

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

RECEIVED
MAY 26 2016
OFFICE OF THE SECRETARY

FINRA Department of Enforcement,
Complainant,

v.

MKM Partners LLC (CRD No. 114666),
Respondent.

BATS Complaint No. 2014041284201

3-17262

APPLICATION FOR REVIEW

Respondent MKM Partners LLC (CRD No. 114666) ("MKM"), through its undersigned counsel Faust Oppenheim LLP, submits its Application for Review pursuant to U.S. Securities and Exchange Commission ("SEC") Rules of Practice, Rule 420(c), in the appeal of the BATS Exchange, Inc. Appeals Committee decision, dated April 25, 2016 ("Decision") as follows:

The determination complained of, and of which MKM seeks the SEC's review, is the Appeals Committee's imposing a fine of \$2,500 and a censure for an SEC Rule 17a-5(d) violation after failing to provide MKM with a hearing pursuant to BATS Rule 8.6.

It defies common sense that an exchange's enforcement of an SEC rule would have a more stringent penalty than the SEC itself. MKM seeks the SEC's review of the Decision that a violation of SEC Rule 17a-5(d) deserves the severe sanction of a censure.

MKM admitted that it failed to timely file its audit report with BATS Exchange, Inc. for the fiscal year 2013. However, MKM has continuously objected only to the imposition of the sanction of a censure, not the fine, as a result of a violation of SEC Rule 17a-5(d). The reasoning is twofold.

First, the Appeals Committee stated that a violation of SEC Rule 17a-5(d) "is not, and has never been, included in BATS' Commission-approved minor rule violation plan". MKM's suggestion is that BATS erred in not making that inclusion especially given the fact that the

SEC, the rulemaking authority, treats a violation of SEC Rule 17a-5(d) with the imposition of an administrative fee, which is not publicly reportable, and it is included in FINRA's minor rule violation plan. BATS finally admitted that it did have the authority to waive the censure upon a decision of the hearing officer, but chose not to after first responding that it did not have the authority to do so. MKM has consistently offered to pay a fine and agrees that \$2,500 may be an appropriate amount. BATS' strictness in adhering to its own minor rule violation plan, yet being loose with its members' fundamental rights to a hearing is incredibly contradictory. As is the Appeals Committee's failure to review evidence which was provided and was completely on point with the issue of sanctions before it.

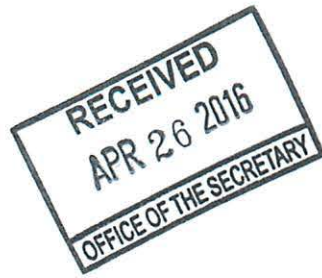
Second, this matter is simply one of a filing of an annual audit, one which BATS had access to and which has been filed timely with the SEC and FINRA since MKM's approval as a broker-dealer. No customer funds are at issue. In fact, there is no issue that is pertinent for public investors to know, which is exactly why FINRA and SEC do not require a public censure for a violation of SEC Rule 17a-5(d). As of this year, the manner in which MKM timely filed its audit reports with FINRA is the now correct method for filing with BATS. Therefore, the imposition of any sanction is not a deterrent against future misconduct.

For the reasons set forth above, MKM respectfully requests that the SEC grant its application to review the BATS Exchange, Inc. Appeals Committee decision, dated April 25, 2016. Faust Oppenheim LLP will accept service on MKM's behalf at 488 Madison Avenue, 17th Floor, New York, New York 10022.

Dated: May 23, 2016



Petra v.Z. Davenport, Esq.



Celia Passaro
FINRA - OGC
(202) 728-8985

April 25, 2016

VIA MESSENGER

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

RE: Complaint No. 201404128420: MKM Partners LLC

Dear Mr. Fields:

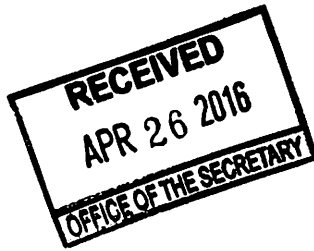
Enclosed please find the decision of the BATS Exchange, Inc. Appeals Committee in the above-referenced matter. The enclosed is the final decision of BATS.

Very truly yours,

Celia Passaro

Enclosure

cc: Brennan Love



Eric Swanson
Corporate Secretary
BATS

April 25, 2016

VIA CERTIFIED MAIL AND EMAIL

Steven D. Oppenheim, Esq.
Faust Oppenheim, LLP
488 Madison Avenue, 17th Floor
New York, NY 10022

RE: Compliant No. 2014041284201: MKM Partners, LLC

Dear Mr. Oppenheim:

Enclosed is the decision of the BATS Exchange, Inc. Appeals Committee in the above-referenced matter. The enclosed decision is the final decision of BATS.

