UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-15794

In The Matter of the Application of

MITCHELL T. TOLAND

For Review of Action Taken by

FINRA

MEMORANDUM OF TOLAND IN SUPPORT OF APPLICATION FOR REVIEW

Respectfully submitted,

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Preliminary Statement

On December 2, 2009, Hallmark Investments, Inc. (the "Firm") submitted a Membership Continuance Application (the "Application") to FINRA's Department of Registration and Disclosure. The Application sought to permit Mitchell T. Toland ("Toland"), a person subject to statutory disqualification, to continue to associate with the Firm as a general securities representative. Ultimately, a FINRA hearing on the Application was scheduled to take place on October 17, 2013.

On October 2, 2013, Toland requested an emergency postponement of the hearing scheduled for October 17, 2013. Given the extremely critical circumstances, described more fully herein, Toland could not attend the hearing on October 17, 2013. Disturbingly, Toland's request for a postponement was denied and the hearing proceeded without him.

On February 19, 2014, FINRA's National Adjudicatory Council ("NAC") issued a decision denying the Firm's Application to permit Toland to continue to associate with the Firm as a general securities representative (the "Decision").

On March 11, 2014, Toland filed an Application for Review with Commission ("Appeal"), requesting that it set aside the Decision and remand the matter to NAC for a full, fair and proper hearing on the merits.

Toland presents this Memorandum in support of his Application for Review. FINRA, pursuant to 15 U.S.C. § 78o-3(b)(8) and 15 U.S.C. § 78o-3(h)(1), is obligated to implement its procedures fairly. Toland respectfully submits that the Hearing Panel abused its discretion and erred by failing to grant his request for a modest postponement of the October 17, 2013, hearing, especially in view of the unique and pressing circumstances. As a result, Toland was unfairly and wrongfully deprived of the opportunity to have a full and fair hearing on the merits.

Statement of Facts

A. Proceedings Prior to the October 17, 2013, Hearing

On December 2, 2009, the Firm submitted a Membership Continuance Application to FINRA's Department of Registration and Disclosure. The Application sought to permit Toland, a person subject to statutory disqualification, to continue to associate with the Firm as a general securities representative.

In February, 2011, Member Regulation recommended that the Chairperson of the Statutory Disqualification Committee, acting on behalf of NAC, approve Toland's continued association with the Firm. In March, 2011, the Chairperson rejected Member Regulation's recommendation.[1] The Firm subsequently sought approval of the Application pursuant to FINRA Rule 9524 and a hearing was scheduled for November 10, 2011. Several weeks prior to the hearing, Toland's newly proposed back-up supervisor received a Wells Notice.[2] As a result,

[1] The primary reason for the rejection was that the initially proposed backup supervisor was unacceptable.

[2] To date, no proceedings have been instituted in connection with the referenced Wells Notice.

Member Regulation and the Firm jointly agreed to postpone the hearing to allow the firm to find a more suitable backup supervisor.

In December, 2011, Member Regulation and the Firm agreed that the hearing would take place on April 19, 2012. In late March, 2012, while the Firm was preparing for the hearing, it learned that FINRA inexplicably 'dropped the ball' and the April 19, 2012, hearing had never been scheduled.[3] Notably, as discussed below, there was no further discussion about a scheduling a hearing for a nearly one year.

In March, 2012, the Firm informed Member Regulation that it had hired an individual named Michael Kleiner to serve as Toland's backup supervisor. However, Kleiner was not registered as general securities principal and Member Regulation allowed Kleiner time to qualify.

It is of note that throughout the entire time the above-described process was pending, numerous FINRA personnel rotated through the matter and, often, many months would pass before counsel for the Firm would hear from the last FINRA employee he dealt with or a new FINRA employee assigned to the matter.

In January, 2013, Kleiner qualified as a principal. As noted, from March, 2012, through January, 2013, counsel for the Firm was contacted sporadically by Member Regulation. However, what happened thereafter is not surprising given Member Regulation's prior conduct.

