

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JEANETTE S. STOFLETH
(CRD No. 4860748),

Respondent.

Expedited Proceeding

No. ARB210015

STAR No. 20210719489

Hearing Officer–MC

EXPEDITED DECISION

January 3, 2022

Respondent failed to pay an arbitration award and failed to demonstrate that she had a bona fide inability to pay or make a meaningful payment toward the award. Respondent is therefore suspended from associating with any FINRA member in any capacity.

Appearances

For the Complainant: Michael Manning, Esq., and Loyd Gattis, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Daniel D’Costa, Esq., D’Costa Law, P.C.

DECISION

I. Introduction

Respondent Jeanette S. Stofleth failed to pay a FINRA arbitration award entered against her in favor of her former employer firm, Morgan Stanley Smith Barney LLC (“Morgan Stanley”) and Morgan Stanley Smith Barney Financing, LLC. Consequently, FINRA sent Stofleth a notice of suspension pursuant to FINRA Rule 9554 notifying her that she would be suspended from associating with any FINRA member firm unless she paid the award or requested a hearing. Stofleth requested a hearing, asserting the defense that she was unable to pay the award. Stofleth’s hearing request stayed the imposition of the suspension. The hearing was conducted on October 13, 2021.

At the hearing, Stofleth did not establish that, after the award was issued, she was unable either to pay the award in full or make a meaningful payment toward satisfying it. Stofleth is therefore suspended from associating with any FINRA member firm in any capacity until she pays the award. In addition, I order her to pay the costs of the hearing.

II. Findings of Fact and Conclusions of Law

A. Regulatory Framework

FINRA's Code of Arbitration Procedure for Industry Disputes requires that an associated person must pay a monetary award issued by an arbitration panel within 30 days after the person receives notice of the award.¹ When an associated person does not pay the award, FINRA Rule 9554 authorizes an expedited process by which FINRA may notify the person that failing to comply within 21 days of being served with the notice will result in the person's suspension from associating with any member.² The suspension takes effect unless the associated person requests a hearing, which stays the imposition of the suspension.³ The hearing request must specifically identify all defenses the person is relying on.⁴ FINRA may not suspend the associated person if a timely motion to vacate or modify the award has been filed in a court with jurisdiction over the matter, unless the motion has been denied.⁵

B. Background

1. Jurisdiction

Stofleth registered with FINRA through Morgan Stanley in April 2016. She remained associated with the firm until her voluntary termination in October 2020, when she became associated with her current member firm employer, through which she remains registered with FINRA, and is therefore subject to its jurisdiction.⁶

2. The Award and Notice of Suspension

While employed by Morgan Stanley, Stofleth received approximately \$422,000 in loans from the firm in five promissory notes. Stofleth used some of the funds for her family's living expenses and transferred some into her brokerage accounts.⁷ In January 2021, Morgan Stanley, subsequently joined by Morgan Stanley Smith Barney Financing, LLC, filed a claim with FINRA Dispute Resolution Services. It alleged that Stofleth violated her obligations under the terms of the notes by failing to repay balances when her employment with Morgan Stanley ended.⁸

¹ FINRA Rule 13904(j).

² FINRA Rule 9554(a).

³ FINRA Rule 9554(d).

⁴ FINRA Rule 9554(e).

⁵ FINRA By-Laws, Article VI, Section 3(b).

⁶ Joint Exhibit ("JX-") 1, at 3-4.

⁷ Hearing Transcript ("Tr.") 21-22, 40-42.

⁸ JX-2, at 1.

On May 27, 2021, a FINRA Dispute Resolution Services arbitration panel entered an award against Stofleth in *Morgan Stanley Smith Barney LLC and Morgan Stanley Smith Barney Financing, LLC v. Jeanette S. Stofleth*, Arbitration Case No. 21-00137. The award was for \$429,404.34, including damages, attorney’s fees, costs, and interest through May 14, 2021.⁹ The same day, FINRA Dispute Resolution Services properly served Stofleth with the award and notified her that unless she filed a motion in court to vacate the award, she had to pay it within 30 days, by June 28.¹⁰

Stofleth did not pay the award by the deadline. Therefore, on June 29, 2021, FINRA notified Stofleth that her association with FINRA would be suspended on July 20, 2021, unless she took one of several actions available to her under FINRA Rule 9554.¹¹ Those actions, recognized by FINRA as defenses to a Rule 9554 suspension, include: (1) paying the award in full; (2) reaching a settlement agreement with Morgan Stanley and complying with its terms; (3) filing a motion to vacate or modify the award that has not been denied; or (4) filing a bankruptcy petition that is pending in a United States Bankruptcy Court or has resulted in the discharge of the award.¹² The notice also informed Stofleth that she was entitled to request a hearing, and could stay the imposition of the suspension by asserting one of these defenses, or claim as a defense that she is financially unable to pay the award.¹³ Stofleth stipulates that FINRA properly served her with the notice of suspension.¹⁴

