

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93837 / December 20, 2021

Admin. Proc. File No. 3-20665

In the Matter of the Application of
LEK SECURITIES CORPORATION
For Review of Action Taken by the
Options Clearing Corporation

Appeal filed: November 18, 2021
Application for stay filed: November 18, 2021
Last brief received: December 2, 2021

ORDER DENYING STAY

Lek Securities Corporation (“Lek”), a registered broker, appeals a determination made on October 15, 2021, by the Options Clearing Corporation (“OCC”), a registered clearing agency, to increase Lek’s additional margin charge to 50% and require Lek to provide daily end-of-day reporting on liquidity sources and uses. Lek also moves the Commission to stay OCC’s action pending Lek’s appeal to the Commission. OCC opposes Lek’s request on the grounds that Lek has failed to show that it is entitled to relief under the four-part test that the Commission applies when an applicant seeks a stay of action by a self-regulatory organization (“SRO”). Because Lek has not met its burden for granting a stay, its request is denied.

I. Background

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. OCC 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 19.¹ Lek is an OCC clearing member.

¹ 15 U.S.C. §§ 78q-1, 78s.

On October 15, 2021, OCC informed Lek that, effective October 18, 2021, OCC was imposing protective measures upon Lek “due to recent and ongoing developments related to” Lek’s “liquidity risk, operational risk and regulatory risk profiles.” First, in accordance with OCC Rules 601 and 609, OCC set Lek’s “additional margin charge” at “50% to mitigate exposures observed in OCC’s sufficiency and adequacy stress test shortfalls.” Second, in accordance with OCC Rule 306, OCC also required Lek to provide “daily end-of-day liquidity sources and uses reporting covering all available bank lines of credit, parent lines of credit, securities financing, unencumbered cash-on-hand, etc.”

On October 22, 2021, Lek sent a letter to OCC requesting review of the protective measures under OCC Rule 305(c) and stating that those measures were “based on erroneous information.” Lek also requested that no action be taken until OCC “conducted a full review of this matter” and Lek “had the opportunity to be heard.” On October 29, 2021, OCC sent a letter to Lek stating that the protective measures “are risk management tools that are within OCC’s discretion under the applicable Rules and are not subject to a Clearing Member’s request for review by the Risk Committee under Rule 305(c).”

On November 18, 2021, Lek filed a letter with the Commission pursuant to Exchange Act Rule 19d-3 and Commission Rule of Practice 420 seeking to appeal OCC’s imposition of the protective measures.² In the letter, Lek stated that the protective measures “limit[ed] or prohibit[ed] [it] from utilizing a fundamental service of OCC.” Lek also argued that the protective measures were improper because OCC primarily based them on “its erroneous understanding of [Lek’s] liquidity needs and its misunderstanding that the FINRA has taken certain actions with respect to [Lek].” Lek requested that the Commission stay the protective measures because it “is likely to prevail on its request to terminate” them before the Commission and “because they are resulting in ongoing and continuing harm to [Lek].” Lek attached the October 15, 22, and 29, 2021 correspondence to its letter to the Commission, but did not submit any affidavits, declarations, or any other evidence with its letter.

On December 2, 2021, OCC filed a letter opposing Lek’s application and request for a stay. OCC contended that the “protective measures are risk management controls within OCC’s discretion” that are not reviewable under Exchange Act Section 19(d) because they “do not constitute any form of disciplinary action, denial of membership or participation, or prohibition or limitation on access to services.” OCC also argued that, even if Lek’s appeal were reviewable, Lek failed to carry its burden to demonstrate that a stay is warranted because it did not sufficiently support its request for a stay. Lek did not respond to OCC’s December 2 letter.

² 17 C.F.R. § 240.19d-3 (providing that applications for review of eligible SRO action “shall be made” pursuant to Commission Rule of Practice 420); 17 C.F.R. § 201.420.

II. Analysis

A stay pending appeal is an “extraordinary remedy,” and the movant bears the burden of establishing that relief is warranted.³ We emphasize that our conclusions with respect to a stay motion “are not final,” and that “[f]inal resolution must await the Commission’s determination of the merits of [Lek’s] appeal.”⁴ We base the conclusions that we reach in considering a stay motion “only on a review of the record and arguments currently before us.”⁵

In deciding whether to grant a stay under Rule of Practice 401,⁶ 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.⁷ “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.”⁸ “The first two factors are the most critical, but a stay decision rests on the balancing of all four factors.”⁹

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.”¹⁰ “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.’”¹¹ “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

³ *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).

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

⁵ *Id.*

⁶ 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).

⁷ *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).

⁸ *Bloomberg*, 2018 WL 3640780, at *7.

⁹ *Id.*

¹⁰ *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)).

¹¹ *Id.* (quoting *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015)) (alterations in *Revel*) (internal citation omitted).

hardships tips *decidedly*” in its favor, its overall burden is no lighter than the one it bears under the “likelihood of success” standard.”¹² 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 protective measures or that it has raised a serious legal question on the merits for two reasons. First, assuming that the Commission may review OCC’s protective measures under Exchange Act Section 19(d), Lek fails to support its assertion that it is “likely to prevail” on its request to terminate them. Rule of Practice 401(a) provides that “if the facts [underlying a stay motion] are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof.”¹³ Lek did not submit any sworn statement to support its attempt to dispute the factual basis on which OCC imposed the protective measures. Because Lek relies solely on unsupported factual assertions, it has failed to raise a serious question on the merits.

Second, Lek fails to respond to OCC’s argument that the protective measures are risk management controls which are not subject to review under Exchange Act Section 19(d).¹⁴ 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 action which the movant seeks to [stay].”¹⁵ Lek alleges that the protective measures “are resulting in ongoing and continuing harm” to it. But it fails to describe or substantiate that harm and does not allege that it is irreparable. A “bare assertion of irreparable harm is never sufficient to prove such harm” or justify the extraordinary remedy of a stay.¹⁶ Accordingly, Lek has not shown that it is likely to suffer irreparable harm without a stay.¹⁷

¹² *Id.* (quoting *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (emphasis in original) (internal citation omitted)).

¹³ 17 C.F.R. § 201.401(a).

¹⁴ *Cf. Lek Sec. Corp.*, Exchange Act Release No. 93653, 2021 WL 5494717, at *3 (Nov. 23, 2021) (finding in challenge to action of another SRO that Lek failed to raise the serious legal question on the merits necessary to justify a stay of the SRO’s action when it “fail[ed] to respond to [the SRO’s] argument that its request for relief [wa]s premature”).

¹⁵ *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)).

¹⁶ *Takeda Pharms. USA v. Mylan Pharms. Inc.*, 967 F.3d 1339, 1349-50 (Fed. Cir. 2020).

¹⁷ *Cf. Lek Sec. Corp.*, 2021 WL 5494717, at *3 (finding that Lek failed to establish that it would suffer irreparable harm if SRO action was not stayed because it did not “contend that it will suffer irreparable harm if the [action] is not stayed, nor did it identify or substantiate the impact that the [action] has on its operations”).

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

Lek 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. Consequently, Lek also has not shown that these factors weigh in favor of granting relief.¹⁸

* * *

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

¹⁸ *Cf. id.* at *4 (finding that Lek failed to show that the final two factors supported its request for a stay where it did not mention them).