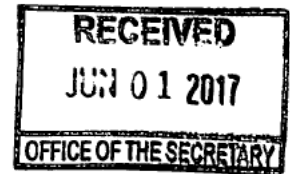


ADMINISTRATIVE PROCEEDING



FILE NO. 3-14104r

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

SHAREMASTER  
Howard Feigenbaum  
460 Tewell Drive  
Hemet, CA 92545

For Review of Action Taken by

FINRA

SHAREMASTER'S RESPONSE IN OPPOSITION TO FINRA'S MOTION

FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE

May 31, 2017

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**I. Sharemaster Opposes FINRA'S Motion.**

**A. First, in response to FINRA's argument that additional evidence is material to the issue of the Commission's jurisdiction:**

Sharemaster argues that additional evidence is not material to the issue of the Commission's jurisdiction and that the Commission has jurisdiction.

The Ninth Circuit Court, in its opinion granting Sharemaster's Petition for Review, based its decision on a \$1,000 penalty for late filing of an annual statement.<sup>1</sup>

1. Evidence of the \$1,000 penalty was raised in Sharemaster's June 25, 2012 Brief on Remand. In that brief, Sharemaster attached a copy of a May 13, 2010, Central Registration Depository (CRD) transaction detail showing an electronic transfer of \$1,000, described as a FINRA Annual Audit Late Fee.<sup>2</sup>
2. The May 13, 2010, \$1,000 CRD assessment occurred well before the October 6, 2010 FINRA Hearing Panel Decision in which the Hearing Panel issued an Order to pay costs of \$1,785.<sup>3</sup>
3. In its August 29, 2013 remand dismissal order, the Commission acknowledged that Sharemaster claimed an assessment of a \$1,000 fine (as a late fee) levied by FINRA and a \$1,000 payment of that fine by Sharemaster.<sup>4</sup>

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<sup>1</sup> Sharemaster v. SEC, pp.24-25.

<sup>2</sup> Sharemaster's Response to the Commission's Order Scheduling Briefs on Remand, June 25, 2012, File No. 3-14104r, Appendix B-3.

<sup>3</sup> FINRA Hearing Panel Decision, October 6, 2010, p.6

<sup>4</sup> SEC Order Dismissing Briefs on Remand, August 29, 2013, footnote 37.

The Commission, at the time of its dismissal order, chose to characterize the \$1,000 assessment of a “late fee” as costs.<sup>5</sup> The Court of Appeals stated:

Calling the \$1,000 a “late fee” is of no moment. Regardless of the label, it appears to be a penalty imposed for not filing an annual report prepared by a PBAOB-registered accountant. It is not part of the separately ledgered “administrative fee” that FINRA taxed to Sharemaster for pursuing an administrative appeal.<sup>6</sup>

In its argument before the Court, the Commission stated that a \$1,000 penalty assessed on Sharemaster was part of a \$1,785 charge made by the FINRA Hearing Panel.<sup>7</sup>

Now, in a second remand, FINRA seeks to show that the \$1,785 represents costs of the proceedings and is not a penalty. Hence, FINRA is offering an accounting of the \$1,785 to show costs and the absence of a penalty, despite the Commission’s assertion to the contrary.

Sharemaster has not maintained that the \$1,785, or any part of it, is an outstanding penalty representing a disciplinary sanction.

However, Sharemaster has consistently maintained that, on May 3, 2010, FINRA assessed a \$1,000 penalty for late filing of the firm’s annual statement. This late-filing penalty appeared in FINRA’s Notice of Action and, on May 13, 2010, FINRA took \$1,000 by electronic transfer from Sharemaster’s CRD account. This \$1,000 penalty remains outstanding and is a “live” disciplinary sanction.<sup>8</sup>

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<sup>5</sup> Sharemaster’s Response to the Commission’s Order, June 25, 2012, footnote 37.

<sup>6</sup> Sharemaster v. SEC, p.21.

<sup>7</sup> Sharemaster v. SEC, p.20.

<sup>8</sup> Sharemaster v. SEC, pp.24-25. FINRA Hearing Exhibit CX-1, p.2. Sharemaster’s Response in Opposition, Attachment A, Appendix,.

For the purpose of clarification, Sharemaster has included, as Attachment A, the previously-cited CRD electronic transaction record of a \$1,000 late-filing fee and, as Attachment B, a copy of a check to FINRA for \$1,785, cited by FINRA in its Motion, Exhibit 2, letters.<sup>9</sup>

FINRA asserts that the Ninth Circuit majority opinion, in footnote 9, invited the Commission to revisit the issue of whether or not the \$1,785 included a late-filing penalty or fine.<sup>10</sup>

The paragraph to which footnote 9 is attached is a Court discussion of a \$1,000 fine imposed on Sharemaster for not timely-filing a statement prepared by a PCAOB-registered accountant. The Court states, if Sharemaster prevails, the sanction would be incorrectly levied and must be set aside<sup>11</sup>.

FINRA argues that the 9<sup>th</sup> Circuit's majority opinion is premised on the Court's presumption that the costs of \$1,785 included a \$1,000 penalty or fine constituting a live sanction.

