

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

TODD CLARK KALISH
(CRD No. 2865875),

Respondent.

Expedited Proceeding
No. ARB220010

STAR No. 20220755306

Hearing Officer–LOM

**ORDER DISMISSING EXPEDITED PROCEEDING AND
ALLOWING SUSPENSION TO TAKE EFFECT**

I. Introduction

This is an expedited suspension proceeding that arises from the failure of Respondent, Todd Clark Kalish, to pay an arbitration award in favor of his former FINRA member firm within 30 days of his receipt of the award. After receiving notice of FINRA's intent to suspend him for failure to comply with the arbitration award, Respondent, through counsel, requested a hearing and obtained a stay of the suspension.

The only defense Respondent asserts to the proposed suspension is that, in his view, the arbitration award lacks proper signatures. He complains that the signatures of the three arbitrators signifying their approval of the award are typed. For that reason, he argues, the arbitration award is invalid and unenforceable. He has not claimed that he has an inability to pay the arbitration award or asserted any of the other recognized defenses to a proposed suspension for failure to pay. Nor has he filed a motion to vacate the arbitration award (at least yet).

At the outset of this proceeding, I raised the question at a pre-hearing conference whether I have authority to consider Respondent's challenge to the validity of the award based on the typed signatures and asked for briefing on the issue. The parties have completed their briefing. After studying the issue and reviewing the parties' briefs, I conclude that Respondent misapprehends my authority and the nature of a suspension proceeding.

FINRA's Code of Arbitration Procedure ("Arbitration Code") states that an arbitration award is final and that there is no right of review or appeal, except where applicable law might provide otherwise. The applicable federal statute, known as the Federal Arbitration Act ("FAA"), allows a party in an arbitration proceeding to file a motion in a court of competent jurisdiction to

vacate an arbitration award. However, the FAA limits the grounds for vacating an arbitration award to specified instances of serious misconduct and profound unfairness. Mere error is not a ground for vacating an arbitration award. The purpose of limited review of arbitration awards is to streamline the resolution of disputes and provide a quicker, less expensive alternative to judicial litigation. When parties agree to arbitration, with its more limited opportunity for review, they accept that limitation in return for what is intended to be a more efficient means of achieving finality in the resolution of a dispute.

Under the FAA, a judicial motion to vacate the arbitration award is the path for challenging the validity of an arbitration award. FINRA's Arbitration Code recognizes that path by providing that all monetary awards shall be paid within 30 days of receipt—*unless* a motion to vacate has been filed in a court of competent jurisdiction. Nothing in FINRA's rules gives the Office of Hearing Officers or any other FINRA department authority to review the validity of an arbitration award. Nor does the Office of Hearing Officers have a role in overseeing the administration of FINRA's dispute resolution forum.

In a suspension proceeding like this one, the issue is not the validity of the arbitration award—which under FINRA's Arbitration Code is final and unassailable if there is no motion to vacate—but whether, despite the validity of the award, the respondent's failure to pay the award within 30 days warrants a suspension. The recognized defenses include where the respondent has fully satisfied the award (perhaps after the 30-day period but before the proposed suspension), where the respondent has negotiated a settlement for less than the award amount or for payments over time and is not in breach of the settlement, and where the respondent has filed for bankruptcy or the bankruptcy court has discharged the award. These defenses take the validity of the arbitration award as a given and yet offer a reason that a suspension should not be imposed.

In sum, the arbitration award is final and unreviewable except pursuant to a judicial motion to vacate. In this expedited suspension proceeding, I have no authority to review the validity of the award based on typed rather than hand-written signatures. Accordingly, this proceeding is **DISMISSED**. The hearing and all other due dates are removed from the calendar.

FINRA Rule 9554(d) requires that a suspension go into effect 21 days after service of the notice unless stayed by a request for a hearing. With the dismissal of this proceeding, the suspension is no longer stayed; and the 21-day deadline is long past. **Therefore, the suspension is effective as of the date of this Order.** Under FINRA Rule 9554(g), however, Respondent can request a termination of the suspension at any time from the appropriate FINRA department on the ground of full compliance with the notice of suspension.

II. Procedural History

A. The Arbitration and Arbitration Award

In September 2018, Respondent initiated an arbitration proceeding against Morgan Stanley, his former member firm, alleging that Morgan Stanley had defamed him and tortiously interfered with existing and prospective contractual relations when it terminated him. He asserted

that Morgan Stanley knew that accusations made against him were not credible. At the arbitration hearing, he sought a range of compensatory and punitive damages that totaled between \$31 million and \$65 million. He also sought expungement of his record as maintained by the Central Registration Depository.¹

Morgan Stanley denied Respondent's allegations and filed a counterclaim for unjust enrichment. It contended that Respondent had received overpayments based on administrative errors.

