UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 70290 / August 29, 2013

Admin. File Proc. No. 3-14104r

In the Matter of the Application of

SHAREMASTER
c/o Howard Feigenbaum
8747 Duval Lane
Hemet, CA 92545

For Review of Disciplinary Action Taken by

FINRA

ORDER DISMISSING
PROCEEDINGS ON REMAND

I.

Sharemaster, a registered broker-dealer, seeks review of a Financial Industry Regulatory Authority ("FINRA") order suspending it from FINRA membership for failure to file an annual financial report audited by an accounting firm registered with the Public Company Accounting Oversight Board ("PCAOB"). In October 2011, we dismissed Sharemaster's application for review.[1] Sharemaster thereafter filed a petition for review with the United States Court of Appeals for the Ninth Circuit, and in its subsequent briefing Sharemaster clarified and elaborated upon the arguments it had originally made before us. In light of those arguments, we requested—and that court ordered—that this matter be remanded to us for further proceedings. Based upon those and the original proceedings in this matter, we find that we lack statutory jurisdiction to consider Sharemaster's application and, accordingly, dismiss that application.[2]

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[1] *Sharemaster*, Order Dismissing Proceedings, Securities Exchange Act Release No. 65570, 2011 WL 4889100 (Oct. 14, 2011).

[2] This matter is before us on a full remand, and our earlier opinion in this matter is hereby withdrawn. Thus, to the extent Sharemaster's May 29, 2012 "Motion for Commission's Full Review of FINRA Hearing Panel Decision of October 6, 2010 and the Disciplinary Actions Taken by FINRA" requests that we review in full our earlier opinion, that motion is granted. To the extent that Sharemaster's motion requests that we address the merits of its challenge to FINRA's October 6, 2010 hearing panel order, however, that motion is denied because, as explained below, we lack jurisdiction to do so.

II.

This matter has a complex procedural history. On February 17, 2010, Sharemaster filed a 2009 annual report that contained financial statements audited by a firm that was not registered with the PCAOB. FINRA rejected the filing, instructing Sharemaster that it must file financials audited by a PCAOB-registered firm.[3] Sharemaster responded that it qualified for an exemption pursuant to Commission Rule 17a-5(e)(1)(i)(A) from the requirement that it file a report audited by a PCAOB-registered firm.[4]

FINRA held an expedited hearing to consider Sharemaster's argument, and on October 6, 2010, a FINRA hearing panel found that Sharemaster was not entitled to such an exemption. The panel concluded that the exception provided in Rule 17a-5(e)(1)(i)(A) is applicable only to firms whose business is limited to one issuer and that Sharemaster did not meet that standard because it had business arrangements with more than one issuer in 2009. Therefore, the panel concluded that Sharemaster's 2009 annual report filing was deficient. To compel Sharemaster to file a properly audited report, the panel then ordered:

> Sharemaster is suspended until it files the requisite annual report. At the end of six months, the suspension will convert to an expulsion if [Sharemaster] has at that time not filed a properly audited annual report for 2009. [Sharemaster] is also ordered to pay costs of $1,785.00, which includes an administrative fee of $750.00 and the cost of the hearing transcript.[5]

Thus, the FINRA hearing panel imposed a coercive sanction—in the form of a suspension—on Sharemaster to induce compliance.[6]

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[3] FINRA Order 1-2.

[4] *Id.* at 2. Section 17(e)(1)(A) of the Exchange Act and Rule 17a-5(d) thereunder generally require registered broker-dealers to file annual reports containing financial statements audited by PCAOB-registered firms. Rule 17a-5(e)(1)(i)(A) provides an exemption to that general requirement; under that provision, a broker or dealer need not file audited financial statements if

> [t]he securities business of such broker or dealer has been limited to acting as broker (agent) for the issuer in soliciting subscriptions for securities of such issuer, said broker has promptly transmitted to such issuer all funds and promptly delivered to the subscriber all securities received in connection therewith, and said broker has not otherwise held funds or securities for or owed money or securities to customers.

