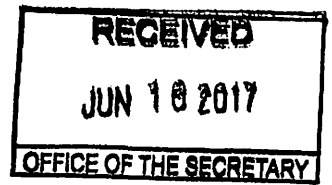


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**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**



In the Matter of the Application of

SHAREMASTER

For Review of Action Taken by

FINRA

File No. 3-14104r

**FINRA'S BRIEF IN RESPONSE TO THE COMMISSION'S APRIL 17, 2017 ORDER  
AND IN OPPOSITION TO SHAREMASTER'S APPLICATION FOR REVIEW**

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June 16, 2017

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**FINRA'S BRIEF IN RESPONSE TO THE COMMISSION'S APRIL 17, 2017 ORDER  
AND IN OPPOSITION TO SHAREMASTER'S APPLICATION FOR REVIEW**

**I. INTRODUCTION**

This appeal stems from an October 6, 2010 FINRA Hearing Panel decision that found the applicant, Sharemaster, failed to comply with the annual financial reporting requirements of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rules by filing a 2009 annual report that contained financial statements that were audited by an accounting firm that was not registered with the Public Company Accounting Oversight Board ("PCAOB"). The Hearing Panel suspended Sharemaster until the firm filed a conforming annual report and ordered that the firm pay proceeding costs totaling \$1,785.00.

The review of FINRA's action is before the Commission on remand from the U.S. Court of Appeals for the Ninth Circuit. The Commission ordered the parties to file briefs addressing the Commission's jurisdiction over Sharemaster's application for review under Section 19(d) of the Exchange Act and, if jurisdiction exists, the merits of the firm's appeal.

Simply put, the Commission should dismiss Sharemaster's application for review. Sharemaster is not the subject currently of any suspension, fine, or other sum that constitutes a

final disciplinary sanction that permits the Commission to exercise jurisdiction under Exchange Act Section 19(d) to review FINRA's action against the firm. Moreover, even were the Commission to determine that it possesses such jurisdiction in this case, the merit of FINRA's action is without any legitimate dispute and that action should be affirmed. The uncontested record establishes that Sharemaster was required, but failed, to file a 2009 annual report that included financial statements audited by a PCAOB-registered accounting firm. Sharemaster received all of the process due it under FINRA's rules and the suspension imposed by the FINRA Hearing Panel served a remedial purpose that furthered important investor protection interests. Although Sharemaster persists in claiming a limited-business exemption from the annual audit requirements of the Exchange Act and Exchange Act Rules, the exemption it claims for 2009 is, consistent with long-standing Commission precedent, foreclosed given the nature and scope of the firm's business. The remedies that Sharemaster seeks from the Commission are unavailable under the Exchange Act, and the matter is effectively moot.

## **II. BACKGROUND**

On February 17, 2010, Sharemaster filed with FINRA an annual report for calendar year 2009 that contained financial statements that were audited by an accounting firm that was not registered with the PCAOB. RP 527-45, 631, 652, 678, 725, 981-86.<sup>1</sup> Sharemaster claimed that its financial statements need not be audited and that the accountant who prepared the statements therefore was not PCAOB-registered. RP 981.

On May 3, 2010, FINRA staff notified Sharemaster that its 2009 annual report was incomplete and deemed the report not to have been filed because the report's financial statements had not been audited by a PCAOB-registered accounting firm. RP 803-05. Consequently,

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<sup>1</sup> "RP" refers to the record page number in the certified record.

FINRA staff informed Sharemaster that FINRA would suspend the firm's membership under FINRA Rule 9552 if the firm failed to file a conforming annual report or request a hearing by May 25, 2010.<sup>2</sup> RP 803.

On June 24, 2010, after Sharemaster timely requested a hearing, a FINRA Hearing Panel conducted a telephonic hearing, pursuant to FINRA Rule 9559. RP 1-32, 585-741. On October 6, 2010, the Hearing Panel issued a decision that found Sharemaster failed to file an annual report for 2009 audited by an accountant registered with the PCAOB, in violation of Exchange Act Rule 17a-5. RP 1025-31. In reaching this conclusion, the Hearing Panel found that Sharemaster was not exempt from filing an audited annual report. RP 1027-29. The Hearing Panel therefore suspended Sharemaster until the firm filed a 2009 annual report containing financial statements audited by a PCAOB-registered accounting firm. *Id.* It also ordered that Sharemaster pay proceeding costs totaling \$1,785.00. *Id.*