On May 12, 2022, FINRA Dispute Resolution Services issued the arbitration panel's award resolving the dispute. The arbitration panel denied Respondent's claims in their entirety and denied his request for expungement. The arbitration panel determined, however, that Respondent was liable to Morgan Stanley on its counterclaim and awarded \$28,397.47 in damages. In addition, the panel assessed filing fees, member fees, postponement fees, and discovery-related fees. The largest set of fees assessed by the panel was for the hearing sessions attended by the parties and the arbitrators. The arbitrators assessed a total of \$47,550 in fees for hearing sessions and split the responsibility for paying the hearing session fees evenly between the parties.

The last page of the arbitration award has signature lines for the three arbitrators on the panel to sign the award. The document states above the signature lines in ordinary type, "I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award." Each arbitrator's name is typed in bold italics in the space for a signature and a date is typed in bold next to each name. The signature date for two of the arbitrators is May 11, 2022; the signature date for the third is May 12, 2022. The date of service is typed in ordinary type at the bottom of the last page as May 12, 2022.

B. This Expedited Suspension Proceeding

Respondent did not fully satisfy the arbitration award within 30 days.² After FINRA staff learned that Respondent had failed to comply with the arbitration award, the staff sent Respondent a notice on June 17, 2022, of FINRA's intent to suspend him if he did not remedy his failure within 21 days.³ The notice explained that the Respondent could request a hearing, but stated in all capitals in bold type, "**NO ASPECT OF THE ARBITRATION PROCEEDINGS OR ARBITRATION AWARD, IF APPLICABLE, WILL BE SUBJECT TO REVIEW OR**

¹ The facts recited regarding the arbitration are derived from the arbitration award, which Respondent attached to his Amended Request for a Hearing, July 18, 2022 ("July 18 Amended Request").

² Respondent's counsel explained at a pre-hearing conference on July 13, 2022, that Respondent has paid a portion of the arbitration award, which counsel referred to as "the FINRA fees." Counsel represented that Respondent has not paid the amount owing to Morgan Stanley. Transcript of Pre-Hearing Conference ("Tr.") 19–20, 34.

³ June 17, 2022, letter notifying Respondent of FINRA's intent to suspend him ("June 17 Notice").

CONSIDERATION DURING ANY SUCH HEARING ON THE PROPOSED SUSPENSION.”⁴

On July 7, before the suspension became effective, Respondent's counsel timely filed a request for a hearing on the suspension.⁵ Under FINRA Rule 9554(d), the request for a hearing stayed the proposed suspension.

In this proceeding, Respondent has raised only one defense. He asserts that the arbitration award was not properly signed by the arbitrators. For that reason, he argues, the arbitration award is invalid and unenforceable. He claims that FINRA has violated its own rules and Ohio law (where the arbitrators are located) because the arbitration award lacks valid signatures.⁶ Although Respondent's asserted defense is not one of the “Rule 9554 enumerated defenses” listed in the notice of suspension,⁷ in his Amended Request for Hearing Respondent insists that he will not limit himself to those defenses.⁸

At the pre-hearing conference on July 13, 2022, I noted that Respondent's defense was not one of the standard defenses recognized in a suspension proceeding for failure to comply with an arbitration award, and I raised a question regarding whether I have authority to determine the validity of the arbitration award based on the signatures.⁹ I requested briefing on the issue, and the parties completed that briefing on August 1.

In the meantime, prior to completion of the requested briefing, on July 18, Respondent served a set of discovery requests on Enforcement, seeking all documents and or agreements

⁴ June 17 Notice 2.

⁵ Request for Hearing, July 7, 2022 (“July 7 Request”).

⁶ July 7 Request; Respondent's Amended Request for Hearing, July 18, 2022 (“July 18 Amended Request”). In its brief regarding the issue of my authority to consider Respondent's challenge to the validity of the arbitration award, the Department of Enforcement breaks down Respondent's defense into six parts, but five of the parts relate to the typed signatures and the assertion that the arbitration award is not enforceable because of them. And the sixth is an attack on how I have handled the expedited proceeding. Department of Enforcement's Brief on the Hearing Officer's Authority to Address Kalish's Defenses (“Enf. Br.”) 2. As Enforcement notes (Enf. Br. 2, 14–15), Respondent argues that by rescheduling the hearing to allow for briefing on my authority, I violated his due process rights. Respondent complains that the hearing is now set after his deadline for filing a motion to vacate. Because I conclude I do not have authority to consider Respondent's defense and this proceeding should be dismissed without a hearing, I do not address Respondent's due process argument.

⁷ June 17 Notice 1.