[5] FINRA Order 2-6.

[6] *See id.*

Thereafter, on October 29, 2010, Sharemaster filed an application for Commission review of FINRA's decision. Sharemaster did not seek a stay of the suspension pursuant to Rule 401(d) of the Commission's Rules of Practice pending our consideration of the appeal.[7] Instead, on November 1, 2010—before any other action in this matter—Sharemaster filed a compliant 2009 annual report that contained financial statements audited by a PCAOB-registered firm.[8] On November 12, 2010, FINRA filed with the Commission a certified record of the proceeding pursuant to Commission Rule of Practice 420(e).[9] Sharemaster filed its opening brief on January 13, 2011, and on February 22, 2011, FINRA filed its response. Between those two dates, on January 24, 2011, FINRA lifted Sharemaster's suspension and sent Sharemaster a letter so advising it.[10]

On March 22, 2011, we directed the parties to address "what impact, if any, Sharemaster's subsequent compliance and FINRA's lifting of the suspension would have on the Commission's consideration" of Sharemaster's application.[11] FINRA and Sharemaster filed responsive briefs on April 11, 2011 and April 12, 2011, respectively, asserting that Sharemaster's compliance and the lifting of the suspension did not preclude Commission review.[12] In its supplemental briefing, Sharemaster also asserted for the first time and in less-than-clear terms that by continuing the suspension beyond November 1, 2010, when Sharemaster had filed a compliant annual report, FINRA had impermissibly extended the suspension period in violation of the terms of the hearing panel's order. Sharemaster contended that we should review this alleged violation. Furthermore, Sharemaster argued "FINRA's failure to comply with the October 6, 2010 Hearing Panel Order by lifting Sharemaster's suspension as of January 24, 2011 instead of November 1, 2010, caused injury through Sharemaster's loss of commission payments" that it would

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[7] 17 C.F.R. § 201.401(d)(1) ("A motion for a stay of an action by a self-regulatory organization for which the Commission is the appropriate regulatory agency, for which action review may be sought pursuant to [Rule 420], may be made by any person aggrieved thereby at the time an application for review is filed in accordance with [Rule 420] or thereafter.").

[8] *See, e.g.,* FINRA April 11, 2011 Br. at 2.

[9] 17 C.F.R. § 201.420(e) (requiring an SRO to file a certified copy of the record upon which the action complained of was taken within fourteen days after receipt of an application for review).

[10] Though the parties dispute when the suspension should have lifted, they agree that FINRA actually lifted it on January 24, 2011. *See* FINRA April 11, 2011 Br. at 2 ("On January 24, 2011, FINRA lifted the suspension imposed by the Hearing Panel . . . ."); Sharemaster June 25, 2012 Br. at 8.

[11] March 22, 2011 Order Directing the Filing of Additional Briefs at 2.

[12] FINRA contended that costs that had been assessed against—but not yet paid by—Sharemaster were sufficient to preserve statutory jurisdiction. FINRA April 11, 2011 Br. at 5.

have otherwise have received.[13] To support its argument, Sharemaster sought to introduce four checks dated November 26, 2010, December 10, 2010, December 17, 2010, and December 23, 2010 that Sharemaster claims had stop-payment orders placed on them due to Sharemaster's suspension.[14]

On October 14, 2011, we issued an order finding that because FINRA's suspension of Sharemaster was no longer in effect, we lacked jurisdiction over this matter pursuant to Section 19(d) of the Exchange Act.[15] Sharemaster subsequently filed a petition for review of our order with the United States Court of Appeals for the Ninth Circuit.[16] Before that court, Sharemaster elaborated on the argument first alluded to in its April 12, 2011 supplemental Commission brief, explicitly arguing that the Commission possessed jurisdiction, pursuant to Exchange Act Section 19(d), to consider FINRA's extension of Sharemaster's suspension beyond November 1, 2010, because that extension constituted either a disciplinary sanction or a denial of access to services.[17] On March 9, 2012, we requested that the Ninth Circuit remand the matter to us, and on May 7, 2012, the Ninth Circuit granted our motion.[18]