On October 29, 2010, Sharemaster filed an application for Commission review of the FINRA Hearing Panel's October 6, 2010 decision.<sup>3</sup> RP 1011. Sharemaster then filed with FINRA a 2009 annual report that contained financial statements audited by a PCAOB-registered

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<sup>2</sup> FINRA Rule 9552 permits FINRA staff to provide written notice to any FINRA member that the failure to provide any information, report, material, data, or testimony in accordance with FINRA rules will result in suspension of membership unless the member or associated person takes corrective action within 21 days. FINRA Rule 9552(a). A member served with a FINRA Rule 9552 notice may file a written request for a hearing before the effective date of suspension. FINRA Rule 9552(e). A timely request for a hearing stays the effectiveness of the suspension notice. FINRA Rule 9552(d); FINRA Rule 9559(c)(1).

<sup>3</sup> The Review Subcommittee of FINRA's National Adjudicatory Council did not call the Hearing Panel's decision for discretionary review under FINRA Rule 9559(q). The Hearing Panel's decision therefore constitutes final FINRA action in this matter under FINRA Rule 9559(o)(5). Under FINRA Rule 9559(s), the filing of Sharemaster's application for review did not stay the effectiveness of the Hearing Panel's decision, and Sharemaster did not seek a stay of the firm's suspension under Rule 401 of the Commission's Rules of Practice.



accounting firm. *See Sharemaster*, Exchange Act Release No. 70290, 2013 SEC LEXIS 2597, at \*5 (Aug. 29, 2013). FINRA subsequently lifted Sharemaster's suspension.<sup>4</sup> *Id.*

On August 29, 2013, without reaching the merits of the firm's appeal, the Commission dismissed Sharemaster's application for review. *Id.* at \*11. The Commission concluded that it lacked jurisdiction to review FINRA's action under Section 19(d) of the Exchange Act because there was no "live" sanction for it to act upon. *Id.*

On February 2, 2017, after reviewing the Commission's decision, the U.S. Court of Appeals for the Ninth Circuit remanded this matter to the Commission for further proceedings. *See Sharemaster v. SEC*, 847 F.3d 1059, 1062 (9th Cir. 2017). The court deferred to the Commission's interpretation of Exchange Act Section 19(d) as only permitting the Commission's review of "live" sanctions. *Id.* at 1068. The court's majority opinion nevertheless stated that, based on its review of the record, the Commission unreasonably decided that there was no longer a live sanction imposed by FINRA on Sharemaster. *Id.* at 1068-71. The court reached this conclusion based on its understanding that the \$1,785.00 in costs that the FINRA Hearing Panel's decision ordered Sharemaster to pay included a \$1,000.00 penalty for not timely complying with Exchange Act Rule 17a-5(d). *Id.* at 1064.

On April 17, 2017, the Commission ordered the parties to file briefs addressing the Commission's jurisdiction to consider Sharemaster's application for review and, if jurisdiction exists, the merits of the firm's appeal. *See Sharemaster*, Exchange Act Release No. 80471, 2017 SEC LEXIS 1181, at \*1 (Apr. 17, 2017).

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<sup>4</sup> FINRA also returned to Sharemaster the costs imposed by the Hearing Panel and notified the firm that FINRA would not seek to reassess those costs while the firm's appeal was pending before the Commission. *See FINRA's Motion for Leave to Submit Additional Evidence*, May 25, 2017, Exhibit 2.

### III. ARGUMENT

#### A. No Final Disciplinary Sanction Exists to Confer on the Commission Jurisdiction to Review FINRA's Action

The Commission's jurisdiction to review FINRA action is established by statute. *WD Clearing, LLC*, Investment Company Act Release No. 75868, 2015 SEC LEXIS 3699, at \*10 (Sept. 9, 2015) (“[T]here must be a statutory basis for us to exercise jurisdiction.”). Section 19(d) of the Exchange Act authorizes the Commission to review only those FINRA disciplinary actions in which a “final disciplinary sanction” is imposed.<sup>5</sup> *Sky Capital LLC*, Exchange Act Release No. 55828, 2007 SEC LEXIS 1179, at \*11 (May 30, 2007). The Commission's review authority under Exchange Act Section 19(d) is further constrained by the requirement that a final disciplinary sanction must be in effect or “live” at the time of the Commission's review for it to confer jurisdiction on the Commission. *Sharemaster*, 2013 SEC LEXIS 2597, at \*13 (“[W]e conclude that the better approach is to construe Section 19(d) and (e) as imposing such a requirement.”), *aff'd*, 847 F.3d at 1068 (“We hold that the Commission's interpretation of Section 19(d)(2) as only permitting review of ‘live’ disciplinary sanctions is permissible . . .”). If the Commission finds that it does not possess jurisdiction to review a FINRA action, it must dismiss the proceeding. *Sky Capital*, 2007 SEC LEXIS 1179, at \*9.

