

BATS EXCHANGE, INC.

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MKM PARTNERS LLC
(CRD No. 114666),

Respondent.

Disciplinary Proceeding
No. 2014041284201

Hearing Officer–AHP

**HEARING PANEL DECISION
GRANTING MOTION FOR SUMMARY
DISPOSITION**

September 1, 2015

MKM Partners LLC failed to file a copy of its annual report with BATS Exchange, Inc. as required by SEC Rule 17a-5(d). MKM Partners is censured and fined \$2,500.

Appearances

Heather L. Freiburger, Esq., FINRA, DEPARTMENT OF ENFORCEMENT, Chicago, Illinois, for the Complainant.

Stephen Oppenheim, Esq., and Petra v.Z. Davenport, LLC, FAUST OPPENHEIM LLC, New York, New York, for the Respondent.

DECISION

More than once, MKM Partners LLC failed to timely provide BATS Exchange, Inc. with copies of the annual reports that it filed with the Securities and Exchange Commission (“SEC”) and FINRA. Now the firm faces sanctions. BATS notified MKM in early 2014 that it had failed to provide a copy of its 2013 annual report by the deadline mandated by SEC Rule 17a-5(d)(1)(i). As had been its practice in each of the three prior years, MKM thereafter submitted a copy of the report to BATS. MKM’s late submission to BATS prompted this disciplinary proceeding.

Against this late submission, MKM raises two legal issues. First, MKM turns the table on BATS and accuses it of failing to meet its obligations to MKM. MKM relies on BATS’ rules and By-Laws that require it to interpret and apply SEC rules consistently with the requirements of the Securities Exchange Act of 1934 (“Exchange Act”). MKM maintains that its administrative error in failing to provide a timely copy of the 2013 report to BATS was caused by the confusing

wording in a BATS regulatory notice MKM received shortly before the filing deadline. MKM's position is that it reasonably interpreted the notice to mean that BATS no longer required such filings and that therefore it would be unfair to impose a sanction for its late filing. Second, MKM maintains that BATS was required to treat a late report as a minor rule violation, as FINRA does. If BATS had, MKM argues, it would not be subject to a public censure. To MKM, BATS seeks to punish MKM for BATS' own errors.

We conclude that MKM's obligation to provide BATS with a copy of its 2013 annual report was definite and straightforward and that BATS was not obligated to treat MKM's late filing as a minor rule violation.

This case also presents a novel issue. Do BATS hearing panels have the authority to summarily decide a disciplinary proceeding where there are no genuine, material issues in dispute? We conclude that they do.

I. Factual Background

The material facts are undisputed. MKM Partners LLC is a registered broker-dealer located in Stamford, Connecticut and a member of BATS, a self-regulatory organization under the Exchange Act. Its fiscal year ends on December 31. Thus, under SEC Rule 17a-5(d)(5), MKM was obligated to provide BATS with a copy of its 2013 annual report no later than March 3, 2014.¹ It did not; MKM provided the report to BATS on June 20, 2014.

Each year between 2011 and 2014, BATS issued a Regulatory Circular to its members reminding them of their obligation to file annual audited reports with BATS.² MKM received each circular.

II. Procedural History

FINRA's Department of Enforcement filed a Statement of Charges with FINRA's Office of Hearing Officers on March 9, 2015.³ In its Answer, MKM denied that it violated SEC Rule 17a-5(d)(6) despite the fact that it had not provided BATS with a copy of its 2013 annual report by the required deadline. MKM asserted that its timely filing with the SEC and FINRA met the filing requirement.

On May 26, 2015, Enforcement filed a motion for summary disposition together with a statement of undisputed facts; a memorandum of points and authorities in support of the motion;

¹ The 60-day deadline fell due on Saturday, March 1, 2014. Accordingly, BATS should have received the report by Monday, March 3 at the latest.

² Regulatory Circular 11-001 (Jan. 10, 2011); Regulatory Circular 12-002 (Feb 8, 2012); Regulatory Circular 13-001 (Feb 8, 2013); Regulatory Circular 14-001 (Feb. 5, 2014).