⁸ July 18 Amended Request 1–2 n.1. Respondent refers to the Rule 9554 defenses as the “allowable defenses,” because FINRA's Guide to Expedited Proceedings (“Guide to Expedited Proceedings”) (available at <https://www.finra.org/rules-guidance/adjudication-decisions/office-hearing-officers-oho/guide-expedited-proceedings#request>) refers to them that way. The Rule 9554 allowable defenses include the filing of a motion to vacate with a court, which essentially operates, under FINRA Rule 9554(d), as a stay of a proposed suspension. That defense protects a regulated person from being suspended while that person challenges the validity of the arbitration award by a judicial motion to vacate. As discussed below, the other Rule 9554 defenses do not challenge the validity of the award. Rather, the remaining defenses suggest reasons not to suspend a respondent even where the award is valid and final.

⁹ Tr. 6–13.

relating to FINRA and the use of electronic signatures (including contracts with vendors), all documents between a former arbitration case administrator and the arbitrators, all documents between the former case administrator and Morgan Stanley and its counsel, and all documents confirming that the arbitrators had authorized or permitted a third party to sign their names to the arbitration award. On July 22, Enforcement filed objections to the proposed discovery.

III. Discussion

A. Respondent Is Required to Comply with FINRA's Arbitration Code

FINRA's Arbitration Code, which is embodied in the Series 12000 rules for customer disputes and the Series 13000 rules for industry disputes, governs arbitrations in FINRA's dispute resolution forum. An associated person registered through a FINRA member firm is required to comply with FINRA's Arbitration Code. FINRA Rule 0140 specifies that FINRA's rules apply to all FINRA member firms and their associated persons—including the rules governing arbitration. Rule 0140 further emphasizes that persons associated with a member firm "shall have the same duties and obligations as a member under the Rules." Article V, Section 2(a)(1) of FINRA's By-Laws requires that a registered person agree to comply with FINRA's rules to become registered.¹⁰ Thus, when Respondent became registered and associated with his FINRA member firm, he agreed—and became obligated—to comply with FINRA's rules, including its arbitration rules.

B. Under FINRA's Arbitration Code, an Arbitration Award Is Final Unless a Judicial Motion to Vacate Has Been Filed

Under FINRA's Arbitration Code, an arbitration award is final unless a judicial motion to vacate has been filed. There is no provision in FINRA's rules for review of an arbitration award by a FINRA department, office, or official.¹¹ And the Office of Hearing Officers has no role in supervising the administration of FINRA's Dispute Resolution Service.

FINRA Rule 12904(b) for customer disputes and FINRA Rule 13904(b) for industry disputes both provide: "Unless the applicable law directs otherwise, all awards rendered under the Code are final and not subject to review or appeal." As indicated in the arbitration award resolving the dispute between Respondent and his former member firm, an arbitration award is "rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions." FINRA makes its arbitration forum available, pursuant to rules approved by the SEC,

¹⁰ See, e.g., *Dep't of Enforcement v. Charles Schwab & Co.*, No. 2011029760201, 2014 FINRA Discip. LEXIS 5, at *40 (Bd. of Governors Apr. 24, 2014) ("FINRA membership constitutes an agreement to adhere to FINRA's rules and regulations, including its [Arbitration] Code and relevant arbitration provisions contained therein.") (quoting *Anderson v. Beland*, 672 F.3d 113, 128 (2d Cir. 2011)). See also *Kidder, Peabody & Co. v. Zinsmeyer Trusts Partnership*, 41 F.3d 861, 863 (2d Cir. 1994) (a member firm is bound to adhere to the organization's rules and regulations, including its arbitration rules).

¹¹ See *John Kincade*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4263, at *6 (Oct. 22, 2019) (arbitration awards are not subject to appeal within FINRA).

but the award clearly states that FINRA “has no part in deciding the award.” That would include no part in the initial decision and no part in reviewing an arbitration award. As the SEC has recognized, “FINRA has only a ministerial role in preparing and serving the awards that arbitrators render.”¹²

The law that “directs otherwise” and creates an avenue for review of an arbitration award is the federal statute governing arbitration, the FAA.¹³ The FAA is applicable to arbitration proceedings involving interstate or foreign commerce, including arbitration in FINRA’s arbitration forum.¹⁴

While the FAA provides for review of arbitration awards, that review is limited. Arbitration is intended to provide a more efficient, less expensive, and speedier alternative to ordinary litigation in the courts. That purpose is served by limiting the ability to challenge an arbitration award.¹⁵ Section 10 of the FAA permits the losing party in an arbitration to file a motion in court to vacate an arbitration award, but only on specific, limited grounds.¹⁶

¹² *Id.* at *9–10.

¹³ 9 U.S.C. §§ 1–14.

