

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 65570 / October 14, 2011

Admin. File Proc. No. 3-14104

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
Financial Industry Regulatory Authority, Inc.

ORDER DISMISSING
PROCEEDINGS

I.

Sharemaster (or the "Firm"), a Financial Industry Regulatory Authority, Inc. ("FINRA") member firm and a registered broker-dealer, seeks review of disciplinary action taken by FINRA. FINRA found that the Firm violated Rule 17a-5 of the Securities Exchange Act of 1934 by filing an annual report that was audited by an accounting firm that was not registered with the Public Company Accounting Oversight Board ("PCAOB").¹ FINRA suspended the Firm until it filed a compliant annual report. The Firm did not file a motion for a stay of FINRA's action pursuant to Rule 401(d) of the Commission's Rules of Practice.² On January 24, 2011, the suspension was lifted after Sharemaster filed an annual report that was audited by a PCAOB-registered accounting firm. We base our findings on an independent review of the record.

II.

A. Background

Exchange Act Section 17(e)(1)(A) and Rule 17a-5(d) thereunder generally require all registered broker-dealers to file annual reports that contain financial statements audited by a

¹ 17 C.F.R. § 240.17a-5.

² 17 C.F.R. § 201.401(d).

PCAOB-registered accounting firm.³ Exchange Act Rule 17a-5(e)(1)(i)(A) provides that a broker or dealer's financial statements need not be audited 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."⁴ At issue in the proceeding below was whether Sharemaster qualified for an exemption pursuant to Exchange Act Rule 17a-5(e)(1)(i)(A) from filing audited financial statements.

On February 17, 2010, Sharemaster submitted its annual report for the year ended December 31, 2009 ("2009 Annual Report"). A certified public accountant, who was not registered with the PCAOB, audited the financial statements. Howard Feigenbaum, the Firm's owner and chief compliance officer, submitted a letter ("Exemption Letter") with the 2009 Annual Report in which he asserted, without elaboration, that the Firm qualified for an exemption pursuant to Exchange Act Rule 17a-5(e)(1)(i)(A) from filing audited financial statements.⁵ Feigenbaum stated that the exemption obviated the need for the accountant to be PCAOB registered.

B. FINRA Initiates a Disciplinary Proceeding.

On May 3, 2010, FINRA notified Sharemaster by letter that the 2009 Annual Report was incomplete because it was audited by an accounting firm that was not PCAOB registered. FINRA stated that it deemed the report not filed and that it would suspend Sharemaster's membership as of May 25, 2010 unless the Firm filed a compliant annual report. Among other things, FINRA advised Sharemaster of its right to a hearing pursuant to FINRA Rules 9552 and 9559.⁶

³ 15 U.S.C. § 78q(e)(1)(A), as amended by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 205(c)(2), 116 Stat. 745 (2002); 17 C.F.R. § 240.17a-5(d); *see generally Gremo Inv. Inc.*, Securities Exchange Act Rel. No. 64481 (May 12, 2011), __ SEC Docket __ (explaining regulatory background of Exchange Act and Sarbanes-Oxley Act provisions requiring, as of January 1, 2010, all broker-dealers to file annual reports that contain financial statements audited by a PCAOB-registered accounting firm).

⁴ 17 C.F.R. § 240.17a-5(e)(1)(i)(A).

⁵ It is unclear why Sharemaster filed audited financial statements, given Feigenbaum's belief that the Firm was not required to do so.

⁶ FINRA Rule 9552(e) provides that a member may file with FINRA a "written request for a hearing pursuant to Rule 9559." FINRA Rule 9559 sets forth the hearing procedures for expedited proceedings under the Rule 9550 series, which is the kind of proceeding at issue here.

On May 17, 2010, Sharemaster timely requested a hearing to challenge the findings of violation and the sanction imposed. FINRA granted the request and on June 24, 2010, a FINRA Hearing Panel conducted an Expedited Proceeding telephonically. Feigenbaum testified that he knew that a broker-dealer is required generally to file an annual report that is audited by a PCAOB-registered accounting firm and that Sharemaster's accountant was not PCAOB registered. Feigenbaum also stated, however, that he believed that the Exchange Act Rule 17a-5(e)(1)(i)(A) exemption from filing audited financial statements applied to Sharemaster because the Firm does not hold customer funds or securities, acts as an agent for issuers, and promptly transmits money or securities of a customer to such issuers. FINRA contended that the "exemption is only applicable to firms whose business in a particular fiscal year is limited to doing business with one issuer" and that Sharemaster "has settlement agreements with more than one issuer" and "received income from more than one issuer in 2009." FINRA asserted that Sharemaster consequently did not qualify for the exemption.