In the enclosed decision, the Appeals Committee found that MKM Partners, LLC (“MKM”) violated SEC Rule 17a-5(d) by failing to timely file a copy of its annual audit report with BATS. The Appeals Committee imposed a fine of \$2,500 and a censure.

Please note that under Rule 8.11 (“Effective Date of Judgment), the penalties imposed in this decision are effective now that this decision is final.

MKM may appeal this decision to the U.S. Securities and Exchange Commission (“SEC”). To do so, MKM must file an application with the SEC within 30 days of receipt of this decision. A copy of this application must be sent to the BATS Office of General Counsel, as must copies of all documents filed with the SEC. Any documents provided to the SEC via facsimile or overnight mail should also be provided to BATS by similar means.

The address of the SEC is:

The Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090 – Room 10915
Washington, D.C. 20549

The address of BATS is:

Attn: Anders Franzon
Office of General Counsel
BATS Global Markets
8050 Marshall Drive, suite 120
Lenexa, KS 66214

If MKM files an application for review with the SEC, the application must identify the BATS case number and state the basis for his appeal. MKM must include an address where it may be

served and a phone number where it may be reached during business hours. If this address or phone number changes, MKM must advise the SEC and BATS. Attorneys must file a notice of appearance.

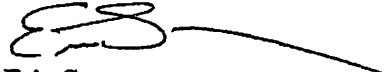
The filing with the SEC of an application for review shall stay the effectiveness of any sanction except a bar. Thus, the fine and censure imposed by the Appeals Committee will be stayed pending appeal to the SEC.

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is (202) 551-5400.

* * *

If your client does not appeal this BATS decision to the SEC and the decision orders your client to pay fines or costs, your client may pay these amounts after the 30-day period for appeal to the SEC has passed. Any fines and costs assessed should be paid to BATS BZX Exchange, Inc., 8050 Marshall Drive, Suite 120, Lenexa, KS 66214. Please contact (913) 815-7000 if you have any questions concerning payment of fines.

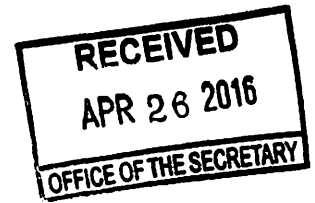
Very truly yours,



Eric Swanson

Enclosure

cc: Susan Light
Heather Frieberger
Leo Orenstein
Jeffrey Pariser
Natasha Cromwell



BATS EXCHANGE, INC.

APPEALS COMMITTEE OF THE BOARD

In the Matter of
Department of Enforcement,
Complainant,
vs.
MKM Partners LLC,
Respondent.

DECISION

Complaint No. 2014041284201

Dated: April 25, 2016

Member firm violated SEC Rule 17a-5(d) by failing to timely file a copy of its annual audit report with BATS Exchange, Inc. Held, findings and sanctions affirmed.

Decision

Respondent MKM Partners, LLC (“MKM”) appeals a September 1, 2015 Hearing Panel Decision Granting a Motion for Summary Disposition. The Hearing Panel found that there was no genuine issue of material fact in dispute that MKM did not timely file its 2013 annual audit report with BATS Exchange, Inc. (“BATS”), in violation of Securities Exchange Act Rule 17a-5(d). The Hearing Panel imposed a fine of \$2,500 and a censure for this violation.

After an independent review of the record, we affirm the Hearing Panel’s findings and sanctions.

I. Facts

A. MKM

MKM is a broker-dealer with its principal place of business in Stamford, Connecticut. MKM has been a member of BATS since August 3, 2009.

B. MKM’s Late Annual Audit Report Filings

MKM’s fiscal year ends on December 31 and it is required to file its annual audit reports with BATS within 60 calendar days of its year end – i.e., by March 1, or the first business day thereafter. The record shows that MKM filed its 2010, 2011, and 2012 annual audit reports late.

On January 10, 2011, BATS issued and sent to MKM its Regulatory Circular 11-001, reminding members of their obligation to timely file their 2010 annual audit reports. The regulatory circular provided a fax number, email, and mailing address to which the report could be sent, and provided a telephone number that members could call with any questions. On April 12, 2011, BATS sent an email to MKM's Chief Compliance Officer, William Arcuri, stating that BATS had not yet received MKM's report. After receiving this correspondence, MKM filed its 2010 report on April 15, 2011, 45 days late.