³ FINRA provides regulatory services to BATS under the terms of a Regulatory Services Agreement dated February 1, 2014.

and the sworn declarations of Teresa Laffoon, a BATS member services representative, Andy Gordon, an investigator with BATS, and Heather Freiburger, an attorney with FINRA's Department of Enforcement. Each declaration has attached exhibits.

On June 2, 2015, MKM filed a memorandum of points and authorities in support of its opposition to Enforcement's motion, a response to Enforcement's statement of undisputed facts, and the sworn declarations of Steven Messina, MKM's founder and president, and Petra v.Z. Davenport, one of MKM's attorneys in this proceeding. Davenport's declaration has three attached exhibits.

The parties also filed a Stipulation of Facts dated May 12, 2015.

III. Applicable Standard for Motions for Summary Disposition

The question of whether a hearing panel has the authority to grant a motion for summary disposition in a BATS disciplinary proceeding is a matter of first impression. We conclude that hearing panels do have this authority and that summary disposition is appropriate here because there are no material facts in dispute.

BATS Rule 8.6(d) grants a Hearing Panel authority to "determine all questions concerning the admissibility of evidence and ... otherwise regulate the conduct of the hearing." This includes the authority to consider and, if warranted, grant a motion for summary disposition.⁴

BATS Rule 8.6 is silent with respect to the legal standard to be applied in deciding a summary disposition motion. Thus, it is appropriate to consider Rule 56 of the Federal Rules of Civil Procedure and the procedural rules of other regulators, such as the SEC and FINRA, which apply a similar standard for summary judgment as that set forth in Rule 56 of the Federal Rules of Civil Procedure.⁵

Rule 56(a) of the Federal Rules of Civil Procedure states that summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact."⁶ A

⁴ BATS Rule 8.6(d). *Cf. Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 1, at *41 n.64 (Jan. 9, 2009), *petition denied*, 586 F.3d 122 (2d Cir. 2009) (upholding the presiding hearing officer's general authority to grant a motion for summary judgment in the absence of a specific summary judgment rule).

⁵ See *Frank P. Quattrone*, Exchange Act Release No. 53547, 2006 SEC LEXIS 703 (Mar. 24, 2006) (applying Fed. R. Civ. P. 56 guidance to a FINRA (then NASD) proceeding when the FINRA standard indicated that a motion for summary disposition "may [be] grant[ed] ... if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law"). See also FINRA Rule 9264(e).

⁶ Fed. R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986) (quoting Fed. R. Civ. P. 56(c)).

genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”⁷

In determining whether a genuine issue of material fact exists, “[t]he evidence of the non-movant is to be believed” and the court must draw “all justifiable inferences” in favor of the non-moving party.⁸ Nevertheless, once the moving party has shown that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, “the nonmoving party must come forward with ‘specific facts showing that there is a *genuine issue for trial*,’”⁹ and “may not rely on conclusory allegations or unsubstantiated speculation.”¹⁰ In other words, the non-moving party must offer “concrete evidence from which a reasonable juror could return a verdict in his favor.”¹¹ The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties’ differing versions of the dispute at trial.¹²

The Hearing Panel finds that there is no genuine issue of material fact in dispute. Thus, the Hearing Panel grants Enforcement’s motion.

IV. Annual Report Filing Requirement

SEC Rule 17a-5(d)(1)(i) requires every broker or dealer registered pursuant to section 15 of the Exchange Act to file annually, on a calendar or fiscal year basis, a report which shall be audited by an independent public accountant.¹³ The annual reports must be filed with the SEC and FINRA, and copies of the reports must be “provided to all self-regulatory organizations of which the broker or dealer is a member, unless the self-regulatory organization by rule waives this requirement.”¹⁴ BATS has not enacted a rule waiving this requirement.¹⁵ BATS relies on SEC Rule 17a-5(d)(6).¹⁶

⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986).

⁸ *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

⁹ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis in original) (quoting Fed. R. Civ. P. 56(e)) (additional citation omitted).

¹⁰ *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) (citations omitted).

¹¹ *Anderson*, 477 U.S. at 256.

¹² *First Nat’l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968).