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<sup>5</sup> Section 19(d) of the Exchange Act authorizes the Commission to review a FINRA action only if that action: (1) imposes a final disciplinary sanction on a member or an associated person of a member; (2) denies membership or participation to any applicant; (3) prohibits or limits any person in respect to access to services offered by such organization or member thereof; or (4) bars any person from becoming associated with a member. 15 U.S.C. § 78s(d)(1). In its May 13, 2017 brief, filed in response to the Commission's April 17, 2017 order, *Sharemaster* does not claim that the Commission possesses jurisdiction to entertain the firm's application for review under any prong other than the “final disciplinary sanction” prong of Exchange Act Section 19(d).

The Commission does not possess jurisdiction to review the FINRA Hearing Panel's October 6, 2010 decision. During the course of these proceedings, the parties, the Commission, and the Ninth Circuit have identified only three possible "sanctions" on which the Commission could base Section 19(d) jurisdiction—a suspension, costs, and a late-filing fee. These limitations and assessments, however, are either not currently in effect or are not reviewable by the Commission as final disciplinary sanctions under Exchange Act Section 19(d). There is therefore nothing for the Commission to review in this matter, and the Commission must dismiss Sharemaster's application for review as moot.

**1. The Commission Lacks Jurisdiction to Review FINRA's Vacated Order Suspending Sharemaster**

The FINRA Hearing Panel's October 6, 2010 decision ordered the suspension of Sharemaster's FINRA membership until the firm filed an annual report that complied with the requirement that the financial statements contained therein be audited by a PCAOB-registered accounting firm. RP 1010. On November 1, 2010, Sharemaster opted to comply with the Hearing Panel's order, and FINRA lifted the firm's suspension. *Sharemaster*, 2013 SEC LEXIS 2597, at \*11. Accordingly, the suspension, which is not currently in effect, may not serve as the basis for the Commission to review FINRA's action under Exchange Act Section 19(d). *See Id.* at \*18 ("Sharemaster . . . opted to comply . . . . Thus, we lack jurisdiction over this matter."), *aff'd*, 847 F.3d at 1066 (rejecting Sharemaster's claim that the Commission unreasonably applied the requirement of a live sanction in dismissing the firm's application for review).

**2. The Costs Imposed on Sharemaster Did Not Include a Sanction and Are Not Otherwise Reviewable Because They Are No Longer in Effect**

The Ninth Circuit remanded this matter to the Commission after concluding that the Commission unreasonably decided that no "live" disciplinary sanction imposed by the FINRA

Hearing Panel's October 6, 2010 decision was in effect at the time of the Commission's review. *See Sharemaster v. SEC*, 847 F.3d at 1068-71. The court reached this conclusion based on its understanding that "[t]he \$1,785 sum that FINRA ordered Sharemaster to pay *evidently* included a \$1,000 penalty for not timely complying with Rule 17a-5(d)" and that "[c]osts associated with the hearing amounted to \$750" and a \$35.00 hearing transcript.<sup>6</sup> *Id.* at 1064 (emphasis added). The court determined that the \$1,000.00 penalty was a "fine" under FINRA Rule 8310 and thus reviewable as a final disciplinary sanction by the Commission because "[t]he sanction remained 'live' even after the suspension lifted because the fine was not canceled and the money was not returned." *Id.* at 1069-70.

