FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DANIEL PAUL MOTHERWAY (CRD No. 2680522), Respondent.	Expedited Proceeding No. ARB200006 STAR No. 202006555490 Hearing Officer–DDM **EXPEDITED DECISION** June 30, 2020

Respondent failed to pay an arbitration award and failed to prove that he has a bona fide inability to pay the award. Respondent is suspended from associating with any FINRA member in any capacity.

Appearances

For the Complainant: Stuart P. Feldman, Esq., and Jeff Fauci, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Daniel Paul Motherway, pro se.

DECISION

I. Introduction

Respondent Daniel Paul Motherway failed to pay a FINRA arbitration award he owed to FINRA member firm, UBS Financial Services, Inc. ("UBS"). As a result, FINRA sent Motherway a Notice of Suspension pursuant to FINRA Rule 9554, notifying him that he would be suspended from associating with any FINRA member firm unless he paid the award or asserted a valid defense for nonpayment. Motherway stayed the suspension by timely filing a request for a hearing and asserting an inability-to-pay defense.

The outcome of this case depends on one question: did Motherway prove that he cannot use his household's assets and income to make a meaningful payment toward the award? The answer to that question is no. Accordingly, Motherway is suspended from associating with any FINRA member in any capacity.

II. Findings of Fact and Conclusions of Law

A. Background

From August 2000 to July 2019, Motherway was registered with FINRA.[1] Motherway is not currently registered with a FINRA member firm.[2] Even though he is not currently registered with FINRA, he is subject to FINRA's jurisdiction pursuant to Article V, Section 4(b) of FINRA's By-Laws.[3]

This matter arises from an arbitration between Motherway and his former broker-dealer, UBS. A FINRA arbitration panel ruled that Motherway breached a promissory note from UBS, and must pay UBS $1,012,729.65 in compensatory damages, plus interest, along with $132,673.76 in attorney's fees, late fees, and costs ("the Award").[4] That same day, FINRA notified Motherway of the Award and told him that if he did not pay it within 30 days, FINRA could suspend his registration.[5]

Motherway did not satisfy the Award, enter into a fully executed, written settlement agreement to pay the Award, file for bankruptcy protection, or timely file a motion to vacate the Award.[6] As a result, on February 7, 2020, FINRA served Motherway with a Notice of Suspension notifying him that his registration would be suspended effective February 28, 2020, for failing to pay the Award.[7] The Notice of Suspension also stated that Motherway could request a hearing, which would stay the effective date of the suspension.[8]

Motherway timely filed a request for a hearing and claimed a bona fide inability to pay the Award.[9] Motherway participated in a hearing held by telephone on May 8, 2020.[10]

B. Inability-to-Pay Standard

FINRA Rule 9554 provides a procedural mechanism for FINRA to address failures to pay arbitration awards on an expedited basis. The rule authorizes FINRA to initiate an expedited proceeding by issuing a written notice that specifies the grounds for, and the effective date of, the

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[1] Stipulations ("Stip.") ¶ 6.

[2] *Id*.

[3] *Id.*; *see also* Joint Exhibit ("JX-") 8.

[4] Stip. ¶ 1; JX-1, at 4. The panel also recommended the expungement from Motherway's Form U5 of certain language that it deemed defamatory regarding his termination from UBS. JX-1, at 4.

[5] Stip. ¶ 2; JX-2.

[6] Stip. ¶¶ 7-10.

[7] Stip. ¶ 4; JX-4; JX-5; JX-6.

[8] JX-4, at 1.

[9] Stip. ¶ 5; JX-7.

[10] Citations to the Hearing Transcript are referred to as "Tr." followed by the page number.

suspension of an individual who has not satisfied an arbitration award. The notice also advises the respondent of his right to file a written request for a hearing.