Sharemaster disagrees.

The Court noted that the Commission, in its dismissal order, introduced the presumption that the \$1,000 penalty was part of the \$1,785.

In its dismissal order, the Commission stated only that \$1,000 of the \$1,785 that FINRA ordered Sharemaster to pay "appears to be another example of costs assessed as part of the FINRA proceedings."<sup>12</sup>

The Court also noted the Commission conceded that the \$1,000 was a late fee.

In its answering brief on appeal, the Commission conceded that this

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<sup>9</sup> Appendix Attachment A and Attachment B.

<sup>10</sup> FINRA's Motion for Leave to Submit Additional Evidence, p.4.

<sup>11</sup> Ibid, pp.21-22.

<sup>12</sup> Ibid, p.20.

\$1,000 sum was “apparently [a] late fee.”<sup>13</sup>

The Court further distinguished the nature of the \$1,000 penalty from administrative costs for proceedings. The Court stated that the \$1,000 . . .

appears to be a penalty imposed for not timely filing an annual report prepared by a PCAOB-registered accountant. It is not part of the separately ledgered “administrative fee” that FINRA taxed to Sharemaster for pursuing an administrative appeal. The fine became a “final” disciplinary sanction when Sharemaster exhausted remedies before FINRA.<sup>14</sup>

FINRA’s Exhibit 1, showing the \$1,785 purely as costs, does not eliminate the existence of an outstanding penalty for late-filing—only that the penalty is not included in the \$1,785. FINRA’s Exhibit 1 is, therefore, not dispositive in forming an opinion about the Commission’s lack of jurisdiction.

Sharemaster argues that the Court’s opinion declaring the \$1,000 a “live” disciplinary sanction is based on “. . . a \$1,000 penalty for not timely filing a compliant annual report. No reference to the \$1,785 is included.”<sup>15</sup>

The \$1,000 has been retained by FINRA. The assessment is a “final” disciplinary sanction because the fine was not canceled and the money was not remitted to Sharemaster and remains a “live” issue.<sup>16</sup>

The 9<sup>th</sup> Circuit, at Oral Argument, permitted Sharemaster to raise the issue of the \$1,000 penalty for late filing,<sup>17</sup> which \$1,000 had previously been raised

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid, p.21.

<sup>15</sup> Sharemaster v. SEC, p.19.

<sup>16</sup> Sharemaster v. SEC, p.21.

<sup>17</sup> 9<sup>th</sup> Circuit Oral Argument, Feb. 3, 2016, <https://www.youtube.com/watch?v=CdV91gjHjF4>, 2 minutes, 20 seconds. Sharemaster’s Response to Commission’s Order Scheduling Briefs on Remand, June 25, 2012, pp.12-13.

in Sharemaster's June 25, 2012 brief on remand and noted by the Commission in its August 29, 2013 remand dismissal order.

The firm asserts that the \$1,000 late-filing penalty remains "live" until Sharemaster exhausts its right of appeal.

**B. Second, regarding FINRA's Exhibit 2, a letter from FINRA's legal counsel releasing Sharemaster from any obligation to pay \$1,785 to FINRA:**

FINRA argues that its forgiveness of \$1,785 is material as to the question of whether or not Sharemaster remains under the threat of any "live" sanction for the purposes of Exchange Act Section 19(d) jurisdiction.<sup>18</sup>

It appears that FINRA's motive is to extinguish any "live" sanction that might allow the Commission's jurisdiction under Exchange Act Section 19(d).

In FINRA's Motion, the rescission of the \$1,785 debt is meant to deprive Sharemaster of any possible basis for continuing an appeal and, thus, avoid the Court's Order granting Sharemaster's Petition for Review.

The \$1,785 has long been part of the FINRA Hearing Panel Decision for which Sharemaster seeks appellate review. By tampering with the Hearing Panel Order for the purpose of litigation, i.e. forgiving the debt, FINRA hopes to remove Sharemaster's standing. The \$1,785 is an element of the Panel's Order which has been an issue on appeal.

Sharemaster asks the Commission to disallow FINRA's May 12, 2017 Exhibit 2 letter since it is meant to remove an element of an adjudicatory hearing on appeal.

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<sup>18</sup> FINRA's Motion, p.4.

## **II. Conclusion:**

### **1. The Accounting:**

The new evidence in FINRA's Exhibit 1 is not cogent and compelling because the evidence does not address the basis for the Court's ruling—the existence of a penalty for late filing an annual statement.

The accounting only indicates that the late filing penalty is not contained in the \$1,785, as Commission's counsel had opined before the Court.

In any case, Appellant has asserted that the live disciplinary sanction results from FINRA's Notice of Action brought about by Sharemaster's use of a statutory exemption in filing its annual report and the electronic taking of a \$1,000 late-filing penalty. The accounting evidence on this issue is immaterial.

