

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 88053 / January 27, 2020

Admin. Proc. File No. 3-19631

In the Matter of the Application of

KJM SECURITIES, INC.

For Review of Disciplinary Action Taken by

FINRA

Appeal filed: December 23, 2019
Application for stay filed: January 7, 2020
Last brief received: January 21, 2019

ORDER DENYING STAY

KJM Securities, Inc., appeals from a final FINRA decision expelling it from FINRA membership and imposing a \$1,000 late fee and costs for failing to file its annual audit report.¹ KJM moves to stay the expulsion pending the Commission's consideration of its appeal. FINRA filed an opposition to the motion, and KJM filed a reply. The motion is denied.

I. Background

KJM did not file its annual audit report by the report's May 30, 2019 due date. Although FINRA granted KJM an extension to June 17, 2019, KJM missed that deadline as well. When KJM did not file its annual audit report by July 9, 2019, FINRA notified KJM that it would be suspended if it failed to file the report by August 2, 2019. KJM was given until August 1, 2019, to request a hearing and stay the suspension. When KJM failed to file its report on August 2, FINRA imposed a suspension. Later that day—one day after FINRA's deadline to request a hearing—KJM requested a hearing and FINRA granted the request and stayed the suspension.

At the hearing in September 2019, Kosta J. Moustakas, KJM's CEO and sole owner, did not dispute that KJM's annual audit report was late. Rather, he represented to the Hearing Panel

¹ *Dep't of Enforcement v. KJM Securities, Inc.*, Expedited Proceeding No. FPI190006, 2019 WL 6827185, at *6 (NASDR Nov. 1, 2019).

that the report would be complete in “a couple more days” and asked the Hearing Panel to forgo a suspension for a short time to permit KJM’s auditors to “finish[] up” the report.

The Hearing Panel declined to credit Moustakas’s predictions. When the Hearing Panel issued its final order seven weeks later, KJM still had not filed its annual audit report. Thus, in a November 1, 2019 order, the Hearing Panel found that KJM violated Section 17(e) of the Securities Exchange Act of 1934, Exchange Act Rule 17a-5, and FINRA Rule 2010 by failing to file an annual audit report for the fiscal year ending March 31, 2019. The Hearing Panel reimposed KJM’s suspension from FINRA membership, and ordered the suspension to convert automatically to an expulsion if KJM failed to file an annual audit report within two months of the Hearing Panel’s order. When KJM failed to file an annual audit report on January 1, 2020—two months from the date of the Hearing Panel’s decision—FINRA expelled it. KJM now moves to stay FINRA’s decision pending its appeal to the Commission.

II. Analysis

Under Rule of Practice 401(d)(1), an aggrieved person may move to stay an SRO action reviewable under Exchange Act Section 19(d).² A stay is an “extraordinary remedy,” and the moving party bears the burden of establishing that relief is warranted.³ In deciding whether to grant a stay, the Commission traditionally considers the following four factors: (i) the likelihood that the moving party will eventually succeed on the merits of the appeal; (ii) the likelihood that the moving party will suffer irreparable harm without a stay; (iii) the likelihood that another party will suffer irreparable harm as a result of a stay; and (iv) a stay’s impact on the public interest.⁴ While a movant need not necessarily establish that success on the merits is more likely than not, it must show at least “a fair prospect” of success,⁵ or demonstrate “that it has raised a serious legal question on the merits.”⁶ And, where a movant shows less than a strong likelihood of success, it must show “that the other factors weigh heavily in its favor.”⁷

KJM has failed to satisfy its burden. Rather than addressing any of the stay factors outlined above, KJM’s motion merely asserts that it has engaged and paid auditors and awaits the results of the audit. Its reply brief repeats the same representation. But far from demonstrating a

² 17 C.F.R. § 201.401(d)(1); 15 U.S.C. § 78s(d).

³ See *Nken v. Holder*, 556 U.S. 418, 432-34 (2009); accord, e.g., *Alpine Securities Corporation*, Exchange Act Release No. 87599, 2019 WL 6251313, at *5 & n.51 (Nov. 22, 2019); *Mark E. Laccetti*, Exchange Act Release No. 79138, 2016 WL 6137057, at *2 & n.10 (Oct. 21, 2016).

⁴ *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).

⁵ *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

⁶ *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *6 (Nov. 27, 2017) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011)).

⁷ *Id.*

likelihood of success on the merits, or even a serious legal question, KJM’s briefing confirms that its annual audit report remains delinquent nearly eight months after its initial due date.

For the first time in its reply brief, KJM asserts that it will suffer irreparable harm from FINRA’s expulsion because it cannot function as a broker-dealer and because the expulsion will harm its reputation. “[G]enerally, any argument raised for the first time in a reply brief shall be deemed to have been waived.”⁸ In any case, KJM’s assertion does not establish that a stay is warranted.

As discussed above, even under the view that a stay may be granted absent a showing of a strong likelihood of success on the merits, courts agree that the movant must show not only that the other factors weigh heavily in its favor but also that it has at least “raised a ‘serious legal question’ on the merits.”⁹ 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.’”¹⁰ We need not determine, therefore, whether KJM has shown that it will be irreparably harmed absent a stay because it has not shown that its appeal presents a serious legal question.¹¹

Nor has KJM established that a stay would not harm others and would be in the public interest. Although KJM argues its continued operations would not pose a danger to the public because FINRA reviewed KJM’s financial records in 2019 and found no infirmity, that does not mean KJM’s failure to file its annual audit report poses no risk to the public. In any case, KJM’s assertions are not supported in the record. Indeed, FINRA stated that its examination uncovered “inaccuracies in [KJM’s] financials.”¹² The Commission has emphasized that the audited annual report requirement is “not technical but involve[s] fundamental safeguards imposed for the protection of the public on those who wish to engage in the securities business.”¹³ Permitting

⁸ *Bruce Zipper*, Exchange Act Release No. 84334, 2018 WL 4727001, at *7 (Oct. 1, 2018).

⁹ *Sherley*, 644 F.3d at 398 (quoting *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.3d 2d 841, 843-44 (D.C. Cir. 1977)); see also, e.g., *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (explaining that even where the movant does not demonstrate a likelihood of success on the merits on appeal, a motion for a stay may also be “granted upon a lesser showing of a ‘substantial case on the merits’ when ‘the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay’”) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (per curiam)) (brackets in original).

¹⁰ *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015) (alterations in original).

¹¹ *But see Mitchell T. Toland*, Exchange Act Release No. 71875, 2014 WL 1338145, at *2 (April 4, 2014) (“Toland’s asserted reputational injury falls short of irreparable harm, particularly given that Toland fails to dispute the material substantive findings of the FINRA decision he challenges.”).

¹² *KJM Securities, Inc.*, 2019 WL 6827185, at *5.

¹³ *Gremo Invests., Inc.*, Exchange Act Release No. 64481, 2011 WL 1825020, at *5 (May 12, 2011).

KJM to continue to participate in the securities industry despite its ongoing failure to file its 2019 annual audit report thus poses substantial risks to investors and the public.

A party seeking a stay that established irreparable harm absent a stay “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.’”¹⁴ Assuming without deciding that KJM establishes irreparable harm, KJM has shown neither of these other two requirements. Accordingly, it is ORDERED that KJM’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

¹⁴ *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (emphasis in original) (internal citations omitted).