

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

REGULATORY OPERATIONS,

Complainant,

v.

TMR BAYHEAD SECURITIES, LLC,
(CRD No. 137264),

Respondent.

Expedited Proceeding

No. FPI180002

STAR No. 20180581339

Hearing Officer—MJD

**EXPEDITED HEARING PANEL
DECISION**

September 10, 2018

TMR Bayhead Securities, LLC failed to file audited annual reports for the fiscal years ending March 31, 2015, March 31, 2016, and March 31, 2017, as required by Section 17(e) of the Securities Exchange Act of 1934 and Exchange Act Rule 17a-5(d). Respondent is suspended from FINRA membership until it files audited annual reports for these three fiscal years. Respondent is also assessed costs.

Appearances

For the Complainant: Meredith MacVicar, Esq., William Otto, Esq., and Ann-Marie Mason, Esq., for Regulatory Operations, Financial Industry Regulatory Authority.

For the Respondent: Todd M. Roberts, President, Chief Compliance Officer, and Financial Operations Principal of TMR Bayhead Securities, LLC.

DECISION

I. Procedural History

On March 23, 2018, Regulatory Operations sent a Notice of Suspension (“Notice”) to TMR Bayhead Securities, LLC (“Respondent” or “TMR Bayhead”) because the firm failed to file audited annual reports for the fiscal years ending March 31, 2015, March 31, 2016, and March 31, 2017 (“relevant fiscal years”). The Notice stated that, pursuant to FINRA Rule 9552, Respondent’s registration would be suspended effective April 16, 2018, unless it submitted the three annual reports by that date. The Notice also informed Respondent that, pursuant to Rule

9559(c)(1), a written request for a hearing filed with the Office of Hearing Officers before April 16, 2018, would stay the effectiveness of the Notice.¹

On April 12, 2018, Respondent timely filed a request for a hearing pursuant to FINRA Rules 9552 and 9559.² On June 7 and June 18, 2018, the parties participated by telephone in a hearing before a FINRA Hearing Panel.

II. Factual Findings and Legal Conclusions

A. Background

TMR Bayhead has been a FINRA member since January 2006.³ Its main offices are located in Poughkeepsie, New York.⁴ Todd M. Roberts (“Roberts”) is the founder⁵ and sole owner of the firm.⁶ Since its inception, he has been the firm’s President, Chief Compliance Officer, and Financial Operations Principal.⁷ He is the firm’s sole principal and the only person associated with the firm.⁸

Most facts are not in dispute. Respondent did not file audited annual reports for the relevant fiscal years. Instead, Respondent filed unaudited annual reports for each of the relevant fiscal years in reliance on an exemption from the audit requirement provided under Exchange Act Rule 17a-5(e)(1)(i)(A) (“single issuer exemption”). Respondent asserts that it properly relied on the single issuer exemption because its business was limited to acting as a broker or agent for a single issuer during each of the relevant fiscal years.⁹ Regulatory Operations asserts that Respondent did not qualify for the exemption because it did not act as an agent for an issuer, did not solicit investors to purchase the issuer’s subscription, did not deliver any funds or securities to any counterparty, and did not complete any transaction.¹⁰

¹ Complainant’s Exhibit (“CX-”) 9, at 2. Respondent’s fiscal years ran from April 1 to March 31 of the following year. Joint Exhibit (“JX-”) 1, at 1, 15, 31.

² JX-15.

³ CX-21, at 4.

⁴ CX-21, at 4.

⁵ Hearing Transcript (“Tr.”) 478.

⁶ CX-21, at 5; JX-15, at 2.

⁷ CX-21, at 5; Tr. 536.

⁸ Tr. 536.

⁹ JX-1, at 2, 9-10, 16, 23-24, 32, 39-40.

¹⁰ Complainant’s Closing Brief at 2. The Hearing Officer issued an order directing the parties to submit written closing arguments in this proceeding. *See* Order Regarding Closing Arguments (June 18, 2018). Complainant’s Closing Brief is its closing argument.

The sole issue before the Hearing Panel is whether TMR Bayhead qualified for the single issuer exemption in each of the relevant fiscal years.

For the reasons discussed herein, the Hearing Panel concludes that Respondent has not met its burden in demonstrating that it qualified for the single issuer exemption in any of the relevant fiscal years.

B. SEC Requirement to File Audited Annual Reports

Section 17(e) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 17a-5(d) thereunder require every registered broker-dealer to file annually a report audited by an independent public accountant. Failure to comply with Exchange Act Rule 17a-5 violates FINRA Rule 2010.¹¹

There is a narrow exemption to this requirement. Pursuant to Exchange Act Rule 17a-5(e)(1)(i)(A), a broker-dealer is exempt from the annual audit requirement if

[t]he securities business of the broker or dealer has been limited to acting as a broker (agent) for the issuer in soliciting subscriptions for securities of the issuer, the broker has promptly transmitted to the issuer all funds and promptly delivered to the subscriber all securities received in connection with the transaction, and the broker has not otherwise held funds or securities for or owed money or securities to customers.

