UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93653 / November 23, 2021

Admin. Proc. File No. 3-20643

In the Matter of the Application of

LEK SECURITIES CORPORATION

For Review of Action Taken by the

National Securities Clearing Corporation

Appeal filed: November 1, 2021
Application for stay filed: November 1, 2021
Last brief received: November 8, 2021

ORDER DENYING STAY

Lek Securities Corporation ("Lek"), a registered broker, appeals a determination by the National Securities Clearing Corporation ("NSCC"), a registered clearing agency, to impose a monetary cap on Lek's unsettled clearing activity. Lek has also appealed within NSCC. Lek now moves the Commission to stay NSCC's action pending Lek's appeal to the Commission. NSCC opposes Lek's request on the ground that the activity cap is not a final action and that Lek did not exhaust its administrative remedies before NSCC before seeking relief from the Commission. Because Lek has not met its burden for granting a stay, its request is denied.

I. Background[1]

Lek states that it is a broker registered with the Commission whose business is limited to effecting transactions on an agency basis for its customers and those of other brokers. NSCC is a registered clearing agency under Section 17A of the Securities Exchange Act of 1934 and a self-regulatory organization subject to Exchange Act Section 19.[2]

[1] We base our summation of the facts on the parties' submissions. Neither party submitted any underlying documents relevant to this matter, including any correspondence from NSCC informing Lek of the determination that is the basis for Lek's appeal and that it seeks to stay.

[2] 15 U.S.C. §§ 78q-1, 78s.

On October 26, 2021, NSCC imposed a cap of $300 million of aggregate unsettled clearing activity as measured by the gross market value of Lek's unsettled portfolio each business day coinciding with the approval of Lek's start-of-day margin call (the "Activity Cap"). According to Lek, "[t]he stated basis for the imposition of the Activity Cap is 'summarily limiting [Lek's] clearing activity' and occurs in the context of a determination by NSCC 'to cease to act for [Lek], subject to [Lek's] right to a hearing." Lek also states that it was informed that the Activity Cap was intended to help it in winding down, but that it has no intention to do so. On October 29, 2021, Lek filed a request for a hearing before NSCC appealing its determination to cease acting for Lek and the imposition of the Activity Cap.

On November 1, 2021, Lek filed a letter with the Commission pursuant to Rule 19d-3 of the Securities Exchange Act of 1934,[3] and Commission Rule of Practice 420,[4] seeking to appeal NSCC's determination to impose the Activity Cap and a stay of the Activity Cap until the conclusion of NSCC's hearing process and of any further appeal of that decision. In the letter, Lek characterizes the Activity Cap as both a "sanction" and a "summary limitation of access to clearing services implemented by NSCC" that "imposes an unfair and unreasonable limitation of the activities and operations of [Lek] under the applicable rules of NSCC." Lek also argues that it is "inconsistent" for NSCC to "subject[] its determination to cease acting to a hearing and, at the same time, [to] truncat[e] L[ek]'s clearing activities before the hearing has been completed." Lek adds that it "believes that the hearing will result in NSCC continuing to act for [Lek]."

On November 8, 2021, NSCC filed a letter opposing Lek's request for a stay. NSCC states that the amount of the Activity Cap was revised to $400 million and that "a hearing on the Activity Cap as revised is now pending." NSCC argues that for this reason "the matter is not 'final' and any application for review and stay of the Activity Cap pending completion of the requested hearing is improper." NSCC also contends that "because [Lek] has not exhausted its remedies with the NSCC, the issues raised in the [Lek] filing are not ripe for review and adjudication by the Commission." Lek did not file a reply responding to NSCC's arguments.

II. Analysis

A stay pending appeal is an "'extraordinary remedy,'" and the movant bears the burden of establishing that relief is warranted.[5] We emphasize that our conclusions with respect to a stay motion "are not final," and that "[f]inal resolution must await the Commission's

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[3] 17 C.F.R. § 240.19d-3.

[4] 17 C.F.R. § 201.420.

[5] *Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780, at *7 (July 31, 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 432-34 (2009)); *accord, e.g., Dreamfunded Marketplace, LLC*, Exchange Act Release No. 93566, 2021 WL 5311630, at *2 (Nov. 12, 2021).

determination of the merits of [Lek's] appeal."[6] We base the conclusions that we reach in considering a stay motion "only on a review of the record and arguments currently before us."[7]

In deciding whether to grant a stay under Rule of Practice 401,[8] we consider whether the movant has established that (i) there is a strong likelihood that it will eventually succeed on the merits of the appeal; (ii) it will suffer irreparable harm without a stay; (iii) no other person will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.[9] "The appropriateness of a stay turns on a weighing of the strengths of these four factors; not all four factors must favor a stay for a stay to be granted."[10] "The first two factors are the most critical, but a stay decision rests on the balancing of all four factors."[11]

To obtain a stay under this framework, a movant need not necessarily establish that it is likely to succeed on the merits but it must at least show "that the other factors weigh heavily in its favor" and that it has "raised a 'serious legal question' on the merits."[12] "In other words, 'even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the [stay opponent] if a stay is granted, [it] is still required to show, at a minimum, serious questions going to the merits.'"[13] "Because the moving party must not only show that there are 'serious questions' going to the merits, but must additionally establish that 'the balance of hardships tips *decidedly*' in its favor, its overall burden is no lighter than the one it bears under the 'likelihood of success' standard."[14] Lek has not met its burden under this standard.