Contrary to the Ninth Circuit's opinion, however, the proceeding costs imposed on Sharemaster included no late-filing penalty or fine, and they do not constitute a final disciplinary sanction that serves to create Exchange Act Section 19(d) jurisdiction in this matter.<sup>7</sup> The Ninth Circuit erred in concluding that the costs imposed by the FINRA Hearing Panel's October 6, 2010 decision included a "fine" for Sharemaster's late-filing of a compliant annual report. As the Hearing Panel's decision makes clear, in the plainest of terms, the \$1,785.00 in costs included "an administrative fee of \$750.00 and the cost of the hearing transcript." RP 1010. The hearing transcript cost in this matter was \$1,035.00, thus leaving no room for the sum of costs imposed to include the \$1,000.00 late-filing penalty the Ninth Circuit presumed was imposed on

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<sup>6</sup> The court's majority premised this conclusion not on the record of FINRA's action but rather on its reading of the Commission's August 29, 2013 dismissal order and a representation that the Commission made in a brief filed with the court. *Id.* at 1069.

<sup>7</sup> The Ninth Circuit's opinion makes clear that, on remand, the Commission may revisit the question of whether the \$1,785.00 of FINRA-imposed costs includes a late-filing penalty or fine. *See id.* at 1070 n.9 (stating "[p]erhaps on remand, the Commission will make . . . a showing" that the \$1,785.00 in costs did not include a penalty or fine).

Sharemaster by the Hearing Panel's decision. *See* FINRA's Motion for Leave to Submit Additional Evidence, May 25, 2017, Exhibit 1.

Because the costs FINRA imposed on Sharemaster did not include a fine, they do not constitute a final disciplinary sanction that evokes Exchange Act Section 19(d) review authority. FINRA's rules unmistakably distinguish between disciplinary sanctions, including suspensions and fines, and the costs of proceeding that a FINRA adjudicator shall order a disciplined member to bear. *Compare* FINRA Rule 8310 (Sanctions for Violation of the Rules) *with* FINRA Rule 8330 (Costs of Proceedings). As the Commission previously determined, correctly, the Commission's authority to review costs imposed by FINRA in a disciplinary action arises from, "and is limited to," the jurisdiction granted to it to review a final disciplinary sanction under Exchange Act Section 19(d). *See Sharemaster*, Exchange Act Release No. 65570, 2011 SEC LEXIS 3610, at \*11 & n.13 (Oct. 14, 2011) (collecting cases). The imposing of costs therefore does not provide any grounds for the exercise of the Commission's Section 19(d) review authority independent of a reviewable, final disciplinary sanction. *See Sharemaster*, 2013 SEC LEXIS 2597, at \*24 (collecting cases). Because there is no final disciplinary sanction currently in effect in this matter, the Commission is simply not authorized to review FINRA's imposition of costs. *See Sharemaster*, 2011 SEC LEXIS 3610, at \*11.

In any event, even were the Commission to conclude that some element of the \$1,785.00 of FINRA imposed costs included a final disciplinary sanction, the sanction is no longer "live." On May 12, 2017, FINRA informed Sharemaster that FINRA forgave the costs of \$1,785.00 ordered by the FINRA Hearing Panel's October 6, 2010 decision. *See* FINRA's Motion for Leave to Submit Additional Evidence, May 25, 2017, Exhibit 2. The forgiveness was immediate. *Id.* There is therefore no further obligation for Sharemaster to remit to FINRA any

sum ordered to be paid by the Hearing Panel's decision. *Id.* Exchange Act Section 19(d) jurisdiction in this matter may not be based on a "sanction" that is now moot. *See Marshall Fin., Inc.*, 57 S.E.C. 869, 877 (2004) ("[W]e have declined to consider an appeal where even a favorable decision by the Commission would entitle [the applicant] to no relief." (internal quotations omitted)).

**3. The Late-Filing Fee Imposed by FINRA Staff Is Not a Final Disciplinary Sanction That Is Reviewable Under the Exchange Act**

Sharemaster's arguments in favor of Commission jurisdiction in this matter are premised singularly on the Ninth Circuit's conclusion that the \$1,000.00 late-filing fee the firm paid was imposed by the FINRA Hearing Panel's October 6, 2010 decision. The late-filing fee levied on the firm, however, was not imposed by the Hearing Panel, but rather assessed by FINRA staff. It is not a final disciplinary sanction that the Commission may review under Section 19(d) of the Exchange Act.