In *Sharemaster*,¹² the Securities and Exchange Commission (“SEC”) recently addressed the limited application of this exemption. The SEC explained that the exemption only applies to brokers who act as agents on behalf of a single issuer.¹³ It also explained that the exemption

[g]enerally ... applies only to brokers and dealers engaged exclusively in self-underwriting. In other words, the exemption is basically designed to relieve a broker-dealer engaged exclusively in underwriting the issues of its parent from the requirement that its annual report of financial statements be audited. As a result, our staff has consistently taken the position that the exemption is available to broker-dealers in this situation. Our staff has also taken the position that the exemption does not apply to a broker that acts for multiple issuers, even if it usually conducts business with only one [issuer] at any given time, because the exemption applies only to those situations which in fact involve a single issuer, as in self-underwriting. It is the limited nature of the business of a broker that solicits subscriptions for a single issuer and the relationship between the broker and that

¹¹ *E. Magnus Oppenheim & Co., Inc.*, 58 S.E.C. 231, 235 (2005).

¹² *Sharemaster*, Exchange Act Release No. 83138, 2018 SEC LEXIS 1036 (Apr. 30, 2018).

¹³ *Id.* at *3.

issuer, such as when the broker is engaged only in underwriting the issues of its parent, that renders the audit requirement unnecessary.¹⁴

The party claiming the exemption bears the burden of establishing that it was entitled to rely on the exemption.¹⁵

C. TMR Bayhead's Business Operations

During the relevant fiscal years, TMR Bayhead's Membership Agreement with FINRA authorized it to engage in the business of private placement of securities, selling tax shelters or limited partnerships in primary distributions, and employing five associated persons who have direct contact with customers in the conduct of the member's securities, trading, and investment banking activities.¹⁶

TMR Bayhead did little to no business during the relevant fiscal years.¹⁷ The firm had no revenue and no expenses except those related to compensation and benefits and regulatory fees.¹⁸ Because TMR Bayhead did not appear to be conducting any securities business, on May 13, 2014, FINRA staff issued a notice to TMR Bayhead requiring the firm to demonstrate that it was actively conducting an investment banking or securities business.¹⁹

Approximately a week later, Roberts responded in writing to FINRA's notice.²⁰ Roberts explained that TMR Bayhead has "always been a broker-dealer with limited focus on providing M&A advisory services, business consulting and valuation services, and private placement services for private company fundraisings."²¹ He assured FINRA staff that, even though TMR Bayhead did not have consistent revenue, it "is very much actually engaged and transacting in more than one branch of the investment banking and securities business"²² Roberts went on to say that TMR Bayhead had two customers—Fountainhead Mobile Solutions, LLC ("Fountainhead"), a mobile medical computing company that was seeking a buyer through the

¹⁴ *Id.* at *22-23 (internal quotations and citations omitted). *See also Emerald Capital Corp.*, 1987 SEC No-Act. LEXIS 2192, at *2 (Apr. 26, 1987) ("[T]he paragraph (e) of Rule 17a-5 exemption is available only to a broker or dealer whose securities business has been limited to acting as a broker (agent) for a single issuer, since the date of the previous financial statements or reports filed pursuant to Rule 15b1-2 under the [Exchange Act]. Having conducted no business is insufficient justification for an exemption from the audit requirement.").

¹⁵ *Sharemaster*, 2018 SEC LEXIS 1036, at *19-20.

¹⁶ CX-1, at 1.

¹⁷ JX-1.

¹⁸ JX-1, at 5, 19, 35.

¹⁹ JX-3, at 1.

²⁰ JX-3, at 2-4.

²¹ JX-3, at 2.

²² JX-3, at 2.

firm, and an unnamed renewable energy and eco-construction company that was a business advisory and potential private placement services customer.²³

On October 23, 2014, FINRA staff requested additional information from TMR Bayhead concerning the firm's business operations, in particular a list of all current and planned deals.²⁴ In response, Roberts represented to FINRA that TMR Bayhead had active "sell side assignments" with two companies—Fountainhead and Medical Wizards, both of which were majority owned by his brother.²⁵ Roberts also represented to FINRA that he had discussions with a third company, a former customer in the orthopedics technology business, about TMR Bayhead engaging in medical and technology "sell side assignments."²⁶ Roberts further told FINRA that he was developing prospects in the solar and wind business to obtain sell side assignments for TMR Bayhead.²⁷

