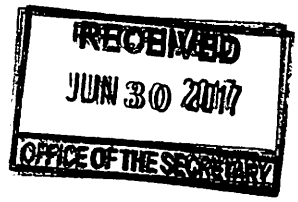
ADMINISTRATIVE PROCEEDING



FILE NO. 3-14104r

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

SHAREMASTER
c/o Howard Feigenbaum
460 Tewell Drive
Hemet, CA 92545

For Review of Action Taken by

FINRA

SHAREMASTER'S REPLY TO FINRA'S OPPOSITION BRIEF

JUNE 30, 2017

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I. INTRODUCTION

The Commission's Order Scheduling Briefs on Remand reads:

> On February 2, 2017, the U.S. Court of Appeals for the Ninth Circuit remanded the matter to the Commission. In light of the remand, the parties are directed to file briefs addressing, among other matters, the Commission's jurisdiction over Sharemaster's application for review in light of the Ninth Circuit's decision and the merits of Sharemaster's petition for review.[1]

FINRA's statement of the Commission's Order Scheduling Briefs on Remand reads:

> 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.[2]

Sharemaster notes that FINRA's insertion of a conditional clause in its restatement of the Commission's briefing Order has skewed the obligation to carry out the Ninth Circuit's Order to review the merits of Sharemaster's petition—which is based on the FINRA Hearing Panel decision of October 6, 2010 and its ruling on the issue of whether or not an SEC staff interpretation properly bars Sharemaster from using an exemption provided in Exchange Act Rule 17a-5(e)(1)(i)(A).

II. BACKGROUND

Sharemaster is appealing the October 10, 2010 decision reached by a FINRA Hearing Panel denying the firm use of a statutory exemption which allows the filing of an annual statement that need not be audited.

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[1] Order Scheduling Briefs on Remand; Securities Exchange Act of 1934 Release No. 80471/April 17, 2017, underscore added.

[2] FINRA's Brief In Response To The Commission's April 17, 2017 Order And In Opposition To Sharemaster's Application For Review, Introduction, p. 1, underscore added.

Sharemaster's position is that it qualifies for the exemption by virtue of the fact that

1. the firm acts as an agent and
2. does not hold or owe any customer money, securities or debts and
3. properly-filed supporting notarized statements with its annual report.[3]

The Hearing Panel based its denial on an SEC staff interpretation of the Exchange Act Rule that limits use of the exemption to firms representing a "single issuer."

FINRA refused to accept the timely-filed statement and deemed it not filed.

On May 3, 2010, Sharemaster received a FINRA Notice of Suspension and Notice of Fee. FINRA took the fee assessed, in the amount of $1,000 for late-filing, from the firm's Central Registration Depository (CRD) account on May 13, 2010. FINRA still holds the $1,000.[4]

Sharemaster requested a hearing which was held on June 24, 2010. The focus of the Hearing, as stated by the FINRA Hearing counsel, centered on the "single-issuer" limitation required by the SEC staff interpretation.[5]

On October 6, 2010, the FINRA Hearing Panel adopted the SEC staff

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[3] Exchange Act Rules 17a-5(e)(1)(i)(A), 17a-5(e)(1)(ii), (17a-5(e)(2)(i) and 17a-5(e)(2)(ii); FINRA Hearing, Complainant's Exhibit 6 (CX-6), Annual Audit. In filing Exhibit CX-6, Complainant omitted Sharemaster's statement of qualification for the exemption. Upon Sharemaster's motion, Complainant agreed to submit the additional information. The Hearing Officer approved. See transcript, pp. 11-12.

[4] Sharemaster's Response in Opposition to FINRA'S Motion for Leave to Submit Additional Evidence, May 31, 2017, Appendix, Attachment A.

[5] Hearing Transcript, p.15.

interpretation as correct. However, the decision did not explain the nature of the interpretation which justifies its limitation to firms representing one issuer and not to firms representing two or more issuers.[6]

On remand, August 29, 2013, the Commission dismissed Sharemaster's Application for Review.

