

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

HENRIQUE DAVID LUCENA
(CRD No. 5605196),

Respondent.

Expedited Proceeding
No. ARB210003

STAR No. 20210706021

Hearing Officer–BEK

EXPEDITED DECISION

August 17, 2021

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

Appearances

For the Complainant: Michelle Galloway, Esq., Loyd Gattis, Esq., and Jennifer L. Crawford, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Daniel D’Costa, Esq.

DECISION

I. Introduction

Respondent Henrique David Lucena failed to pay an arbitration award rendered against him in favor of his former employer, Morgan Stanley, a FINRA member firm. As a result, FINRA sent Lucena a Notice of Suspension (“Notice”) pursuant to FINRA Rule 9554, informing 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. The forthcoming suspension was stayed when Lucena timely requested a hearing and asserted as his defense that he had an inability to pay the award. A videoconference hearing was held on June 2, 2021. Lucena failed to establish his defense. Accordingly, he is suspended from associating with any FINRA member firm.

II. Findings of Fact and Conclusions of Law

A. Lucena Failed to Pay an Arbitration Award and Asserted an Inability to Pay Defense

The parties stipulated that (1) Lucena has been associated with a member firm since July 2020 and registered with FINRA as a General Securities Representative; (2) an arbitration award of over \$1 million was entered against Lucena on January 29, 2021, in favor of Lucena's former employer, Morgan Stanley; (3) FINRA notified Lucena on February 1, 2021, that the award had been issued and must be paid in full within 30 days, by March 3, 2021; (4) Lucena did not pay the award; and (5) on March 5, 2021, FINRA properly served Lucena with notice of the suspension, which he received March 8, 2021.¹

The parties further stipulated that Lucena has not entered into a fully executed, written settlement agreement with Morgan Stanley, has not filed for bankruptcy, and does not have a pending motion to vacate or modify the award.²

On March 9, 2021, Lucena timely filed with the Office of Hearing Officers his request for a hearing, asserting an inability to pay the award.³ In light of the stipulated facts, the only issue to decide is whether Lucena has a bona fide inability to pay the award, and he has the burden to demonstrate such.⁴ The parties agreed at the May 12, 2021 Initial Pre-Hearing Conference ("IPHC")⁵ and reconfirmed at the June 2 hearing that this was the only issue and that Lucena had the burden of proof.⁶

B. Inability-to-Pay Standard

To demonstrate an inability to pay, a respondent must prove more than a current lack of funds on hand to pay the award in full.⁷ A respondent must show that (1) "he is unable to make some meaningful payment toward the award from available assets or income";⁸ (2) "at no time

¹ Revised Stipulations ("Rev. Stip.") ¶¶ 1-7; *see also* Joint Exhibits ("JX-") 1-7 (supporting the stipulations).

² Rev. Stip. ¶¶ 9-11.

³ Rev. Stip. ¶ 8; Request for Hearing. Pursuant to FINRA Rule 9559(c)(1), Lucena's request for a hearing stayed his suspension.

⁴ *Robert Tretiak*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653, at *17 (Mar. 19, 2003) ("It is well settled that a respondent bears the burden of demonstrating his or her inability to pay, and that [FINRA] is entitled to make a searching inquiry into any such claim.") (citing *Daniel Joseph Avant*, 1995 SEC LEXIS 2816, at *10 (1995)).

⁵ IPHC Transcript 5.

⁶ Hearing Transcript ("Tr.") 6.

⁷ *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*, 2003 SEC LEXIS 653.

⁸ *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *16 (quoting *Dep't of Enforcement v. Respondent*, No. ARB010032, at 3 (Mar. 15, 2002), https://www.finra.org/sites/default/files/OHO_Ddecision/p006652_0_0.pdf).

after the award became due did he have the ability to pay all or any meaningful amount of the award”;⁹ and (3) “he is incapable of reducing his living expenses, diverting funds from other expenditures, or borrowing funds to pay the award.”¹⁰ Moreover, the failure to come to some settlement with the arbitration claimant despite good-faith efforts is not a defense.¹¹ In sum, if one can make meaningful payments at any time after the award was issued, the inability to pay defense fails.

C. Lucena Failed to Establish an Inability to Pay Defense

1. Lucena Failed to Demonstrate That He Was Unable to Make Meaningful Payments From His Income

a. Lucena Underestimated His Earning Ability

Lucena estimated his net monthly income for 2021 at \$6,813.¹² He arrived at this amount, however, by totaling his net salary through March 15 and dividing by 12, as though he would earn nothing for the remainder of the year.¹³

In support of his estimate, Lucena explained that his pay fluctuates. For example, he attributed his January 2021 net pay of over \$46,000 to a \$20 million account he brought to his current firm at the end of 2020.¹⁴ He asserted that bringing in such a large account is anomalous and thus not reflective of his usual monthly income.¹⁵ He also stated that he earned between \$2,600 and \$3,000 in net pay¹⁶ for the “last month” (presumably May 2021),¹⁷ and he suggested that his pay might be as little as \$1,000 a month towards the end of the year.¹⁸

Lucena, however, underestimated his salary for 2021. Annualizing his 2021 stipulated net salary of \$80,749 through April 15 over the entire year renders a net annual salary of \$242,247,

⁹ *Tretiak*, 2000 NASD Discip. LEXIS 35, at *20.