In an October 6, 2010 decision, the Hearing Panel found that the Firm submitted an annual report that was audited by an accounting firm that was not PCAOB registered, that Sharemaster was not exempt from filing an annual report that included financial statements audited by a PCAOB-registered firm, that the report submitted was incomplete, that the incomplete report was deemed not filed pursuant to FINRA's By-Laws, and that the Firm violated Exchange Act Rule 17a-5. The Hearing Panel suspended Sharemaster "until it files the requisite annual report," with the suspension to convert to an expulsion at the end of six months if the report was not filed. The Hearing Panel also imposed costs of \$1,785. On October 29, 2010, Sharemaster filed with the Commission an application for review of the Hearing Panel's decision. Sharemaster did not request a stay of the suspension pursuant to Rule 401(d) of the Commission's Rules of Practice pending the Commission's consideration of the application for review. In its brief filed on appeal, Sharemaster states that it filed a compliant annual report on November 1, 2010. On January 24, 2011, while this appeal was pending, the suspension was lifted.

III.

Sharemaster asks the Commission to set aside FINRA's decision and "deem filed" the 2009 Annual Report originally submitted. Sharemaster asserts that its subsequent compliance should have no impact on the Commission's authority to consider this appeal because "acquiescence through compliance was not an abandonment of a protected legal interest derived from statute but, rather, based solely on financial exigencies."

FINRA contends that "Sharemaster did not show that it qualified for an exemption" and that FINRA's "findings are correct." FINRA acknowledges that it has lifted the suspension and that "the sanction is no longer in effect." FINRA nonetheless states that "a Commission decision that leaves unresolved the issue of whether Sharemaster must pay the costs ordered by the Hearing Panel would fail to address a key component of Sharemaster's appeal."

Exchange Act Section 19 authorizes FINRA members or persons associated with such members to seek Commission review of action taken by FINRA. Under Exchange Act Section 19(d), certain FINRA action "shall be subject to review" by the Commission, namely

action that: (i) imposes a final disciplinary sanction on a FINRA member; (ii) denies membership or participation to an applicant; (iii) prohibits or limits any person with respect to access to services offered by FINRA or a FINRA member; or (iv) bars any person from becoming associated with a FINRA member.⁷ Here, the question is whether the Commission has jurisdiction based on a "final disciplinary sanction;" neither party argues, and we do not find, that any of the other three bases for jurisdiction exists.

This is a case of first impression.⁸ *Wedbush Morgan Securities, Inc.*⁹ appears to be the closest Commission precedent. There, NASD found that the firm violated an NASD rule for failing to pay an arbitration award. NASD ordered the firm to pay the award by a certain date or be suspended. The suspension never took effect because the firm paid the arbitration award before the deadline. The firm filed an application for review after it had paid, and we dismissed the appeal for lack of jurisdiction. In that case, then, there never was a final disciplinary sanction, which distinguishes it from this case. Like in *Wedbush*, however, here there is no final sanction in place for the Commission to review. As we previously have held, "Section 19(d) does not . . . grant us jurisdiction to review disciplinary actions generally, but only over those in which a final disciplinary sanction is imposed."¹⁰

The parties argue that the Commission should resolve the case because, although the suspension has been lifted, a violation was found and costs were assessed. The best arguments for finding that we have jurisdiction appear to be that FINRA had imposed a suspension that had consequences for the applicant that would warrant Commission review, and that one can read the statute to permit review even where a sanction that once existed has been lifted. That approach, however, does not address the more straightforward reading of the statute – that the Commission reviews final disciplinary sanctions and that in this case, because Sharemaster filed a compliant annual report instead of not complying and seeking a stay pursuant to Rule 401(d) of the Commission's Rules of Practice, and because the sanction therefore has been lifted, there is nothing left to review.

⁷ 15 U.S.C. § 78s(d).

⁸ FINRA instituted this action as an expedited proceeding under the Rule 9550 series, which resulted in the imposition of a conditional suspension that could be lifted following the applicant's subsequent compliance. *See Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change Relating to Uniform Hearing Procedures For and Consolidation of Rules Applicable to Expedited Proceedings*, File No. SR-NASD-2003-110, Exchange Act Rel. No. 48887 (Dec. 5, 2003), 81 SEC Docket 3103, 2003 WL 22926826.

⁹ Order Dismissing Proceedings, Exchange Act Rel. No. 57138 (Jan. 14, 2008), 92 SEC Docket 1306.