On February 2, 2017, based on a $1,000 fine which preserved jurisdiction, the 9th Circuit Court of Appeals granted Sharemaster's Petition for Review before the Commission.

III. ARGUMENT

A. FINRA argues that no final disciplinary sanction exists to confer on the Commission jurisdiction to review FINRA's Action.

FINRA states that of 3 reviewable sanctions which it has identified, none are viable to Sharemaster to establish jurisdiction, to wit, (1) suspension, (2) costs and (3) late-filing fee as a disciplinary sanction.[7] They argue:

1. No jurisdiction exists if Sharemaster is no longer suspended
2. No costs remain because costs were forgiven in FINRA's May 12, 2017 letter to Sharemaster and
3. The late-filing fee is not a disciplinary sanction under FINRA Rule 8310.

Sharemaster asserts the contrary. Sharemaster's petition is subject to review as argued herein.

1. FINRA argues that the Commission lacks jurisdiction to review FINRA's vacated order suspending Sharemaster.

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[6] FINRA Hearing Panel decision, pp. 5-6.
[7] FINRA's Brief in Response to the Commission's April 17, 2017 Order and in Opposition to Sharemaster's Application for Review, p.6.

Sharemaster has argued that the firm's compliance with the Hearing Panel's Order, regarding the filing of a report prepared by a PCAOB-registered accountant, occurred for several reasons:

(1) The suspension imposed on Sharemaster constituted an economic hardship to the firm. The firm's economic viability depends on the receipt of commissions. An extended period of suspension would permanently harm the firm by cutting off receipt of commissions, Sharemaster's only source of income.

(2) The expedited hearing did not offer an automatic stay, and the SEC's Rules of Practice had no time frame in which consideration of a request for a stay might occur. The response time depended on an indeterminate factor—the Commission's other responsibilities.[8]

(3) The looming threat of expulsion, within six months, threatened the firm's existence and its pursuit of an appeal. Sharemaster's compliance was the result of the coercive nature of the Hearing Panel Order.

(4) Sharemaster also argued before the Commission and before the Court that, even if suspension is no longer live, it is capable of repetition but evading review, and thus should qualify for an exception to the live-sanction requirement.[9]

While the Court did not rule on the "capable of repetition but evading review" argument, Sharemaster asserts that the argument is still valid.

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[8] SEC Rules of Practice, Rule 401, p. 63.
[9] Sharemaster v. SEC, p. 24.

(5) Lastly, the validity of Sharemaster's suspension depends on the determination of the merits of Sharemaster's petition for review—the exemption afforded by Exchange Act Rule 17a-5(e)(1)(i)(A) versus denial based on the single-issuer interpretation as differentiated from multiple issuers.

2. FINRA argues that the costs imposed on Sharemaster did not include a sanction and are not otherwise reviewable because they are no longer in effect.

FINRA argues that the 9th Circuit's majority opinion is premised on the Court's presumption that the costs of $1,785 included a $1,000 penalty or fine constituting a live sanction and that the Court erred in taking this view. FINRA presents an accounting of the $1,785 to show that no sanction exists within the sum of costs.[10]

Sharemaster asserts that the Court's majority opinion is based on the existence of a $1,000 late-filing fee as a live sanction, and that the sanction is not part of administrative costs. The Court stated ". . . we conclude that the disciplinary sanction imposed by FINRA remained live based on the $1,000 fine."[11]

The Court noted the Commission agreed that the $1,000 was a late fee. In its answering brief on appeal, the Commission conceded that this $1,000 sum was "apparently [a] late fee."[12]

The Court opined that the $1,000 is a "live" disciplinary sanction based on

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[10] FINRA Motion to Submit Additional Evidence, Exhibit 1.
[11] Sharemaster v. SEC, p. 21 and p.24.
[12] Ibid., p. 20.

