BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

The Association of Mitchell T. Toland
With Hallmark Investments, Inc.

For Review of Denial of Registration by

FINRA

File No. 3-15794

FINRA'S BRIEF IN OPPOSITION TO MITCHELL T. TOLAND'S APPLICATION FOR REVIEW

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I. INTRODUCTION

This appeal concerns a single issue: whether FINRA abused its discretion by refusing to grant Mitchell T. Toland's request to postpone an October 17, 2013 hearing on an application for Toland to continue to associate with Hallmark Investments, Inc. ("Hallmark" or "the Firm") notwithstanding his statutory disqualification. The record unequivocally demonstrates that FINRA did not abuse its discretion, and the Commission should dismiss this appeal.

Toland paints a myopic and unsubstantiated picture of a FINRA hearing panel that acted arbitrarily and unfairly by focusing exclusively on the short period surrounding his October 2013 postponement request. He fails, however, to acknowledge any of the nearly four years of context behind that request, the hearing panel's previous postponements of the hearing on multiple occasions, and FINRA's discovery, several months before Toland's postponement request at issue, of Toland's blatant and intervening misconduct subsequent to the disqualifying event.

Viewed in a fuller light, the hearing panel acted well within its discretion to deny Toland's final request to postpone the hearing, and appropriately balanced the need to proceed promptly to a hearing with Toland's request to once again postpone the hearing on this matter.

Indeed, a cursory examination of the record reveals that, notwithstanding Toland's settlement with FINRA in September 2009 for willfully failing to disclose a personal bankruptcy filing (which rendered him statutorily disqualified), he failed to disclose 11 additional judgments and liens filed against him. These additional judgments and liens totaled more than $490,000. Making matters worse, a number of these judgments and liens arose after his 2009 disqualifying settlement order (and after he expressly assured FINRA that he would comply with its reporting obligations going forward). FINRA's Department of Member Regulation ("Member Regulation") first discovered Toland's continuing misconduct in early 2013—more than three years after Hallmark filed the application and after Member Regulation had consented to several continuances of the hearing so that Hallmark could find an adequate backup supervisor for Toland, without any knowledge of Toland's continued misconduct. Although Toland gives these facts minimal attention, he does not contest any of them.

The record further shows that, after Member Regulation discovered Toland's continuing serious misconduct in early 2013, Toland requested two *additional* postponements of the hearing. In August 2013, the hearing panel granted the first request, over Member Regulation's objection, to permit Toland's counsel to help his daughter move to college. The hearing panel set the hearing for October 17, 2013, in Washington, D.C. At that point, more than 44 months had already elapsed since Hallmark filed the application.

In early October 2013, Toland's counsel once again asked to postpone the hearing, this time because of Toland's mother's illness and her upcoming cancer treatments. Although the

hearing panel denied Toland's request, it attempted to accommodate him by moving the location of the hearing to New York (close to Toland and his mother's residence). Toland rejected this accommodation. He also rejected a subsequent opportunity to participate in the hearing by telephone. Neither Toland nor his counsel (or any Hallmark representative for that matter) attended the hearing. The hearing panel thus conducted a hearing without them, and FINRA subsequently denied Hallmark's application. The NAC found that Toland engaged in serious intervening misconduct and presented an unreasonable risk of harm to the market or investors.

The hearing panel provided Toland and Hallmark with ample opportunity to participate in a hearing and to present evidence to support Hallmark's efforts for Toland to remain associated with it notwithstanding his statutory disqualification. For years, FINRA accommodated Toland's requests for delays (including several years where Toland kept FINRA and his customers in the dark concerning his financial situation), and he simply has not demonstrated that the hearing panel abused its discretion in denying the last in a string of postponement requests. Despite Toland's best efforts to characterize himself as the victim of an arbitrary and capricious hearing panel, the facts demonstrate otherwise and show that Toland's customers and the investing public were the real victims of Toland's campaign to hide from them the severity of his financial difficulties. FINRA urges the Commission to dismiss Toland's appeal.

II. FACTUAL BACKGROUND

A. Toland's Willful Failure to Disclose his Personal Bankruptcy and Subsequent Failures to Disclose Judgments and Liens

Toland is statutorily disqualified because he willfully failed to update his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to reflect that, among

other things, he filed for bankruptcy in October 2005.[1] RP 1136-37. Toland eventually amended his Form U4 in April 2008 to reflect his bankruptcy filing after FINRA staff questioned him concerning his failure to disclose this matter. RP 1137. Pursuant to an Order Accepting Offer of Settlement dated September 22, 2009 (the "2009 Order"), FINRA suspended Toland for 45 days and fined him $5,000 for this misconduct. RP 151.