¹⁰ *Russell A. Simpson*, 53 S.E.C. 1042, 1046 (1998). We have defined a disciplinary action as "an action that responds to an alleged violation of [a self-regulatory organization] rule or Commission statute or rule, or an action in which a punishment or sanction is sought or intended." *Id.*

On October 29, 2010, when Sharemaster filed with the Commission an application for review of FINRA's decision, the suspension that FINRA imposed earlier that month was still in effect. At that point, Sharemaster had the option to not file a compliant annual report (in which case the suspension would convert to an expulsion at the end of six months) and to seek a stay of the suspension pursuant to Rule 401(d) of the Commission's Rules of Practice pending the Commission's consideration of the appeal. Instead, on January 24, 2011, after Sharemaster filed a properly audited annual report in compliance with the Hearing Panel's order, the suspension was lifted. Because the suspension is no longer in effect, there is no final disciplinary sanction within the meaning of Exchange Act Section 19(d) that is subject to review by the Commission.¹¹

Nor does the imposition of costs create jurisdiction. FINRA's rules distinguish between disciplinary sanctions and costs.¹² Our authority to review costs imposed by FINRA in a disciplinary action derives from, and is limited to, the jurisdiction granted to us by Exchange Act Section 19(d) to review a final disciplinary sanction.¹³ Here, we are not authorized to review the costs of \$1,785 imposed by FINRA because there is no final disciplinary sanction that is subject

¹¹ A conclusion that the Commission lacks jurisdiction under the circumstances is similar to how courts treat situations of contempt or compliance with injunctions. Specifically, the federal courts have jurisdiction over cases and controversies under Article III of the Constitution. Courts have held that: "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." *In re Grand Jury Subpoena Duces Tecum*, 955 F.2d 670, 672 (11th Cir. 1992). 'A long line of precedent holds that once a civil contempt order is purged, no live case or controversy remains for adjudication.' *Id.* (quoting *In re Campbell*, 628 F.2d 1260, 1261 (9th Cir. 1980))." *U.S. v. Zakharia*, 2011 WL 1283682 (6th Cir. 2011) (unpublished). Similarly, with respect to injunctive actions, courts have held that a case can become "moot not by happenstance or voluntary action of the appellee, but because the appellants, rather than seeking a stay, complied with the court order. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24, 115 S. Ct. 386, 130 L.Ed.2d 233 (1994)." *Clarke v. Office of Fed. Hous. Enter. Oversight*, 171 F. App'x 864, 865 (D.C. Cir. 2005) (unpublished).

¹² Compare FINRA Investigations and Sanctions Rule 8310 (Sanctions for Violations of Rules) with Rule 8330 (Costs of Proceedings).

¹³ See *Maryland Sec. Co., Inc.*, 40 S.E.C. 443, 449 n.18 (1960) ("The scope of our review under the [Exchange] Act to determine whether a penalty imposed is excessive or oppressive includes the determination of whether an amount assessed as costs of the proceedings is proper."); *Ernest F. Boruski, Jr.*, 40 S.E.C. 258, 264 n.10 (1960) (same); *Boren & Co.*, 40 S.E.C. 217, 229 n.31 (1960) (same); *Managed Inv. Programs*, 37 S.E.C. 783, 791 (1957) (same); see also, e.g., *Rita H. Malm*, 52 S.E.C. 64, 76 n.41 (1994) (imposing sanctions but modifying costs).

to Commission review.¹⁴ Sharemaster's appeal therefore must be dismissed for lack of jurisdiction.

Sharemaster also seeks to recover the late filing fee imposed by FINRA and costs other than those imposed by FINRA, such as \$25.00 in commission checks cancelled by the customer, and PCAOB-registered accountant fees and mailing expenses. However, even if FINRA had not lifted the sanction and we had jurisdiction to review the FINRA-imposed costs, we would not have authority to order FINRA to pay these collateral costs.¹⁵ Under the circumstances, we have determined to dismiss Sharemaster's application for review.¹⁶

Accordingly, it is ordered that Sharemaster's application for review be, and it hereby is, dismissed.

By the Commission.

Elizabeth M. Murphy
Secretary

¹⁴ See *Wedbush*, 92 SEC Docket at 1310 (dismissing for lack of jurisdiction an appeal involving NASD disciplinary action where there was no final disciplinary sanction to review and although costs were imposed).

¹⁵ Cf. *Robert M. Ryerson*, Exchange Act Rel. No. 57839 (May 20, 2008), 93 SEC Docket 6058, 6066 & n.20 (rejecting as a collateral attack, and finding no jurisdiction to grant, request for stay of NASD's collection efforts); *Marshall Fin., Inc.*, 57 S.E.C. 869, 877 n.21 (2004) (stating that Exchange Act Section 19 did not appear to authorize the setting aside or remission of NASD-imposed arbitration fees in connection with the Commission's review of associated disciplinary proceeding).

¹⁶ Sharemaster submitted, pursuant to Commission Rule of Practice 452, three motions to adduce additional evidence, including, among other things, proof of payment of certain expenses, correspondence with regulators, and lost commissions. Rule 452 permits a party to adduce new evidence on appeal only if the moving party shows "with particularity" both (a) that the evidence is "material" and (b) that there were "reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. § 201.452. Because we have determined to dismiss Sharemaster's appeal for lack of jurisdiction, Sharemaster's motions are moot, and we accordingly deny the motions.