On February 8, 2012, BATS issued and sent to members, including MKM, Regulatory Circular 12-002, reminding members of their obligation to file their 2011 annual audit reports. Like the previous year's notice, the regulatory circular provided information on how to submit reports and invited members to contact BATS with questions.

Notwithstanding this reminder, MKM again failed to timely file its annual audit report. On May 25, 2012, BATS issued MKM a cautionary letter. The cautionary letter noted MKM's failure to file its report as required, and asked MKM to submit its report along with an acknowledgement of the cautionary letter, and a statement of the steps MKM intended to take to ensure its future compliance with its report filing obligations.

On May 29, 2012, MKM acknowledged receipt of the cautionary letter, submitted its 2011 annual audit report to BATS, and represented that it had "taken steps to assure compliance in the future by coordinating with our accounting department and CFO to provide a copy of our annual audit to BATS . . . not more than sixty . . . days after our year end per SEC Rule 17a-5(d)(5)." MKM's 2011 annual audit report was filed almost three months late.

On February 8, 2013, BATS once again issued a regulatory notice reminding members to submit their annual audit reports for 2012. Like the previous years' notices, this notice provided information on how to submit the report to BATS and a number to contact with any questions.

Notwithstanding BATS' annual reminder, MKM once again failed to timely file its report. On March 27, 2013, BATS followed-up with an email to MKM requesting the filing. MKM filed its report on April 4, 2013, more than 30 days late.

C. MKM's 2013 Annual Report

In 2014, BATS continued its previous practice of reminding members to timely file their annual audit reports. BATS issued Regulatory Circular 14-001 on February 5, 2014 (the "2014 Circular"). The 2014 Circular, which was sent to MKM, advised members that:

The purpose of [the] Regulatory Circular is to remind Members of their obligation under SEC Rule 17a-5(d) to file annual audit reports with all self-regulatory organizations to which such Members belong BATS Members are required to provide copies of their annual audit reports to [BATS].

The 2014 Circular went on to provide a fax number, email address, and mailing address to which the reports could be submitted. It also provided a contact telephone number for members with any questions.

After MKM once again missed the deadline for filing its annual audit report, BATS sent MKM a reminder email on March 27, 2014. This time, MKM did not respond, and BATS referred the matter to the Financial Industry Regulatory Authority ("FINRA") for investigation pursuant to BATS' regulatory services agreement with FINRA. MKM ultimately filed its report with BATS on June 20, 2014, more than three months late, and after it had been contacted by FINRA in connection with FINRA's investigation.

II. Procedural History

On March 9, 2015, BATS filed a one-cause complaint against MKM. The complaint alleged that MKM violated SEC Rule 17a-5(d) by failing to timely file its 2013 annual audit report with BATS. MKM submitted an answer to the complaint, denying the violation and asserting that: (1) the 2014 Circular was confusing and could be read as waiving the requirement to file the report with BATS; (2) it timely filed its report with FINRA and the SEC; and (3) that its failure to file timely with BATS should be treated as a minor rule violation and that sanctions would be inappropriate because MKM had already taken corrective action.

On April 27, 2015, the Hearing Officer held a prehearing conference call with counsel for BATS and MKM, and subsequently issued an April 28, 2015 order memorializing the discussion with the parties. The Hearing Officer's order states:

I confirmed with counsel that there are no material facts in dispute regarding the violation alleged in the Statement of Charges. Specifically, counsel for MKM confirmed that MKM failed to submit a copy of its 2013 annual audit with BATS Exchange, Inc. within 60 days following the end of MKM's fiscal year, as required by SEC Rule 17a-5(d)(6). Based on the parties' representations, I then explored whether a hearing was needed or whether the parties could submit their arguments on the papers. Counsel agreed that they would discuss the possibility of submitting the case on the papers.

In the event a hearing is needed, the parties agreed that the hearing would be held in New York City. Tentatively, I set a hearing for June 24, 2015. I further directed the parties to advise the Office of Hearing Officers no later than May 5, 2015, if they reach an agreement on proceeding on the papers. If the parties do not reach an agreement, I will issue a scheduling order setting the hearing for June 24, 2015. (Emphasis added.)

On May 5, 2015, BATS and MKM submitted a joint proposed scheduling order. The proposed scheduling order provided that the parties would agree to and submit a joint stipulation

of facts, set out the briefing schedule for a motion for summary disposition, and proposed a hearing date of June 24, 2015 “*should the matter not be resolved by motion or settlement prior to that date.*” (Emphasis added.) On May 6, 2016, the Hearing Officer issued an order adopting the parties’ proposed deadlines, and adding some additional deadlines.

