

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
May 16, 2017

SECURITIES EXCHANGE ACT OF 1934
Release No. 80705 / May 16, 2017

Admin. Proc. File No. 3-14104r

In the Matter of the Application of

SHAREMASTER
c/o Howard Feigenbaum
8747 Duval Lane
Hemet, CA 92545

For Review of Action Taken by

FINRA

ORDER DENYING STAY

This matter stems from an October 2010 FINRA decision finding that Sharemaster failed to file an annual report for 2009 that was audited by an accountant registered with the Public Company Accounting Oversight Board (“PCAOB”). As a result, FINRA found that Sharemaster violated Rule 17a-5 under the Securities Exchange Act of 1934, suspended Sharemaster until the firm filed a conforming annual report, and ordered that it pay costs totaling \$1,785.00. Sharemaster appealed FINRA’s decision to the Commission, claiming that it was exempt, under Exchange Act Rule 17a-5(e)(1)(i)(A), from the requirement that its annual report be audited by an accountant registered with the PCAOB. After it filed its application for review, Sharemaster filed a compliant annual report for 2009. FINRA then lifted the suspension.

On August 29, 2013, the Commission issued an order dismissing Sharemaster’s application for review after concluding that it lacked jurisdiction under Section 19(d) of the Exchange Act.¹ On February 2, 2017, the U.S. Court of Appeals for the Ninth Circuit remanded the matter to the Commission.² On April 17, 2017, the parties were ordered to file briefs

¹ *Sharemaster*, Exchange Act Release No. 70290, 2013 WL 4647204 (Aug. 29, 2013).

² *Sharemaster v. SEC*, 847 F.3d 1059, 1071 (9th Cir. 2017).

addressing the Commission's jurisdiction over Sharemaster's application for review in light of the Ninth Circuit's decision as well as the merits of the firm's appeal.³

On April 26, 2017, Sharemaster moved, "pursuant to Rule 401 of the Commission's Rules of Practice," for a "stay of execution of the FINRA Order of October 6, 2010 requiring the filing of an annual PCAOB audited . . . report." Sharemaster further describes its motion as requesting: (1) "[a] stay of the PCAOB audited report requirement during the ongoing period of litigation"; and (2) "[i]n the event that Applicant does not prevail in this ongoing litigation, . . . (a) that there be no retroactive requirement to provide PCAOB annual audited reports for the duration of the stay and (b) that there be no imposition of future sanctions as late fees for the stayed filings of PCAOB-audited annual reports."

Rule 401(d) provides for a stay of SRO action for which review may be sought pursuant to Rule 420.⁴ Rule 420 provides for review of SRO determinations that impose a final disciplinary sanction, deny or condition membership or participation, prohibit or limit access to services, or impose a bar from association.⁵ As a result, the only relief we could provide under Rule 401(d) would be a stay of FINRA's 2010 decision. We note that FINRA already lifted the suspension imposed in that decision. And FINRA returned to Sharemaster the costs that the decision imposed, and has informed the firm that FINRA would not seek to reassess those costs while the firm's appeal is pending before the Commission.

In any event, Sharemaster has not satisfied its burden of establishing that it is entitled to any stay. The Commission generally consider a stay request in light of four factors: (1) whether the party seeking the stay is likely to succeed on the merits; (2) whether the party seeking the stay is likely to suffer irreparable harm absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) whether the stay will serve the public interest.⁶ The party requesting a stay has the burden of establishing that a stay is justified.⁷ Sharemaster's motion fails to justify a stay. Sharemaster makes no showing whatsoever of likelihood of success on the merits. And although it implies that the "financial burden of paying for an audit by a PCAOB-registered accountant" constitutes irreparable injury,

³ See *Sharemaster*, Exchange Act Release No. 80471, 2017 WL 1372517 (Apr. 17, 2017).

⁴ Rule of Practice 401(d), 17 C.F.R. § 201.401(d).

⁵ Rule of Practice 420, 17 C.F.R. § 201.420.

⁶ See *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Steven Altman*, Exchange Act Release No. 63665, 2011 WL 52087, at *2 (Jan. 6 2011).

⁷ *Cuomo*, 772 F.2d at 978; *Altman*, 2011 WL 52087, at *2.

“injury resulting from attempted compliance with government regulation ordinarily is not irreparable harm.”⁸ Sharemaster does not address the other two factors.

Accordingly, it is ORDERED that Sharemaster’s motion is DENIED.

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

Brent J. Fields
Secretary

⁸ *Am. Hosp. Ass’n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980).