Again, in an effort to determine whether TMR Bayhead was conducting any securities business, on December 8 and 9, 2014, FINRA staff asked the firm to provide due diligence materials and evidence of ongoing communications related to TMR Bayhead's two current deals—Fountainhead and Medical Wizards.²⁸

In response to these two requests, on December 9, 2014, Roberts produced an email he sent to his brother on December 8, 2014, asking whether there is "anything new on the strategic and/or financial buyers' interest front."²⁹ He also produced an email he sent on December 9, 2014, to the CEO of Solar Krafte Utilities about potential solar energy projects for TMR Bayhead. At that time, Roberts produced no other evidence to demonstrate TMR Bayhead was engaged in any business activity or communications with Fountainhead, Medical Wizards, or any other entity.³⁰

D. TMR Bayhead Failed to Demonstrate that Its Securities Business Was Limited to Soliciting Subscriptions for Securities in a Single Issuer

Despite Roberts' representations to FINRA in May and October 2014, on May 3, 2015, Roberts filed Respondent's unaudited annual report for the fiscal year ending March 31, 2015, affirming to the SEC that "[s]ince the previous annual report, [TMR Bayhead] has limited its

²³ JX-3, at 3.

²⁴ JX-5, at 1.

²⁵ JX-5, at 2.

²⁶ JX-5, at 2.

²⁷ JX-5, at 2.

²⁸ Tr. 157-58; JX-4, at 1.

²⁹ JX-4, at 4.

³⁰ Tr. 157-59; JX-4, at 5.

securities business to acting as a broker or dealer for a single issuer.”³¹ Roberts made this same affirmation to the SEC in Respondent’s unaudited annual reports filed for the fiscal years ending March 31, 2016, and March 31, 2017.³²

Roberts testified at the hearing that, during the relevant fiscal years, Respondent was engaged in business with a single issuer—PDA Verticals Corporation (“PDA Verticals”)—which was majority owned by his brother.³³ Roberts testified that the relationship with PDA Verticals related to the placement of PDA Verticals’ securities with a strategic investor, business partner, or competitor.³⁴ Roberts also testified that, during the relevant fiscal years, Respondent advised PDA Verticals on the issuance of securities to PDA Verticals employees or consultants.³⁵ As part of those services, Roberts testified that TMR Bayhead assisted PDA Verticals with awarding PDA Verticals stock to between three and six unnamed PDA Verticals employees.³⁶

The Hearing Panel does not credit Roberts’ testimony that, during the relevant fiscal years, Respondent was exclusively soliciting subscriptions for securities in a single issuer. Roberts’ testimony at the hearing contradicts his prior representations to FINRA about the firm’s business operations. In 2014, Roberts represented to FINRA staff twice that he was engaged in business or seeking business opportunities with multiple entities in an obvious effort to assuage FINRA’s concern that Respondent’s business was inactive.³⁷ Despite these representations, Roberts affirmed to the SEC that the firm had only been engaged in business with a single issuer.³⁸

Also, Respondent’s unaudited annual reports for the relevant fiscal years are devoid of any evidence that Respondent solicited subscriptions for securities or engaged in any meaningful business operations. Respondent reported no revenues and no expenses related to any securities business.³⁹ It defies credulity that Respondent purportedly solicited subscriptions for securities for nearly three years but never incurred any expenses related to those activities. The Hearing

³¹ JX-1, at 2.

³² JX-1, at 16, 32.

³³ Tr. 533-34, 537-38, 579-80.

³⁴ Tr. 534.

³⁵ Tr. 547-51.

³⁶ Tr. 546-51, 556, 559-60, 590-91.

³⁷ See JX-3; JX-4; JX-5.

³⁸ Roberts claimed at the hearing for the first time that PDA Verticals, Fountainhead, and Medical Wizards were a single issuer because PDA Verticals was doing business as Fountainhead and Medical Wizards was acquired by PDA Verticals in approximately 2014. Tr. 528-34, 579. The Hearing Panel did not find this credible, particularly in light of Roberts’ failure to substantiate his claim with any supporting documentation.

³⁹ JX-1, at 5, 19, 35.

Panel does not credit Roberts' testimony that Respondent incurred business expenses for soliciting subscriptions but chose not to report those expenses on the broker-dealer's records.⁴⁰

Moreover, Roberts failed to provide a single document to demonstrate the purported limited nature of Respondent's business operations. Roberts had numerous opportunities in the last two years to gather and obtain documentation to support Respondent's claimed single issuer exemption.⁴¹ Nonetheless, Roberts relies on only a few documents to support his claimed exemption:

- two undated and unexecuted form letters and one dated (March 10, 2013) but unexecuted letter from Respondent which contemplated future engagements with either PDA Verticals or Fountainhead wherein Respondent would act as the exclusive financial advisor in connection with the sale of those businesses;⁴²
- a December 2014 email exchange between Roberts and his brother wherein Roberts asks his brother whether there is "anything new on the strategic and/or financial buyers' interest front";⁴³ and
- a May 7, 2017 letter from Roberts' brother on behalf of PDA Verticals confirming an intention and agreement to continue the relationship between PDA Verticals and Respondent whereby Respondent would continue to promote PDA Verticals as a non-exclusive broker and agent acting to solicit suitable investors who might be interested in a substantial subscription of PDA Verticals equity securities.⁴⁴

None of these documents demonstrate that Respondent actually had any business operations during the relevant fiscal years. Rather, the documents show what Respondent contemplated doing in the future. The May 7, 2017 letter from Roberts' brother is equally unavailing in demonstrating Respondent's business was limited to a single issuer in the relevant fiscal years. Indeed, the letter is silent about the period of the purported prior relationship between Respondent and PDA Verticals. Moreover, Respondent offered no testimony from Roberts' brother or other witnesses to corroborate or bolster Roberts' testimony that TMR Bayhead was engaged in any securities business on behalf of PDA Verticals.⁴⁵ Respondent's reliance on undated and unexecuted form agreements, a vague email, and a letter from Roberts' brother that postdates the relevant fiscal years does not persuade the Hearing Panel that

⁴⁰ Tr. 503-06, 581-86.

⁴¹ FINRA repeatedly requested documentation from Respondent to support its claimed exemption. *See* JX-8; JX-9; JX-11.

⁴² JX-2; JX-9, at 5-9.

⁴³ JX-4, at 4.

⁴⁴ JX-9, at 4.

⁴⁵ Tr. 575-76.

Respondent's business was limited to soliciting subscriptions for securities in only PDA Verticals for the relevant fiscal years.

In addition, the Hearing Panel does not find credible Roberts' testimony that TMR Bayhead purportedly assisted PDA Verticals with awarding stock to PDA Verticals employees or consultants during each of the fiscal years. There are no documents or other evidence to support his claim. Nonetheless, even if the Hearing Panel were to credit Roberts' testimony on this issue, the record demonstrates that there was no solicitation of securities. Roberts admitted that PDA Verticals awarded the stock, at its discretion, to its employees or consultants.⁴⁶

Respondent has not met its burden of demonstrating that it qualified for the single issuer exemption. The record is clear that Respondent was not engaged in the type of business contemplated by this narrow exemption. Specifically, Respondent was not underwriting issues for its parent company. Respondent has never had a parent company and it does not argue that it was underwriting issues for its parent company. Even if the single issuer exemption may be applied more broadly than the context of a broker-dealer underwriting issues for its parent company, Respondent has not provided any documentation to establish that its business was limited to a single issuer or that it solicited or effected any transactions for any issuers. Indeed, the weight of the evidence reveals that Respondent had little to no business activities during the relevant fiscal years.⁴⁷

Accordingly, the Hearing Panel finds that Respondent failed to file its audited annual reports for the fiscal years March 31, 2015, March 31, 2016, and March 31, 2017, in violation of Section 17(e) of the Exchange Act, Exchange Act Rule 17a-5(d), and FINRA Rule 2010.

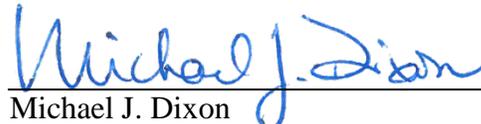
III. Order

Respondent is suspended from FINRA membership for failing to file audited annual reports for the relevant fiscal years, in violation of Section 17(e) of the Exchange Act, Exchange Act Rule 17a-5(d) and FINRA Rule 2010. The suspension will be effective upon the issuance of this Decision and will remain effective until Respondent files a report, or reports, complying with the requirements of Section 17(e) of the Exchange Act and Exchange Act Rule 17a-5. If Respondent files acceptable audited annual reports for the relevant fiscal years, pursuant to Rule 9552(f), it may apply to Regulatory Operations for termination of the suspension.

⁴⁶ Tr. 589-91.

⁴⁷ The Hearing Panel declines to address whether as a matter of law a completed transaction is necessary to qualify for the single issuer exemption because the Hearing Panel did not find any credible evidence that Respondent either solicited or effected any securities transaction for any issuer.

Respondent is ordered to pay costs of \$5,169.50, which includes an administrative fee of \$750 and \$4,419.50 for the cost of the hearing transcript. The costs shall be due on a date established by FINRA.⁴⁸


Michael J. Dixon
Hearing Officer
For the Hearing Panel

Copies to:

Todd M. Roberts (via email, overnight courier, and first-class mail)
Meredith MacVicar, Esq. (via email and first-class mail)
William Otto, Esq. (via email)
Ann-Marie Mason, Esq. (via email)

⁴⁸ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.