C. The Inability to Pay Defense

Except when an award is payable to a public customer, a respondent may claim inability to pay as a defense to a suspension notice.¹⁵ Respondents asserting this defense assume the burden of proof, and must document fully their financial circumstances,¹⁶ including their assets and liabilities, matters that are deemed “peculiarly within [their] knowledge.”¹⁷ To satisfy their burden of proof, respondents must show that since the issuance of the award, they have been unable to pay the full amount and “unable to make some meaningful payment toward the award

⁹ JX-2; Stipulations (“Stip.”) ¶¶ 2-4. Stofleth is liable for additional interest accruing on the outstanding principal sum from May 15, 2021, until she pays the award.

¹⁰ JX-4.

¹¹ JX-6.

¹² FINRA By-Laws, Art. VI, Sec. 3(b); NASD Notice to Members 00-55, at 2 (Aug. 2000), <http://www.finra.org/rules-guidance/notices/00-55>.

¹³ JX-6.

¹⁴ Stip. ¶ 14.

¹⁵ SR-FINRA-2010-014, Order Approving Proposed Rule Change Relating to FINRA Rule 9554, Exchange Act Release No. 62211, 75 Fed. Reg. 32525 (June 8, 2010) (approving change to FINRA Rule 9554 making the defense of inability to pay an arbitration award unavailable to a respondent when the award is issued in favor of public customers).

¹⁶ *Robert Tretiak*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653, at *17 n.16 (Mar. 19, 2003).

¹⁷ *Bruce M. Zipper*, Exchange Act Release No. 33376, 1993 SEC LEXIS 3525, at *8 (Dec. 23, 1993).

from available assets or income” by reducing expenses, borrowing funds, or selling assets.¹⁸ When respondents’ evidence of financial condition is insufficient or incomplete, the defense fails.¹⁹

D. The Hearing

At the expedited hearing of this case, Stofleth argued that, taken together, her high monthly expenses, lack of access to her investment accounts, and inability to liquidate her primary residence without rendering her family homeless, prevent her from paying or meaningfully defraying the award.²⁰

In response, Enforcement argued that Stofleth’s available assets are substantial enough to allow her to pay or make a meaningful contribution toward paying the award. Enforcement pointed out that Stofleth has almost no unsecured debt; sufficient monthly income to meet her family’s living needs; and accessible assets including equity in her home, securities investments, retirement accounts, and cash.²¹

Stofleth, who is 43 years old,²² is currently married but separated with a divorce pending. She is her family’s sole breadwinner and supports her stay-at-home spouse and their two children, aged 17 and 14.²³ Since leaving Morgan Stanley, Stofleth testified, she has experienced “a big decrease” in her income. In 2020, she earned \$187,000, compared to an expected total of \$132,000 by this year’s end.²⁴ Her average gross monthly income, Stofleth estimates, is \$11,000,²⁵ and her net monthly income averages \$7,000.²⁶

Since separating from her spouse, Stofleth’s largest monthly expense is the \$3,100 monthly rental of the apartment where she now resides. Next is her \$2,491 monthly home mortgage payment. Her other expenses include: her family’s monthly grocery bill, averaging \$1,700; \$320 for utilities; \$215 for life insurance for herself and her spouse; medical expenses of \$1,700, partly required to treat chronic health conditions of both her and one son; a car payment

¹⁸ *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *16 n.22 (Mar. 17, 2016) (quoting *Dep’t of Enforcement v. Respondent*, No. ARB010032, at 3 (Mar. 15, 2002) (redacted), http://www.finra.org/sites/default/files/OHODDecision/p006652_0_0.pdf).

¹⁹ *William J. Gallagher*, Exchange Act Release No. 47501, 2003 SEC LEXIS 599, at *9-11 (Mar. 14, 2003).

²⁰ Tr. 15-16.

²¹ Tr. 13-14.

²² Tr. 33.

²³ Tr. 24-26.

²⁴ Tr. 26-27.

²⁵ Tr. 27.