In connection with FINRA's investigation into Toland's misconduct, FINRA staff interviewed him in June 2008. RP 677-702. During the investigative interview, FINRA staff directed Toland to specific questions on the Form U4 requiring that he disclose bankruptcy filings, judgments, and liens filed against him. Toland testified that he did not know he had to disclose these matters on his Form U4.[2] RP 698-99. Toland further testified that, "if I knew I had to [disclose bankruptcy filings and liens], I would have done it, and that's what I can say, not even a question. . . . I will try and be the best I can." RP 702.

Toland's promise of future compliance with FINRA's disclosure rules rang hollow. Indeed, Toland failed to disclose 11 judgments and liens filed against him totaling more than $490,000. *See* RP 1091-1125. These judgments and liens consist of the following:

- A tax lien in the amount of $28,004 filed by New Jersey in January 2008;
- A tax warrant in the amount of $15,965 filed by New York in December 2008;

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[1] It appears that Toland also failed to disclose two arbitration awards entered against him, although FINRA did not allege any violations in connection with those failures. *See* RP 697.

[2] Article V, Section 2(c) of FINRA's By-Laws requires that an associated person keep his Form U4 current at all times and to update information on the Form U4 within 30 days. Question 14.K(1) of Form U4 asks, "Within the past 10 years have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?" Question 14.M on the Form U4 asks, "Do you have any unsatisfied judgments or liens against you?"

- A tax warrant in the amount of $10,140 filed by New York in September 2010;
- A tax warrant in the amount of $731 filed by New York in November 2010;
- A judgment in the amount of $22,951 obtained by Columbia Grammar & Preparatory School in February 2011;
- A judgment in the amount of $614 obtained by Midland Funding LLC in July 2011;
- Four federal tax liens totaling $386,838 filed by the IRS in May 2012 (for tax years 2003 through 2010);[3] and
- A federal tax lien in the amount of $25,000 filed by the IRS in June 2012 (for tax year 2011).

Toland has never disputed the existence or his knowledge of these judgments and liens. It is also undisputed that many of these judgments and liens arose *after* Toland's conciliatory testimony where he assured FINRA that he would disclose such matters in the future, and *after* the 2009 Order. Toland still has not disclosed certain tax liens on his Form U4. *See* RP 1139.

B. Toland's Employment History

Toland first registered in the securities industry as a general securities representative (Series 7) in June 1990. RP 023. Toland joined the Firm in October 2005. RP 001. Previously, he was associated with 15 different firms. RP 017-19.

C. Toland's Employment While the Application Was Pending

FINRA has long followed the practice of allowing a person, such as Toland, who becomes statutorily disqualified while employed in the securities industry to remain in the industry until he has had the opportunity for a hearing and FINRA's MC-400 application process

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[3] These four liens were subsequently consolidated into a single lien. RP 601, 1139.

has been completed. *See* FINRA By-Laws, Art. III, Section 3(c). If FINRA denies an application, its decision takes effect immediately.

Toland was associated with the Firm at the time the 2009 Order was entered against him. Thus, he remained employed by the Firm throughout the entire time that the Application remained pending before FINRA, through and including any hearing on the Application, any postponements of that hearing, and ultimately a decision by the NAC.[4]

D. Toland's Regulatory History

Toland has had two arbitration awards entered against him. RP 673, 715. In September 2005, a FINRA Dispute Resolution arbitration panel awarded Toland's former firm compensatory damages of $101,750, plus interest, attorneys' fees, and costs. RP 715. The firm alleged that Toland breached three promissory notes he executed in connection with forgivable loans. Toland did not pay this award, as he received a bankruptcy discharge of his debts. RP 600, 721.

In January 2005, a FINRA Dispute Resolution arbitration panel awarded Toland's former employing firm compensatory damages of $29,300, plus interest. The firm alleged that Toland breached a promissory note that he executed in connection with a forgivable loan and defamed his employer. RP 673. Toland did not pay this award, as he received a bankruptcy discharge of his debts. RP 600, 721.

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[4] Consequently, while Toland repeatedly feigns indignation regarding the duration of these proceedings, any and all delays in finally resolving the Application benefited Toland because he continued to work at the Firm until the NAC issued its decision. As explained herein, Toland's continued employment at Hallmark during the Application process is one reason why Member Regulation acted expeditiously after discovering, in early 2013, that Toland continued to engage in egregious misconduct subsequent to the 2009 Order.

