SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 97180 / March 21, 2023

Admin. Proc. File No. 3-19897

In the Matter of the Application of

DANIEL PAUL MOTHERWAY

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Registered securities association suspended associated person of member firm because he failed to pay an arbitration award. *Held*, application for review is dismissed.

APPEARANCES:

Daniel Paul Motherway, *pro se*.

Alan Lawhead, Jante Turner, and Gary Dernelle for the Financial Industry Regulatory Authority, Inc.

Appeal filed: July 29, 2020
Last brief received: November 16, 2020

Daniel Paul Motherway, formerly a registered representative with UBS Financial Services, Inc., seeks review of a FINRA decision indefinitely suspending him from association with any member firm because he failed to pay an arbitration award owed to UBS.[1] Based on our independent review of the record, we find no basis for Motherway's contention that the indefinite suspension should be set aside. Accordingly, we dismiss his application for review.

I. Background

A. FINRA instituted proceedings against Motherway after he failed to pay an arbitration award issued by a FINRA arbitration panel.

Motherway joined UBS in November 2015 and remained employed there until he was terminated in June 2017. On October 16, 2017, UBS filed an arbitration claim with FINRA's Office of Dispute Resolution alleging that Motherway breached a promissory note. On January 7, 2020, after a hearing, an arbitration panel awarded UBS $1,012,729.65 in compensatory damages, plus interest, and $132,637.76 in costs, attorneys' fees, and late fees (the "Award").[2] FINRA properly served Motherway with notice of the Award and of his obligation to pay it within 30 days, but he failed to pay the Award, either in full or in part.

On February 7, 2020, FINRA instituted expedited proceedings against Motherway by serving him with a notice of suspension.[3] The notice stated that, based on his "failure to comply with" the Award, FINRA would suspend Motherway from association with member firms in any capacity on February 28, 2020, unless he established before that time that he had: (1) paid the Award in full; (2) entered into a settlement agreement concerning the Award and was in compliance with his obligations thereunder; (3) timely filed an action to vacate or modify the Award and such motion had not been denied; or (4) filed for bankruptcy protection and the

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1 *Department of Enforcement v. Daniel Paul Motherway*, Expedited Proceeding No. ARB200006 (Hearing Officer June 30, 2020), *available at* https://www.finra.org/sites/default/files/2020-08/OHO_Motherway_ARB200006_063020.pdf.

2 Motherway filed a separate arbitration claim against UBS that asserted numerous causes of action. The arbitration panel granted Motherway's motion to consolidate his case with the one initiated by UBS. In its decision, the panel granted Motherway's request to expunge as "defamatory" the explanation UBS had given for Motherway's termination on the form it filed with FINRA and directed that it be changed to "termination for providing conflicting and misleading information in connection with the firm's inquiry into a non-securities related matter." The panel denied Motherway's remaining requests for relief.

3 *See* FINRA Rule 9554(a) ("If a . . . person associated with a member . . . fails to comply with an arbitration award . . . FINRA staff may provide written notice to such . . . person stating that failure to comply within 21 days of service of the notice will result in . . . a suspension from associating with any member."); *see also* FINRA Rule 9554(d) ("The suspension . . . referenced in a notice issued and served under this Rule shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.").

proceeding was pending in U.S. Bankruptcy Court or such a court had discharged the Award.[4] The notice also stated that Motherway could request a hearing, which would stay the effective date of the suspension.[5]

Motherway timely requested a hearing and asserted an inability to pay as his defense. A FINRA Hearing Officer held a telephonic hearing on May 8, 2020.

B. FINRA's Hearing Officer found that Motherway had sufficient assets to pay the Award.

On June 30, 2020, the Hearing Officer issued a decision finding that Motherway failed both to pay the Award and to establish a "bona fide inability to pay" the Award. At the outset of the proceeding, the Hearing Officer's Case Management and Scheduling Order had required Motherway to provide a Statement of Financial Condition ("SFC") and supporting documentation. The SFC instructed Motherway to list all assets owned by him or his spouse and all assets that were subject to his or his spouse's "possession, enjoyment, or control," along with "all money or other income received from any source . . . ."

