

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION



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In the Matter of the Application of  
MKM PARTNERS LLC  
For Review of Action Taken by  
BATS Exchange, Inc.  
Admin. Proc. File No. 3-17262

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**MKM PARTNERS LLC'S REPLY BRIEF  
IN SUPPORT OF APPLICATION FOR REVIEW**

I. INTRODUCTION

BATS' conclusion is irrational. Its brief opposing MKM's application for review begins with an untrue statement that MKM has "refus[ed] to accept a fair, remedial sanction".<sup>1</sup> That's patently false and unfair. MKM has repeatedly requested to pay a fine of \$2,500 to BATS, FINRA and now to the SEC. MKM is fully prepared to accept responsibility for its errors. However, it is not willing to accept a public censure based on inconsistent regulatory treatment for a late filing to an exchange, when the same document was timely filed with FINRA and the SEC. MKM's failure to file with BATS was merely an administrative error, not an intentional violation.

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<sup>1</sup> BATS Exchange, Inc.'s Brief in Opposition to the Application for Review, dated August 29, 2016 ("BATS' Opposition").

MKM unintentionally forgetting to email its annual audit report after it was prepared and sent to the SEC and FINRA was an obvious administrative oversight. MKM had the report, it was emailed to the SEC and FINRA and the firm had every intention to email it to BATS. MKM made an administrative error that for other regulators would be a minor rule violation.

Further, neither MKM nor the undersigned was provided with a copy of the certified record. Therefore, the internal citations herein are to the documents themselves.<sup>2</sup>

## II. OBJECTIONS TO BATS' "FACTUAL BACKGROUND"

BATS' reliance on its perception of MKM's pattern of noncompliance in justifying its position is facetious. BATS chose to ignore facts it was presented with during settlement negotiations and motions to the Hearing Panel as they did not conform to its preconceived notion that MKM is a repeat offender that should be penalized. FINRA refused to investigate any facts surrounding MKM's filing of its 2012 audit report and instead inaccurately stated as fact that it was late.<sup>3</sup>

BATS' repetition of its "reminders" to MKM of the filing dates are much less than they appear on its face. The notices are automated emails, without an option to reply, that are sent among dozens of innocuous emails regarding ticker symbol changes. They aren't alerts in the manner in which BATS prefers to describe them. They are easily overlooked as form emails which would not pertain to MKM's business.

## III. PROCEDURAL HISTORY

The procedural history is contained in the documents which speak for themselves. However, as discussed above, MKM has not been made privy to the "Certified Record". Throughout MKM's attempts to settle the AWC with BATS it was continuously told that BATS

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<sup>2</sup> See BATS' Opposition, FN1.

<sup>3</sup> Respondent's Opening Brief, dated November 30, 2015, Pp.7-8.

could not accept a settlement offer which did not include a public censure. However, nowhere in the BATS Rules is that stated. MKM was denied its right to a hearing, a fair hearing, and to present its defense to an unbiased panel. Both the Hearing Panel and the Appeals Committee had the authority to assess only a fine without a public censure, but neither did so.

The issue is now before the SEC, reviewing decisions based on the violation of an SEC Rule. MKM wants the SEC to see that MKM is a compliant firm, who made a mistake and are willing to pay a fine of \$2,500, but feel that public censure is inappropriate for a violation of SEC Rule SEC Rule 17a-5(d)(6).

#### IV. ARGUMENT

Nowhere, absolutely nowhere, in BATS Rules is there authority for the Hearing Panel to dispose of this matter without a hearing. Any of BATS and FINRA's stretching justifications are a far, far reach. Too far for the SEC to sustain. BATS retroactively justifies its actions by stating that other SROs have summary disposition procedures,<sup>4</sup> but admits that it does not.

The rules which BATS compares, and relies on for its "broad authority" aren't even close:

1. BATS Rule 8.6(d) authorizes the hearing officer to "regulate the conduct of the hearing".
- versus-
2. NYSE Rule 476(c) authorizes the hearing officer to "resolve any and all procedural and evidentiary matters and substantive legal motions".<sup>5</sup>

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<sup>4</sup> BATS' Opposition, FN2.

<sup>5</sup> Id. at P.8.

## V. PUBLIC CENSURE IS NOT FAIR AND NOT REMEDIAL

The SEC must have noted that BATS has elevated itself to “agency” level, on par with the SEC, in scraping to find support for its unfair position regarding the sanction. BATS cites cases whereby the SEC was permitted to choose a particular remedy or sanction.<sup>6</sup> Of course the SEC was so permitted, but BATS does not have the same license to rule its exchange members.

BATS does agree with MKM that going forward, MKM’s filings will be accepted through a FINRA system.<sup>7</sup> This development by BATS and FINRA clearly removes the “remedial” purpose of the ordered sanction. In the future, MKM is now required to file with BATS in the same manner in which it has been filing with FINRA. Given the nature of MKM’s business, the type of violation involved in this matter, and the mechanism for future filing there is no “due regard for the public interest and protection of investors”, if there ever was.

## VI. CONCLUSION

It seems that as a matter of regulatory prudence that each exchange and regulator having a different consequence for the same rule violation is a burden on industry members and confusing to the investing public. BATS and MKM disagree as to MKM’s regulatory history. MKM is incredibly proud to have maintained a clean record since its inception which is a very rare occurrence. BATS elevating a letter of caution, and a subsequent late filing making MKM into a serial violator that needs to be censured for what is elsewhere a minor rule violation or money fine is inappropriate.<sup>8</sup> That’s simply not fair and not a rational penalty for a mistake of human error.

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<sup>6</sup> Id. at P.12. BATS is an eleven year old stock exchange and citing caselaw from 1945 in an arrogant attempt to place itself in even footing with the SEC, a government agency.

<sup>7</sup> Id. at P13.

<sup>8</sup> See NASD Notice to Members 01-54, Attachment A, Section 2, Fees (1)(1) and (3)(A).

For the reasons set forth above, MKM respectfully requests that the SEC reverse the BATS Exchange, Inc. Appeals Committee decision, dated April 25, 2016, and merely impose a \$2,500 fine on MKM without a public censure.

Dated: September 12, 2016

FAUST OPPENHEIM LLP

By:  \_\_\_\_\_

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CERTIFICATE OF WORD COUNT

As required by U.S. Securities and Exchange Commission, Rules of Practice, Rule 450(d), I certify that the document contains 1,033 words, excluding the parts of the document that are exempted by said Rule.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on September 12, 2016.

A handwritten signature in black ink, appearing to be 'P. Davenport', written over a horizontal line.

Petra v.Z. Davenport  
FAUST OPPENHEIM LLP

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 12, 2016, I caused a copy of the foregoing MKM Partner's Reply Brief in Support of Application for Review by the SEC to be sent by certified mail with return receipt requested to:

The Office of the Secretary  
U.S. Securities and Exchange Commission  
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