Additionally, five customers filed complaints against Toland from November 1992 through July 1998. RP 027-49. These customer complaints alleged that Toland engaged in unauthorized trading, made unauthorized use of margin, made unsuitable recommendations, mismanaged customer accounts, and engaged in unauthorized transactions. Toland's firms denied three of these customer complaints, and the other two complaints were settled for $3,500.[5]

III. PROCEDURAL HISTORY

A. Initial Proceedings and Multiple Postponements of the Hearing

The Firm filed a Membership Continuation Application ("the Application") on December 2, 2009. RP 151. In February 2011, while Toland's creditors were—with his knowledge but unbeknownst to Member Regulation—filing numerous judgments and liens against him, Member Regulation recommended that Toland's proposed continued association with the Firm be approved.[6] RP 1193. In March 2011, Member Regulation's recommendation was rejected because: (1) the Firm's president, owner, and proposed backup supervisor at the time had disciplinary history (including a two-month suspension), numerous customer complaints filed

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[5] Toland's appeal exclaims that his "disciplinary history demonstrates that he has always handled his customers with the utmost care," and points to the fact that his five customer complaints, the most recent of which occurred in 1998, were settled for $3,500. Memorandum of Toland in Support of Application for Review ("Brief") at 13. Toland, however, ignores the fact that his seemingly intentional pattern of failing to disclose critical information regarding his personal finances, in violation of FINRA's rules, deprived his customers of important information concerning their broker. This hardly constitutes treating one's customers with the "utmost" care.

[6] Member Regulation recommended approval of the Application pursuant to FINRA Rule 9523(a), which provides that, with respect to certain statutorily disqualifying events, the Chairperson of the Statutory Disqualification Committee, acting on behalf of the NAC, may accept or reject the recommendation of Member Regulation to approve an application where the parties have consented to a supervisory plan.

against him, and had recently filed for bankruptcy; (2) Toland's proposed primary supervisor, Michael Burns ("Burns"), supervised 15 other registered representatives and served as the Firm's chief compliance officer (which raised concerns that Burns had insufficient time to supervise a statutorily disqualified individual); and (3) FINRA staff identified troubling issues in connection with the Firm's ongoing 2010 cycle examination, including whether registered individuals conducted business at the Firm while suspended. Member Regulation informed the Firm why the Application had been rejected. RP 597, 1389.

The Firm subsequently sought approval of the Application pursuant to FINRA Rule 9524, and a hearing was scheduled for November 10, 2011. RP 541. Several weeks prior to this hearing, however, Toland's proposed backup supervisor received a Wells notice. RP 547. Without knowledge of Toland's additional undisclosed judgments and liens, which remained undisclosed, Member Regulation agreed with Toland's request to postpone the hearing to allow the Firm time to find a more suitable backup supervisor.[7]

In March 2012, the Firm informed Member Regulation that it had hired Michael Kleiner ("Kleiner") to serve as Toland's backup supervisor. RP 583. Kleiner, however, was not registered as a general securities principal (and thus was not suitable to supervise Toland's activities at the Firm). *Id.* Member Regulation therefore agreed, again without knowledge of Toland's undisclosed additional judgments and liens, to allow Kleiner time to qualify as a

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[7] Toland states that, "[t]o date, no proceedings have been instituted in connection with the referenced Wells Notice." Brief at 2. This fact, even if true, misses the point. At the time of the scheduled November 2011 hearing, Toland's proposed backup supervisor was not suitable as a result of the pending Wells notice. Postponing the hearing to permit the Firm to find someone more suitable as a backup supervisor benefited Toland and the Firm.

principal before rescheduling this matter for a hearing.[8] RP 1065. Kleiner eventually qualified as a principal in January 2013, but approximately one month later, Member Regulation discovered that Toland had been engaging in the same exact misconduct that resulted in his statutory disqualification by failing to disclose 11 additional judgments and liens. RP 072, 1071.

FINRA subsequently provided notice that the hearing would take place on June 5, 2013; the hearing was subsequently moved to August 15, 2013.[9] RP 551, 557. In late July 2013, however, Toland's counsel requested another adjournment of the hearing, asserting that he unexpectedly needed to assist with his daughter's move to college. RP 562-65. The Hearing Panel granted this request, over Member Regulation's objection, and rescheduled the hearing for October 17, 2013, in Washington, D.C. FINRA also advised the parties that any proposed exhibits and witness lists must be filed and served no later than October 3, 2013. RP 1019.