". . . a $1,000 penalty for not timely filing a compliant annual report prepared by a PCAOB-registered accountant."[13]

FINRA's Exhibit 1, showing the $1,785 purely as costs, does not eliminate the existence of an outstanding penalty or fine for late-filing—only that the penalty is not part of the $1,785. FINRA's Exhibit 1 accounting, therefore, is not dispositive in forming an opinion about the Commission's lack of jurisdiction.[14]

After arguing that the $1,785 is not the source of any final disciplinary sanction, FINRA states that, on May 25, 2017 [sic], it forgave the costs of $1,785 ordered by the Hearing Panel, thus removing from Sharemaster the obligation to pay. FINRA concludes that "jurisdiction in this matter may not be based on a 'sanction' that is now moot."[15]

Why does FINRA feel compelled to eliminate the $1,785 after asserting that the costs do not constitute a basis for jurisdiction?

It appears that FINRA's motive is to extinguish any possible "live" sanction that might allow the Commission's jurisdiction under Exchange Act Section 19(d). The existence of the $1,785 as part of Sharemaster's appeal may be construed as a debt owed pending resolution of the merits on appeal of the controversy focused on the SEC staff interpretation blocking Sharemaster's use of a statutory exemption. If the $1,785 is a debt owed pending appeal, it falls within the "live issue" concept.

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[13] Ibid., p. 21.
[14] FINRA Motion to Submit Additional Evidence, Exhibit 1
[15] FINRA's Opposition Brief, p. 9.

FINRA has previously stated that ". . . costs that had been assessed against—but not yet paid by—Sharemaster were sufficient to preserve statutory jurisdiction."[16] The rescission of the $1,785 debt is meant to deprive Sharemaster of any basis for continuing an appeal and, thus, permit avoidance of the Court's Order granting Commission review on the merits of Sharemaster's petition.

By tampering with the Hearing Panel Order for the purpose of litigation, i.e. forgiving the debt to eliminate jurisdiction, FINRA is abusing the appeals process on which Sharemaster depends.

Sharemaster asks the Commission to disallow and not consider FINRA's May 12, 2017 rescission letter since its effect is meant *to remove an element of an adjudicated hearing.* FINRA's use of its authority to manipulate the outcome of Sharemaster's appeal, if allowed to stand, impacts the individual due process rights of Howard Feigenbaum, Sharemaster's sole proprietor.

3. FINRA argues the late-filing fee imposed by FINRA Staff is not a final disciplinary sanction that is reviewable under the Exchange Act

The basis for FINRA's assertion is that the late-filing fee levied on Sharemaster was not imposed by the Hearing Panel but by FINRA staff and that the fee is not a reviewable under Section 19(d).

Sharemaster disagrees. The FINRA-imposed late-filing fee is a fine and qualifies as a disciplinary sanction under FINRA Rule 8310. The late-filing fee is a disciplinary sanction for several reasons:

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[16] SEC Order Dismissing Proceedings On Remand, Admin. File Proc. No3-14104r, p.3, n.12.

1. The status of the $1,000 is confirmed as a fine in a case cited by FINRA in its Opposition Brief, *Gremo Investments.*[17]

   FINRA deemed Gremo's annual report not filed and informed Gremo that the firm could face an assessment of $100 per day for up to ten days. "The Hearing Panel upheld the suspension, fined the Firm $1,000, and imposed costs of $1605." The ruling further states, "FINRA suspended the Firm until it files a compliant annual report and imposed a $1,000 fine."[18]

2. The Court determined that the assessment of a $1,000 late-filing fee assessed against Sharemaster is a fine and a disciplinary sanction:

   > The imposition of a fine is a "disciplinary sanction" under both FINRA's rules and the Commission's precedent. See FINRA Rule 8310 (listing "fine" as a disciplinary sanction); 17 C.F.R. § 240.19d-1(c)(2) (acknowledging that a sanction may "consist of a fine"); Tague Sec. Corp., Exchange Act Release No. 18510, 47 SEC 743, 1982 WL 32205, at *2 (Feb. 25, 1982) (listing "expulsion, suspension, fine or censure" as final disciplinary sanctions). Calling the $1,000 a "late fee" is of no moment.[19]

3. FINRA Rule 8310, Sanctions for Violations of the Rules, part (a)(2), states that a fine is an imposition of a sanction.