On May 23, 2012, Sharemaster filed a motion requesting the Commission's "Full Review of FINRA's Hearing Panel Decision of 10/6/10 and the Disciplinary Actions Taken by FINRA." On May 24, 2012, we issued an order instructing the parties to file briefs "address[ing] Sharemaster's argument that the Commission had the authority—pursuant to Exchange Act Section 19(d)—to order the lifting of the suspension corrected because FINRA's asserted delay in lifting the suspension constituted either a disciplinary sanction or a denial of access to services."[19] We now consider those—and the parties' earlier—filings.

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[13] Sharemaster April 12, 2011 Br. at 12 & n.22.

[14] *See id.* Sharemaster had previously filed, on April 1, 2011, a motion to adduce additional evidence, which included, among other things, copies of these four checks. These checks total $25.00.

[15] *Sharemaster*, Order Dismissing Proceedings, Exchange Act Release No. 65570, 2011 WL 4889100 (Oct. 14, 2011).

[16] *Sharemaster v. SEC*, *appeal docketed*, No. 11-73328 (9th Cir. Nov. 3, 2011).

[17] *Sharemaster v. SEC*, No. 11-73328 (9th Cir.), Sharemaster Opening Br. at 11; *see also id.* at 7-8.

[18] *Sharemaster v. SEC*, No. 11-73328 (9th Cir. May 7, 2012).

[19] Order Scheduling Briefs on Remand at 2.

III.

We conclude that we lack statutory jurisdiction to consider Sharemaster's application to review the coercive sanction imposed by FINRA because there is currently no live sanction for us to act upon. Originally, Sharemaster and FINRA argued that we had jurisdiction to consider Sharemaster's application. On remand, Sharemaster contends that we have authority to review both its original suspension and the continuation of that suspension beyond November 1, 2010. Reversing its earlier position, FINRA now argues that we lack jurisdiction. We conclude that none of the arguments advanced by the parties identifies a supportable basis for jurisdiction.

A. The Commission lacks statutory jurisdiction to review FINRA's October 6, 2010 order suspending Sharemaster.

As noted, on October 6, 2010, a FINRA hearing panel suspended Sharemaster until it filed a compliant annual report; if Sharemaster did not do so within six months, the suspension would convert to an expulsion. When Sharemaster filed an application seeking review of that order on October 29, 2010, FINRA's coercive sanction was in effect. Sharemaster could have, but did not, seek a stay of the suspension pending our resolution of this matter.[20] On November 1, 2010, Sharemaster opted to comply with the hearing panel order, and FINRA has since lifted the suspension. There is, therefore, no sanction currently in effect, and the question is whether that fact divests us of jurisdiction.

Our jurisdiction to review FINRA and other self-regulatory organization ("SRO") disciplinary actions is governed by Exchange Act Sections 19(d) and (e). Those sections do not unambiguously answer the question before us. Section 19(d) provides that certain FINRA actions "shall be subject to review" by the Commission, and it lists reviewable actions as those that: (1) impose a final disciplinary sanction; (ii) deny membership or participation to an applicant; (iii) prohibit or limit any person with respect to access to services offered by FINRA or a FINRA member; or (iv) bar any person from becoming associated with a member.[21] Section 19(e) governs review of any "final disciplinary sanction," but neither that section nor any other provision of the Exchange Act defines that term or expressly addresses whether a coercive sanction must be in force at the time of Commission review.

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[20] The suspension here was imposed as a result of expedited proceedings, and neither our rules nor FINRA's provide for an automatic stay of suspensions in expedited cases. *See* FINRA Rule 9550-series. By contrast, outside of the expedited review context, FINRA Rule 9370 provides for an automatic stay—except for bars and expulsions—upon the filing of an application for review.

[21] 15 U.S.C. § 78s(d).