On October 2, 2013, Toland's counsel requested yet another postponement of the hearing in this matter. RP 1026. Counsel explained that Toland's mother had been diagnosed with cancer and would be undergoing treatments two to three times per week. Counsel further explained that Toland was her sole caretaker and that he should not be "compelled to abandon his mother at this critical juncture." *Id.* Member Regulation opposed any continuance, but

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[8] Toland repeatedly states that FINRA "dropped the ball" and never scheduled a hearing that the parties allegedly agreed to have in April 2012 (in which Toland purportedly was prepared to participate). Brief at 3, 5, 11. Similar to Toland's argument regarding his initial proposed backup supervisor, Toland's blame-shifting is disingenuous. Prior to discovering Toland's continuing misconduct, Member Regulation attempted to accommodate the Firm's quest to find a qualified backup supervisor, which the Firm knew was crucial to the NAC's approval of the Application. Conducting a hearing after Kleiner passed the general securities principal examination, which he did in January 2013, benefited Toland and the Firm.

[9] Although Toland's brief spends considerable time discussing the June 5, 2013 hearing date (and Toland's counsel's unavailability on that date), it is undisputed that the hearing date was moved without issue.

indicated that it was willing to travel to New York or New Jersey, where Toland resides, for the hearing. RP 1030.

A hearing panel of FINRA's Statutory Disqualification Committee (the "Hearing Panel") declined to postpone the hearing, but agreed that, under the circumstances, it would move the location of the hearing to New York as a reasonable accommodation to Toland.[10] RP 1043. Toland's counsel subsequently informed the Hearing Panel that Toland would not attend the hearing in New York. RP 1055. The Hearing Panel advised the parties that the hearing would occur as scheduled, albeit by telephone, on October 17, 2013, and provided the parties with the necessary information to participate in a telephonic hearing. RP 1057. Member Regulation participated in the hearing. Toland, Toland's proposed primary supervisor, and Toland's counsel did not. See RP 1062-81. Further, at no time did the Firm or Toland submit any proposed exhibits or documents in support of the Application.

B. The NAC Denies the Application

In a decision dated February 19, 2014, the NAC determined that Toland's continued association with the Firm presented an unreasonable risk of harm to the markets or investors. RP 1150. The NAC analyzed the Application pursuant to Commission precedent applicable to a case such as Toland's, including *Paul Van Dusen*, 47 S.E.C. 668 (1981), *Arthur H. Ross*, 50 S.E.C. 1082 (1992), and *May Capital Group, LLC*, Exchange Act Release No. 53796, 2006 SEC LEXIS 1068 (May 12, 2006). RP 1145-50.

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[10] Pursuant to FINRA Rule 9524(a)(1), when a sponsoring firm requests a hearing, the NAC appoints a hearing panel composed of two or more members. The hearing panel conducts a hearing and recommends a decision to the Statutory Disqualification Committee. *See* FINRA Rules 9524(a)(1) & (10). The Statutory Disqualification Committee then considers the hearing panel's recommendation and presents a written recommendation to the NAC, and the NAC then either grants or denies the request for relief. *See* FINRA Rules 9524(a)(10) & (b)(1).

First, the NAC concluded that Toland continued to engage in misconduct (in fact, the very same misconduct underlying his statutory disqualification) subsequent to the 2009 Order. RP 1146-47. The NAC stated "[g]iven that Toland's failure to disclose his personal bankruptcy in October 2005 led to a suspension, fine, and ultimately these proceedings, we are troubled and perplexed by Toland's repeated and continuing failures to disclose judgments and liens on his Form U4." RP 1146. The NAC found inexcusable that Toland continued to ignore his duties to disclose such matters, particularly after FINRA staff directed him to the very questions on the Form U4 that required judgments and liens to be disclosed. The NAC held that "[f]or years, Toland deprived customers and the investing public of material information concerning his financial difficulties and his ability to manage his own financial obligations." RP 1147. The NAC further held that Toland's repeated failures to disclose numerous judgments and liens were, on their own, sufficiently egregious to warrant the Application's denial. *See* RP 1147.