²⁶ Tr. 21.

of \$350; her spouse's college educational expenses averaging \$1,709; charitable gifts of \$25; and attorneys' fees of \$322. These total monthly expenses, Stofleth testified, come to \$19,482, much higher than her \$7,000 net monthly income, which is why, she stated, she "can't afford to make payments to Morgan Stanley."²⁷

Stofleth acknowledged that she has a savings account with approximately \$41,000 but is drawing from it to pay monthly living expenses.²⁸ In addition, she testified she has about \$500,000 in her retirement account, and \$8,000 in her 401(k) account. Stofleth testified that she also has \$315,645 in securities but claimed the funds are inaccessible because they are in Morgan Stanley accounts and the firm refuses to transfer them to her. Besides, she testified, she has earmarked these funds for other purposes, such as her sons' college education.²⁹ Stofleth has not paid any part of the award, has not reached a settlement agreement with the claimants, filed for bankruptcy protection, filed a motion in court to vacate or modify the award, or tried to borrow funds to pay it in whole or in part.³⁰

1. Respondent's Present Financial Condition

Stofleth's Statement of Financial Condition ("Statement") estimates her assets at \$2,045,345 and her liabilities at \$865,561, leaving her an estimated net worth of \$1,179,783.³¹ She noted, however that the calculation of her assets includes her currently inaccessible securities held by Morgan Stanley.³² Among her liabilities, Stofleth included the award, which she estimated at \$422,000.³³

a. Home Equity

Stofleth owns a home in Kirkland, Washington. As of September 13, 2021, she estimated that it had a fair market value of at least \$1,050,000. She based her estimate partly on a September 24, 2021 Zillow estimate that valued her home at \$1,210,200, and partly on its tax assessed value and an appraisal she obtained when she refinanced the mortgage.³⁴ There is a single mortgage on the property of approximately \$400,000; it is otherwise unencumbered.³⁵ This leaves her with equity in her home of approximately \$650,000, based on her calculation of

²⁷ Tr. 27-29.

²⁸ Tr. 32.

²⁹ Tr. 33-35.

³⁰ Stip. ¶¶ 16-18.

³¹ JX-8, at 1-2.

³² Tr. 43.

³³ Tr. 44; JX-8, at 2.

³⁴ Tr. 45-47; JX-18.

³⁵ Tr. 47-48; Stip. ¶¶ 19-23.

the home's market value.³⁶ In addition, Stofleth has available a \$115,000 home equity line of credit that she has not drawn on.³⁷

b. Retirement Accounts

Stofleth stipulates that she has two individual retirement accounts. As of August 31, 2021, one was valued at \$501,951³⁸ and the other at \$68,009,³⁹ for a combined value of \$569,960.⁴⁰ She also has a 401(k) account worth more than \$8,900.⁴¹ When asked if she had calculated the costs she would incur if she were to liquidate the first retirement account, Stofleth testified she had not made the calculations, but estimated that she would be taxed at a rate of 33%. This estimate included income taxes at the tax rate of 23% for her income bracket plus an early withdrawal penalty of an additional 10%.⁴²

c. Cars

Stofleth owns two cars, a 2011 BMW and a 2018 Nissan. On her Statement, Stofleth estimated their value at \$33,000.⁴³ The BMW is paid for; the Nissan, purchased with a loan, has a balance due of \$23,000.⁴⁴

d. Net Worth

Based on her estimated total assets of \$2,045,345, and liabilities of \$865,561, as noted on the Statement, Stofleth's net worth is \$1,179,783.⁴⁵ This estimate includes the value of her home, cars, furniture, retirement accounts, and cash on hand of approximately \$31,200. The liabilities include her mortgage, which she estimated at \$402,433, her car loan of \$23,000, credit card debt of \$18,128, and the award, which she estimated at \$422,000.⁴⁶

Furthermore, Stofleth indicated on the Statement that she has \$18,128 in current credit card debt,⁴⁷ and under the list of expenses she made an entry of \$90,592, labeled "Payment on

³⁶ Tr. 47-48.

³⁷ Tr. 48-49; JX-21.

³⁸ JX-28, at 1.

³⁹ JX-29, at 2.

⁴⁰ Tr. 59-60.

⁴¹ Tr. 60-62.

⁴² Tr. 62-63.

⁴³ JX-8, at 1.

⁴⁴ Tr. 35; JX-8, at 2.

⁴⁵ JX-8, at 1-2.

⁴⁶ *Id.*

⁴⁷ JX-8, at 2.