BATS subsequently filed a motion for summary disposition by the agreed upon deadline. BATS’ motion included a memorandum of points and authorities in support of its motion, a statement of undisputed facts, and two sworn declarations attaching key documents.

MKM filed a timely opposition to the motion for summary disposition. MKM also filed a memorandum of supporting points and authorities, a response to BATS’ statement of undisputed facts, and two declarations attaching documents. While MKM argued in its opposition that there were material facts in dispute, it did not take the position that the Hearing Panel lacked the authority to decide the case on the papers without a hearing.

On June 5, 2015, days after the motion for summary disposition was fully briefed, the hearing officer issued an order adjourning the hearing and vacating the pre-hearing schedule. The Order explained that a new hearing panelist needed to be appointed, and that “[t]hereafter, the Hearing Panel [would] consider the pending motion for summary disposition [and] *if a hearing is required*, the case will be rescheduled.” (Emphasis added.) On June 8, 2015, the Hearing Officer notified the parties that a replacement panelist had been appointed and made the required disclosures concerning the panelists’ designations and backgrounds.

On September 1, 2015, the Hearing Panel issued its decision granting BATS’ motion for summary disposition. The Panel found that it had the power to grant a motion for summary disposition, that MKM violated Exchange Act Rule 17a-5(d) by failing to timely file its annual audit report with BATS, and that given the nature of the violation and the presence of aggravating factors, including the cautionary action letter MKM had previously received, sanctions of a \$2,500 fine and a censure were appropriate to remediate the misconduct and protect the investing public.

This appeal followed.

III. Discussion

While MKM acknowledges that it did not timely file its annual audit report with BATS, it raises several challenges to the Hearing Panel’s decision. First, MKM argues that the Hearing Panel should not have decided the case on the papers and that it was denied its right to a hearing under BATS rules. Second, MKM argues that the Hearing Panel wrongly granted the motion for summary disposition because there were material facts in dispute relevant to whether the sanction of a censure was appropriate. We have considered and reject MKM’s arguments. As discussed below, we find that the Hearing Panel had the authority to consider the motion for summary disposition and it correctly found that there are no genuine material facts in dispute.

A. The Hearing Panel Had the Authority to Decide the Motion for Summary Disposition

The Hearing Panel correctly found that it had the authority to decide a motion for summary disposition. While the BATS rules do not explicitly address motions for summary disposition, BATS Rule 8.6(d) gives the hearing panel the broad authority to “regulate the conduct of the hearing.” We agree with the Hearing Panel that this broad discretion includes the power to decide a case on the papers if the standard for summary disposition is met. The Commission and other self-regulatory organizations, including FINRA and the New York Stock Exchange, have summary disposition procedures. *See* SEC Rule of Practice 250; FINRA Rule 9264; NYSE Rule 9264. Moreover, the Commission has upheld a decision decided on a motion for summary disposition where the applicable rules did not explicitly provide for such motions. *See Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *8 n.3 (Jan. 9, 2009) (upholding a decision granting a motion for summary disposition pursuant to a rule which authorized the hearing officer to “resolve any and all procedural and evidentiary matters and substantive legal motions”), *aff’d*, 586 F.3d 122 (2d Cir. 2009).

We also agree with the Hearing Panel’s application of the standard contained in Federal Rule of Civil Procedure (“FRCP”) 56 in deciding the motion for summary disposition in this matter. FRCP 56 provides that a motion for summary judgment, or here disposition, shall be granted if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

Once again, the Commission has approved of the application of the FRCP 56 standard in the absence of an explicit standard governing such motions. *See Heath*, 2009 SEC LEXIS 14, at *41 n.64. (applying the standard in FRCP 56 where the NYSE rules at the time did not specify a governing legal standard for motions for summary disposition). Moreover, the Commission and FINRA apply a standard substantially identical to the FRCP 56 standard. *See Stephen L. Kirkland*, Initial Decisions Release No. 875, 2015 SEC LEXIS 3583, at *9 (Sept. 2, 2015) (stating that an ALJ may grant a motion for summary judgment under Commission Rule of Practice 250 if “there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law”) (internal quotations omitted); *Dep’t of Enforcement v. Walblay*, Complaint No. 2011025043201, 2014 FINRA Discip. LEXIS 3, at *22 (FINRA NAC Feb. 25, 2014) (affirming a decision granting a motion for summary disposition where the movant “demonstrated the absence of genuine issues of material fact”); *Dep’t of Enforcement v. Newberg*, Complaint No. CAF030013, 2004 NASD Discip. LEXIS 50, at *10-11 (NASD NAC July 6, 2004) (finding that the summary disposition standard under the applicable NASD rule was “identical to the standard under Rule 56(c) of the Federal Rules of Civil Procedure . . . governing summary judgments”).