In late April, 2013, after a several month lag in substantive communications with Member Regulation, and with virtually no prior discussion whatsoever, counsel the Firm received an email from Member Regulation (Bernard Canepa) stating that he scheduled a hearing

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[3] Not surprisingly, this error on FINRA's part is glaringly absent from the Procedural History section of the Decision. This is so because NAC relied solely on FINRA's biased submission, which NAC adopted nearly verbatim.

for June 5, 2013. Counsel immediately contacted Mr. Canepa and said Canepa should have consulted with counsel first, as counsel was not available on that date. Canepa asked if June 19 or 20 would be acceptable for a hearing date, and counsel replied that he would let Canepa know in a few days.

Notwithstanding the preceding, on May 3, 2013, counsel received an email from FINRA (Melanie Campbell at OGC) indicating that the hearing for the matter was scheduled for June 5, 2013. Apparently, Ms. Campbell did not know of counsel's conversation with Mr. Canepa only a few days earlier, wherein counsel advised Mr. Canepa that he had a court appearance scheduled for June 5, 2013. Given counsel's conversation with Mr. Canepa, the June 5, 2013, hearing had clearly been scheduled in error.

Upon counsel's receipt of the May 3, 2013, email from Ms. Campbell, he immediately contacted Ms. Campbell to 'reschedule' the hearing (at this point counsel had advised Mr. Canepa and Ms. Campell that counsel was not available on June 19 or 20). Ms. Campbell advised counsel the only dates available were July 24 and August 14, 15, 28 and 29. In response, counsel advised Ms. Campbell (and Mr. Canepa) that he was not available on July 24, and August 28 and 29 were unacceptable dates for counsel and one potential witness. Counsel also advised Ms. Campbell and Mr. Canepa that he was available on August 15 and, at that point, the potential witnesses were able to commit to August 15, 2013 (though more than one potential witness told counsel that those dates often coincide with end of summer family plans/vacations). With that in mind (and noting that all witnesses and counsel would all have to travel to DC from NY, potentially impeding even local family plans), counsel asked Ms. Campbell about potential September dates. She advised there were no available dates in September. Thus, and despite the limitations noted, the hearing was scheduled for Wednesday, August 15, 2013.

At this juncture, through no fault of Toland, twenty-one (21) months had elapsed since the initial hearing was scheduled for November, 2011, and fourteen (14) months had elapsed since Toland was prepared to participate in the April, 2012, hearing that FINRA inexplicably failed to schedule.

On July 22, 2013, counsel requested an adjournment of the August 15, 2013, hearing, as he was unexpectedly needed to assist in his daughter's 1,250 mile (round trip) move to college. The adjournment request was granted, over Member Regulation's objection, and the hearing was rescheduled for October 17, 2013.[4]

B. Proceedings Pertaining to the October 17, 2013, Hearing

On October 2, 2013, by letter to FINRA's OGC, counsel for Toland requested an emergency adjournment of the October 17, 2013, hearing, based on serious and unanticipated circumstances. (*See*, Maistrow Affirmation, Ex. A.)

The October 2, 1013, letter request advised as follows: Ten days prior to the letter, Toland's mother, who is 77 years old and elderly, was diagnosed with Stage 3/Stage 4 ovarian cancer; she was going for further testing on October 3, 2013, to determine if the cancer which had spread to her lungs was the same cancer or a separate form of cancer, which would determine the course of treatment prescribed for Mrs. Toland. Additionally, the letter noted that under the best case scenario, Mrs. Toland's treatments would be twice a week (5.5 hour and 2.5 hour sessions), and under the worst case scenario her treatments would be three days per week. Either way, the side effects will be debilitating, especially for a 77 year-old.

[4] Astonishingly, Member Regulation, in opposition to my request for an adjournment, called my request "puny." I have been practicing law since 1985, and I can safely say that this is the first time I asked for a professional courtesy that was met with this response.

Further, counsel's October 2, 2013, letter noted that, irrespective of whether Mrs. Toland will be receiving chemotherapy treatment 2 or 3 days per week, her treatments would commence the following week (i.e., the week of October 7th) and the side effects from the treatments would be severe. However, and because Toland was only asking for an 8-10 week postponement of the hearing, the letter also noted that Mrs. Toland's doctors advised that "the deleterious impact of the treatments will likely wane during 18 week treatment course." (emphasis supplied.) [5]

Counsel's October 2, 2013, letter also pointed out that Toland lives with his mother and is her sole caretaker and there were no relatives or friends who were able to take Mrs. Toland to and from her treatments and attend to her while she suffered through the after effects of the chemotherapy course. Moreover, the letter stated that Toland is fully aware of the magnitude of the instant FINRA proceeding and did not take the same lightly, and circumstances were entirely unforeseen and, of course, could not be direr.