In light of the statutory ambiguity, we must decide whether the statutory framework provided by Congress should be interpreted to require that a coercive sanction be in effect for us to review it.[22] For several reasons, we conclude that the better approach is to construe Sections 19(d) and (e) as imposing such a requirement.

First, though it does not definitively answer the question, the statutory language defining our jurisdiction suggests that a live sanction is required for review. In particular, Section 19(e), which describes what we may do in response to a final disciplinary sanction imposed by an SRO appears to contemplate that there be a sanction in place—at the time of review—for us to act upon. For instance, in describing "any proceeding to review a final disciplinary sanction," Section 19(e)(1) provides that there must be, among other things, "opportunity for the presentation of supporting reasons to *affirm, modify, or set aside the sanction*."[23] Moreover, Section 19(e)(1)(A) provides that if an SRO acted appropriately, the Commission "shall so declare *and*, as appropriate, *affirm the sanction* imposed by the [SRO], *modify the sanction . . . , or remand* to the [SRO] for further proceedings."[24] And similarly, Section 19(e)(1)(B) provides that if an SRO did not act appropriately, the Commission "shall, by order, *set aside the sanction* imposed by the [SRO] and, if appropriate, remand to the [SRO] for further proceedings."[25] The statutory text therefore appears to contemplate a live sanction for the Commission to act upon.[26]

Second, coercive sanctions operate like judicial civil contempt sanctions, and we believe they ought to be treated similarly. Like civil contempt—and unlike traditional disciplinary sanctions—a coercive sanction is designed to compel a particular action and will generally lift upon completion of that action. In the civil contempt context, once a contemnor has complied and the sanction has lifted, the contemnor is generally not entitled

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[22] As noted above, this is an unusual situation; in many cases our jurisdiction will be preserved because an applicant automatically receives a stay pursuant to FINRA's rules in non-expedited proceedings. *See supra* footnote 20. And in expedited proceedings such as this where FINRA's rules do not provide for an automatic stay, the applicant may, of course, seek a stay, which if granted would preserve our jurisdiction.

[23] 15 U.S.C. § 78s(e)(1) (emphasis added); *see also SEC v. Vittor*, 323 F.3d 930, 934 (11th Cir. 2003) (noting Section 19(e) provides "that if … the SEC confirms the SRO's findings of misconduct, the SEC by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization" (internal quotation marks omitted)).

[24] 15 U.S.C. § 78s(e)(1)(A) (emphasis added).

[25] 15 U.S.C. § 78s(e)(1)(B) (emphasis added).

[26] *See Marshall Fin., Inc.*, Exchange Act Release No. 50343, 57 SEC 869, 876-77, 2004 WL 2026518, at *3 (Sept. 10, 2004) (finding a lack of jurisdiction where a suspension "was never imposed" and there was, consequently, nothing under "Exchange Act Section 19(e) . . . to 'set aside'").

to appellate review.[27] Because coercive sanctions operate in the same way, we believe it makes policy sense to follow that long established practice.

Third, a contrary conclusion could compel the Commission to issue effectively advisory opinions in the context of coercive sanctions that have long since lifted. Based on the statutory scheme, we do not believe that Congress has expressed an intent or desire that we be required to issue opinions with no direct, real world effect. Indeed, we believe that little would be gained from requiring us to engage in such a practice.[28]

Fourth, we believe that reading Sections 19(d) and (e) to require such advisory examinations could waste limited Commission resources and possibly come at the expense of parties with genuine, urgent, and ongoing disputes.[29] Federal courts similarly decline to review hypothetical disputes because, as they have often explained, limited judicial resources should be used to resolve real controversies.[30]

Fifth, requiring a live sanction ensures meaningful review because the parties will have a substantial and concrete interest in the outcome of the proceedings. By contrast, when a decision will have no direct effect—because the purpose of a sanction has been