A respondent may assert certain limited defenses for failure to pay an award in an expedited proceeding under FINRA Rule 9554. These include (1) the award has been paid in full; (2) the parties have agreed to settle the 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 of competent jurisdiction; and (5) the respondent has a bankruptcy petition pending in U.S. Bankruptcy Court, or a U.S. Bankruptcy Court has discharged the award.[11] In an arbitration not involving public customers, a respondent may also assert a bona fide inability to pay the arbitration award.[12]

As the respondent, Motherway bears the burden of establishing a bona fide inability to pay.[13] The Securities and Exchange Commission ("SEC") has stated that "[b]ecause the scope of [a respondent's] assets is peculiarly within [his] knowledge . . . [the respondent] should properly bear the burden of adducing evidence with respect to those assets."[14] FINRA also is entitled to make a searching inquiry into a respondent's assertion of inability to pay.[15]

To establish an inability-to-pay defense, Motherway must show more than a current lack of funds on hand to pay the award in full. He "must establish that at no time after the award became due did he have the ability to pay all or any meaningful amount of the award," not just that at "some later time his assets were insufficient to pay the award."[16] He must show that he cannot reduce his living expenses, borrow funds, or otherwise "make some *meaningful payment* toward the settlement of the award from *available assets or income*, even if he could not pay the full amount of the award." [17] Finally, an inability-to-pay defense may also be rejected when the evidence provided by a respondent is insufficient or incomplete.[18]

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[11] FINRA By-Laws, Art. VI, Sec. 3(b); NASD Notice to Members 00-55, at 2 (Aug. 2000), http://www.finra.org/industry/notices/00-55; *Dep't of Enforcement v. Respondent*, OHO Redacted Decision ARB060031, at 4-5 (Apr. 16, 2007), http://www.finra.org/sites/default/files/OHODecision/p038228_0_0.pdf.

[12] *William J. Gallagher*, 56 S.E.C. 163 (2003).

[13] *Gallagher*, 56 S.E.C. at 169.

[14] *Bruce M. Zipper*, 51 S.E.C. 928, 931 (1993).

[15] *Robert Tretiak*, 56 S.E.C. 209, 220 (2003).

[16] *Dep't of Enforcement v. Tretiak*, No. C02980085, 2000 NASD Discip. LEXIS 35, at *20 (OHO Mar. 10, 2000), *aff'd*, 2001 NASD Discip. LEXIS 1 (NAC Jan. 23, 2001), *aff'd*, 56 S.E.C. 209 (2003).

[17] *Dep't of Enforcement v. Respondent*, OHO Redacted Decision ARB010013, at 9 (Jan. 25, 2002), http://www.finra.org/sites/default/ files/OHODecision/p006654_0_0.pdf (emphasis added); *see also Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *16 (Mar. 17, 2016).

[18] *Gallagher*, 56 S.E.C. at 169-70.

C. Motherway Failed to Establish an Inability to Pay

Motherway had the burden to prove that he could not make any meaningful payment toward the Award from the assets and income available to him. He did not meet that burden. Instead, the evidence demonstrated that he had sufficient assets and income available to him to make a meaningful payment to UBS.

1. Motherway's Statement of Financial Condition

The Case Management and Scheduling Order ("CMSO") required Motherway to complete and provide to Enforcement a Statement of Financial Condition form ("SFC") and all supporting documents. The CMSO attached a blank SFC for Motherway to complete and provide to Enforcement.

The SFC asked Motherway to provide financial information for his entire household, not just himself. For example, the SFC directed Motherway to "[l]ist all assets owned by you, your spouse, or any other member of your household, directly or indirectly, and all assets which are subject to your or your spouse's possession, enjoyment, or control, regardless of whether legal title or ownership is held by a relative . . . ."[19] Similarly, it required Motherway to "[l]ist all money or other income received from any source on a monthly basis during the past 12 months . . . by you, your spouse, or any other member of your household."[20] The SFC also required Motherway to list "all liabilities"[21] and "all monthly expenditures (for any purpose) for you or your household for the past 12 months . . . ."[22]

Motherway completed the SFC and signed it on March 8, 2020.[23] In the SFC, he listed household assets that exceeded liabilities, exclusive of the Award, by $956,181.[24] That included more than $140,000 in cash, more than $910,000 in retirement savings, nearly $490,000 in real estate, and about $60,000 in automobiles.[25] In addition, he listed more than $6,500 in monthly household income, net of expenses,[26] and estimated that the household income for 2019 was

[19] JX-9, at 1.