¹⁰ *Id.*

¹¹ *See Dep’t of Enforcement v. Tretiak*, Nos. C02990042, C02980085, 2001 NASD Discip. LEXIS 1, at *16-17 (NAC Jan. 23, 2001), *aff’d*, 2003 SEC LEXIS 653.

¹² Tr. 40-41; JX-8, at 5.

¹³ Tr. 40-41.

¹⁴ Tr. 57-58; JX-20 (reflecting mid-January net salary of over \$46,000).

¹⁵ Tr. 58.

¹⁶ Tr. 45. Lucena did not offer evidence supporting his asserted “last month’s” pay of \$2,600–\$3,000.

¹⁷ JX-20; JX-15, at 8. The last pay stub in the record, for mid-April 2021, reflects net pay of \$15,358.

¹⁸ Tr. 45-46.

or more than \$20,000 per month.¹⁹ Moreover, annualizing Lucena’s stipulated gross salary of \$127,257 through April 15 over the entire year renders an estimated gross salary of \$381,771, or over \$31,000 per month,²⁰ which is close to his stipulated gross salary over the past three years, as shown in the chart below:²¹

Year	Annual Gross Salary	Monthly Gross Salary
2018	\$362,259	over \$30,000
2019	\$354,343	over \$29,000
2020	\$381,404	over \$31,000

Despite having stipulated to these amounts, at the hearing Lucena testified that his gross pay for the past three years was about \$140,000 per year less than what he stipulated to and less than his pay statements reflect.²² He explained that the \$1.25 million loan he received in 2017 from Morgan Stanley was pro-rated and reported on his pay stubs as part of his income on an annual basis over a nine-year period.²³ Lucena did not, however, present any evidence to support this testimony.

Even accepting Lucena’s explanation of his gross pay over the past three years, however, he still earned an average gross pay of more than \$226,000 per year, or a little over \$18,800 per month, for the past three years.²⁴

Regardless of whether Lucena actually received more than \$200,000 or \$300,000 per year in gross annual salary over the past three years, his assumption that he will not continue to earn a similar salary through 2021 and beyond is not well founded. More to the point, by estimating his net monthly income based on no earnings after mid-March, Lucena significantly

¹⁹ I derived this estimated annual net salary by dividing Lucena’s stipulated net salary through mid-April (\$80,749), Rev. Stip. ¶ 16, by 4 (months) and then multiplying by 12. I used a denominator of 4, as opposed to 3.5, because, although Lucena’s stipulated net salary through April 15 is \$80,749, it appears to be his net salary for the first 4 months of the year, as opposed to 3.5 months. This is because the pay stubs in JX-15 reflect payments only for the first half of each month from September 2020 through April 2021; the exhibits in evidence do not include pay stubs and information for the second half of each month. The parties did not address the absence of this information.

²⁰ Rev. Stip. ¶ 15. I derived the estimated annual gross salary in the same manner described in the preceding footnote.

²¹ Rev. Stip. ¶¶ 12–14. Neither party presented evidence of Lucena’s net salary for 2018–2020.

²² Tr. 18-20. Notwithstanding Lucena’s contrary hearing testimony, I credit the amounts he agreed to in the stipulations. *C.f. Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 667 (2010) (describing a stipulation as “binding and conclusive” and “not subject to subsequent variation” (quoting 83 C. J. S., Stipulations § 93 (2000))).

²³ Tr. 18-20.

²⁴ I computed Lucena’s average gross salary over the past three years by adding his stipulated gross salary for each of the past three years (\$362,259 + \$ 354,343 + \$381,404), and then dividing by 3, resulting in an average stipulated gross salary of \$366,002. I then subtracted the \$140,000 that Lucena claimed he did not actually receive in each of the past three years, resulting in an average gross pay of \$226,000 (rounded down).

understated what he might reasonably expect to earn through 2021. Indeed, his mid-April pay stub shows gross earnings of \$22,697 (and net earnings of \$15,358) for the pay period²⁵—clear evidence that Lucena underestimated his expected net monthly income for 2021 by presuming he would earn nothing after March 15.

b. Lucena Overstated His Expenses and Failed to Demonstrate That He Could Not Reduce His Expenses