¹³ 17 C.F.R. § 240.17a-5(d)(1)(i).

¹⁴ 17 C.F.R. § 240.17a-5(d)(6).

¹⁵ Department of Enforcement’s Statement of Undisputed Facts (“Statement of Facts”) ¶ 7; Declaration of Teresa Laffoon (“Laffoon Decl.”) ¶ 17; Declaration of Andy Gordon (“Gordon Decl.”) ¶ 2. BATS Rules are available at <https://www.batstrading.com/regulation>.

¹⁶ Gordon Decl. ¶ 2.

BATS did not receive a copy of MKM's 2013 annual report by the applicable deadline. Thus, three weeks later, BATS sent MKM an email reminding it to provide a copy of the report as soon as possible.¹⁷ MKM did not respond to the email. Several weeks later, FINRA's Department of Enforcement sent MKM a letter that requested MKM to provide its 2013 annual report to BATS and to submit a written statement to FINRA explaining why MKM had not provided the report to BATS timely.¹⁸ In response, MKM provided BATS with a copy of its 2013 annual report on June 20, 2014, more than three weeks late.¹⁹ BATS explained in a letter to FINRA that the late submission "was the result of an error, now corrected, in failing to maintain this on the Compliance calendar."²⁰

This was not the first time that MKM had failed to timely provide BATS with a copy of its annual report. For the three prior years, MKM had filed copies of its annual audit reports with BATS late.²¹ MKM filed its 2010 annual report with BATS on April 15, 2011; its 2011 annual report on May 29, 2012; and its 2012 annual report on April 4, 2013.

This also is not the first time that BATS has taken corrective action against MKM. After MKM failed to timely submit its 2011 annual report, BATS issued a Cautionary Action Letter to MKM on May 25, 2012.²² Shortly thereafter, MKM's Chief Compliance Officer responded, stating that MKM "[h]as taken steps to assure compliance in the future by coordinating with our accounting department and CFO to provide a copy of our annual audit to BATS ... not more than sixty (60) days after our year end per SEC Rule 17a-5(d)(5)"²³

V. MKM Violated SEC Rule 17a-5(d)(5)

In light of MKM's assurance in 2012 that it would thereafter comply with the SEC submission requirement, the first question is whether anything changed to relieve MKM of its obligation to submit a copy of its 2013 report to BATS. Nothing had.

A. BATS Did Not Waive the Filing Requirement

Although BATS did not enact a rule waiving the annual-report submission requirement, MKM asserts that it was entitled to presume that BATS no longer required the submissions because it had entered into a regulatory services agreement with FINRA. MKM weaves together three unrelated facts to reach its presumption. First, MKM cites the language of BATS

¹⁷ Laffoon Decl. ¶ 15 and Ex. 10.

¹⁸ Declaration of Heather Freiburger ("Freiburger Decl.") ¶ 3 and Ex. 1.

¹⁹ Stipulation of Facts ("Stip.") ¶¶ 7-8.

²⁰ Freiburger Decl. ¶ 4 and Ex. 2.

²¹ Laffoon Decl. ¶¶ 7, 10, 13, and 16.

²² Stip. ¶ 4.

²³ Gordon Decl. ¶ 6 and Ex. 2.

Regulatory Circular 14-001 that plainly reminds BATS members that they must provide BATS with copies of their annual reports, as mandated by SEC Rule 17a-5(d)(6), that BATS relies on this rule, and that BATS “[does] not impose independent filing requirements on its members.”²⁴ Second, MKM notes that BATS had announced that it had entered into a regulatory services agreement with FINRA. Third, MKM points out that the SEC recently amended SEC Rule 17a-5(d)(6) to permit self-regulatory organizations such as BATS to waive the requirement that it receive copies of members’ annual reports filed with the SEC and FINRA. MKM then asks: “Which is it? Is there an independent filing requirement or not?”²⁵

MKM’s question—Is there an independent filing requirement or not?—ostensibly arises from MKM’s avowed confusion about whether BATS could have meant that filing with FINRA satisfied MKM’s filing obligation with BATS. Why? Because FINRA provided services to BATS under the terms of a regulatory services agreement, and MKM filed annual reports with FINRA. The logic underlying MKM’s purported quandary is directly undercut by the plain wording of the regulatory circular.