Finally, the October 2, 2013, letter concluded by stating, "Mr. Toland's career is at risk and he should be afforded a full and fair opportunity to be heard. Given the above-described circumstances, it would be shameful, detrimental and prejudicial if these proceedings go forward on October 17, 2013, without Mr. Toland in attendance. As such, I am respectfully submitting this request for an emergency (compassionate and humane) adjournment of the October 17 hearing."

Member Regulation, by letter to OGC dated October 3, 2013, stated, "...it is of the opinion that a hearing can still be conducted on October 17, 2013." (emphasis supplied.) Further,

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[5] The Decision (at 17, footnote 5) notes, "that neither Toland nor his counsel provided any proposed dates for a continued hearing, other than to suggest that Toland would be available once his mother's treatments had been completed in 18 weeks. This is a blatant misstatement. Immediately subsequent to his October 2, 2013, letter, counsel for Toland told Mr. Canepa of Membership Regulation that an 8-10 week adjournment would suffice, which is exactly why the letter contained the statement that the ill effects of the treatment would likely wane during the 18 week course. Unfortunately, Membership Regulation steadfastly refused to a postponement of any length, so neither Toland nor his counsel suggested any specific proposed dates.

Member Regulation's letter stated, "To that end, the Department offers to change the hearing location from Washington, DC to either the New York or New Jersey District offices, so as to be convenient for the Firm, Mr. Toland and his counsel, Brad Maistrow. Additionally, we anticipate that the hearing will run for no more than 2 ½ hours." (emphasis supplied.) (*See*, Maistrow Affirmation, Ex. B.)

Counsel for Toland, by letter to OGC dated October 4, 2013, pointed out that Member Regulation's estimates did not take into account the time for Mr. Toland to present his side, and that round trip travel time in metropolitan New York (from the cancer treatment center, or the Tolands' home, to the situs of the hearing and back) could easily take three hours. (*See*, Maistrow Affirmation, Ex. C.) Further, counsel for Toland noted that the (FINRA) estimated hearing time plus the travel time would undoubtedly consume an entire day, and Mr. Toland simply could not abandon his mother for that period of time, regardless of whether she was receiving treatment at the cancer center or at home suffering from the side effects.

Notwithstanding the above, OGC, by letter dated October 4, 2013, denied Toland's request to postpone the hearing, and scheduled the same to take place on October 17, 2013, in FINRA's New York offices at the World Financial Center. (*See*, Maistrow Affirmation, Ex. D.)

By letter to OGC dated October 15, 2013, counsel for Toland advised that Mrs. Toland's treatments had commenced and she was not reacting well, she would be receiving treatment on October 17, 2013, the day of the scheduled hearing, and notwithstanding the New York hearing locale to "accommodate" Toland, the same was not an accommodation at all and Toland would be unable to attend the hearing.

Further, counsel's October 15, 2013, letter stated as follows: "Make no mistake, Mr. Toland is not thumbing his nose at this FINRA proceeding. However, he has no choice but to

take care of his mother right now. While I believe the refusal to afford Mr. Toland due process – his day in court, so to speak – is, under the extant circumstances, inappropriate and disappointing, the failure to extend Mr. Toland a modicum of human decency and compassion is disturbing." The letter concluded by requesting that all correspondence pertaining to the adjournment request be included in the record so a higher tribunal would be cognizant of the fact that Mr. Toland, as a result of very serious circumstances beyond his control, was deprived of an opportunity to defend in the proceedings and, therefore, have the matter decided on the merits. (*See*, Maistrow Affirmation, Ex. E.) [6]

As noted above, Toland's request for a postponement was denied and the hearing proceeded on October 17, 2013, without him. As also noted above, on February 19, 2014, FINRA's National Adjudicatory Council ("NAC") issued a decision denying the Firm's Application to permit Toland to continue to associate with the Firm as a general securities representative (the "Decision"). [7]

[6] The October 15, 2013, letter asked that all correspondence pertaining to the postponement request be included in the record. For convenience, the above referenced correspondence is annexed to the Maistrow Affirmation, submitted herewith, as Exhibits A through E.