4. FINRA states that the $1,000 late-filing fee was not a component of the Hearing Panel decision. Sharemaster asserts that the late-filing fee is an integral part of the Hearing Panel decision. The issue of the $1,000 is impacted by the determination of whether or not an SEC staff interpretation

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[17] FINRA's Brief in Opposition, p. 13.
[18] Security Exchange Act of 1934 Rel. No.64481/May 12, 2011, Admin Proc. File No.3-14093, pp. 3 and 7, underscores added.
[19] Sharemaster v. SEC, p. 21.

blocked Sharemaster's claim for an audit exemption and, thereby, caused the late-filing by FINRA's rejection of the firm's original timely filing.

A Hearing witness for FINRA, on June 24, 2010, addressed the issue of late-filing in testimony. The witness, when asked on direct examination, if Sharemaster filed its financial statements for the fiscal year 2009, stated, "My understanding is that they did."[20] The second filing pursuant to the October 6, 2919 FINRA Hearing Panel Order was filed by Sharemaster on November 1, 2010.

Sharemaster asserts that the issue of late-filing, and its attendant fee, is germane to the issue of whether or not the "single issuer" interpretation was correct, i.e. it goes to the determination of the merits of the case.

5. FINRA's Notice of Fee, a $1,000 assessment, was in evidence before the Panel.[21]
6. The Hearing Panel decision ratified the suspension imposed by FINRA's Notice of Suspension and ratified the late-filing fee imposed by FINRA's Notice of Fee.
7. FINRA states that the Commission does not possess jurisdiction under Section 19(d) of the Exchange Act to review the $1,000 fee imposed on Sharemaster by FINRA.

The Court's Opinion contradicts FINRA's assertion:

> Unlike the sunk transactional costs of pursuing an administrative appeal, if Sharemaster prevails on the merits of his argument (that he was not required to use a PCAOB-registered accountant), the

[20] FINRA Hearing Transcript, p. 47.
[21] FINRA Hearing, Complainant's Exhibit 1 (CX-1), p. 2.

> Commission would be compelled to set aside the $1,000 fine because Sharemaster, in fact, timely complied with securities laws. The Commission's view that it lacks authority to order FINRA to "repay" the $1,000 conflicts with the Exchange Act. The Commission has authority to "act upon" a monetary sanction pursuant to Section 19(d)(2) and 19(e). Section 19(e)(1) provides that the Commission must "set aside" such a sanction if it was incorrectly levied. 15 U.S.C. § 78s(e)(1). Moreover, Section 19(e)(2) makes clear that the Commission has authority to "cancel, reduce, or require the remission of such sanction," even if the fine was correctly levied. Id. § 78s(e)(2) (emphasis added).[22]

FINRA points to *Marshall Fin., Inc., 57 S.E.C. at 877 n.21* to support its contention that the Commission cannot set aside fees assessments or authorize remission of fees. In *Marshall,* the firm agreed to pay fees to avoid suspension.

In Sharemaster's case, FINRA assessed the $1,000 late-filing fee or penalty and took the money from Sharemaster's CRD account (March 13, 2010) before a Hearing was held (June 24, 2010). The purpose of the Hearing was to determine whether Sharemaster could use a statutory exemption in light of an SEC staff interpretation limiting its use. The outcome of the Hearing would determine whether or not the firm had, indeed, late-filed its annual statement. The $1,000 was incorrectly levied prior to a Hearing determination and remains with FINRA. The $1,000 late-filing fee or penalty constitutes a "live" issue on appeal until the merits have been determined on appeal.