Loans,”⁴⁸ which, she testified, was the amount of payments she made for charges on her credit cards for the previous 12 months.⁴⁹ The charges were for living expenses including food, utilities, cars, gasoline, medical expenses, rent, and insurance.⁵⁰ She testified that her practice is to use credit cards for living expenses and then to pay the charges off in full each month.⁵¹ Stofleth does so, rather than paying only the monthly minimum amount to keep current, to avoid the otherwise high interest rates she would be charged.⁵² Consequently, she actually has no current outstanding credit card debt, reducing the liabilities she claimed on the Statement by \$18,128.

e. Income, Expenses, and Cash Flow

Stofleth estimated that her gross income for 2020 was \$187,000 and expects that in 2021, it will be significantly less, about \$132,000. She calculated her gross monthly income to be about \$11,000,⁵³ and her net monthly income to be about \$7,000.⁵⁴ Under questioning by Enforcement, Stofleth acknowledged that her pay stubs show that her net pay for the first eight months of 2021, through the pay period ending on September 4, was \$69,776, after deductions for federal tax, health insurance, and pre-tax contributions to her 401(k) account, totaling \$5,219.⁵⁵ For the first eight months of 2021, then, her average monthly net income came to about \$8,750.⁵⁶ If she had not chosen to contribute to her 401(k) account, her income for the first eight months of 2021 would have been \$74,995, and her average monthly income would have been \$9,374.

Stofleth testified that her monthly expenses for her family total approximately \$19,482.⁵⁷ But her summarization of the expenses added up to significantly less. In her testimony, Stofleth’s itemization of her expenses included \$3,100 for rent for her apartment; \$2,491 for her monthly mortgage payment, including principal, taxes, and insurance; \$1,700 for food; \$320 for utilities; \$215 for life insurance for herself and her spouse; \$1,700 for medical expenses; \$350 for her car payment; \$1,709 for her spouse’s college education expenses; \$25 in monthly charitable contributions; and \$322 for attorney’s fees.⁵⁸ These expenses come to \$11,932, or \$7,550 less

⁴⁸ JX-8, at 6.

⁴⁹ Tr. 77.

⁵⁰ Tr. 77-81.

⁵¹ Tr. 28.

⁵² Tr. 101.

⁵³ Tr. 26-27; JX-8, at 4.

⁵⁴ Tr. 21.

⁵⁵ Tr. 73-75.

⁵⁶ JX-31, at 15.

⁵⁷ Tr. 29.

⁵⁸ Tr. 27-29.

than her total claimed monthly expenses. In her testimony, Stofleth did not account for the difference.

E. Respondent Failed to Establish an Inability to Pay or Make a Meaningful Contribution Toward Satisfying the Award

Based on the evidence submitted on the record of this expedited proceeding, Stofleth did not satisfy the burden of proof required to establish her defense. The evidence did not show that since the award was issued, Stofleth has been unable to either pay it in full or make a meaningful contribution toward satisfying the award by using funds available to her from her current assets and income⁵⁹ or, taking advantage of her excellent credit rating and equity available to her, by borrowing funds.⁶⁰

Significantly, Stofleth's monthly net income is sufficient to meet her family's essential needs. As noted above, her monthly net income, with pre-tax contributions to her 401(k) account, is approximately \$8,750. As also noted above, her Statement represents her family's monthly expenses to total \$11,932, significantly less than the \$19,482 that she claimed them to be in her testimony. Furthermore, Stofleth did not provide documentation to support a number of her claimed monthly expenses making even the \$11,932 figure subject to doubt.

In the context of a hearing such as this, undocumented liabilities do not establish a basis for proving the defense of an inability to pay.⁶¹ And the defense may fail when a respondent has made no attempt to use the equity in a home to borrow or make other efforts obtain a loan to pay an award.⁶²

Here, Stofleth did not provide documentation supporting the entries she made on the Statement claiming medical expenses of \$20,400, loan payments of \$90,592, and education expenses of \$20,513. Setting these aside, Stofleth's non-discretionary expenses as represented on her Statement for the previous year, include \$67,095 for her mortgage and apartment rental, \$20,400 for food for her family, \$3,840 for utilities, \$4,200 for her automobiles, \$3,859 for attorney and other professional fees, and \$2,587 for insurance premiums, for a total of

⁵⁹ *DiPietro*, 2016 SEC LEXIS 1036, at *16 n.22.

⁶⁰ *Dep't of Enforcement v. Motherway*, No. ARB200006, 2020 FINRA Discip. LEXIS 39, at *4 (OHO June 30, 2020), *appeal docketed*, No. 3-19897 (SEC July 29, 2020). *Regulatory Operations v. Fannin*, No. ARB170007, at 12 (OHO Aug. 25, 2017), https://www.finra.org/sites/default/files/OHO_Fannin_ARB170007_082517.pdf (inability-to-pay defense fails when respondent does not present "evidence of any attempt to borrow funds" to satisfy an award).

⁶¹ *See John G. Pearce*, Exchange Act Release No. 37217, 1996 SEC LEXIS 1329, at *797 (May 14, 1996) (inability to pay defense failed when respondent's tax returns and sworn financial statement did not show inability to pay, and respondent admitted not attempting to obtain a loan to pay an award).