¹⁴ *See, e.g., Gross v. HSBC Bank USA, N.A.*, No. 1:21-cv-08636 (PAC), 2022 U.S. Dist. LEXIS 133781, at *4 (S.D.N.Y. July 27, 2022) (“FINRA arbitral awards are subject to judicial review under the Federal Arbitration Act”); *Bishop v. Dalton Kent Sec. Grp., Inc.*, No. 21 Civ. 8957 (PAC) (SLC), 2022 U.S. Dist. LEXIS 100901, at *5 (S.D.N.Y. June 6, 2022) (“The FAA governs confirmation of an award rendered in a FINRA arbitration”), *adopted*, 2022 U.S. Dist. LEXIS 113271 (June 27, 2022).

¹⁵ *See, e.g., Admin. Dist. Council 1 of Ill. of the Int’l Union of Bricklayers & Allied Craftworkers, AFL-CIO v. Masonry Co.*, 941 F. Supp. 2d 912, 916 (N.D. Ill. 2012) (“In keeping with the federal policy favoring arbitration, the courts must limit the ability of the losing party in arbitration to challenge the arbitration ruling in supplemental litigation.”), *aff’d*, 2012 U.S. Dist. LEXIS 153722 (Oct. 25, 2012). The purpose of arbitration is “to provide parties with a speedier and less costly alternative to litigation.” *Cunningham v. Ford Motor Co.*, No. 21-cv-10781, 2022 U.S. Dist. LEXIS 127786, at *9 (E.D. Mich. July 19, 2022) (quoting *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000)).

¹⁶ 9 U.S.C. § 10. Section 10 of the FAA specifies the statutory bases for vacating an arbitration award:

- (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;
- (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 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.

The statutory grounds for vacatur do not include review of the merits of an arbitration award or procedural errors that have not prejudiced a party. Rather, the grounds for vacating an award involve only serious abuses of authority and unfair prejudice. As the Fourth Circuit Court of Appeals has said, a federal court may vacate an arbitration award only where an arbitrator’s error “deprives a party to the proceeding of a fundamentally fair hearing.” *Wachovia Sec., LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012) (FINRA arbitration panel issued \$1.1 million award for attorneys’ fees and costs under a state law against frivolous claims; district court refused to vacate award and appellate court affirmed). The Court explained in *Wachovia*, “When parties consent to arbitration, and thereby consent to extremely limited appellate review,

Arbitration awards are presumed to be correct, and the burden to rebut the presumption is on the party requesting vacatur.¹⁷

To allow full scrutiny of arbitration awards would frustrate the purpose of having arbitration at all.¹⁸ Congress has determined that permitting plenary review of arbitration would undermine its policy of favoring arbitration as an expeditious and relatively inexpensive means of resolving disputes.¹⁹ And the Supreme Court is protective of what it calls the “essential virtue” of arbitration, which is the ability to resolve disputes “straight away.”²⁰ It has held that the FAA prohibits private parties from contracting to provide additional grounds for vacatur of an arbitration award.²¹

As the Fourth Circuit Court of Appeals has explained, “[T]he narrow standard of review acts as a bulwark against legal ingenuity. Lawyers can easily find one thing or another in almost any proceeding to which they wish to take exception.”²² The Seventh Circuit Court of Appeals has similarly said, “Arbitration can be an effective way to resolve a dispute in less time, at less expense, and with less rancor than litigating in the courts. Arbitration loses some of its luster, though, when one party refuses to abide by the outcome”²³

they assume the risk that the arbitrator may interpret the law in a way with which they disagree.”
Id. at 478 n.5.

Although review under the FAA is limited, the grounds for vacatur are sufficiently broad in scope to protect a party’s right to a fair hearing. Grounds for vacatur encompass an award procured by corruption, fraud or “undue means,” “or any other misbehavior by which the rights of any party have been prejudiced.”

¹⁷ *Franskousky v. Morgan Stanley Smith Barney LLC*, No. 3:14-cv-878-J-32JRK, 2014 U.S. Dist. LEXIS 174120, at *7 (M.D. Fla. Dec. 17, 2014).

¹⁸ *UBS Fin. Servs. v. Padussis*, 842 F.3d 336, 339 (4th Cir. 2016).

¹⁹ *Cristo v. Charles Schwab Corp.*, 2021 U.S. Dist. LEXIS 244294, at *7 (S.D. Cal. Dec. 21, 2021) (citations and quotations omitted); *Bricklayers & Allied Craftworkers*, 941 F. Supp. 2d 912, 915–16 (collecting cases declaring that review of arbitration awards must be limited to protect the economical, streamlined arbitration process).

²⁰ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008).

²¹ *Id.*

²² *Padussis*, 842 F.3d at 339.