B. FINRA states that Sharemaster failed to file a conforming annual report in violation of Exchange Act Rule Requirements

[22] Sharemaster v. SEC, pp. 21-22.

FINRA asserts that Sharemaster has not established that the firm is entitled to an exemption for 2009 from the requirement that it file audited annual financial statements.

Sharemaster maintains that it timely-filed an annual report in compliance with Exchange Act requirements and properly claimed an exemption pursuant to Exchange Act Rules 17a-5(e)(1)(i)(A), 17a-5(e)(1)(ii), 17a-5(e)(2)(i) and 17a-5(e)(2)(ii).

(1) The annual report included an independent accountant's financial statement.

(2) Additionally, Sole Proprietor, Howard Feigenbaum attached a statement demonstrating that the firm acts as an agent, does not hold or owe customer funds, securities or debts, promptly delivers all money, in the form of checks, payable to the mutual fund or insurance company. The issuers send evidence of securities ownership directly to the subscriber.

(3) Sole Proprietor, Howard Feigenbaum, attached to the annual statement an oath, sworn before a Notary Public, that the financial statement is true and correct and affirmed that he does not have any proprietary interest in any account classified solely as that of a customer.

(4) Sharemaster's annual statement was entered into evidence as Complainant's Exhibit 6 in the FINRA Hearing.

1. **FINRA asserts that Sharemaster filed a 2009 annual report that did not comply with Exchange Act requirements.**

FINRA states that Exchange Act Rule 17a-5 requires that all broker-dealers

file annual report financial statements prepared by PCAOB-registered accountants.

Gremo Inv., Inc., is again cited as precedent.[23]

In reviewing *Gremo*, Sharemaster notes how that case differs from Sharemaster's:

1. Gremo Investments argued that the Supreme Court ruled that the PCAOB was unconstitutional.[24]

By contrast, Sharemaster asserts that the firm properly used a statutory exemption in the Exchange Act that permits brokers who qualify to file an annual statement that need not be audited. Sharemaster filed its 2009 annual report in compliance with Section 17a-5 and Exchange Act Rules 17a-5(e)(1)(i)(A), 17a-5(e)(1)(ii), 17a-5(e)(2)(i) and 17a-5(e)(2)(ii), as noted above in section B.

2. The Sarbanes-Oxley Act preamble cited in *Gremo* reads:

"An Act To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes."[25]

Gremo Investments, Inc. is a corporation.[26]

Sharemaster has been a sole proprietorship since the firm became a FINRA member. The firm was a sole proprietorship when it filed its 2009 annual

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[23] FINRA's Brief in Opposition, p.12.
[24] *Gremo Inv., Inc.*, Exchange Act Release No. 64481, May 12, 2011, p. 5.
[25] Sarbanes-Oxley Act, Pub. L. No. 107-204, preamble; Gremo, p. 6, n.15, and FINRA Brief in Opposition, p.12
[26] *Gremo Inv. Inc., Exchange Act Release No. 64481,* title page.

report and remains a sole proprietorship to this date. Sharemaster makes no corporate disclosures pursuant to the securities laws, or for other purposes.[27]

Sharemaster asserts its annual report did comply with Exchange Act rule requirements by virtue of its qualification for an Exchange Act exemption and the fact that the firm acts as an agent and not a holder of customer securities and money.

2. **FINRA states that its action was taken in accordance with FINRA's rules in furtherance of important Exchange Act and Exchange Act Rule requirements.**

Sharemaster maintains that the firm qualifies for an exemption from filing an audited annual report for several reasons and that the exemption does not detract from important Exchange Act rule requirements:

1. Sarbanes-Oxley did not repeal or invalidate the statutory exemption provided under Exchange Act Rule 17a-5(e)(1)(i)(A) which permits a broker to file an annual statement that need not be audited.