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[27] *See SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003) (purging of contempt renders dispute over contempt moot); *United States v. Paccione*, 964 F.2d 1269, 1274 (2d Cir. 1992) (because "[w]ithin the designated time period, [contemnor] complied and apparently purged himself . . . his appeal from the order finding him in civil contempt is moot"); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1479-80 (9th Cir. 1992) (decision not to comply and face contempt prevented objections to discovery order from mooting); *In re Grand Jury Subpoena Duces Tecum*, 955 F.2d 670, 672 (11th Cir. 1992) ("In the context of purely coercive civil contempt, a contemnor's compliance with the district court's underlying order moots the contemnor's ability to challenge his contempt adjudication. 'A long line of precedent holds that once a civil contempt is purged, no live case or controversy remains for adjudication.' " (quoting *In re Campbell*, 628 F.2d 1260, 1261 (9th Cir. 1980) (per curiam))).

[28] We note that we may—and do—issue topic-specific advisory statements. These statements come in various forms, including interpretive guidance, responses to frequently asked questions, and no-action letters, but whether and when to do so remains within the Commission's sound discretion. We do not believe that Congress intended a different result here.

[29] *See, e.g.*, *NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119, 124 (3d Cir. 1984) ("[I]t is difficult to justify the time expended in the administrative and judicial process to adjudicate a 'settled' dispute when the limited resources could be used to resolve controversies of genuine interest to the parties.").

[30] *See Florida State Conference of NAACP. v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008) (a purpose of case or controversy requirement is "the reservation of judicial resources to resolve more concrete and pressing disputes"); *Senty-Haugen v. Goodno*, 462 F.3d 876, 889 (8th Cir. 2006) ("the ripeness doctrine avoids wasting scarce judicial resources in attempts to resolve speculative or indeterminate factual issues" (internal quotation marks omitted)).

fulfilled—parties frequently may have little, if any, incentive to effectively, diligently, and vigorously present all of the issues.

Applying those considerations here, we construe Sections 19(d) and (e) to require a live coercive sanction at the time of our review, and we conclude that the Commission lacks jurisdiction to review the now-lifted coercive sanction imposed in this case. If Sharemaster had either not complied with the coercive sanction or had sought a stay, the sanction it seeks to have reviewed would have remained in place and we could have undertaken the review contemplated by Section 19(e). Sharemaster, however, opted to comply, and at that point, the sanction lifted. There is, accordingly, nothing for the Commission, as Section 19(e) contemplates, to "affirm, modify, or set aside." Thus, we lack jurisdiction over this matter.

B. The Commission lacks statutory jurisdiction to review FINRA's extension of Sharemaster's suspension beyond November 1, 2010.

We also conclude that we lack jurisdiction to consider Sharemaster's argument that its suspension was wrongfully extended beyond November 1, 2010, when it filed a compliant annual report. Sharemaster contends that its suspension was wrongfully extended or that a new sanction was imposed when FINRA failed to lift its suspension until January 24, 2011, nearly three months after it complied with the hearing panel order.[31] Nonetheless, we still lack jurisdiction because the suspension has lifted and, as discussed above, there is nothing to "affirm, modify, or set aside."[32]

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[31] The plain text of the FINRA hearing panel order provided that, "Sharemaster is suspended *until it files the requisite annual report*." FINRA Order 6 (emphasis added). Nevertheless, FINRA contends that Sharemaster's suspension did not lift when Sharemaster filed a compliant annual report. FINRA June 14, 2012 Br. at 4-6. Instead, FINRA maintains that Sharemaster's suspension did not lift until—nearly three months later—after FINRA completed a review designed to ensure that report was compliant. *See id*. FINRA, however, does not explain how the language quoted above could have reasonably notified Sharemaster that the suspension would not lift until FINRA conducted and completed such a review.

[32] Sharemaster contends that FINRA's extension of the suspension beyond November 1, 2010 constituted both a disciplinary sanction and a denial of access under Exchange Act Section 19(d). Sharemaster June 25, 2012 Br. at 8. FINRA has treated the extended suspension as a final disciplinary action and the harms (both actual and potential) that Sharemaster alleges (such as lost commissions and the specter of a FINRA enforcement proceeding) appear to flow from FINRA's treatment of the extended suspension as a final disciplinary action. *E.g.*, *id.* at 9-11. Based on those considerations, we believe that for purposes of determining jurisdiction in this case the extended suspension was inextricably intertwined with the October 6 FINRA hearing panel order and, as a result, it is appropriately considered a final disciplinary sanction and not a denial of access.