[20] JX-9, at 4.

[21] JX-9, at 2.

[22] JX-9, at 5.

[23] JX-9.

[24] JX-9, at 1-2. *See Regulatory Operations v. Grady*, No. ARB170025, 2017 FINRA Discip. LEXIS 51, at *18 (OHO Dec. 14, 2017) ("As to whether the Award should be included among Grady's liabilities, while Grady is correct that a net worth calculation should ordinarily include all liabilities, the more useful analysis in this case excludes the Award.").

[25] JX-9, at 1. Motherway's wife purchased two cars for more than $100,000 in September and October 2019. Tr. 43.

[26] JX-9, at 4-5.

slightly more than $400,000.[27] The SFC lists sufficient assets and income, then, for Motherway to make a meaningful payment toward the Award. Indeed, Motherway does not dispute this.

2. Motherway's Defense

Instead, Motherway argues that the SFC does not accurately depict his financial condition. More to the point, he asserts that all of the assets and income listed on the SFC belong to his wife, not to him.[28] As an example, he testified, the cash is held in his wife's checking account, and is "hers and hers alone,"[29] as are the retirement savings.[30] In addition, he testified, the family house is in his wife's name.[31] And all of the income listed on the SFC is attributable to his wife's employment at another financial services firm.[32]

Motherway testified that he has not been employed since July 2019, despite his best efforts to find employment both inside and outside the financial services industry.[33] While he has nearly $20,000 in a personal account at UBS,[34] he testified that UBS froze that account.[35] As a result, Motherway argued, he has zero assets to his name, and no income, while he is responsible for over $1 million in liabilities, largely from credit card debt, the Award, and various arbitration fees.[36] Without any assets, Motherway testified, he is unable to obtain a secured loan.[37]

"The Award is against Daniel Motherway," Motherway argued at the hearing, "not Daniel Motherway and wife."[38] His wife therefore "has no legal obligation"[39] and is "under no legal compulsion"[40] to "tap into her assets to pay [his] liability,"[41] Motherway insisted. As a

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[27] Tr. 39-40.

[28] Tr. 23-24.

[29] Tr. 23-24.

[30] Tr. 24.

[31] Tr. 73.

[32] Tr. 23-24.

[33] Tr. 29-31; JX-8; Respondent's Exhibit ("RX-") 2-28.

[34] JX-12, at 1.

[35] Tr. 50.

[36] Tr. 24-25, 31, 35.

[37] Tr. 31-33.

[38] Tr. 78.

[39] Tr. 78.

[40] Tr. 79.

[41] Tr. 78-79.

result, he asserted, her assets and income should not be considered when determining whether he has an ability to pay a meaningful portion of the award.[42]

But Motherway misunderstands his burden of proof. It is not enough to assert that his wife has no legal obligation to pay the Award, or even his other liabilities. Instead, he must prove that he cannot pay a meaningful portion of the Award from the assets and income "available" to him, whether to borrow against or leverage in some other way.[43] The SFC expressly seeks information about the financial condition of a respondent beyond the assets that he owns in his own name, and the income he personally generates.[44] Indeed, the SEC and FINRA have repeatedly looked for a full picture of financial resources available to the respondent to decide whether that respondent has a true inability to pay. Adjudicators have looked to a respondent's "combined family income,"[45] including income and assets held by a spouse,[46] as well as whether a respondent could borrow money from family members,[47] whether a respondent could use his spouse's property as collateral for a loan,[48] and whether a respondent's spouse could continue to work and generate income.[49]

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[42] Tr. 89-90.

[43] *DiPietro*, 2016 SEC LEXIS 1036, at *16.

[44] JX-9, at 1-2, 5.

[45] *DBCC No. 1 v. Glen McKinley Richars, III*, 1998 NASD Discip. LEXIS 48, at *10 (NAC July 2, 1998).