[7] The Decision (at 13, footnote 19) notes that Member Regulation moved for a default denial of the Membership Continuance Application, but Hearing Panel rejected the default request and denied the Application "on its merits."

Argument

FINRA'S FAILURE TO GRANT TOLAND A MODEST ADJOURNMENT OF THE OCTOBER 17, 2013, HEARING, ESPECIALLY UNDER THE UNIQUE AND PRESSING CIRCUMSTANCES, VIOLATED ITS MANDATE TO PROVIDE FAIR PROCEDURES, DEPRIVED TOLAND OF AN OPPORTUNITY TO DEFEND AND WAS A CLEAR ABUSE OF DISCRETION

FINRA is required to provide fair procedures for disciplining its members and persons associated with members. (*See*, Securities and Exchange Act of 1934, 15 U.S.C. § 78o-3(b)(8).) Moreover, FINRA is obligated to "bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record." (emphasis supplied.) (*See*, Securities and Exchange Act of 1934, 15 U.S.C. § 78o-3(h)(1).)

In the instant matter, FINRA did not heed these requirements; its refusal to grant Toland's request for a postponement unfairly and wrongfully precluded Toland's opportunity to defend against the charges. As a result, FINRA clearly abused its discretion in denying Toland's modest adjournment request under truly exigent circumstances. [8]

[8] To justify the refusal to deny Toland's request for an adjournment of the October 17, 2013, hearing, the Decision cites *Robert J. Prager*, Exchange Act Release No. 51974, 58 SEC 634, 2005 WL 1584983, at *13 (Jul. 6, 2005) ("In NASD proceedings the trier of fact has broad discretion in determining whether to grant a request for a continuance.") and *Falcon Trading Group, Ltd.*, Exchange Act Release No. 36619, 52 SEC 554, 1995 WL 757798, at *5 (Dec. 21, 1995) ("... in NASD proceedings, as in judicial proceedings, the trier of fact has broad discretion in determining whether a request for a continuance should be granted, based on the particular facts and circumstances presented." (emphasis supplied.) Further, the Decision also states that the refusal grant Toland's adjournment request was a proper exercise of discretion because of the length of the Application process and the offer to "accommodate" Toland by conducting the hearing in New York.

However, as noted in detail in this Memorandum, the duration of the Application process was predominantly at the hand of FINRA, and the offer to hold the hearing in New York, rather than DC, did not, under the circumstances, "accommodate" Toland in any way. Moreover, the facts and circumstances in *Robert J. Prager* and *Falcon Trading Group, Ltd.* are not even remotely analogous to the facts and circumstances relating to Toland's request for a continuance of the October 17, 2013, hearing.

In *Robert J. Prager*, Robert Prager and James Alexander appealed to the SEC from an NASD Disciplinary proceeding ruling. Jerome Rosen, an individual involved with Prager and Alexander, was also a respondent in the NASD Disciplinary proceeding, but the proceeding was stayed as to Rosen when he filed for Bankruptcy. In the Prager and Alexander appeal to the SEC, Alexander asserted that the NASD abused its discretion by denying his

As noted above in detail, and downplayed and given short shrift in the Decision, Toland's elderly mother had just been diagnosed Stage 3/Stage 4 cancer, chemotherapy treatments (3 sessions/week) were starting one week prior to the hearing, Toland lives with his mother, is her sole caretaker and there were no friends or relatives to transport and attend to Toland's mother. As also noted above, the Decision also states the Hearing Panel – at Member Regulation's suggestion – offered to conduct the hearing in New York or New Jersey "as a reasonable accommodation to Toland." Under the circumstances, holding the hearing in New York or New Jersey, did not accommodate Toland and was certainly not "reasonable." It was self-serving, short-sighted and not even remotely reasonable for Member Regulation to assert (and for the Hearing Panel to accept) that Toland could drop off his mother for chemotherapy, travel (in the metropolitan New York area) to the hearing situs, be present for "approximately 2 ½ hours" (according to Member Regulation), and easily return to the treatment center to timely retrieve his