²³ *Publicis Commun. v. True North Communs. Inc.*, 206 F.3d 725, 727 (7th Cir. 2000). Federal courts have lamented that there is a “genre of almost-reflexive appeal of arbitration awards . . . leading to arbitration no longer being treated as an alternative to litigation, but as its precursor.” *E.g., Beckley Oncology Assocs. v. Abumasmah*, 993 F.3d 261, 266 (4th Cir. 2021) (quotations and citations omitted). The Eleventh Circuit Court of Appeals has expressed frustration with the proliferation of motions attacking arbitration awards and suggested “A realistic threat of sanctions may discourage baseless litigation of arbitration awards and help fulfill the purpose of the pro-arbitration policy.” *B.L. Harbert International, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913–14 (11th Cir. 2006). The court in *Harbert* did not impose sanctions, but a district court in that circuit later took up the suggestion and imposed sanctions for filing a baseless motion to vacate an arbitration award. *Rueter v. Merrill Lynch, Pierce, Fenner & Smith*, 440 F. Supp. 1256 (N.D. Ala. 2006).

C. FINRA's Arbitration Code Requires Payment of a Monetary Award Within 30 Days Unless a Motion to Vacate Is Filed

FINRA's Arbitration Code and other rules streamline arbitration in FINRA's forum and support the purposes of the FAA. FINRA's rules do this by creating an incentive to bring any challenge to the validity of an arbitration award even before the expiration of the three-month window provided by the FAA for a motion to vacate. Under FINRA's rules, a regulated person or entity must pay a monetary award within 30 days or file a judicial motion to vacate within that period. Otherwise, the regulated person or entity may be subject to an expedited suspension proceeding for failure to pay the award and be suspended.

FINRA Rule 12904(j) for customer disputes and FINRA Rule 13904(j) for industry disputes both provide, "All monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction." FINRA's Arbitration Code clearly requires the losing party in an arbitrated dispute to pay a monetary arbitration award within 30 days,²⁴ *unless* a judicial motion to vacate is filed.²⁵ Notably, the exception to the payment requirement applies only when a motion to vacate *has* been filed. It does not excuse payment on the basis that a motion to vacate *might be* filed in the future.

D. Suspension Proceedings Encourage Compliance and Discourage Delay in the Payment of Monetary Arbitration Awards

FINRA initiates expedited suspension proceedings under FINRA Rules 9554 and 9559 when members and associated persons fail to pay arbitration awards within the 30-day window provided by the Arbitration Code. Suspension proceedings encourage compliance and discourage delay in the payment of arbitration awards. FINRA's suspension process is designed to relieve the successful party in a FINRA arbitration of the need to seek judicial confirmation to enforce the duty to pay a monetary award.²⁶

²⁴ Participants in the securities industry are well-aware of the requirement to comply with arbitration awards within 30 days. NASD Notice to Members 00-55, at 2 (Sept. 2000), <http://www.finra.org/industry/notices/00-55> (informing members that NASD [now FINRA] Dispute Resolution requests to be notified by claimants if a member or associated person has not paid an arbitration award within 30 days and requiring member firms to certify in writing that they have complied with awards against them or their associated persons).

²⁵ See Guide to Expedited Proceedings, listing the pendency of a judicial motion to vacate an arbitration award as a recognized defense to a suspension proceeding.

²⁶ Section 9 of the FAA permits a successful party to an arbitration proceeding to seek judicial confirmation of the arbitration award for up to a year after the award is issued. Confirmation results in entry of the award by a court as an enforceable judgment. But confirmation of an arbitration award is a "summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Gross*, 2022 U.S. Dist. LEXIS 133781, at *9 (quotations and citations omitted). An arbitration award is final, even without judicial confirmation, and FINRA can require payment of a monetary arbitration award without waiting for judicial confirmation. If a losing party complies with FINRA's rules and pays a monetary award within 30 days, it will be unnecessary for the successful party to seek judicial confirmation and an enforceable judgment. Thus, FINRA's rules contribute to the conservation of judicial resources and the efficiency and fairness of the arbitration process.

FINRA Rule 9554 authorizes FINRA staff to provide a written notice to an associated person who fails to pay an arbitration award that he or she will be suspended from association with any member if the associated person fails to comply within 21 days of receipt of the notice. A person served with notice of a proposed suspension may file a request for a hearing before the effective date of the suspension, however, which stays the suspension. Article VI, Section 3(b) of FINRA's By-Laws similarly provides that FINRA may suspend an associated person for a failure to comply with an arbitration award issued pursuant to FINRA's arbitration rules, unless the person has made a timely motion to vacate or modify the award and the motion is still pending and not denied.²⁷ A timely motion to vacate is a strictly limited exception to the obligation that arbitration awards be paid promptly.²⁸

If a hearing is requested and a stay obtained, FINRA Rules 9554 and 9559 further provide for an expedited hearing process on the proposed suspension. Rule 9559(f)(4) provides that a hearing regarding a proposed suspension for failure to pay an arbitration award shall be held within 30 days of a respondent's request for a hearing.²⁹

E. In a Suspension Proceeding, the Validity of the Arbitration Award Is Not at Issue, and the Award Cannot Be Collaterally Attacked

The focus in a suspension proceeding is on whether the respondent should be suspended, not the validity of the arbitration award. As discussed above, any challenge to the validity of an arbitration award must be brought in a court of competent jurisdiction on a motion to vacate.³⁰ If a motion to vacate has not been filed, then the arbitration award is final and the losing party is under an obligation under FINRA rules to pay a monetary award within 30 days.