[46] *Dep't of Enforcement v. Respondent*, OHO Redacted Decision ARB010016, at 7 (Jan. 28, 2002), https://www.finra.org/sites/default/files/OHODecision/p006653_0_0.pdf (listing wife's pension and retirement plan among "assets that [respondent] could tap to make some meaningful payment toward the award"); *see also Philip A. Lehman*, Exchange Act Release No. 54660, 2006 SEC LEXIS 2498, at *31 (Oct. 27, 2006) (in rejecting Lehman's inability-to-pay defense for a civil money penalty, noting that "[d]isclosure of a spouse's information may be useful in determining whether, and to what extent, such spouse's assets or liabilities offset the assets and liabilities of the individual submitting the sworn financial statement.").

[47] *DBCC v. Bruce M. Zipper*, No. C07910138, 1994 NASD Discip. LEXIS 194, at *12 (NBCC Oct. 31, 1994) ("Zipper stated that he planned to borrow $10,000 from his family to settle his tax obligation to the IRS . . . Zipper failed to present to the NASD any information as to why he could not or would not borrow to pay the arbitration award, or any part thereof."), *aff'd*, 51 S.E.C. 928 (1993); *Regulatory Operations v. DiPietro*, No. ARB140066, 2015 NASDR OHO LEXIS 137, at *7 (OHO Jun. 8, 2015) ("if the DiPietro children own the company or the property, then DiPietro still failed to meet his burden of establishing that [the property] is not a potential source of substantial funds" because "he did not demonstrate that his children would be unwilling to sell [the property] in order to give or lend him money so that he could pay all, or a meaningful portion of, the award."), *aff'd*, 2016 SEC LEXIS 1036.

[48] *DBCC No. 3 v. Donald F. Spalletta*, No. C3A920010, 1993 NASD Discip. LEXIS 279, at *21-22 (NBCC Jan. 7, 1993) ("We note that we have seen no evidence of any attempts made by Spalletta to obtain a loan to pay the award, and that his interest in the farm [in his wife's name only] may be sufficient to support the farm's use as collateral for such a loan.").

[49] *Dep't of Enforcement v. Respondent*, OHO Redacted Decision DFC990003, at 6 (Oct. 6, 1999), https://www.finra.org/sites/default/files/OHODecision/p006702_0_0.pdf; *see also Retirement Surety, LLC*, Initial Decision Release No. 1392, 2019 SEC LEXIS 5372, at *27 (Dec. 20, 2019) (rejecting inability-to-pay defense to

Under these circumstances, then, it is proper to look beyond just the assets in Motherway's name and his personal income. He lives in the house that his wife owns.[50] He drives a car she owns, and which was purchased for almost $50,000 in October 2019.[51] He filed his 2018 federal income and state tax returns jointly with his wife.[52] She regularly transferred money to his checking account.[53] Between October 7, 2019 and January 13, 2020, for example, she transferred at least $13,150 to his checking account so that he could pay his bills and cover overdraft charges.[54] This occurred even while Motherway was employed in the brokerage industry,[55] suggesting that he and his wife regularly commingled assets.

In addition, while his arbitration was pending, Motherway divested himself of a substantial asset—his ownership interest in his house—to his wife, for essentially nothing. UBS filed its Statement of Claim, instituting an arbitration against Motherway and seeking more than a millions dollars in damages from him for breach of a promissory note, on October 16, 2017.[56] Less than a month later, Motherway and his wife transferred a house in New Jersey that they owned jointly to his wife alone, so that she became the sole owner.[57] As consideration for the transfer, his wife paid $10 (to both Motherway and herself).[58]

Motherway's wife sold the New Jersey house in July 2019 for $818,000.[59] At closing, she was paid $197,840 in cash, the profit from the sale.[60] Two days after selling their house, his wife used that profit to purchase another home, in Georgia, for $544,955, with a down-payment of $200,000.[61] Motherway was not listed in the settlement documents as the purchaser for that house,[62] and he testified that he has no ownership interest in the house.[63] Indeed, he claimed that he did not participate at all in the sale of the New Jersey house or the purchase of the Georgia

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civil money penalty, noting that "it appears likely that his household income will increase . . . in the future" and "[h]e and his wife have not yet reached retirement age.").