### **2. The Letter of Forgiveness:**

The letter of forgiveness, FINRA's proposed Exhibit 2, the May 12, 2017 letter, seeks to eradicate the possibility that the owing of \$1,785 may be construed, in any way, as evidence supporting Appellant's standing. FINRA has previously contended:

. . . that costs that had been assessed against—but not yet paid by—Sharemaster were sufficient to preserve statutory jurisdiction.<sup>19</sup>

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<sup>19</sup> SEC Order Dismissing Proceedings On Remand, Admin. File Proc. No3-14104r, p.3, n.12.



The \$1,785 is a pending debt and a “live issue” which inures to the issue of Sharemaster’s standing and the Commission’s jurisdiction.

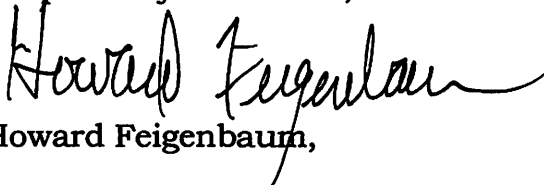
While your appeal is being considered by the SEC, FINRA will not require you to pay the costs imposed in the Hearing Panel decision and FINRA will not take any action against Sharemaster under FINRA Rule 8320 at this time. Be advised that should the SEC uphold the findings following your appeal, FINRA will seek to have Sharemaster comply with the Hearing Panel’s decision and require Payment as entered by the FINRA Hearing Panel.<sup>20</sup>

It is clear that FINRA’s forgiving the \$1,785 costs that Sharemaster owed is designed specifically to thwart Sharemaster’s preservation of statutory jurisdiction.

3. If the proposed accounting evidence, proposed Exhibit 1, is not admitted, no long-term injustice to FINRA will result.
4. However, if FINRA’s proposed Exhibit 2, forgiveness of \$1,785 debt, is allowed, Sharemaster may suffer harm on appeal because of FINRA’s pre-meditated effort to remove Sharemaster’s standing regarding the \$1,785 debt owed and alters the record on appeal, the pending debt.

Sharemaster asks the Commission to deny FINRA’s Motion.

Respectfully submitted,



Howard Feigenbaum,

460 Tewell Drive,  
Hemet, CA 92545

May 31, 2017

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<sup>20</sup> FINRA’s Motion, February 17, 2011 letter, proposed Exhibit 2.

## APPENDIX

Transaction Detail

Organization CRD#: 24012  
 Organization SEC#: 8-40906  
 Account Status:  
 Account Balance:  
 Balance As Of:  
 Funds Deficient Transactions:  
 Processed Transactions:  
 Current Amount Due:

Organization Name: SHAREMASTER  
 Applicant Name: FEIGENBAUM, HOWARD  
 Deficient  
 \$99.00  
 02/14/2011 01:03:58 AM  
 \$0.00  
 \$0.00  
 \$99.00

Search Parameters:

Post Date From: 05/03/2010 To: 05/31/2010

Total Transaction Amount \$1,000.00  
 Total Transaction Count 1

Records per Page: 25 Total Records: 1							
Post Date	Transaction Date	Transaction#	Description	Individual Name	Individual CRD#	Branch CRD#	Amount
05/14/2010	05/13/2010		FINRA Annual Audit Late Fee	CAS-68442-H1407X			\$1,000.00
Records per Page: 25 Total Records: 1							

Statement Period: February 1 through February 28, 2011  
Account Number: [REDACTED] 0494

Account Number: [REDACTED] 0494

3746

SHAREMASTER  
SHAREGROWERS INC.

7/13 2011

To: Finance Admin 10/10

1000 [unclear]

Bank of America

[Signature]

[MICR Line]

3746

Ref. No.: 7912278842 Amt: 2,600.00

3747

SHAREMASTER  
SHAREGROWERS INC.

FINRA

To: FINRA

1000 [unclear]

Bank of America

05-2409 [unclear]

[Signature]

[MICR Line]

3747

Ref. No.: 3392182923 Amt: 100.00

3748

SHAREMASTER  
SHAREGROWERS INC.

FERRIS

To: FINRA

1000 [unclear]

Bank of America

05-2409 [unclear]

[Signature]

[MICR Line]

3748

Ref. No.: 3192005136 Amt: 1,785.00

3749

SHAREMASTER  
SHAREGROWERS INC.

FERRIS

To: SIR

1000 [unclear]

Bank of America

[Signature]

[MICR Line]

3749

Ref. No.: 6592644729 Amt: 20.13

**CERTIFICATE OF SERVICE**

**In the Matter of the Application of**

**Sharemaster**

**For Review of Disciplinary Action Taken by FINRA**

**File No. 3-14104r**

**SHAREMASTER'S RESPONSE IN OPPOSITION TO**

**FINRA'S MOTION FOR LEAVE TO SUBMIT**


**ADDITIONAL EVIDENCE**

I, Howard Feigenbaum, certify that on May 31, 2017, I caused the original and three copies of Sharemaster's Response in Opposition to FINRA's Motion for Leave to Submit Additional Evidence, to be served, by Federal Express, on:

**Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090**

and by Federal Express on:

**Mr. Gary Dernelle,  
Office of the General Counsel  
FINRA  
1735 K Street, NW  
Washington, DC 20006**

  
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Hemet, CA 92545