A suspension proceeding is not an alternative to judicial review under the FAA. The SEC has flatly stated, "An arbitration award cannot be collaterally attacked by a respondent in a FINRA expedited proceeding."³¹ As the SEC has repeatedly explained, "To permit a party

²⁷ The By-Laws specify an even shorter written notice period of 15 days.

²⁸ *Dep't of Enforcement v. Garratt*, No. ARB210001, 2021 FINRA Discip. LEXIS 27, at *6-7 (NAC Aug. 31, 2021).

²⁹ A hearing may be continued, however, as the hearing in this proceeding was to allow for briefing on the issue of my authority to address Respondent's defense. FINRA Rules 9559(d)(4) and 9235 authorize a Hearing Officer to do all things necessary and appropriate to discharge his or her duties, and FINRA Rule 9559(d)(6) permits a Hearing Officer to extend or shorten time limits for good cause shown.

³⁰ *Sequeira v. SEC*, 816 F. App'x 703, 707 (3d Cir. 2020) ("Any challenge to the award itself, including a claim that the arbitration panel lacked jurisdiction, should have been brought in a court of competent jurisdiction.") (quotations omitted). See also *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4263, at *13 (Oct. 22, 2019) (Respondent's "recourse for challenging an allegedly erroneous arbitration award would be by seeking to vacate, modify, or correct the award in court under the Federal Arbitration Act.").

³¹ *Keith Sequeira*, Exchange Act Release 85231, 2019 SEC LEXIS 286, at *24 Mar. 1, 2019), *aff'd*, 816 F. App'x 703. See also *Michael Schwartz*, Exchange Act Release No. 81784, 2017 SEC LEXIS 3111, at *22 (Sept. 29, 2017) (respondent in expedited suspension proceeding for non-payment of arbitration award may not collaterally attack the underlying award because that tactic would subvert procedures designed to promote prompt payment); *Michael*

dissatisfied with an arbitral award to attack it collaterally for legal flaws in a subsequent disciplinary proceeding would subvert the salutary objective that the NASD's [now FINRA's] [arbitration] resolution seeks to promote."³²

Other than the filing of a judicial motion to vacate, which effectively operates as a stay of a suspension notice, the recognized defenses to a proposed suspension for failure to pay an arbitration award take the validity of the award as a given. The recognized defenses are reasons proffered by a respondent for not suspending that person even though the award is presumed valid.³³

- Payment in full, even if past the 30-day deadline;
- A settlement with the successful claimant, either for less than the amount awarded in arbitration or for installment payments, and proof that the respondent is not in default;
- Respondent has filed for bankruptcy, or a bankruptcy court has discharged the award; or
- In industry disputes, that the respondent has a bona fide inability to pay the award.

F. The FAA Does Not Override FINRA's Rule Requiring Payment of the Award Within 30 Days or Restrict FINRA's Ability to Suspend Respondent

The FAA permits a losing party in an arbitration proceeding to file a motion to vacate for up to three months from issuance of the award.³⁴ The FAA, however, does not govern FINRA's ability to require regulated persons to pay an arbitration award or file a motion to vacate earlier than that. Nothing in the FAA provides that an arbitration award is preliminary or contingent or unenforceable until the expiration of the three-month period for filing a motion to vacate. The statute simply permits the filing of a motion to vacate during the three-month period.

To avoid a suspension under FINRA's rules, the losing party has the obligation to act quickly—within 30 days—either to pay the award or to file a motion to vacate. FINRA imposes this obligation to enhance the effectiveness of its arbitration forum and promote the public interest. The 30-day requirement induces industry members to pay arbitration awards promptly

DiPietro, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *13 (Mar. 17, 2016) ("An arbitration award cannot be collaterally attacked by a respondent in an FINRA expedited proceeding . . .").

³² *Tony R. Smith*, Exchange Act Release 43748, 2009 SEC LEXIS 2939, at *13 n.14 (Dec. 20, 2000) (collecting cases).

³³ See, e.g., *Regulatory Operations v. Grady*, No. ARB170025, 2017 FINRA Discip. LEXIS 51, at *2–3 (OHO Dec. 14, 2017).

