 federal income tax return lists her occupation as "senior sales analyst." Curiously, McGaffey states that the error in listing her occupation was a carryover from when she was in fact employed in 2006, nearly six years prior. McGaffey's explanation suggests that the couple filed inaccurate income tax returns for six years.¹¹⁹ Also curious is McGaffey's claim that he allowed his brother, an adult who was capable of earning a living, to live rent-free in the Southfield Property for six years from 2010 to 2016. This claim is directly contradicted by McGaffey's own 2012 federal income tax return which states that he earned \$6,000 in rental income from the property. Even if, as McGaffey claims, he falsely stated this on the 2012 tax return based on the advice of an accountant, it nonetheless calls McGaffey's credibility into question that he willingly answered falsely on a federal income tax return. McGaffey even contradicted himself when he spoke of sending a monthly stipend to

¹¹⁸ The following exchange is emblematic of many of McGaffey's answers:

McNeil-Lambkin: You never provided the 1099 forms for 2013 or 2014; isn't that correct?

McGaffey: That means I don't have them available.

Hearing Officer: So when you wrote "attached" on page 2 of CX-10, that was incorrect?

McGaffey: What I had available was attached.

Hearing Officer: So were your 2013, 2014, 2015 1099s attached, were they or were they not?

McGaffey: I believe the ones that I had available were attached.

Hearing Officer: Okay. So answer my question but please listen to my question. Was your 2013 1099 attached, yes or no?

McGaffey: I don't know. I am not looking at it. Ms. McNeil-Lambkin, you can probably answer that question better.

Hearing Officer: Do you know if you attached it, Mr. McGaffey?

McGaffey: I attached what I had available.

Hearing Officer: So you don't know if your 2014 or '15 were attached either; is that right?

McGaffey: Not without looking at it, no.

Tr. 69-70.

¹¹⁹ Furthermore, the indication that McGaffey's wife was a senior sales analyst appears next to the signature line where McGaffey's wife would have had to sign the return. *See* CX-23, at 3. It strains credulity to conclude that McGaffey's wife missed this incorrect statement for six years when she signed income tax returns.

his mother. In a written submission, he claimed to have sent her \$500 monthly, but during testimony he stated that it was actually \$1,000 monthly.

Another aspect of the Southfield Property causes me to question the truthfulness of McGaffey's claims. In October 2016, in response to a request for a list of all real property that McGaffey has owned since January 1, 2014, McGaffey stated that the only property in which he has had an interest is his primary residence. In fact, McGaffey owned the Southfield Property as far back as 2005, when he paid off the mortgage, and had not yet entered into a contract to sell the Southfield Property. Only after Regulatory Operations learned from CRD that McGaffey owned rental property did McGaffey disclose his ownership and sale of the Southfield Property. Similarly, McGaffey claims that he cannot sell insurance, even though his license to sell in Michigan is current and active. Furthermore, McGaffey admitted his recent affiliation with IDIC Financial, an entity through which he presumably can sell insurance, only after Regulatory Operations discovered it on McGaffey's website.

Given these significant questions about whether McGaffey has been fully forthcoming with the details of his financial situation, I am compelled to require documentation to substantiate his claims. McGaffey, however, failed to produce reliable documentation of many of his assets and liabilities. His 1099 forms for 2011, 2012, and 2015 and federal income tax return for 2012 indicate that he generated earnings during those years. Without 1099 forms for 2013 and 2014, I am unable to form a complete picture of his earnings. McGaffey has offered no explanation of whether he and his wife, both of whom he states are able to work, have attempted to secure some form of employment outside of the securities and insurance industries during the period that McGaffey attempts to rebuild his investment advisory business. He also has not explained if he has attempted to secure additional credit and why, although his brother ultimately obtained gainful employment, he allowed him to live rent-free for six years. Additionally, McGaffey claims to have supported his family of four over the past year by reliance on friends' and family members' willingness to allow him to use their credit cards, small loans from friends and family, gift cards, and sales of personal belongings. When asked for details, however, such as the names of some of the friends and family and evidence of his sales of personal items, he refused to answer. His claimed reliance on friends and family is particularly difficult to comprehend when, as of the start of 2016, he purportedly allowed his brother to live rent free and provided \$1,000 per month to his mother.

McGaffey also refused to produce any year-end statements for his joint bank account with his wife. He produced a select handful of monthly statements only. He claimed to be unable to produce any credit card statements and therefore prevented any review of his credit card purchases and payment history.

Given the many inconsistencies in McGaffey's claims, the vagueness of his responses, his attempts to conceal pertinent financial information, and the incomplete nature of the documentation that McGaffey did produce, I find that McGaffey failed to prove a *bona fide* inability to pay. "Without complete information and documentation, [I am] unable to ascertain

Respondent's true financial situation, and for that reason alone, Respondent has failed to meet his burden of proof."¹²⁰

III. Conclusion

I find, and the parties do not dispute, that McGaffey has not paid any portion of the Award. I further find that McGaffey failed to establish any of the defenses permitted by FINRA rules or case law and specifically failed to demonstrate the defense he asserted, a *bona fide* inability to pay.

Accordingly, pursuant to Article VI, Section 3 of FINRA's By-Laws and Rule 9559(n), McGaffey is suspended effective as of the date of issuance of this decision from associating with any member firm in any capacity. The suspension shall continue until Respondent provides documentary evidence to FINRA showing that: (1) the Award has been paid in full; (2) he and the claimant have agreed to settle the matter; or (3) he has filed a petition in a United States Bankruptcy Court, or the debt has been discharged by a United States Bankruptcy Court.¹²¹

In addition, McGaffey is ordered to pay FINRA costs of \$2,111.68, which includes an administrative fee of \$750 and hearing transcript costs of \$1361.68. The fine and costs shall become due upon the issuance of this decision.

Carla Carloni
Hearing Officer

¹²⁰ *Dep't of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB040037, at 9; *see also Gallagher*, 56 S.E.C. 163, 169-170 (rejecting inability to pay defense where respondent provided incomplete documentation and failed to demonstrate that he could not borrow against his home or otherwise to pay the arbitration award).

¹²¹ I have considered all of the arguments made by the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.