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request for a continuance after Rosen filed for Bankruptcy. Specifically, Alexander asserted that Rosen, as a result of the Bankruptcy, was made unavailable to testify at the NASD hearing, and in light of Alexander's unavailability, Rosen needed more time to prepare his defense. The SEC determined that the NASD did not abuse its discretion in denying Alexander's request for a continuance because, *inter alia*, Alexander did not establish that Rosen failed to attend the NASD hearing on account of his Bankruptcy and that Rosen remained subject to NASD jurisdiction to attend the hearing under Rule 8210. Moreover, SEC decision noted that Prager, Alexander's co-respondent, joined with Enforcement in opposing Alexander's request for a continuance, as Prager wanted the hearing to proceed on schedule.

In Falcon Trading Group, Ltd., six weeks prior to the NASD hearing, Bloom, counsel for Falcon and co-respondents Vittor and Gurian, determined that he had a conflict and could not represent all three clients. Four weeks before the hearing, attorney Sorkin appeared for Vittor and Gurain and requested a consent adjournment from NASD. The request was denied and Sorkin filed a motion for a continuance or, in the alternative, for 30 days for Vittor and Gurian to obtain new counsel. Simultaneously, Bloom filed a motion for a continuance or, in the alternative, for 45 days for Faclon to obtain new counsel. Sorkin's motion asserted he did not have enough time to prepare, and Bloom's motion asserted that he no longer had the time to properly prepare for the hearing because he had scheduled surgery before the hearing and his wife had broken her leg. The Sorkin and Bloom motions were denied, and Bloom withdrew as Falcon's counsel (with Falcon's consent). Five days prior to the hearing, Falcon, *pro se*, filed an emergency motion for a 45 day adjournment so it could retain new counsel. On the same day, Sorkin also filed an emergency request for Vittor and Gurian to obtain new counsel. Sorkin's motion was denied and, apparently, no action was taken on Falcon motion. The hearing began on the scheduled date, and none of the respondents were represented by counsel. The NASD ultimately issued a decision finding that the three respondents had violated NASD rules. On appeal, the SEC determined, *inter alia*, that where respondents had six weeks' notice (prior to hearing date) of their counsel's conflict, respondents had sufficient time to obtain new counsel and have counsel prepare for the hearing and, as such, the NASD's denial of the various continuance motions was well within its discretion.

mother and attend to her needs thereafter. Given the extremely critical circumstances, it was impossible for Toland to attend the hearing on October 17, 2013, and the Hearing Panel's refusal to grant a postponement under the circumstances was a clear failure by FINRA to implement its procedures fairly and an abuse of FINRA's discretion.

Moreover, also noted above in detail, these proceedings have spanned a number of years, through no fault of Toland. In December, 2011, Member Regulation and the Firm agreed that the hearing would take place on April 19, 2012. Then, in late March, 2012, while the Firm was preparing for the hearing, it learned that FINRA inexplicably 'dropped the ball' and the April 19, 2012, hearing had never been scheduled. After FINRA's error, there was no further discussion about a scheduling a hearing for a nearly one year.

What's more, in late April, 2013, after a several month lag in substantive communications with Member Regulation (Bernard Canepa) scheduled a hearing for June 5, 2013 without consulting counsel for Toland. As a result, the hearing erroneously scheduled June 5, 2013, hearing was "rescheduled" to August 15, 2013 (which, as noted above, was adjourned to October 17, 2013, because counsel had a family commitment).

As also noted above, at the time FINRA erroneously scheduled the June 5, 2013, hearing, twenty-one (21) months had elapsed since the initial hearing was scheduled for November, 2011, and fourteen (14) months had elapsed since Toland was prepared to participate in the April, 2012, hearing that FINRA inexplicably failed to schedule. Apparently, FINRA was not inordinately concerned with the duration of the proceedings, and Hearing Panel's decision, notwithstanding FINRA's own foot dragging, to put its foot on the gas by refusing to adjourn the October 17, 2013, hearing, was improper and unjust.