Motherway's SFC, dated March 8, 2020, listed assets that exceeded liabilities by $956,181, not including the Award. Those assets included more than $140,000 in cash, more than $910,000 in retirement savings, nearly $490,000 in real estate, and automobiles worth approximately $60,000. Motherway also listed more than $6,500 in monthly household income after expenses and estimated that his household income for 2019 was more than $400,000. Based on the information in the SFC, the Hearing Officer concluded that Motherway had sufficient assets and income "available to him" to "make a meaningful payment toward the Award."

The Hearing Officer rejected Motherway's argument that all of the assets listed on the SFC should not be considered because they belonged exclusively to his spouse. In doing so, the Hearing Officer noted that Motherway lives in the house his wife owns; drives a car that she owns (which she purchased for almost $50,000 in October 2019); filed his 2018 federal and state income tax returns jointly with his wife,[6] and regularly received transfers of money to his

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[4] *See* FINRA By-Laws Article VI, Section 3(b) (stating that FINRA may suspend an associated person for failure to comply with an arbitration award "where a timely motion to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied, or for failure to comply with a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the Corporation's Rules"); NASD Notice to Members 00-55, 2000 WL 1375123, at *2 (Aug. 10, 2000) (setting forth the defenses for non-payment of arbitration awards).

[5] *See supra* note 3; FINRA Rule 9559(c)(1) (stating that a timely request for a hearing stays the effectiveness of a notice of suspension in a Rule 9554 expedited proceeding).

[6] Motherway testified that subsequent tax filings by the couple were also joint, but it is unclear from the record the years to which he was referring.

checking account from his wife, including transfers of at least $13,150 between October 7, 2019 and January 13, 2020.

The Hearing Officer also noted that Motherway and his wife transferred ownership of a house in New Jersey that they owned jointly to ownership in his wife's name alone on November 10, 2017—less than a month after UBS filed its arbitration claim against him. His wife paid $10 in consideration for the transfer of the property. Motherway's wife later sold the New Jersey house in July 2019 for $818,000 and received proceeds of $197,840 from the sale. She purchased a new home in Georgia solely in her name for $544,955 two days later with a down payment of $200,000. Motherway and his family continue to live in the Georgia home.

The Hearing Officer concluded that "Motherway offered no evidence at the hearing that his substantial resources were truly unavailable to him to make a meaningful payment toward the Award" and, further, that "[h]e offered no evidence that he attempted to borrow funds from his wife." As a result, the Hearing Officer suspended Motherway from association with any FINRA member in any capacity until Motherway provides documentary evidence to FINRA showing that (1) the Award has been paid in full; (2) Motherway and UBS have agreed to settle the matter (and he is in compliance with the settlement terms); or (3) he has a petition for bankruptcy protection pending in U.S. Bankruptcy Court, or his debt has been discharged by such a court.[7] Motherway then timely filed this appeal.

II. Analysis

Section 19(f) of the Securities Exchange Act of 1934 "governs our review of an SRO action imposing an indefinite suspension contingent on the payment of an arbitration award."[8] Section 19(f) requires that we dismiss Motherway's appeal if the specific grounds on which FINRA based its action exist in fact; FINRA's action was in accordance with its rules; and that those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[9]

A. The specific grounds for the suspension exist in fact.

The parties have stipulated to the existence of and terms of the Award and to the facts that Motherway has not paid any portion of the Award, has not settled with UBS, has not moved to vacate the Award, and has not filed for bankruptcy protection. Accordingly, the record supports the Hearing Officer's determination that Motherway had not satisfied the Award or established that he is otherwise entitled to avoid the imposition of an indefinite suspension. We

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[7] *See supra* note 4. It does not appear, and Motherway does not argue, that he sought to discharge the Award in bankruptcy.

[8] *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *2 (Mar. 17, 2016) (citing *William J. Gallagher*, Exchange Act Release No. 47501, 2003 WL 1125378, at *2 (Mar. 14, 2003)).