Seeking to avoid this conclusion, Sharemaster points to two harms that it contends the Commission may remedy. First, "Sharemaster asserts that if an incorrect date for lifting [its] suspension is allowed to stand, Sharemaster remains subject to disciplinary sanctions for conducting business during the period of November 1, 2010 to January 24, 2011." To substantiate its claim, Sharemaster contends that "during a cyclical FINRA examination of Sharemaster in September 2011, a FINRA examiner explained that for firms which had been suspended, FINRA's policy is to review the firm's records to determine if business was conducted during the period of suspension" and that FINRA had requested Sharemaster's "records from October 6, 2010 through January 24, 2011."[33] We do not question the sincerity of Sharemaster's fear, but the record before us does not include any action for us to review. Because the harm Sharemaster alleges is that FINRA *might* discipline it, rather than a claim that it is currently under sanction—or has been disciplined—for engaging in business between November 1, 2010 and January 24, 2011, the issue is not ripe for review. We have previously rejected similar arguments.[34] Furthermore, if FINRA were at some point to discipline Sharemaster for conducting business during that period, Sharemaster would be free at that time to seek our review of that action. As such, we decline to review the possibility of a disciplinary sanction.

Second, Sharemaster points to four checks dated November 26, 2010, December 10, 2010, December 17, 2010, and December 23, 2010 that Sharemaster contends had stop-payment orders placed on them due to Sharemaster's suspension. Sharemaster implies that these checks are commissions which, but for the extended suspension, Sharemaster would have received.[35] Even assuming we may properly consider this

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[33] Sharemaster June 25, 2012 Br. at 11.

[34] S*ee Allen Douglas Sec*., *Inc.*, Exchange Act Release No. 50513, 57 SEC 950, 958, 2004 WL 2297414, at *3 (Oct. 12, 2004) ("The possibility, however likely, of Allen Douglas becoming subject to disciplinary proceedings does not, by itself, give rise to a right of review under Section 19(d). In contrast, if Allen Douglas had proceeded with [prohibited conduct] . . . and became subject to an [SRO] disciplinary sanction as a result, the disciplinary action would be reviewable." (footnotes and internal quotation marks omitted)); *see also Morgan Stanley & Co., Inc.*, Exchange Act Release No. 39459, 1997 WL 802072, at *2 (Dec. 17, 1997) (finding that Commission lacked jurisdiction to review SRO's denial of company's exemption application and that company could seek Commission review if the SRO subsequently imposed a disciplinary sanction); *Tague Sec. Corp.*, Exchange Act Release No. 18510, 47 SEC 743, 1982 WL 32205, at *2 (Feb. 25, 1982) (finding that Commission lacked jurisdiction to review SRO's request that company adjust trades, but noting that if the company rejected the request and the SRO imposed disciplinary sanctions, the company could seek Commission review of those sanctions).

[35] *See* Sharemaster April 12, 2011 Br. at 12 & n. 22. Although Sharemaster does not expressly say so, these payments may be trail commissions, which are paid to a broker-dealer so long as clients remain invested in a mutual fund. Under NASD Rule 2420 and relevant guidance, a suspended broker-dealer may not receive any form of commission for broker-dealer activities, including trail commissions. *See*

evidence, we do not have the power to remedy the harm that Sharemaster alleges and, as such, it is not a basis for jurisdiction. As we have previously held, Congress has not authorized the Commission in Sections 19(d) and (e) to award damages or direct payments to applicants in SRO proceedings under review.[36] Thus, we lack the power to order FINRA—or the private parties who allegedly failed to pay the commissions—to remit to Sharemaster the amount represented by the checks. Accordingly, Sharemaster's