The \$1,000.00 late-filing fee was not a component of the October 6, 2010 FINRA Hearing Panel decision on which Sharemaster's application for review is based. RP 1005-10. This fee was levied instead by FINRA staff several months earlier, on May 3, 2010, in the ordinary course of FINRA's business and under Section 4(g) of Schedule A to FINRA's By-Laws, which instructs FINRA staff to impose on a member a late fee of \$100.00 for each day, up to a maximum of ten days, that an annual report is delinquent.<sup>8</sup> RP 804. Unlike the threat of

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<sup>8</sup> Fees assessed under Schedule A to FINRA's By-Laws are levied in accordance with Article VI of the By-Laws, which permits FINRA to fix and levy assessments to be paid by FINRA members using any facility that FINRA operates or controls. Such fees are established and amended by rule filings and reviewed by the Commission under Section 19(b)(1) of the Exchange Act and Exchange Rule 19b-4 for consistency with Exchange Act Section 15A(b)(6), which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among members, issuers, and other persons using any

[Footnote continued on next page]

suspension, assessment of the late-filing fee could not be avoided by Sharemaster's request for a hearing.<sup>9</sup> RP 803. FINRA automatically deducted the fee from the firm's Central Registration Depository ("CRD<sup>00</sup>") account on May 14, 2010. *See* Sharemaster's Motion for Submission of Additional Evidence, March 28, 2011, Exhibit 1a.

The late-filing fee levied by FINRA staff was not the result of a FINRA disciplinary action and thus cannot constitute a final disciplinary sanction.<sup>10</sup> *See Allen Douglas Sec., Inc.*, 57 S.E.C. 950, 955-56 (2004) ("NASD did not employ its disciplinary procedures, did not make a determination that Allan Douglass had violated a statute or rule, and did not impose a final disciplinary sanction."). Staff's assessment of this fee involved no determination of wrongdoing by FINRA and did not have a disciplinary character, notwithstanding its financial impact on Sharemaster. *See Morgan Stanley*, 53 S.E.C. 379, 383 (1997) (finding that staff's denial of an exemption request, which was considered by NASD's business line and Fixed Income Committee, and did not employ NASD's disciplinary procedures, was "not a disciplinary action

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[Cont'd]

FINRA-operated facility or system. *See, e.g.*, Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Section 4 of Schedule A to the FINRA By-Laws, Exchange Act Release No. 68942, 2013 SEC LEXIS 519, at \*1, 10 (Feb. 15, 2013).

<sup>9</sup> A late-filing fee is not an element of FINRA Rule 9552 and is not stayed by the filing of a hearing request. *See* FINRA Rule 9552(a) ("FINRA staff may provide written notice . . . that the failure to take corrective action . . . will result in suspension of membership . . ."); FINRA Rules 9552(d) ("The suspension referenced in a notice . . . shall become effective . . . , unless stayed by a request for a hearing pursuant to Rule 9559."). It also is not a sanction, requirement, restriction, or limitation that may be approved, modified, or withdrawn by a Hearing Panel under FINRA Rule 9559. *See* FINRA Rule 9559(n)(1).

<sup>10</sup> Thus, there was no action for which notice to the Commission was required under Exchange Act Section 19(d)(1) or Exchange Act Rule 19d-1. *See* 15 U.S.C. § 78s(d)(1) (requiring, in part, that a self-regulatory organization promptly file with the Commission notice of any final disciplinary action taken with respect to a member or person); 17 C.F.R. § 240.19d-1(a), (c)(1) (same).

within the meaning of the Exchange Act because it did not impose a ‘punishment or sanction’”). The Commission does not possess jurisdiction under Section 19(d) of the Exchange Act to review the \$1,000.00 fee imposed on Sharemaster by FINRA staff for the firm’s untimely compliance with requirements that the firm file an annual report certified by a PCAOB-registered auditor. *See Marshall Fin., Inc.*, 57 S.E.C. at 877 n.21 (“Exchange Act Section 19 does not appear to authorize the setting aside of NASD’s Fees assessments or authorize ‘remission’ of the Fees.”).

**B. Sharemaster Failed to File a Conforming Annual Report in Violation of Exchange Act and Exchange Act Rule Requirements**

Should the Commission conclude that it possesses jurisdiction to review FINRA’s action in this matter, which it should not, the Commission should nonetheless dismiss Sharemaster’s application.<sup>11</sup> The merit of FINRA’s action is without any legitimate dispute and is well grounded in the uncontested facts. FINRA undertook expedited proceedings against Sharemaster in accordance with FINRA’s rules and for purposes that are consistent with important provisions of the federal securities laws that are necessary to monitor the financial status of broker-dealers and to protect investors. Despite its protest to the contrary, Sharemaster has not established that it is entitled to an exemption for 2009 from the requirement that its annual report include audited financial statements. The Commission should therefore dismiss the firm’s application for review.