⁶² *Gallagher*, 2003 SEC LEXIS 599, at *169-70 (rejecting an inability to pay defense when respondent's financial statement contained inaccuracies and he did not document that he in fact could not pay and was unable to borrow against his home or otherwise obtain a loan).

\$101,981.⁶³ Monthly, these essential expenses total approximately \$8,498—or slightly less than her paystubs show her net monthly income to be, with her discretionary monthly 401(k) contributions deducted.

Importantly, Stofleth has significant assets readily available to enable her to pay the award in full or make a meaningful contribution toward satisfying it. Stofleth has an untapped line of credit of \$115,000 and equity in her home of at least approximately \$650,000.⁶⁴ Stofleth stipulates that her assets include securities in five Morgan Stanley accounts worth at least \$337,000.⁶⁵ Although she testified that Morgan Stanley has denied her access to the accounts, there is no evidence that she is unable to apply some of the cash in them or liquidate the equity and mutual funds for the purpose of applying the proceeds to the award.⁶⁶ In addition, Stofleth has more than \$560,000 in her individual retirement accounts.⁶⁷ Given her ample other assets to draw from—cash, her home equity line of credit, and securities accounts— Stofleth need not completely deplete her retirement accounts to pay the award.

Stofleth testified that the securities accounts are intended for her sons’ college education costs, and the line of credit and her retirement funds are not intended to be used to pay an award to Morgan Stanley. These views are understandable, but they do not support a defense of inability to pay, because these are sources from which she could, if she chose, obtain funds to apply to the award.

Stofleth claims that her family’s high monthly living expenses preclude her from borrowing funds to make a meaningful payment toward the award. However, her admitted failure even to try to borrow funds to satisfy all or a meaningful portion of the award is enough to undermine her claim of inability to pay.

In sum, Stofleth has failed to satisfy her burden of proof. She did not demonstrate that since the issuance of the award, she has been “unable to make some meaningful payment toward the award from available assets or income” by reducing expenses, borrowing funds, or converting assets to cash, even if unable to pay the full amount.⁶⁸

III. Conclusion

FINRA issued Stofleth a notice of suspension under FINRA Rule 9554 on May 27, 2021, for failure to pay the arbitration award issued against her. FINRA Rule 9559(n) permits a Hearing Officer wide discretion to “approve, modify or withdraw . . . sanctions . . . imposed by the notice” and to assess costs. I find that a conditional suspension will provide Stofleth with an

⁶³ JX-8, at 6.

⁶⁴ Stip. ¶¶ 21-23.

⁶⁵ Stip. ¶ 25.

⁶⁶ JX-23 through JX-27 are Stofleth’s account statements showing substantial assets in equity and mutual funds.

⁶⁷ Stip. ¶¶ 26-27.


⁶⁸ *DiPietro*, 2016 SEC LEXIS 1036, at *16 n.22, *19.

incentive to pay the award underlying this proceeding.⁶⁹ Based on the testimony and evidence presented at the hearing, I find that Stofleth failed to substantiate that she has an actual inability to pay the award or to make a meaningful contribution toward paying it.

IV. Order

Therefore, pursuant to Article VI, Section 3(b) of FINRA's By-Laws, and FINRA Rule 9559(n), Respondent Jeannette S. Stofleth is suspended from associating with any FINRA member firm in any capacity, effective upon the issuance of this Decision. The suspension is to remain in effect until Stofleth produces sufficient documentary evidence to FINRA that (1) she has paid the award in full; (2) she and Morgan Stanley have agreed to settle the matter and she is current in fulfilling her obligations under the terms of the settlement; or (3) she has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the award. Upon Stofleth making such a showing, the suspension will automatically terminate.

In addition, Stofleth is **ORDERED** to pay the costs of this proceeding, which include \$833.23 for the transcript plus a \$750 administrative fee, for a total of \$1,583.23.⁷⁰ These costs are due and payable upon the issuance of this Decision.⁷¹


Matthew Campbell
Hearing Officer

Copies to:

Jeanette S. Stofleth (via email and overnight delivery)
Daniel D'Costa, Esq. (via email)
Michael Manning, Esq. (via email)
Lloyd Gattis, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

⁶⁹ *Michael David Schwartz*, Exchange Act Release No. 81784, 2017 SEC LEXIS 3111, at *18 (Sept. 29, 2017).

⁷⁰ Stofleth must pay the costs of the hearing before the suspension terminates.

⁷¹ I considered and rejected without discussion all other arguments by the parties.