Given FINRA's conduct, it is clear that its failure to grant Toland's emergency postponement request – especially under the very serious circumstances pertaining to his mother – was not a fair implementation of its procedures, as mandated by 15 U.S.C. §§ 78o-3(b)(8) and 78o-3(h)(1), and Toland was wrongfully precluded from an "opportunity to defend." [9] Moreover, having been deprived of a hearing on the merits, Toland is compelled to note that the Decision is unfairly skewed, and a number of substantive and potentially mitigating factors, which would have been presented by Toland at a hearing, and are not part of the October 17, 2013, hearing record. [10] For example, Toland's father passed away in 2011 after a 2 ½ year battle with Alzheimer's and dementia. While this was trying emotionally, it had a serious financial impact on Toland, too, as his parents had inadequate insurance for Toland's father's care. Further, Toland's son, now 12 years old, has been undergoing intensive therapy (PT, OT and speech) for the past 10 years as a result of various disabilities and has seen numerous neurologists over the years. And during the same period, Toland was going through a marital separation/divorce.

In addition to the preceding, the Decision improperly described the Firm's disciplinary and regulatory conduct as "disconcerting." Again, if Toland's modest adjournment request had not been improperly and unfairly denied, the Hearing Panel (which, as noted above, adopted FINRA's hearing submission nearly verbatim) would have ultimately learned, for example, that at the time of the October 17, 2013, hearing, the Firm had recently gone through an exhaustive 8-month Cycle Examination (which included OTR examinations), and it completed the same with

[9] Again, as noted in footnote 5, *supra*, Toland was not seeking an 18 week adjournment. Instead, Toland was more than willing to proceed within 8-10 weeks of October 17, 2013.

[10] See, footnote 7, *supra*. Certainly, the hearing did not proceed "on the merits," and this statement simply compounds the FINRA's failure to implement its procedures fairly (i.e., providing Toland with an "opportunity to defend").

flying colors; the Firm was neither fined nor sanctioned in any way and was simply directed to take certain corrective actions.

Toland acknowledges FINRA's mission to protect the public interest by preventing an unreasonable risk of harm to the market or investors. However, given the amount of time these proceedings have already taken (predominantly at the hand of FINRA and through no fault of Toland), and given Toland's disciplinary history with respect to customer complaints, it is clear that an 8-10 week adjournment of the October 17, 2013, hearing would not have presented an imminent risk of unreasonable of harm to investors (making FINRA's refusal to grant Toland a modest adjournment, under the dire circumstances surrounding his mother, disturbing as well as patently unfair).

In fact, Toland's disciplinary history demonstrates that he has always handled his customers with the utmost care – of the five customer matters referenced in the Decision, the most recent one was asserted in 1998. With regard to the 1998 customer complaint (and as noted in the Decision), no action was taken (because the complaint was without merit). Similarly, separate complaints asserted in 1995 and 1993 were both found to have no merit by Toland's employer. The two remaining customer complaints were asserted in 1992, and as indicated in the Decision, one matter was settled for $1,000 and the other matter was settled for $2,500.

In short, two separate matters were settled for a total of $3,500 twenty-two (22) years ago, and three other matters, the last of which was asserted sixteen (16) years ago, were determined to be without merit. It is beyond cavil that Mr. Toland has always handled his customers' accounts properly.[11]

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[11] It is important to note that, in addition to Toland's virtually unblemished customer record for the past two decades, during the past five years, despite a multitude of serious personal family issues during this time period, Toland has not been the subject of a single customer complaint.

Conclusion

FINRA is required to provide fair procedures for disciplining its members and persons associated with members. (*See*, Securities and Exchange Act of 1934, 15 U.S.C. § 78o-3(b)(8).) Moreover, FINRA is obligated to "bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record." (*See*, Securities and Exchange Act of 1934, 15 U.S.C. § 78o-3(h)(1).) Toland respectfully submits that FINRA did not heed these requirements and FINRA's refusal to grant Toland's reasonable request for a postponement unfairly and wrongfully precluded Toland's opportunity to defend against the charges. As such, FINRA, under truly exigent circumstances, clearly abused its discretion in denying Toland's modest adjournment request.

For the all of the foregoing reasons, the Commission should enter an Order setting aside the NAC Decision of February 19, 2014, and remanding the matter to FINRA for full, fair and proper hearing on the merits.

Dated: New York, New York
May 20, 2014

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