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<sup>11</sup> Exchange Act Section 19(e) governs the Commission’s review of the merits of FINRA’s action and requires the Commission to sustain such action if the record shows by a preponderance of the evidence that Sharemaster engaged in the violative conduct and FINRA’s action was taken in accordance with its rules and in a manner consistent with the purposes of the Exchange Act. *See* 15 U.S.C. § 78s(e)(1).



**1. Sharemaster Filed a 2009 Annual Report That Did Not Comply with Exchange Act Requirements**

Section 17(e) of the Exchange Act and Exchange Act Rule 17a-5 thereunder require broker-dealers to file annual reports containing financial statements audited by an accounting firm registered with the PCAOB. *See* 15 U.S.C. § 78q(e)(1)(A); 17 C.F.R. § 240.17a-5(d); *see generally Gremo Inv., Inc.*, Exchange Act Release No. 64481, 2011 SEC LEXIS 1695 (May 12, 2011) (explaining background of Exchange Act and Sarbanes-Oxley Act provisions requiring all broker-dealers to file annual reports that contain financial statements audited by a PCAOB-registered accounting firm). Sharemaster is a FINRA member broker-dealer approved to engage in the sale of mutual funds and variable life insurance or annuities. RP 676-78, 722-23, 845-47. It is undisputed that, on February 17, 2010, Sharemaster filed with FINRA the firm's 2009 annual report and that the annual report contained financial statements that were audited by an accounting firm that *was not* registered with the PCAOB. RP 527-45, 631, 652, 678, 725, 981-86. The conclusion that Sharemaster violated Exchange Act Rule 17a-5 is thus fully supported by the facts. *See Gremo*, 2011 SEC LEXIS 1695, at \*7 (finding that a FINRA member violated Exchange Act Section 17(e) and Exchange Act Rule 17a-5 by filing an annual report with financial statements audited by a non-PCAOB-registered accounting firm).

**2. FINRA's Action Was Taken in Accordance with FINRA's Rules and in Furtherance of Important Exchange Act and Exchange Act Rule Requirements**

FINRA's action to obtain Sharemaster's full compliance with the requirement that it file an annual report certified by a PCAOB-registered accounting firm was fully consistent with FINRA rules. On May 3, 2010, FINRA notified Sharemaster that its 2009 annual report was incomplete and did not qualify as an annual report and informed the firm that its FINRA membership would be suspended absent corrective action or a timely request for hearing. *See*

FINRA Rule 9552(a), (c). As was its right, Sharemaster requested and received a hearing in accordance with FINRA Rule 9559. *See* FINRA Rule 9552(e); FINRA Rule 9559. And on October 6, 2010, a FINRA Hearing Panel issued a written decision finding that the firm violated Exchange Act Rule 17a-5 and imposed a suspension and costs that were carefully measured and consistent with those permitted under FINRA's rules. *See* FINRA Rule 9559(n)-(p).

FINRA's action also furthered the application of essential provisions of the Exchange Act and Exchange Act Rules. Congress mandated that the financial statements of broker-dealers be audited by PCAOB-registered accountants through the Sarbanes-Oxley Act amendments to the Exchange Act. *See generally Gremo*, 2011 SEC LEXIS 1695, at 11 & n.14. This important requirement was enacted to monitor the financial status of broker-dealers and to protect investors by improving the accuracy and reliability of broker-dealer disclosures made pursuant to the federal securities laws. *Id.* at 14-15.

Although Sharemaster claims that Congress intended to relieve certain broker-dealers from the requirement that their financial statements be audited by PCAOB-registered accounting firms, and the increased costs of obtaining the services of PCAOB-registered accountants, the firm is plainly mistaken. The Exchange Act does not reflect such Congressional intent and, in fact, any additional financial burden that Sharemaster may have borne by complying with the requirement that it file financial statements audited by a PCAOB-registered accounting firm is based on a Congressional determination that PCAOB registration protects the public interest by ensuring more rigorous broker-dealer audits and reporting. *See id.* at \*11.

Reporting violations, especially the violation that Sharemaster committed in this case, are serious. *See id.* at \*15. Accordingly, there can be no doubt that the limited suspension that

FINRA imposed on Sharemaster served a remedial purpose.<sup>12</sup> *Id.* (“We find that the sanctions are remedial because they will impress upon the Firm and others the importance of filing annual reports that are audited by PCAOB-registered firms . . . and protect the investing public by reducing the likelihood of any recurrence of a violation.”).