BATS Regulatory Circular 14-001 dated February 5, 2014, unambiguously stated:

- The purpose of the circular was to remind members that they are obligated to file annual audit reports with *all* self-regulatory organizations to which they belong.
- BATS members are required to provide copies of their annual audit reports to BATS.
- BATS members can comply with the filing requirement by sending copies of their annual reports to BATS by fax, email, or mail.
- The email address for filing copies of the annual reports is membershipservices@bats.com.
- If a member had any questions, it should contact BATS Membership Services.

Simply put, the wording precludes MKM’s strained construction. But, even if we were to credit MKM’s claim of confusion (which we do not), there are two other factors that preclude us from finding in MKM’s favor. First, MKM took no steps to clear up its confusion. MKM would have been able to clarify any confusion over the filing requirement by exerting as little effort as calling BATS Member Services at the telephone number provided in the circular. Second, SEC Rule 17a-5(d)(6) limits the method a self-regulatory organization may employ to waive the filing

²⁴ See Respondent’s Memorandum of Points and Authorities in Support of Respondent’s Motion in Opposition to Complainant’s Motion for Summary Disposition at 3.

²⁵ *Id.*

requirement—the self-regulatory organization must enact a rule approved by the SEC. MKM knew that BATS had not enacted such a rule. Thus, we conclude that MKM lacked a reasonable basis to believe that BATS had waived the filing requirement.

B. BATS Was Not Obligated to Designate Violations of SEC Rule 17a-5(d)(6) as a Minor Rule Violation

MKM's secondary defense is that BATS violated the Exchange Act and its own rules and By-Laws by not including violations of SEC Rule 17a-5(d)(6) among those violations covered by its SEC approved Minor Rule Violation Program. MKM cites no authority for its position, and we find none. The fact that other self-regulatory organizations such as FINRA include violations of SEC Rule 17a-5(d)(6) in their approved minor rule violation plans is of no help to MKM. Each self-regulatory organization must follow its approved plan according to its terms.

For these reasons, we conclude that MKM violated SEC Rule 17a-5(d)(6) by failing to provide BATS with a copy of its 2013 annual report within the time required by SEC Rule 17a-5(d)(5).

VI. Sanctions

The Department of Enforcement requests that we impose a censure and a \$2,500 fine. MKM opposes the censure. MKM argues that imposition of a censure for an administrative error would be unfair and unreasonable. We disagree.

The purpose of a sanction in a disciplinary proceeding is to remediate misconduct and protect the investing public.²⁶ To those ends, sanctions should be tailored to address the misconduct involved in each particular case.

Relevant factors to be considered in determining a sanction that is appropriately remedial include “[t]he seriousness of the offense, the corresponding harm to the trading public, the potential gain to the broker for disobeying the rules, the potential for repetition in light of the current regulatory and enforcement regime, and the deterrent value to the offending broker and others”²⁷

We considered the foregoing factors as well as BATS treatment of similar violations in other cases and concluded that the sanction the Department of Enforcement proposes is appropriately remedial and fair. Examining MKM's pattern of non-compliance over four consecutive years, we are particularly concerned that this violation occurred after BATS issued a Cautionary Action Letter to MKM less than one year before the submission deadline for the 2013 annual report. Also, we are disturbed by MKM's attempt to blame BATS for its violation.

²⁶ See *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005).

²⁷ *Id.* at 190.

MKM's position could not be more unfounded. No reasonable person could have concluded from the plain wording of the BATS regulatory circular that BATS was advising its members that they no longer needed to provide it with copies of their annual reports. Under these circumstances, a censure in addition to a fine is appropriate.

VII. Order

MKM Partners LLC is censured and fined \$2,500.²⁸



Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

MKM Partners LLC (by first-class mail)
Stephen Oppenheim, Esq. (by email and first-class mail)
Petra v.Z. Davenport, Esq. (by email)
Heather L. Freiburger, Esq. (by email)
Jeffrey Pariser, Esq. (by email)

²⁸ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.