Sharemaster acts as an agent, does not hold or owe customer funds, securities or debt obligations, thus allowing the firm to qualify for a statutory exemption.[28]

2. This statutory exemption is similar to another exemption in the Exchange Act which exempts brokers from the requirement that every firm send out customer statements. Exchange Act Rule 17a-5(c)(1) sets out which firms are obligated to send customers statements of account. An exception is made for firms whose business includes:

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[27] Complainant's Exhibit 9 (CX-9), p.2, Sharemaster membership agreement.
[28] See member agreement, CX-9.

> The prompt forwarding of subscriptions for securities to the issuer, underwriter or other distributor of such securities and of receiving checks, drafts, notes, or other evidences of indebtedness payable solely to the issuer, underwriter or other distributor who delivers the security directly to the subscriber or to a custodian bank, if the broker or dealer does not otherwise hold funds or securities for, or owe money or securities to, customers;[29]

The rationale for permitting the above-cited exemption is the same as the audit exemption—the qualifying broker or dealer does not hold funds or securities or owe money or securities to customers. The institution or firm which holds or owes customer funds or securities has the obligation to issue customer statements.[30]

One can infer that Rule 17a-5(c)(1)(ii) provides relief to brokers and dealers because protection of the public is not at risk—no customer money or securities are held and, therefore, no customer statements need be issued by brokers and dealers who qualify for the exemption.

3. A canon of statutory interpretation declares that statutes should be internally consistent. A particular section of a statute should be consistent with the rest of the statute.[31]

The language and meaning of the exemption in Exchange Act Rule 17a-5(e)(1)(i)(A) should be consistent with that of the section's preceding exemption in Exchange Act Rule 17a-5(c)(1)(ii). Both focus on brokers and dealers who do not hold or owe customer money or securities and, for that reason, permit an exemption to a rule.

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[29] underscore added; Exchange Act Rule 17a-5(c)(1)(ii).
[30] Exchange Act Rule 17a-5(c)(1).
[31] Lozman v. City of Riviera Beach, 133 S. Ct. 735, 744 (2013) Majority opinion, Sect.III, C: "Our view of the statute is consistent with its text, precedent, and relevant purposes."

3. **FINRA states that Sharemaster did not qualify for an exemption from the requirement that it file audited financial statements**

FINRA argues that Sharemaster did not establish that the firm was entitled to the exemption provided under Exchange Act Rule 17a-5(e)(1)(i)(A).

FINRA' argument is incorrect. Sharemaster filed its 2009 annual statement in accordance with Exchange Act Rules 17a-5(e)(1)(i)(A), 17a-5(e)(1)(ii), (17a-5(e)(2)(i) and 17a-5(e)(2)(ii). See FINRA Hearing Complainant's Exhibit 6, Sharemaster's Annual Statement submitted for 2009 which includes a statement of exemption qualification and documents in compliance with Exchange Act Rules listed above.[32] Also see Complainant's Exhibit 9, Membership Agreement indicating the nature of Sharemaster's business—limited to the sale of mutual funds and variable products by application way only.[33] Sharemaster's business meets the explicit conditions that FINRA sets forth in its argument.[34]

FINRA argues that Sharemaster does not qualify for the exemption because the firm represents more than one issuer.[35]

Sharemaster asserts that the SEC staff interpretation finds no support in the Exchange Act. The language of Exchange Act Rule 17a-5(e)(1)(i)(A) does not limit the exemption to an agent soliciting subscription for securities of a single issuer. The Rule uses the word "issuer" in the same consistent context as Exchange Act Rule 17a-5(c)(1)(ii) which permits an exemption from the

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[32] FINRA Hearing, CX-6, entered into evidence
[33] FINRA Hearing, CX-9, entered into evidence.
[34] FINRA's Opposition Brief, pp. 14-15, n.13.
[35] Ibid., p. 15.

obligation to send customer statements for firms that do not hold customer money or securities.