**3. Sharemaster Did Not Qualify for an Exemption from the Requirement that It File Audited Financial Statements**

Sharemaster claims that it was exempt from the requirement that it file audited financial statements for 2009 and thus from the requirement that the financial statements be certified by a PCAOB-registered accountant. Sharemaster bears the burden of establishing that it was entitled to this exemption. *See FCS Sec.*, Exchange Act Release No. 64852, 2011 SEC LEXIS 2366, at \*18 (July 11, 2011) (“Applicants bore the burden of establishing that they were entitled to the Exemption.”); *see also* Exchange Act Rule 17a-5(e)(1)(ii), 17 C.F.R. § 240.17a-5(e)(1)(ii) (requiring an oath or affirmation that states the facts and circumstances relied upon for an exemption from the requirement that annual reports be prepared by an independent public accountant). It has failed to meet its burden.

Sharemaster’s appeal rests on its claim that it was entitled in 2009 to a limited-business exemption under Exchange Act Rule 17a-5(e)(1)(i)(A), which states that a broker-dealer is not required to engage an independent public accountant to provide its annual report if certain

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<sup>12</sup> Under Exchange Act Section 19(e), the Commission must sustain a FINRA imposed sanction unless it finds, having due regard for the public interest and the protection of investors, that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition. *See* 15 U.S.C. § 78s(e)(2). Sharemaster does not claim, and the record does not show, that FINRA’s action in this matter imposed an unnecessary or inappropriate burden on competition.

explicit conditions are met.<sup>13</sup> That exemption, however, is a narrow one and applies only to broker-dealers that limit their business to soliciting, as agent, subscriptions for securities of a single issuer.<sup>14</sup> *First Nev. Sec., Inc.*, 50 S.E.C. 1015, 1017 (1992). The uncontested record in this matter establishes that, in 2009, Sharemaster had selling agreements with eight to ten different issuers, sold shares of multiple mutual funds to the firm's customers as a broker, and received from several issuers commissions and 12b-1 fees from the sale of mutual fund securities. RP 527-45, 634, 653-54, 663-65, 689-91, 701-05, 722-25, 732, 849-61, 923-57. Sharemaster therefore cannot claim a limited-business exemption for 2009. Its annual report was required to be prepared by an independent auditor and to include financial statements certified by

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<sup>13</sup> Exchange Act Rule 17a-5(e)(1)(i)(A) provides that a broker-dealer's financial statements need not be audited if:

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

17 C.F.R. § 240.17a-5(e)(1)(i)(A).

<sup>14</sup> Sharemaster complains that this interpretation conflicts with the terms of Exchange Act Rule 17a-5(e)(1)(i)(A). Sharemaster's complaint, however, is based on a self-serving recitation of what it views are the purposes of the limited-business exemption that finds no support in the Exchange Act, Exchange Act Rules, or any cited legal support. The Commission should reject the interpretation of Exchange Act Rule 17a-5(e)(1)(i)(A) presented by Sharemaster because it clearly conflicts with Commission precedent. *See Cirtran Corp.*, Initial Decisions Release No. 1134, 2017 SEC LEXIS 1405, at \*13 (May 11, 2017) ("Commission precedent is clear . . . . Miller's position that his actions are reasonable and do not harm Blink's shareholders does not change the fact that the investing public can be harmed when a publicly traded company does not provide the public complete, timely, and accurate financial information."); *cf. Med-X, Inc.*, Initial Decisions Release No. 1130, 2017 SEC LEXIS 1347, at \*31 (May 8, 2017) ("In the absence of Commission precedent, . . . Med-X relied on Richardson's interpretation."); *cf. also Harry M. Richardson*, 58 S.E.C. 134, 144 n.26 (2005) ("To the extent that NASD by-laws might allow consideration of Richardson's underlying misconduct beyond that permitted under Commission precedent, Commission precedent controls.").

a PCAOB-registered accounting firm. *See FCS Sec.*, 2011 SEC LEXIS 2366, at \*18 (affirming FINRA action for a firm's failure to file audited annual reports where the applicants did not establish they were entitled to the protection of the limited-business exemption); *see also Gremo*, 2011 SEC LEXIS 1695, at \*7.