Accordingly, we find that the Hearing Panel properly exercised its broad discretion under BATS Rule 8.6(d) to consider and grant BATS’ motion for summary disposition and properly applied the standard contained in FRCP 56 in deciding the motion.

1. BATS Rule 8.7 Does Not Apply to This Proceeding

MKM mistakenly relies on BATS Rule 8.7 to argue that the Hearing Panel did not have the authority to consider a motion for summary disposition and that it was wrongfully deprived of a hearing. MKM misunderstands that rule. Rule 8.7 does not apply to disciplinary proceedings. Instead, Rule 8.7 provides an alternative procedure where a respondent has admitted the charges asserted by BATS, failed to answer them, or the charges are otherwise not in dispute. Under those circumstances, BATS's chief regulatory officer can impose a penalty without a hearing. The rule, however, allows the respondent to request a hearing within a specified time period. If the respondent does request a hearing, then the case is converted to a disciplinary proceeding.

In this case, BATS never invoked the alternative procedure under BATS Rule 8.7. The complaint against MKM was handled under the disciplinary proceedings rules – i.e., a hearing panel was appointed to decide the case and the other applicable procedures were followed. Indeed, MKM received a hearing before a hearing panel, albeit one on the record, as it was within the discretion of the Hearing Panel to do once it determined that there were no material facts in dispute and BATS was entitled to judgment as a matter of law.

2. The Hearing Panel Issued a Decision as Required by BATS Rule 8.9

MKM's argument that the Hearing Panel did not provide a decision as required by BATS Rule 8.9 is similarly unfounded. Rule 8.9 provides that “[f]ollowing a hearing conducted pursuant to Rule 8.6 . . . the Hearing Panel shall prepare a decision in writing, based solely on the record . . . [which] shall include a statement of findings and conclusions, with the reasons therefor, upon all material issues presented on the record.” The Hearing Panel's decision in this case meets these requirements.

The Hearing Panel issued its decision after a hearing “conducted pursuant to Rule 8.6.” As discussed above, Rule 8.6 gives hearing panels the broad discretion to “regulate the conduct of the hearing,” including the authority to decide a case on a motion for summary disposition where the applicable standard is met. The Hearing Panel found, and we agree, that there were no genuine issues of material facts and BATS was entitled to judgment as a matter of law. Moreover, the Hearing Panel issued a written decision which set forth its factual findings, legal conclusions, and the reasons therefor, as required by the rule.

B. There Are No Genuine Disputes of Material Fact that MKM Violated Exchange Act Rule 17a-5(d) When it Failed to Timely File Its Annual Report with BATS

The Hearing Panel found that there were no genuine issues of material fact in dispute that MKM violated Exchange Act Rule 17a-5(d) by failing to timely file its annual audit report with BATS. After an independent review of the record, we affirm.

Applying the standard contained in FRCP 56, a motion for summary disposition should be granted where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” An issue of material fact exists “if the evidence is such that a

reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986). In determining whether a genuine issue of material fact exists, the evidence of the non-moving party must be believed and all reasonable inferences must be drawn in favor of the non-moving party. *Id.* at 255. Once the moving party has shown that there is no genuine issue of material fact and it is entitled to judgment as a matter of law, the non-moving party must come forward with “specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Moreover, the non-moving party “may not rely on conclusory allegations or unsubstantiated speculation.” *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1988). Rather, the non-moving party must offer “concrete evidence from which a reasonable juror could return a verdict in his favor.” *Anderson*, 477 U.S. at 256.

Exchange Act Rule 17a-5(d)(1)(i) requires that every registered broker or dealer file an annual financial report which meets certain specified requirements and is prepared by an independent public accountant. 17 C.F.R. § 240.17a-5(d)(1)(i); 17 C.F.R. § 240.17a-5(d)(2). The report must be filed within sixty calendar days after the end of the broker’s or dealer’s fiscal year. 17 C.F.R. § 240.17a-5(d)(5). In addition to filing the report with the Commission, “[c]opies of the reports must be provided to all self-regulatory organizations of which the broker or dealer is a member, unless the self-regulatory organization by rule waives this requirement.” 17 C.F.R. § 240.17a-5(d)(6).

MKM has repeatedly acknowledged that it did not timely file its 2013 annual report with BATS as required by Exchange Act Rule 17a-5(d)(6). MKM’s 2013 fiscal year ended on December 31. MKM did not, however, file its report by March 3, 2014, as required.¹ MKM filed its report with BATS on June 20, 2014, more than three months late. MKM missed its filing deadline despite receiving BATS’ 2014 Circular reminding members to file and BATS’ March 27, 2014 email sending a second reminder, and only filed its report after FINRA began its investigation on behalf of BATS. MKM’s late filing was a violation of Exchange Act Rule 17a-5(d).