[9] 15 U.S.C. § 78s(f). Section 19(f) also requires that the action not impose an undue burden on competition. *Id.* Motherway does not claim, and we see no basis for concluding, that his suspension imposes an unnecessary or inappropriate burden on competition.

therefore find that the specific grounds on which FINRA based Motherway's indefinite suspension exist in fact.

1. Motherway's sole defense is an inability to pay the Award.

Motherway's sole contention is that the Hearing Officer erred in finding that Motherway "had sufficient assets and income available to him to make a meaningful payment to UBS" and failed to establish that he had a bona fide inability to pay.[10] "To prevail on an inability-to-pay defense a respondent must demonstrate that he is unable to make some meaningful payment toward the award from available assets or income."[11] Motherway, as the party claiming an inability to pay, bears the burden of proving the defense "[b]ecause the scope of his assets is peculiarly within [his] knowledge."[12]

Motherway argues that, contrary to the Hearing Officer's finding, he has "no income, no assets, no employment, no ability to borrow, [and] no ability to make a 'meaningful payment.'" He testified before FINRA that, despite his best efforts to find employment both inside and outside the financial services industry, he had not been employed since July 2019; that, while he had nearly $20,000 in a personal account at UBS, UBS froze that account; and that, without any assets, he was unable to obtain a secured loan. Motherway acknowledges that the SFC "demand[ed] disclosure of [his] spouse's assets and liabilities." But he claims that his wife's assets should not have been considered because "these assets are *not* subject to [his] enjoyment" (emphasis in original). According to Motherway, his wife never "took any funds from the promissory note" at issue and "is not liable for any of [his] debt and therefore her solely owned assets are not relevant to the ability to pay."

Motherway has failed to meet his burden and prove a *bona fide* inability to pay the Award in light of the family assets he disclosed. The issue is not, as Motherway frames it, whether his wife is liable for his debts. Instead, the question is whether Motherway can establish that he had a "bona fide inability to pay" the Award with funds that were available to him from any source. And, in his SFC, Motherway disclosed that his wife had assets that could pay at least a significant portion of the Award, so the burden was then on him to show that those assets were not available to him.[13] We agree with the Hearing Officer that Motherway failed to meet

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[10] Motherway also faults the Hearing Officer for defining the term "meaningful payment." We see no reason to reverse FINRA's decision on this basis since Motherway admittedly made no payment towards the Award. As a result, he cannot be deemed to have made a *meaningful* payment regardless of how the term is defined.

[11] *DiPietro*, 2016 WL 1071562, at *4 (internal quotations and citations omitted).

[12] *Bruce M. Zipper*, Exchange Act Release No. 33376, 1993 WL 538925, at *2 (Dec. 23, 1993).

[13] *See DiPietro*, 2016 WL 1071562, at *5 (stating "an inability-to-pay defense is unavailable if a respondent can borrow against assets to satisfy the award or pay a meaningful part of it"); *Gallagher*, 2003 WL 1125378, at *3 (upholding hearing officer's rejection of inability to pay defense where applicant "submitted no evidence that he could not have borrowed against the home, or otherwise, the necessary money to pay the arbitration award").

this burden and that, as a result, his wife's assets were properly considered in assessing his claimed inability to pay.

As the Hearing Officer found, Motherway and his wife filed joint state and federal income tax returns and appeared regularly to comingle their assets. Motherway drove a car purchased the year before the proceeding for $50,000 and titled in his wife's name, had his legal fees related to the arbitration paid by his wife, and received regular financial support from her following the arbitration proceeding.[14]

Motherway also continues to live in a house titled solely in his wife's name. Significantly, Motherway's wife purchased this house with funds that Motherway had effectively given to her in connection with the sale of a house that the couple had previously owned jointly, and he did so shortly after the arbitration proceeding was initiated. The proceeds from the sale of the jointly-owned house also were substantial, close to $200,000, but Motherway had earlier relinquished them to his wife, without any apparent compensation. Although Motherway asserts that there were legitimate reasons for the transfer,[15] the fact that it immediately followed initiation of the arbitration proceeding suggests a possible link between the two. In any event, and regardless of the motivation for the transfer, Motherway has failed to establish why the house or any other asset held by his wife could not have been liquidated or encumbered (at least in part) and thereby used to make a meaningful payment towards the Award.