NASD Rule 2420; *see also* IM-2420-2 Continuing Commissions Policy (interpreting NASD Rule 2420 to mean that, "[u]nder no circumstances shall payment of any kind be made by a member to any person who is not eligible for membership in the Association or eligible to be associated with a member because of any . . . suspension still in effect"). It thus appears that FINRA treats Rule 2420 as encompassing, within the activities prohibited by a suspension, the receipt of broker-dealer compensation. *See also* FINRA June 14, 2012 Br. at 7 ("[A] fair description of a firm's suspension is that it prevents a firm from engaging in *any* business of a broker-dealer." (emphasis in original)).

[36] *See Beatrice J. Feins*, Exchange Act Release No. 33374, 51 SEC 918, 922 n.14, 1993 WL 538913, at *3 n.14 (Dec. 23, 1993) (declining to reach state law or claims for monetary damages because "[w]e are not authorized under statute to award damages"); *see also Marshall Fin., Inc.*, Exchange Act Release No. 50343, 57 SEC 869, 877 n.21, 2004 WL 2026518, at *3 & n.21 ("Exchange Act Section 19 does not appear to authorize the setting aside of [the SRO's] Fees assessment or authorize 'remission' of the Fees.").

argument does not alter the fact that there is, at present, no final disciplinary sanction in place for us to "affirm, modify, or set aside."[37]

Accordingly, it is ORDERED that Sharemaster's application for review is dismissed.

By the Commission.[38]

Elizabeth M. Murphy
Secretary

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[37] Originally, Sharemaster also implied that the Commission could remedy its claimed injuries by ordering FINRA to correct the date that its suspension lifted in FINRA's Central Registration Depository. *See* Sharemaster April 12, 2011 Br. at 10 & n.11. Sharemaster disclaims this argument on remand, asserting, "Sharemaster is not appealing information which FINRA published . . . or asking FINRA to delete disputed information." Sharemaster June 25, 2012 Br. at 12; *see also id.* at 11 (explaining the correction Sharemaster requests is that the Commission order FINRA to correct the date of the suspension, not the registry). Sharemaster and FINRA, at an earlier point, also contended that costs imposed by the FINRA hearing panel might preserve jurisdiction. But we are not empowered to review FINRA's assessment of costs or fees. *See Marshall Fin., Inc.*, Exchange Act Release No. 50343, 57 SEC 869, 877 n.21, 2004 WL 2026518, at *3 & n.21 (Sept. 10, 2004) ("Exchange Act Section 19 does not appear to authorize the setting aside of [the SRO's] Fees assessment or authorize 'remission' of the Fees."); *see also Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 WL 2117161, at *5 (May 20, 2008) (no jurisdiction to grant a stay of SRO fee collection efforts). Furthermore, even if we were so empowered, we would, as courts do, decline to exercise jurisdiction solely to litigate the issue of costs and fees. *E.g.*, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) ("[R]easonable caution is needed to be sure that mooted litigation is not pressed forward, and unnecessary judicial pronouncements on even constitutional issues obtained, solely in order to obtain reimbursement of sunk costs."); *Bank of Marin v. England*, 385 U.S. 99, 111 n.1 (1966) (Fortas, J., dissenting) (stating that it is well-established that dispute over costs will not salvage an otherwise moot case); 1A C.J.S. ACTIONS § 76 (2012) ("Generally, a moot action will not be retained for determination merely to decide incidental questions such as liability for costs or attorney's fees." (citing cases)). Sharemaster also now contends that "FINRA assessed and received payment of a $1000 fine against Sharemaster," Sharemaster June 25, 2012 Br. at 12, but the document Sharemaster cites—which it does not explain—simply lists this charge as a "late fee," not a fine, *see id.* at 13, Appendix B-3. As such, it appears to be another example of costs assessed as part of the FINRA proceedings here, but even if this amount did not represent an assessment of costs, we would still, as explained above, lack the power to order FINRA to repay Sharemaster. *See supra* at footnote 36.

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