As support for its contention that the Commission should reject Sharemaster's view of the interpretation, FINRA offers *Cirtran Corp.* as precedent. *Cirtran Corp.* focuses on harm to shareholders by a publicly-traded company not providing the public with complete, timely, and accurate financial information. This is markedly different than a broker who neither holds nor owes customer funds, securities or debt and acts as an agent, representing investment companies and insurance companies which provide customers with financial information.[36]

FINRA also offers *Med-X, Inc.* in support of rejecting Sharemaster's view of the "single issuer" interpretation. *Med-X, Inc.* failed to timely-file a required report and, as a result, unknowingly sold shares while not in compliance with rules. Unlike Med-X, Inc., Sharemaster does not hold or directly sell shares to customers. The firm acts as an agent for investment companies and insurance companies who do hold and sell shares. This precedent, like *Cirtran Corp.* is not on point.[37]

In another cited precedent, *Harry M. Richardson*, a case denying Richardson's application for association with a member firm, focuses on FINRA's consideration of the previously-suspended applicant with a history of misconduct, allowed to reapply after a certain period, and FINRA's obligation to protect the public interest. FINRA concludes it must opt for the latter and deny

[36] Ibid., p. 15.
[37] Ibid., p.15, n. 14.

the application because of Commission precedent regarding the public interest.[38]

Sharemaster's case is distinguished by its reliance on and compliance with statute. In respect to protecting the public interest, a timely-filing of Sharemaster's annual statement pursuant to statutory exemption is not misconduct. Howard Feigenbaum, Sharemaster's sole proprietor is not a scofflaw. The issue is whether or not the SEC staff interpretation is correct in barring Sharemaster's use of the exemption.

Regarding *FCS Sec.* offered by FINRA as precedent for claiming that Sharemaster did not establish that it is entitled to the protection of the limited-business exemption, Sharemaster's case is distinguished by several important facts.[39]

FCS failed to file annual reports for fiscal years 2006 and 2007. Sharemaster has never failed to file an annual report for any fiscal year. Sharemaster followed statutory procedure in establishing its qualification for use of the audit exemption by filing its annual report with a statement of qualification and notarization. FCS did not.

FCS seemed to create a sham transaction to establish a record of buying and selling in order to qualify as a business eligible for an exemption. And FCS limited its business to friends and family. Sharemaster has a diverse customer

[38] FINRA's Opposition Brief, p. 15, n. 14.
[39] FINRA's Opposition Brief, p. 16.

base who purchase and sell shares of mutual funds offered by investment companies that the firm represents as an agent.[40]

C. FINRA states that Sharemaster is not entitled to any relief that is beyond the Commission's authority to grant

FINRA argues that because the Commission can only review actions that impose a final disciplinary sanction under Section 19(d). The Commission may not order FINRA to remove from the public record any derogatory information regarding Sharemaster or order reimbursement for the difference in accounting fees should the Commission find that FINRA erred in its action against Sharemaster.[41]

As to the issue of correcting the public record if, on appeal, Sharemaster were to prevail, FINRA, as a self-regulatory organization, does have the authority to issue a notice to member firms and to withdraw a derogatory statement from Broker Check. Likewise, if, on appeal, Sharemaster's filing of its annual statement is found to be permissible, and the Hearing Panel's decision is overturned, equitable relief would additionally be in order.

As to the issue of reimbursement of costs, the Court has spoken:

> The Commission's view that it lacks authority to order FINRA to "repay" the $1,000 conflicts with the Exchange Act. The Commission has authority to "act upon" a monetary sanction pursuant to Section 19(d)(2) and 19(e). Section 19(e)(1) provides that the Commission must "set aside" such a sanction if it was incorrectly levied. 15 U.S.C. § 78s(e)(1). Moreover, Section 19(e)(2) makes clear that the Commission has authority to "cancel, reduce, or require the remission of such sanction," even if the fine was correctly levied. Id. § 78s(e)(2) (emphasis added).[42]

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[40] Ibid., p. 16.
[41] FINRA Reply Brief, p. 16.
[42] Sharemaster v. SEC, p. 22.