Lucena listed almost \$10,000 in monthly expenses on his Statement of Financial Condition.²⁶ This included alimony and child support of \$2,610 and another \$1,000 in childcare, which represents his share of childcare costs and is an additional requirement under the terms of his divorce.²⁷ His listed monthly expenses also included \$1,895 for rent and \$1,000 for food, \$700 for utility expenses, \$600 for car expenses, and \$500 for insurance premiums.²⁸ He also listed \$100 in loan payments, \$442 for income taxes, and \$1,000 in attorney/professional fees.²⁹

His list overstates his expenses, however. Specifically, Lucena included \$1,000 in monthly expenses for attorney's fees, but he explained at the hearing that he had already paid these fees, so they are not an ongoing monthly expense.³⁰ Lucena failed to demonstrate what future legal expenses, if any, he might accrue. Lucena also included monthly loan payments of \$100 on his Statement of Financial Condition,³¹ but he clarified at the hearing that he only paid \$44 per month for loan payments.³²

Lucena noted at the hearing that he recently remarried,³³ and further stated that he takes care of his mother, who is older and retired.³⁴ But he failed to state any expenses associated with his wife and mother not already listed in his Statement of Financial Condition.

With regard to utility expenses and car payments, Enforcement elicited Lucena's testimony that his \$700 utility payments included about \$330³⁵ for cellphone lines for himself, his mother, his ex-wife, and his son,³⁶ while his \$600 car payments included \$373 for a leased

²⁵ JX-15, at 8.

²⁶ JX-8, at 6.

²⁷ JX-8, at 6; *see also* Tr. 22-23, 59-60.

²⁸ JX-8, at 6; Tr. 24.

²⁹ JX-8, at 6.

³⁰ Tr. 24, 44, 48-49.

³¹ JX-8, at 6.

³² Tr. 46-47.

³³ Tr. 22.

³⁴ Tr. 24.

³⁵ Tr. 48; JX-8, at 6.

³⁶ Tr. 46; JX-8, at 6.

Mercedes.³⁷ Although Enforcement argued that these two examples indicate that Lucena could make some meaningful payments on the award if he reduced his monthly expenses and changed his lifestyle, it is not clear that these two examples adequately support that argument. However, the combination of additional savings on his phone bill and auto expenses with the difference in his overstated expenses (attorney fees and loan payments) provides more than \$1,000 a month that Lucena could pay toward satisfaction of the arbitration award.

c. Lucena Believed He Could Make Meaningful Payments

Lucena testified at the hearing that he offered to settle the award with Morgan Stanley for \$250,000 payable over 10 years.³⁸ Morgan Stanley countered with an offer to settle for \$400,000 over five years, payable every trimester.³⁹ Lucena rejected this counter offer as beyond his ability to pay.⁴⁰ His offer to pay \$250,000 over 10 years, however, reflects Lucena's own view that he could make meaningful payments toward the award even if he could not fully pay off the award or Morgan Stanley's \$400,000 settlement offer.

* * *

In sum, Lucena understated his income, overstated his expenses, and failed to demonstrate that he has been, or will be, unable to make meaningful payments from his income.

2. Lucena Failed to Demonstrate That He Could Not Have Made a Meaningful Payment from His Assets

In his Statement of Financial Condition, Lucena listed \$27,574 in cash as his only asset⁴¹ and liabilities of \$1,126,093.⁴² He clarified at the hearing, however, that \$1 million of the liabilities was the Morgan Stanley arbitration award,⁴³ and that another \$50,000 was a promissory note from his current employer.⁴⁴ Moreover, the promissory note represents a forgivable debt and Lucena is complying with all obligations under the note, so it is not due now.⁴⁵ He also listed \$12,364 in installment loans and \$17,729 in credit card debt.⁴⁶ At the

³⁷ Tr. 47; *see also* Tr. 24.

³⁸ Tr. 21.

³⁹ Tr. 21.

⁴⁰ Tr. 21-22.

⁴¹ JX-8, at 1.

⁴² JX-8, at 2.

⁴³ Tr. 42-43.

⁴⁴ Tr. 42-43; JX-8, at 2.

⁴⁵ Tr. 42-43.

⁴⁶ JX-8, at 2.

hearing, he stated that he had a little less than \$10,000 in the bank,⁴⁷ and no other appreciable assets.⁴⁸

On February 1, 2021, however, three days after the arbitration award was issued, Lucena had about \$53,000 in his checking account.⁴⁹ He testified that he repaid \$5,000 that he owed some friends,⁵⁰ but he failed to demonstrate that he was legally required to repay his friends after the date of the arbitration award or by any specified time. And he did not claim to have paid any other unlisted, non-monthly expense after the date of the arbitration award.