While acknowledging the untimely filing of its annual audit report with BATS, MKM argues that the Hearing Panel wrongfully granted the motion for summary disposition because MKM raised disputed material facts that required a hearing. We address each of these below.

1. BATS Did Not Waive the Filing Requirement

MKM argues that the 2014 Circular was confusing and could be read as a waiver by BATS of the filing requirement under Exchange Act Rule 17a-5(d)(6). Notably, MKM does not assert that it actually misunderstood the 2014 Circular at the time. To the contrary, at the time it called the late filing an “administrative error.” The Hearing Panel rejected this argument and we agree.

¹ March 1, 2014 was a Saturday, making MKM’s report due the following business day, or Monday, March 3.

First, we agree with the Hearing Panel that the 2014 Circular is unambiguous concerning members' obligations to file their annual reports with BATS. The 2014 Circular plainly says its purpose is to "remind [m]embers of their obligation . . . to file annual audit reports . . ." While the 2014 Circular does omit the amendment to Exchange Act Rule 17a-5(d)(6) providing that a self-regulatory organization may by rule waive the filing requirement, it accurately quotes, in bold, the general rule that copies of annual reports "shall be provided to all self-regulatory organizations of which said broker or dealer is a member." The 2014 Circular goes on to state that "BATS [m]embers are required to provide copies of their annual audit reports to [BATS]," and provides instructions for how to submit the reports. We agree with the Hearing Panel that this wording "precludes MKM's strained construction" that the 2014 Circular could be read as a waiver of the filing requirement.

Second, to the extent MKM did have any genuine confusion concerning the 2014 Circular, that confusion could have quickly been resolved had MKM contacted BATS for clarification at the number provided in the 2014 Circular for members who "have any questions in connection with [it]." MKM does not claim that it took any steps to clear up this alleged confusion. Indeed, MKM does not appear to have ever claimed any actual confusion at the time for what it called its "administrative error." Moreover, any misunderstanding MKM claims to have had should also have been cleared up by BATS' March 27, 2014 reminder email informing MKM that a "copy of [its] full report . . . should be submitted to BATS membership services as soon as possible." MKM, however, did not submit its report until almost three months later, and only after FINRA had commenced its investigation.

Finally, Exchange Act Rule 17a-5(d)(6) allows self-regulatory organizations to waive the filing requirement "by rule." It is undisputed that BATS never enacted any such rule. Accordingly, even if MKM's claimed "confusion" about the 2014 Circular was genuine, it would not excuse its failure to timely file given that MKM knew, or should have known, no such rule had been enacted by BATS.

2. There Is No Evidence that MKM Was Unfairly Targeted for Failing to Settle with BATS

MKM argues that it was unfairly targeted for disciplinary action by BATS after it declined to settle with BATS over its late filing. MKM takes issue with BATS's refusal to settle without a censure, and argues that it was differently situated from other firms that settled for the same violation because it had an "unblemished regulatory record." We have made an independent review of the record and find no evidence of any such unfairness towards MKM.

First, as a registered national securities exchange, BATS has an obligation to enforce its rules and, in becoming a member of BATS, MKM consented to be regulated by it. MKM was given the opportunity to settle but declined to do so on the terms offered by BATS. Moreover, BATS had no obligation to agree to the settlement terms MKM demanded, and its refusal to do so is not evidence of unfairness towards MKM. BATS was entitled to request the sanction it thought appropriate in settlement without reference to sanctions imposed against other members. See *William Scholander*, Exchange Act Release No. 74437, 2015 SEC LEXIS 841, at *21 (Mar. 4, 2015) (stating that the "Commission has consistently held that the appropriateness of the

sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases”) (internal quotes omitted); *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908 (Dec. 11, 2014) (same), *aff'd*, 2016 U.S. LEXIS 4367 (2d Cir. 2016).

Second, the record shows that with respect to its annual audit report filings, MKM’s record was not as “unblemished” as it claims. MKM’s filings were late for each of the three years prior to the misconduct at issue, and it had previously received a cautionary letter from BATS warning MKM about its late filings. Notwithstanding its representation that it had taken corrective action to ensure timely filing, MKM continued to miss the filing deadline for the next two years, including the violation at issue here. Under these circumstances, BATS’ insistence that a censure be part of any settlement is not evidence of bias or unfairness towards MKM.