A. Lek fails to raise a serious question on the merits.

Lek fails to establish that it is likely to succeed on the merits in its challenge to the Activity Cap or that it has raised a serious legal question on the merits. First, Lek fails to

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6 *Bloomberg*, 2018 WL 3640780, at *7 (quoting *Harry W. Hunt*, Exchange Act Release No. 68755, 2013 WL 325333, at *4 (Jan. 29, 2013)).

7 *Id*.

8 17 C.F.R. § 201.401(d)(1); *see also* Exchange Act Section 19(d)(2), 15 U.S.C. § 78s(d)(2) (authorizing Commission to stay challenged self-regulatory organization action).

9 *Windsor Street Capital, L.P.*, Exchange Act Release No. 83340, 2018 WL 2426502, at *3 (May 29, 2018); *Ahmed Gadelkareem*, Exchange Act Release No. 80586, 2017 WL 1735943, at *1 (Apr. 28, 2017).

10 *Bloomberg*, 2018 WL 3640780, at *7.

11 *Id.*

12 *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *6 (Nov. 27, 2017) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011)).

13 *Id.* (cleaned up) (quoting *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015)).

14 *Id.* (cleaned up) (quoting *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (emphasis in original) (internal quotation marks and citation omitted)).

respond to NSCC's argument that its request for relief is premature.[15] Lek does not dispute that NSCC has not taken final action with respect to the Activity Cap, and it acknowledges that the Activity Cap is the subject of a pending proceeding before NSCC. And although Lek relies on Exchange Act Section 19(e)(2) as support for a stay, that provision applies to Commission review of "final disciplinary sanction[s]."[16] Lek also does not assert that it sought a stay of the Activity Cap from NSCC before seeking a stay from the Commission. Based on the arguments to date, Lek has not shown that it may bring a challenge to the Activity Cap before the Commission, while its challenge to that same action is pending before NSCC.

Second, even if Lek had addressed NSCC's argument that it has not yet exhausted its administrative remedies at NSCC, it has not raised a serious question with respect to the merits of the Activity Cap. Although Lek has purported to identify the basis on which NSCC imposed the Activity Cap, it did not submit NSCC's letter notifying it of the action, or any underlying materials, thus making it impossible to assess the merits of its challenge.

In any case, the arguments that Lek presents are not persuasive at this stage of proceedings. Lek attributes the Activity Cap to NSCC's decision to cease acting for it, which it is appealing before NSCC, and states that it does not intend to wind down operations. Lek states that it believes that the hearing on its appeal before NSCC will result in NSCC continuing to act for it. But Lek does not explain why it thinks it will succeed in its challenge to NSCC's decision to cease acting for it or show why doing so would mean that it necessarily would also prevail on its challenge to the Activity Cap.[17] Lek also asserts that the Activity Cap is "unfair and unreasonable" under applicable NSCC rules, but it does not identify those rules or explain why they support its assertion. And although Lek asserts that NSCC has acted inconsistently by making the Activity Cap immediately effective but its decision to cease acting for NSCC potentially effective only after a hearing, it has not asserted that this violates any NSCC obligation. Finally, because it did not file a reply brief, Lek did not address how NSCC's decision to raise the Activity Cap by $100 million affects its arguments. Accordingly, Lek has not shown that it has raised a serious legal question on the merits.

B. Lek has not established that it will suffer irreparable harm absent a stay.

To establish irreparable harm, a movant "must show an injury that is 'both certain and great' and 'actual and not theoretical'" and "'that the alleged harm will directly result from the

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15 *See generally MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621 (2d Cir. 2004) (addressing requirement of exhaustion of remedies before self-regulatory organizations).

16 15 U.S.C. § 78s(e)(1) & (2).

17 *Cf. Richard Allen Riemer, Jr.*, Exchange Act Release No. 82014, 2017 WL 5067462, at *2-3 (Nov. 3, 2017) (finding a "complete failure to attempt to establish a likelihood of success on the merits" where the movant did "not even assert that his appeal is likely to succeed," "attempt to rebut FINRA's findings or further develop his arguments," or "explain why they now are likely to succeed" despite having been rejected by FINRA).

action which the movant seeks to [stay].'"[18] Lek does not contend that it will suffer irreparable harm if the Activity Cap is not stayed, nor did it identify or substantiate the impact that the Activity Cap has on its operations. In particular, Lek did not explain how the Activity Cap, which NSCC asserts is now set at $400 million, compares to any limitations that were in place previously and how any change has impacted or harmed Lek's business activities.

Lek states that it was "informed orally that the Activity Cap was intended to help [Lek] in winding down." Although the Commission has held that in some circumstances "the destruction of a business, absent a stay , . . rises to the level of irreparable injury,"[19] Lek does not contend that the Activity Cap will cause its business to fail. Thus, Lek has not shown that it is likely to suffer irreparable harm without a stay.

C. Lek has not shown that the risk of harm to others and the public interest support a stay.

Lek also does not mention the final two factors in its request for a stay: whether other persons will suffer substantial harm as a result of a stay and whether a stay is likely to serve the public interest. Based on the limited information before us, we conclude that Lek has not shown that these factors weigh in favor of granting relief.

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Lek has not satisfied its burden of establishing that a stay is warranted. Accordingly, it is ORDERED that Lek's motion for a stay is denied.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

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[18] *Zipper*, 2017 WL 5712555, at *4 (alteration in original) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)).

[19] *Scottsdale Cap. Advisors Corp.*, Exchange Act Release No. 83783, 2018 WL 3738189, at *3 (Aug. 6, 2018) (quoting *Scattered Corp.*, 52 SEC 1314, 1997 LEXIS 2748, at *15 (Apr. 28, 1997)).