³⁴ 9 U.S.C. § 12.

and reduces the ability of industry members to force successful adversaries in arbitration to wait for an extended period to satisfy their awards.³⁵

FINRA is not required to delay its suspension proceeding until the possibility that the award might be challenged on a motion to vacate has expired. Such a ruling would allow a losing party to delay payment of the award even where that person did not intend to file a motion to vacate. The SEC has specifically rejected the argument that there is no obligation to pay an arbitration award until every possibility of overturning the award is exhausted. In *Gallagher*, the respondent's motion to vacate an arbitration award had been denied, but he then filed an appeal and asserted that he need not pay until the appeal was decided. The SEC declared in that case: "Honoring arbitration awards is essential to the functioning of the [FINRA] arbitration system."³⁶ It explained that forcing an arbitration claimant to wait for an extended period of time for satisfaction of an arbitration award owing to it and requiring it to pursue legal avenues to collect the amount due is not in the public interest.³⁷ Once a motion to vacate has been denied, the obligation to pay is immediate; and FINRA is authorized to commence a suspension proceeding if payment is not forthcoming.³⁸

FINRA's rule requiring payment of an arbitration award within 30 days is consistent with the purpose of the FAA to streamline the resolution of disputes in arbitration. It also is consistent with FINRA's own regulatory mission. The failure to comply with FINRA's rules and to fulfill one's financial obligations not only undermines the fair functioning of the arbitration process—it also raises serious concerns about a person's ability to comply in the future, and whether customers and other securities industry participants may be at risk when dealing with that person.³⁹

G. Respondent's Arguments Are Without Merit

Respondent argues that the arbitration award is invalid and unenforceable. Rule 13904(a) for industry disputes, like Rule 12904(a) for customer disputes, provides, "All awards shall be in

³⁵ *Perpetual Securities, Inc.*, Exchange Act Release No., 2003 SEC Lexis 3150, at *8–10 & n.12 (Sept. 3, 2003).

³⁶ *William J. Gallagher*, Exchange Act Release No. 47501, 2003 SEC Lexis 599, at *13 (Mar. 14, 2003).

³⁷ *Id.* at *13–14.

³⁸ *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *11 (Mar. 17, 2016) (FINRA not required to delay suspension proceeding by an appeal of a decision denying a motion to vacate).

³⁹ As FINRA has said in the context of arbitrations to resolve customer disputes with securities industry professionals, "The ability to work in the securities industry carries with it, among other things, an obligation to comply with the federal securities laws, FINRA rules, and orders imposed by the disciplinary and arbitration processes. Allowing members or their associated persons that fail to pay arbitration awards to remain in the securities industry presents regulatory risks and is unfair to harmed customers." SR-FINRA-2010-014, Proposed Rule Change Relating to FINRA Rule 9554 to Eliminate Explicitly the Inability-to-Pay Defense in the Expedited Proceedings Context, 75 Fed. Reg. 21686, (Mar. 31, 2010), *adopted by* SR-FINRA-2010-014, Order Approving Proposed Rule Change, Exchange Act Release No. 62211, 2010 SEC LEXIS 1800 (June 2, 2010). *See also Garratt*, 2021 FINRA Discip. LEXIS 27, at *14 (payment of arbitration awards and the facilitation of the arbitration process assist in the protection of investors and further the public interest).

writing and signed by a majority of the arbitrators” Respondent asserts that the typed signatures in this case are insufficient and a violation of FINRA Rule 13904(a).⁴⁰ Respondent calls it “ludicrous” to think that a person could be suspended for failing to pay an arbitration award that does not comply with FINRA’s own rules.⁴¹ To explain why the alleged violation is significant, Respondent’s counsel argued in the pre-hearing conference that such typed signatures cannot be authenticated. He insists that FINRA must provide an audit trail so that the typed signatures can be verified.⁴²

Respondent has provided no support for his assertion that the Hearing Officer has authority to consider the validity of the signatures on the arbitration award or his further assertion that I should permit discovery on the signature issue. He fails to understand the interplay between FINRA’s Arbitration Code and the FAA. While the FAA provides an avenue for review of an arbitration award, the Arbitration Code does not. And while the FAA provides three months to challenge an arbitration award, the Arbitration Code encourages more prompt action. A regulated person must either pay a monetary award or challenge it by a judicial motion to vacate within 30 days—or face a potential suspension. The FAA does not govern when FINRA might give notice of a potential suspension or suspend a regulated person.

If Respondent wanted to avoid a potential suspension, he could have moved to vacate the award in a court of competent jurisdiction within 30 days of receipt of the award. The option of

⁴⁰ Respondent’s Brief in Response to the Hearing Officer’s Authority to Hear and Rule on this Matter (“R. Br.”). Respondent has cited no authority for the proposition that the typed signatures violate FINRA’s rules. He simply presumes a violation.

⁴¹ R. Br. 4.