3. There Is No Evidence of Bias By the Hearing Officer

MKM accuses the Hearing Officer of acting “arbitrarily,” not being impartial, and suggests that it was somehow surprised by the Hearing Panel’s decision to grant the motion for summary disposition because “[t]here was never any indication” that the case would be decided on the papers without a hearing. We have carefully reviewed the record, and find MKM’s claims utterly baseless.

There is no evidence that the Hearing Officer acted arbitrarily. As discussed above, the Hearing Panel correctly found that it had the authority to decide the motion for summary disposition and we agree with the Hearing Panel’s conclusion that there are no genuine issues of material fact with respect to MKM’s violation of Exchange Act Rule 17a-5(d). We find that the Hearing Panel’s decision is supported by the record evidence and applicable law.

Moreover, MKM’s claim that there was no indication that it would not get a hearing is simply contrary to the facts. The record shows that the Hearing Officer raised the possibility of deciding the case on the papers during the first conference call with the parties, which was memorialized in an order issued the next day. During that call, counsel for MKM conceded that the annual audit report had not been timely filed and counsel agreed to discuss the possibility of submitting the case on the papers. The order also scheduled a *tentative* hearing date.

After this conference call, MKM and BATS submitted a joint proposed order which set a schedule for briefing on a motion for summary disposition, and scheduled a hearing date “should the matter not be resolved by motion.” BATS subsequently filed a motion for summary disposition and MKM submitted papers in opposition. After the motion was fully briefed, the Hearing Officer issued a second order which specifically said the Panel would consider the motion for summary disposition and reschedule the hearing if it was required.

MKM’s contention that it was taken by surprise by the Hearing Panel decision is not credible. The record shows that MKM fully participated in scheduling and briefing the motion. We note as well that MKM never objected to the Hearing Panel considering the motion for summary disposition until it filed this appeal. Under these circumstances, MKM’s contention

that it was treated unfairly by the Hearing Panel because it did not prevail on its opposition to the motion is without merit.

4. MKM's Filings with Other Regulators Do Not Excuse Its Late Filing with BATS

MKM also suggests that its failure to timely file its annual audit report with BATS was not significant because the audit had already been filed with the Commission and FINRA and, therefore, was publically available.² MKM's filings with other regulators, however, do not excuse its failure to timely file with BATS as required by Exchange Act Rule 17a-5(d). As discussed above, Exchange Act Rule 17a-5(d) requires that a registered broker or dealer file its annual audit report with every self-regulatory organization of which it is a member, unless that regulator by rule waives the filing requirement. BATS did not waive the filing requirement here, and relied on its members to file their reports in order for it to fulfill its regulatory oversight functions. It is irrelevant that the report may have been available from another source. BATS required its members to file the report with it, and MKM was obligated to comply with BATS rules.

IV. Sanctions

While MKM acknowledges the violation and need for a sanction, it argues that the censure imposed by the Hearing Panel is excessive, particularly as compared to the sanctions imposed by other regulators who treat this misconduct as a minor rule violation. We have considered MKM's arguments and we disagree. We find that the sanction of a \$2500 fine and censure is appropriately remedial and fair given the nature of MKM's violation and its record of late annual audit report filings, and we affirm it.

² Related to this argument, on February 8, 2016, MKM submitted a motion to adduce additional evidence in this appeal. MKM seeks the admission of two documents: (1) BATS Regulatory Circular 16-001 dated January 27, 2016, in which BATS announced that beginning in 2016, annual audit reports would be submitted through FINRA's Firm Gateway System; and (2) FINRA Regulatory Notice 16-05 dated January 2016, in which FINRA notified members of the SEC's no-action letter permitting electronic filing of annual audit reports. MKM argues that these documents are relevant to the appropriate sanction in this case because had these rules been in effect in 2014, MKM's filing with FINRA would have satisfied its filing obligations with BATS.

MKM's motion to adduce is denied. The documents MKM seeks to introduce are dated almost two years after the misconduct at issue in this matter and, therefore, are completely irrelevant. Moreover, even if admitted, these documents do not change the outcome of this matter. In 2014, the time at issue in this case, MKM was required to file its annual audit report with BATS. The fact that BATS now accepts filing through a FINRA system does not change the fact that MKM did not comply with its regulatory obligations at the time.

A. The Sanction of a Censure and Fine Is Appropriate for MKM's Misconduct

The purpose of a sanction is to remediate misconduct and protect the investing public. *See McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005) *see also The Dratel Group, Inc.*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035, at *59 (Mar. 17, 2016) (sanctions should be remedial and are imposed with “due regard for the public interest and the protection of investors”). One of the factors to consider in imposing a sanction is whether the respondent’s misconduct “fits within a broader pattern of noncompliance.” *Id.* at *65.