**C. Sharemaster Is Not Entitled to Any Relief That Is Beyond the Commission's Authority to Grant**

Sharemaster requests that the Commission, should it find that FINRA erred in its action against the firm, impose certain remedies, including an order that FINRA remove from public record any derogatory information concerning FINRA's action and reimbursement for the difference in accounting fees paid to the firm's PCAOB-registered accountant. As discussed above, however, the Commission is only authorized to review those actions that impose a final disciplinary sanction under Section 19(d) and it is limited in its review authority, under Exchange Act Section 19(e), to setting aside those final disciplinary sanctions only as a remedy for unlawful FINRA action. *See* 15 U.S.C. § 78s(d), (e).

Neither of the remedies noted above may be utilized by the Commission in this matter. First, FINRA's public disclosure of information is not a final disciplinary sanction and does not concern the Commission's Section 19(d) review authority. *See Eric David Wanger*, Exchange Act Release No. 79008, 2016 SEC LEXIS 3770, at \*11 (Sept. 30, 2016) (finding that the Commission does not have jurisdiction to review FINRA BrokerCheck® disclosures). The Commission therefore cannot order that FINRA alter any public disclosure of information related to this matter under Exchange Act Section 19(e).

Second, the request that FINRA be ordered to reimburse Sharemaster for any additional costs incurred when it obtained the services of a PCAOB-registered accountant is essentially a plea for damages, something the Commission cannot award. *See Sky Capital*, 2007 SEC LEXIS

1179, at \*10 (finding the Commission has no authority to grant relief that includes a request for damages). Such additional costs are merely collateral to FINRA's action and therefore cannot constitute a final disciplinary sanction under Exchange Act Section 19(d). *See Wanger*, 2016 SEC LEXIS 3770, at \*13 (concluding that an action that is collateral to an underlying disciplinary action is not itself final disciplinary action that is reviewable under Section 19(d)). FINRA's action is not reviewable simply because it caused Sharemaster to incur costs that it believes adversely affected it. *See Sky Capital*, 2007 SEC LEXIS 1179, at \*11-12 ("We have stated that SRO action 'is not reviewable merely because it adversely affects the applicant.'").

Thus, Sharemaster's requests for remedies should be denied.

#### **IV. CONCLUSION**

Because Sharemaster is not the subject currently of any final disciplinary sanction, there is nothing for the Commission to review in this matter under Exchange Act Section 19(d), and nothing also for it to set aside. Should the Commission consider the merits of FINRA's action, it will find that it is without dispute that Sharemaster failed to file timely its required annual financial statements, in violation of Exchange Act Rule 17a-5, and that FINRA's action was taken in accordance with FINRA's rules in a manner that furthered important provisions of the federal securities laws and that served the public interest. Although Sharemaster ostensibly seeks the return of a \$1,000.00 late-filing fee, an assessment that is not a final disciplinary sanction under Exchange Act Section 19(d), it is clear that its desire to perpetuate these proceedings is merely for the hopeful purpose of obtaining a favorable legal opinion concerning an exemption that it must know, given long-standing Commission precedent, it is not entitled to. The Commission should deny Sharemaster this opportunity and dismiss the firm's application for review. *See Marshall*, 57 S.E.C. at 877-78 ("Marshall's desire for helpful precedent, without

anything more substantial at stake in the controversy, does not persuade us that this case is not moot.”).

Respectfully submitted,



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Date: June 16, 2017

**CERTIFICATE OF SERVICE**

I, Gary Dernelle, certify that on June 16, 2017, I caused the original and three copies of FINRA's Brief in Response to the Commission's April 17, 2017 Order and in Opposition to Sharemaster's Application for Review in the matter of the Application for Review of Sharemaster, Administrative Proceeding No. 3-14104r, to be served by messenger and facsimile on:

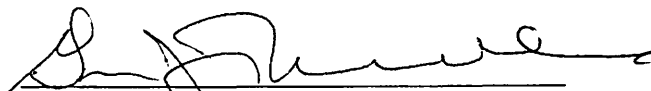
Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Room 10915  
Washington, DC 20549-1090  
Fax: (202) 772-9324

and by electronic mail and Federal Express Overnight Delivery on:

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Service was made on the Commission by messenger and the applicant by FedEx and electronic mail due to the distance between the offices of FINRA and applicant's address.

Respectfully submitted,



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