Moreover, Lucena failed to demonstrate that he had to spend any of the \$53,000 he had in the bank at the time of the arbitration award for his daily living expenses. From January 29, 2021 (the date of the arbitration award), through April 15, 2021 (the date of Lucena's Statement of Financial Condition), Lucena also received over \$34,000 in net salary.⁵¹ Even accepting Lucena's listed expenses of almost \$10,000 a month, that would come to \$30,000 in expenses for February, March, and April, leaving more than \$4,000 of net income during this period. Stated differently, Lucena's asserted monthly expenses were less than his net income during this period.

Lucena also argued that \$50,000 is not a meaningful payment on a \$1 million award, but he failed to provide any support for his argument or the proposition that \$50,000 is not meaningful to the arbitration claimant.

* * *

In summation, Lucena had about \$53,000 in his checking account three days after the date of the award. He testified that he paid \$5,000 to friends. He had about \$10,000 in the bank at the time of the hearing, but he failed to explain how he spent the other \$38,000. He therefore failed to demonstrate that he could not have paid that \$38,000 and the \$5,000 he paid his friends toward the arbitration award. And, because he failed to demonstrate that his monthly expenses exceeded his monthly income, he failed to demonstrate that he could not have paid the almost \$10,000 in his checking account at the time of the hearing toward satisfaction of the arbitration award.

⁴⁷ Tr. 26.

⁴⁸ Tr. 30.

⁴⁹ Tr. 50; JX-13, at 81. Of the \$1.25 million loan Lucena received in 2017, Lucena explained that he lost about \$550,000 in his investment account, and he paid off student debt of about \$100,000. (Tr. 25, 28). He did not account for the rest of the loan. It therefore is not clear what Lucena did with the rest of the money, but Enforcement did not dispute Lucena's assertion that he only had about \$53,000 at the time of the arbitration award.

⁵⁰ Tr. 51-52.

⁵¹ JX-20.

3. Lucena Failed to Demonstrate That He Could Not Obtain a Loan

Lucena admitted at the hearing that he has not sought a loan to pay off or pay down the arbitration award.⁵² He testified that he did not seek a loan because he did not believe his credit was good enough.⁵³ Yet he has a history of significant earnings and, aside from the arbitration award, he failed to demonstrate significant debt due at this time. He also failed to demonstrate that his expenses exceeded his income, which might have supported his assertion that he could not get a loan. Simply stated, he failed to demonstrate that he could not have obtained a loan. Indeed, he informed Enforcement during their investigation that he might borrow funds depending on the outcome of the hearing,⁵⁴ evidencing a belief that he could indeed secure a loan.

III. Conclusion

Lucena failed to demonstrate that, since the time of the arbitration award, he (1) lacked the income to make meaningful payments on the award; (2) lacked the assets to make a meaningful payment toward the award; and (3) could not obtain a loan to permit meaningful payment toward the award. The failure to demonstrate any one of them is fatal to his claim of inability to pay, and he failed to demonstrate all three.

Allowing Lucena to remain in the securities industry without paying the arbitration award would undermine the arbitration process and be unfair to the arbitration creditor.⁵⁵ “Conditionally suspending [Lucena] from association with FINRA members gives him an incentive to pay the award. And ‘[i]nducing him to pay the award through suspension of his [FINRA] membership furthers the public interest and the protection of investors.’”⁵⁶

Accordingly, it is appropriate to suspend Lucena from association in any capacity with any FINRA member firm.

IV. Order

Pursuant to Article VI, Section 3(b) of FINRA’s By-Laws, Respondent Henrique David Lucena is suspended from associating with any FINRA member firm in any capacity, effective as of the date of this Decision. The suspension shall remain in effect until Lucena produces documentary evidence to FINRA showing that (1) the award has been paid in full; (2) Lucena and the arbitration creditor have settled the matter (and he is in compliance with the settlement

⁵² Tr. 26, 53-54.

⁵³ Tr. 26, 53-54.


⁵⁴ JX-11, at 2 (email from Lucena to Enforcement); Tr. 55.

⁵⁵ Cf. *DiPietro*, 2016 SEC LEXIS 1036, at *23-24.

⁵⁶ *Michael David Schwartz*, Exchange Act Release No. 81784, 2017 SEC LEXIS 3111, at *18 (Sept. 29, 2017) (quoting *William J. Gallagher*, Exchange Act Release No. 47501, 2003 SEC LEXIS 599, at *13-14 (Mar. 14, 2003)).

terms); or (3) Lucena has a petition pending in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt. Upon such showing, the suspension shall automatically terminate.⁵⁷

Further, Lucena is **ORDERED** to pay FINRA costs of \$1,631.88, which include an administrative fee of \$750 and the hearing transcript cost of \$881.88.


Bruce E. Kasold
Hearing Officer

Copies to:

Henrique David Lucena (via overnight courier and email)
Daniel D'Costa, Esq. (via email)
Michelle Galloway, Esq. (via email)
Loyd Gattis, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

⁵⁷ Lucena must also pay the costs of the hearing before the suspension terminates