We agree with the Hearing Panel that considering these factors, a censure and fine is appropriate for MKM’s misconduct. The record shows that MKM filed its annual audit reports late for four consecutive years. Moreover, MKM continued its late filings despite receiving annual reminders from BATS, a cautionary letter, and representing to BATS that it had taken steps to prevent future violations. MKM’s conduct shows a disregard for its obligation to comply with regulatory rules. We are also troubled by MKM’s attempt to minimize the importance of its misconduct and to blame BATS by arguing that the 2014 Circular, which clearly set forth MKM’s filing obligations, was somehow misleading. Under these circumstances, we find that a censure and \$2,500 fine is an appropriately remedial sanction.

B. A Violation of SEC Rule 17a-5(d) Is Not a Minor Rule Violation Under BATS Rules and BATS Is Not Required to Assess the Same Sanction as Other Regulators

MKM argues that the Hearing Panel had the authority to treat its violation of Exchange Act Rule 17a-5(d) as a minor rule violation under BATS Rule 8.15, and unfairly declined to do so. Once again, MKM misunderstands the applicable rules.

Exchange Act Rule 19d-1 requires self-regulatory organization such as BATS to report to the Commission when it takes certain disciplinary actions against members. Exchange Act Rule 19d-1(c)(2) provides an exception to this reporting rule where the violation “has been designated as a minor rule violation pursuant to a plan or any amendment thereto filed with and declared effective by the Commission.” In 2008, the Commission approved BATS’ minor rule violation plan contained in BATS Rule 8.15. *See* 73 Fed. Reg. 74540 (2008).

BATS Rule 8.15 provides that BATS *may* in lieu of commencing a disciplinary hearing impose a fine not to exceed \$2,500 for certain enumerated minor rule violations. A person fined under Rule 8.15 may challenge the imposition of the fine by filing a written response which converts the matter into a conventional disciplinary proceeding. Rule 8.15(e) requires that BATS “prepare and announce to its Members and Member organizations from time to time a listing of the [BATS] [r]ules as to which [BATS] may impose fines” under Rule 8.15.

Exchange Act Rule 17a-5(d) is not, and has never been, included in BATS’ Commission-approved minor rule violation plan. Accordingly, BATS never had the option to treat MKM’s misconduct as a minor rule violation in lieu of commencing a disciplinary proceeding. Moreover, even if Rule 17a-5(d) had been included in the minor rule violation plan, BATS’ decision to impose a fine on a member without a hearing pursuant to that rule is optional, and

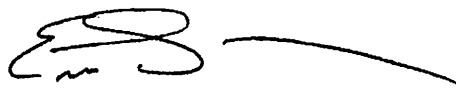
BATS could have elected to proceed by commencing a disciplinary proceeding, as it did here. See BATS Rule 8.15(e) (“[n]othing in [8.15] shall require [BATS] to impose a fine pursuant to this [r]ule with respect to the violation of any [r]ule included in” the plan); See also, *Schon-Ex, LLC*, Exchange Act Release No. 57857, 2008 SEC LEXIS 1194, at *30 (May 23, 2008) (rejecting respondent’s argument that a violation should have been treated as a minor rule violation where certain rules were not included in the NY Stock Exchange’s minor rule violation plan, and because the Exchange had discretion whether to treat other violations as a minor rule violation); *Sig Specialists, Inc.*, 58 S.E.C. 519, 534 (2005) (explaining that the NY Stock Exchange had discretion to treat a violation under its minor rule violation plan). The form of the proceeding here was in BATS’ discretion, not that of the Hearing Panel. Moreover, the fact that another regulator may include a violation of Exchange Act Rule 17a-5(d) in its Commission-approved minor rule violation plan is completely irrelevant.

MKM is correct that the Hearing Panel had the discretion to impose an appropriate sanction here, and could have determined that a fine alone was sufficient. As discussed above, however, the Hearing Panel properly found that a fine and censure was appropriate given MKM’s misconduct and its history of late filings. In short, MKM’s misconduct was properly adjudicated as part of a disciplinary proceeding and, as discussed above, the Hearing Panel imposed an appropriately remedial sanction.

V. Conclusion

We find that MKM failed to timely file its 2013 annual audit report with BATS in violation of Exchange Act Rule 17a-5(d). For this violation, MKM is censured and we order MKM to pay a fine of \$2,500.

On behalf of the BATS Appeals Committee,



Eric Swanson
Corporate Secretary

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