Because the Court has determined that a $1,000 late-filing fee is a fine and a sanction, and since *Gremo Inv. Inc.* describes a $1,000 late-filing fee as a fine, and since FINRA Rule 8310 states that a fine is a disciplinary sanction, and since the Court has stated that the Commission has the authority to act upon a monetary sanction under Sections 19(d)(2) and 19(e), Sharemaster requests the return of the $1,000 late filing fee upon a favorable determination of the merits.[43]

If Sharemaster prevails on the merits, i.e. the firm's initial timely-filed 2009 financial statement was correct, and an audit exemption correctly-claimed, then the additional resulting costs of filing subsequent audited statements should not have occurred, and the expense should accrue to the monetary sanction. The Commission has the authority to act upon a monetary sanction.

IV. CONCLUSION

1. FINRA has not complied with the Commission's Briefing Order to address the merits of Sharemaster's petition for review. Instead, they argue the Commission does not have jurisdiction to hear the merits of Sharemaster's petition for review.

The central issue of Sharemaster's petition questions the Hearing Panel's adopting of the SEC staff interpretation of an exemption in Exchange Act Rule 17a-5(e)(1)(i)(A) denying Sharemaster's use of the exemption. Sharemaster asserts that the interpretation is arbitrary and capricious. Further, the interpretation is unreasonable, does not support the statute and is not

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[43] *Gremo Inv. Inc.*, p.3 and p.7; FINRA Rule 8310.

consistent with a similarly-worded exemption in a previous part of the same section. What is the reason for limiting the exemption to a "single issuer" as opposed to two or more issuers?

FINRA, in its Brief in Opposition, has not expressed any argument directed to the merits.

2. Sharemaster asserts that the $1,000 late-filing fee is a disciplinary sanction, as expressed in the Court's opinion and confirmed by FINRA in *Gremo Investments, Inc.* as a fine which, under FINRA Rule 8310, constitutes a sanction. This disciplinary sanction preserves Commission jurisdiction in hearing Sharemaster's petition for review.

3. FINRA states that Sharemaster's . . . "desire to perpetuate 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."[44]

Sharemaster has a right to appeal, protected by the Administrative Procedures Act. SEC staff interpretation does not have the force of law. Sharemaster is entitled to defend a legally-protected interest in the statutory exemption. For reasons stated above, and in Sharemaster's Brief, the interpretation is unreasonable, arbitrary and capricious and unsupportive of the statute.

Any perpetuation of proceedings, since 2010, has been the result of an effort to frustrate Sharemaster having a fair hearing on the merits of its view

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[44] FINRA's Opposition Brief, p. 17.

that the SEC staff interpretation wrongly blocks the use of Exchange Act Rule 17a-5(e)(1)(i)(A).

As directed by the Ninth Circuit Court of Appeals, Sharemaster asks the Commission to review the merits of Sharemaster's petition. Sharemaster asserts that the firm has a legally-protected interest in Exchange Act Rule 17a-5(e)(1)(i)(A), as stated in Sharemaster's Brief, and that an SEC staff "single issuer" interpretation wrongly invades that legally-protected interest.[45]

Respectfully submitted,

Howard Feigenbaum
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Hemet, CA 92545

Date: June 28, 2017

[45] Sharemaster's Brief in Response to Commission's Order of April 17, 2017, pp. 12-14.

CERTIFICATE OF SERVICE

In the Matter of the Application of

Sharemaster

For Review of Disciplinary Action Taken by FINRA

File No. 3-14104r

SHAREMASTER'S REPLY TO

FINRA'S OPPOSITION BRIEF

June 30, 2017

I, Howard Feigenbaum, certify that on June 28, 2017, I caused the original and three copies of Sharemaster's Reply to FINRA's Opposition Brief to be served, by Federal Express, on:

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

And one copy, by Federal Express, on:

Mr. Gary Dernelle,
Office of the General Counsel
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