[50] Tr. 24, 37.

[51] Tr. 43-44; JX-11, at 1.

[52] Tr. 37-38; JX-15, at 2, 7, 10.

[53] Tr. 53.

[54] Tr. 53; JX-12, at 4-7, 10-11, 13.

[55] Tr. 54-55; JX-12, at 22, 26.

[56] JX-1, at 2.

[57] JX-16, at 3; Tr. 68.

[58] JX-16, at 4.

[59] JX-16, at 8.

[60] JX-16, at 11.

[61] Tr. 35; JX-16, at 14.

[62] JX-16, at 17.

[63] Tr. 73.

house.[64] Motherway argued that his house therefore should not be considered as an asset in deciding whether he has an ability to pay the Award.[65] Yet this argument ignores how his wife was able to use his valuable interest in the house they jointly owned in New Jersey to fund the purchase of the house in Georgia, in which they now live. Motherway failed to prove that his family home should not be considered as an asset in assessing his ability to pay the Award.

In short, Motherway offered no evidence at the hearing that his substantial household resources were truly unavailable to him to make a meaningful payment toward the Award. He offered no evidence that he attempted to borrow funds from his wife. Nor did he offer any evidence that she would refuse or be unable to provide him with that money. This is fatal to his inability-to-pay defense.[66]

III. Conclusion

Motherway has not paid any portion of the Award. He also failed to establish any of the defenses permitted by FINRA rules or case law. Specifically, he failed to prove the defense he asserted, a bona fide inability to pay.

"Honoring arbitration awards is essential to the functioning of the [FINRA] arbitration system, and requiring associated persons to abide by arbitration awards enhances the effectiveness of the arbitration process."[67] Motherway did not honor the Award entered against him, undermining the arbitration process. "Conditionally suspending [Motherway] from association with FINRA members gives him an incentive to pay the Award. And inducing him to pay the award through suspension of his [FINRA] membership furthers the public interest and the protection of investors."[68]

Accordingly, pursuant to Article VI, Section 3 of FINRA's By-Laws and Rule 9559(n), Motherway is suspended from associating with any FINRA member in any capacity, effective as of the date of this Decision. The suspension shall continue until Motherway 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 (and he is in compliance with the settlement terms); or

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[64] Tr. 68.

[65] Tr. 89-90.

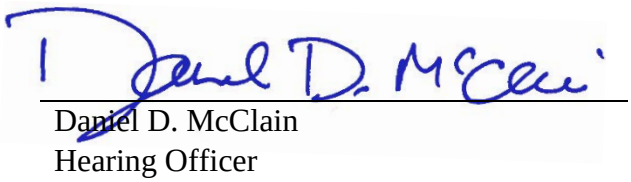
[66] *See, e.g.*, *Gallagher*, 56 S.E.C. at 169-70 (rejecting inability-to-pay defense where respondent failed to demonstrate that he could not borrow against his home); *John G. Pearce*, 52 S.E.C. 796, 797-99 (1996) (rejecting inability-to-pay defense where respondent made no attempt to secure a line of credit or obtain a loan to satisfy the arbitration award); *Regulatory Operations v. Fannin*, No. ARB170007, at 12 (OHO Aug. 25, 2017), https://www.finra.org/sites/default/files/OHO_Fannin_ARB170007_082517.pdf (rejecting inability-to-pay defense when respondent "provided no evidence of any attempt to borrow funds in order to satisfy the Award.").

[67] *Michael David Schwartz*, Exchange Act Release No. 81784, 2017 SEC LEXIS 3111, at *18 (Sept. 29, 2017) (internal quotation marks omitted) (quoting *Gallagher*, 56 S.E.C. 163, at 171.).

[68] *Id.*

(3) he has a petition pending in a United States Bankruptcy Court, or the debt has been discharged by a United States Bankruptcy Court.

In addition, Motherway is ordered to pay costs of $1,627.18, which includes an administrative fee of $750 and the hearing transcript cost of $877.18.[69] The costs are due upon the issuance of this Decision.



Daniel D. McClain
Hearing Officer

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[69] 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.