Motherway disputes the Hearing Officer's finding that he and his wife "regularly commingled assets" on the ground that they maintained separate bank accounts, but that fact alone is not dispositive. Indeed, as noted, Motherway acknowledged that his wife had regularly transferred funds into his checking account, indicating that the boundaries between the accounts were somewhat superficial. Moreover, other than his own testimony, Motherway introduced no other evidence to support his claim that his wife's assets were unavailable to him.

Motherway further argues that the Hearing Officer should not have considered the transactions involving the family homes because they occurred prior to the date of the Award. Although Motherway cites in support of this argument FINRA Rule 9554, that rule (which sets forth the expedited procedures that FINRA may employ when an associated person fails to pay an arbitration award) does not limit or even address the information that a hearing officer may consider in evaluating an inability-to-pay defense. And we see no basis, as a matter of fairness or otherwise, for excluding it here.

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[14] Although Motherway claims that his wife is providing him money now only so he can pay his bills, the record shows that Motherway's wife transferred money to him even while he was employed. In any event, the fact that she was willing and able to help him pay certain bills raises the question of why she could not, as he claims, help him pay the Award.

[15] Motherway testified that the move occurred because the family could no longer afford to live in New Jersey, adding, with respect to the transfer of his interest, that they "couldn't afford for [him] to be on an application for a home because [he] had no income." He further testified that, because of his personal problems at the time, they "thought it best in that state of mind" to transfer his interest to his wife.

Finally, Motherway contends that, because she did not testify in the FINRA proceeding, his wife was unable to shed further light on the family's finances that might have proved exculpating. But, as the Hearing Officer made clear at the hearing, "[t]he party arguing inability to pay has the burden of proving the defense."[16] And based on the information he was required to provide in response to the SFC, Motherway knew his wife's finances would be considered in connection with his asserted inability-to-pay defense. It was, therefore, his responsibility to call his wife or any other witnesses necessary to establish such defense. And Motherway does not claim that he was prevented from calling his wife (or anyone else) as a witness or that he was otherwise prevented from introducing evidence regarding his asserted inability to pay.[17] We therefore conclude that substantial evidence supports FINRA's determination that Motherway failed to prove that "his substantial household resources were truly unavailable to him to make a meaningful payment to the Award" and that the specific grounds on which FINRA based Motherway's indefinite suspension and the denial of his inability-to-pay defense exist in fact.

B. The suspension was consistent with FINRA's rules.

We find, and Motherway does not dispute, that Motherway's suspension was in accordance with FINRA's Rules. FINRA Rule 9554 provides for expedited proceedings to suspend from association with a member firm an associated person who has failed to pay an arbitration award. The rule authorizes FINRA to initiate such a proceeding by issuing a written notice that specifies the grounds for, and the effective date of, the suspension and advises the respondent of his or her right to file a written request for a hearing.[18] FINRA Rule 9559 then provides the applicable hearing procedures in a proceeding under Rule 9554 and provides that FINRA must issue a written decision following the hearing.[19] It is undisputed that FINRA's written notice to Motherway complied with Rule 9554 and that, after Motherway requested a hearing, FINRA complied with the requirements of Rule 9559, as well.

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16 *DiPietro*, 2016 WL 1071562, at *4.

17 At the hearing, Motherway stated that he would "have appreciated a chance for" his wife to answer questions about her assets but that she wasn't given "an opportunity." Motherway, however, did not support this claim at the hearing, nor subsequently. Motherway asserts further that the Hearing Officer's finding that he never sought to borrow money from his wife is unsubstantiated. But since the burden of establishing an inability to pay was on Motherway, it was not necessary for the Hearing Officer to make such a finding, so whether it was substantiated is irrelevant. We also note that Motherway chose not to introduce evidence on this issue.