⁴² Tr. 23 (“This is a concern [the typed signatures] because it eliminates the ability of authentication.”). R. Br. 10 (courts have relied on audit trails in determining whether electronic signatures are valid).

I asked Respondent’s counsel at the pre-hearing conference, whether he had any reason to doubt the authenticity of the arbitration award. He said that he did—but the only basis he offered for that view was that he considers the award to be “unsigned.” Tr. 37. Respondent has not suggested any reason to doubt that the award was approved by the arbitrators and represents their genuine decision. Indeed, by paying the fees assessed by the arbitrators, the Respondent has treated the award as genuine.

Respondent has raised what he perceives to be a rule violation, but not one that casts doubt on the fairness of the arbitration proceeding. At the pre-hearing conference, Respondent’s Counsel described the typed signatures as a “technical issue.” Tr. 22.

It would be contrary to the FAA for the arbitrators’ decision to be invalidated for some “technical issue.” *See Wachovia Secs., Inc. v. Gangale*, 125 F. App’x 671, 677 (6th Cir. 2005) (“By submitting their dispute to binding arbitration instead of to a court, the parties agree to accept the result, regardless of its legal and factual accuracy.”) (quotations and citation omitted).

In fact, federal courts have rejected the argument that a possible violation of FINRA’s signature requirement is a basis for vacating an arbitration award. *See, Olson v. Wexford Clearing Servs. Corp.*, 397 F.3d 488, 491–92 (7th Cir. 2005) (ruling that an award was final even though it was not signed by a majority of the arbitrators, an arguable violation of FINRA’s rules); *Mendelka v. Penson Fin. Servs., Inc.*, No. 16-cv-7393 (PKC), 2017 U.S. Dist. LEXIS 49536, at *10 (S.D.N.Y. Mar. 31, 2017) (refusing to vacate an award for its failure to “abide” by “formalities,” including the omission of the signature of one of three arbitration panel members despite FINRA rule requiring the signatures of the arbitrators).

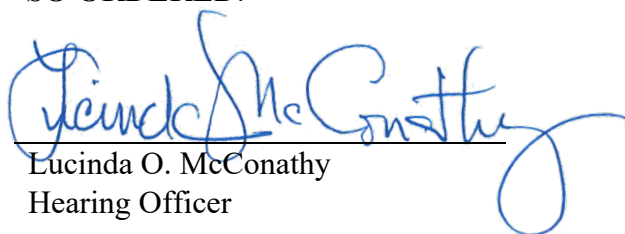
moving to vacate the award may remain open to him until the close of the three-month window under the FAA,⁴³ but Respondent has failed to act timely under FINRA's rules.

When a respondent in an expedited suspension proceeding under FINRA Rule 9554 fails to state "one or more of the permitted defenses," he "waives h[is] right to a hearing."⁴⁴ Consequently, the respondent's hearing request is dismissed, the notice of suspension is deemed final FINRA action, and the notice of suspension becomes effective.⁴⁵

IV. Order

For the reasons discussed above, this expedited suspension proceeding for failure to pay an arbitration award within 30 days is **DISMISSED**. The hearing and any other remaining due dates are removed from the calendar. The stay of suspension is no longer in effect. Accordingly, the notice of proposed suspension dated June 17, 2022, is deemed final FINRA action. Respondent's suspension shall be effective as of the date of this Order. Respondent's proposed discovery is **DENIED AS MOOT**.

SO ORDERED.


Lucinda O. McConathy
Hearing Officer

Dated: August 4, 2022

⁴³ At the pre-hearing conference, Respondent's counsel indicated that Respondent might yet file a motion to vacate under the FAA. According to counsel, the deadline for doing so is August 10. Counsel suggested that Respondent might argue on a motion to vacate that the arbitration panel failed to receive all the pertinent evidence. Tr. 16, 21-23. It was unclear from counsel's remarks whether Respondent might also raise the perceived problem with the arbitrators' signatures that he raises here.

⁴⁴ See OHO Order 09-01 (20090187451) (July 29, 2009), at 2, https://www.finra.org/sites/default/files/OHODecision/p119914_0_0_0.pdf

⁴⁵ As discussed above, the intention to file a motion to vacate in the future is not a defense to an expedited suspension proceeding and cannot prevent the suspension here from going into effect. An expedited suspension proceeding is designed to encourage prompt action to either pay the award or seek review.

However, if Respondent files a motion to vacate after the issuance of this Order, which makes the suspension effective, he may then apply to the Office of Dispute Resolution for a termination of the suspension. FINRA Rule 9554(g) provides that a person suspended in this type of expedited proceeding can file a written request for termination of the suspension on the ground of full compliance with the notice of suspension. The notice of suspension served on Respondent provides, "If you are suspended, the suspension will continue until documentary evidence is provided to FINRA that one or more of the enumerated Rule 9554 defenses has occurred." June 17 Notice 1.

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