18 *See supra* note 3.

19 *See* FINRA Rule 9559(o)(1) (stating that in proceedings initiated under FINRA Rule 9554 "[w]ithin 60 days of the date of the close of the hearing, the Hearing Officer shall prepare a proposed written decision and provide it to the National Adjudicatory Council's Review Subcommittee.").

C. FINRA Rule 9554 is, and was applied in a manner, consistent with the Exchange Act's purposes.

FINRA Rule 9554 is consistent with the purposes of the Exchange Act. Exchange Act Section 15A(b)(6) requires that FINRA's rules be designed to protect investors and the public interest.[20] "And allowing 'members or their associated persons that fail to pay arbitration awards to remain in the securities industry presents regulatory risks.'"[21] "As a result, Rule 9554 further[s] FINRA's investor protection mandate by promoting a fair and efficient process for taking action to encourage members and associated persons to pay arbitration awards."[22] "The payment of arbitration awards and the facilitation of the arbitration process, in general, will assist in the protection of investors and further the public interest."[23]

FINRA's application of Rule 9554 to Motherway was consistent with these purposes. "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."[24] "Conditional suspension of [Motherway's] association with FINRA members gives him an incentive to pay the award . . . and furthers two central purposes of the Exchange Act—serving the public interest and the protection of investors."[25] Under the circumstances, permitting Motherway to remain in the industry without paying the award, or meeting his burden to demonstrate a *bona fide* inability to pay the award[26] would not only undermine the arbitration process but would also expose investors to an individual who has refused to accept the results of that process by failing to make any effort, meaningful or

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20 15 U.S.C. § 78*o*-3(b)(6).

21 *Keith Patrick Sequeira*, Exchange Act Release No. 85231, 2019 WL 995508, at *6 (Mar. 1, 2019) (quoting *Order Approving Proposed Rule Change Relating to FINRA Rule 9554*, Exchange Act Release No. 62211, 2010 WL 2233764, at *2 (June 2, 2010)).

22 *Id.* (quoting *Order Approving Proposed Rule Change Relating to FINRA Rule 9554*, 2010 WL 2233764, at *3).

23 *Id.* (quoting *Order Granting Approval of Proposed Rule Change Relating to Suspension or Cancellation of Membership or Registration for Failure to Comply with Arbitration Awards*, Exchange Act Release No. 31763, 1993 WL 25192, at *3 (Jan. 26, 1993)).

24 *Gallagher*, 2003 WL 1125378, at *4; *see also DiPietro*, 2016 WL 1071562, at *6 (noting that Rule 9554 is "consistent with" the Exchange Act because it "further[s] FINRA's obligation to take appropriate action when associated persons violate FINRA rules").

25 *DiPietro*, 2016 WL 1071562, at *6; *see also Gallagher*, 2003 WL 1125378, at *4 ("Inducing him to pay the award through suspension of his NASD membership furthers the public interest and the protection of investors.").

26 As noted, Motherway also apparently never sought to discharge the Award in bankruptcy, which provided an alternative defense to this proceeding. *See supra* note 7.

otherwise, towards paying the amounts he was found to owe, despite having agreed to do so when becoming a FINRA associated person.[27]

An appropriate order will issue.[28]

By the Commission (Chair GENSLER and Commissioners CRENSHAW, UYEDA, and LIZÁRRAGA; Commissioner PEIRCE dissenting).

Vanessa A. Countryman
Secretary

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[27] *See* FINRA Rule 13200 of the Code of Arbitration Procedure for Industry Disputes ("Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons.").

[28] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97180 / March 21, 2023

Admin. Proc. File No. 3-19897

In the Matter of the Application of

DANIEL PAUL MOTHERWAY

For Review of Action Taken by

FINRA

ORDER DISMISSING APPLICATION FOR REVIEW

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review filed by Daniel Paul Motherway is dismissed.

By the Commission.

Vanessa A. Countryman
Secretary