Second, the NAC held that the Firm's disciplinary and regulatory history also warranted denial of the Application. RP 1147-48. The NAC stated that, "[s]imilar to Toland, the Firm has a troubling history of failing to comply with FINRA's reporting and disclosure obligations," citing to a FINRA settlement, two FINRA Cautionary Actions, and a consent order with the Indiana Securities Division involving reporting and disclosure violations. *Id.* The NAC also pointed to another recent settlement in which the Firm consented to findings that it failed to establish appropriate supervisory procedures regarding email review, and other disciplinary actions. RP 1148. The NAC concluded that, "[t]he totality of the Firm's disciplinary and regulatory history is disconcerting and supports our conclusion that it is not capable of assuming the additional heavy burden of supervising a statutorily disqualified individual such as Toland." *Id.*

Third, the NAC found that Toland's proposed supervisors and the proposed supervisory plan were inadequate. RP 1148-49. The NAC expressed concerns that Burns, the Firm's chief compliance officer, did not have sufficient time to supervise a statutorily disqualified individual. RP 1148. The NAC's apprehension regarding Burns' ability to supervise Toland was amplified by the fact that Burns had served as the Firm's chief compliance officer since 2005, during which time the Firm's regulatory and disciplinary history occurred. The Indiana Securities Division also cited Burns for failing to reasonably supervise a registered representative. The NAC further found that the record did not show that Toland's proposed backup supervisor, Kleiner, had any supervisory experience, and that the supervisory plan contained several deficiencies. RP 1149. Consequently, the NAC denied the Application.

The NAC also considered, and rejected, Toland's argument that he was deprived of his due process rights because the Hearing Panel refused to grant his request to postpone the October 17, 2013 hearing. RP 1149-50. The NAC concluded that the proceedings were conducted fairly and in accordance with FINRA's rules and the Securities Exchange Act of 1934 ("Exchange Act"), and found that the Hearing Panel did not abuse its discretion in denying the postponement request. The NAC considered that the Application had been pending for almost four years, all while Toland continued to work in the industry (the last several months during which Toland's egregious intervening misconduct had surfaced). The NAC also considered that applicants had been granted several previous requests to postpone the hearing, that the Hearing Panel attempted to accommodate Toland and the Firm, and that applicants did not propose any alternatives other than to suggest that Toland would potentially be available once his mother's treatment had concluded in 18 weeks. RP 1150.

On March 11, 2014, Toland appealed the NAC's denial and filed a motion to stay the NAC's denial, on nearly the same grounds as those currently advanced by Toland. RP 1151. Pursuant to an order dated April 4, 2014, the Commission denied Toland's motion to stay and rejected his argument that FINRA abused its discretion by refusing to postpone the October 2013 hearing.

IV. ARGUMENT

Section 19(f) of the Exchange Act sets forth the applicable standard of review in an appeal from a FINRA decision denying an application to associate with a statutorily disqualified person. That section provides that if the Commission finds that: (1) the "specific grounds" upon which FINRA based its denial "exist in fact;" (2) such denial is in accordance with FINRA's rules; and (3) such rules are, and were applied in a manner consistent with the purposes of the Exchange Act, it "shall dismiss the proceeding," unless it finds that such denial "'impose[s] any burden on competition not necessary or appropriate in furtherance of the purposes' of the Exchange Act." *See William J. Haberman*, 53 S.E.C. 1024, 1027 (1998), *aff'd*, 205 F.3d 1345 (8th Cir. 2000).

FINRA complies with the Exchange Act in denying an application such as Toland's when it bases its determination on a "totality of the circumstances" and explains "the bases for its conclusion." *See Leslie A. Arouh*, Exchange Act Rel. No. 62898, 2010 SEC LEXIS 2977, at *46 (Sept. 13, 2010). In situations where an individual's misconduct has already been addressed by the Commission or FINRA, and sanctions have been imposed for such misconduct, the Commission has instructed that FINRA should not consider the individual's underlying misconduct when it evaluates a statutory disqualification application. Instead, the Commission has directed FINRA to consider other factors, such as: (1) "other misconduct in which the

applicant may have engaged"; (2) "the nature and disciplinary history of a prospective employer"; and (3) "the supervision to be accorded the applicant." *Van Dusen*, 47 S.E.C. at 671; *see also May Capital Group*, 2006 SEC LEXIS 1068, at *21. FINRA, however, may consider the conduct underlying a disqualifying order if an applicant's later misconduct was so similar that it formed a "significant pattern." *Ross*, 50 S.E.C. at 1085, n.10.

As explained below, the NAC's decision fully comports with the standards of Exchange Act Section 19(f). It is undisputed that the bases for the NAC's denial exist in fact, and the NAC properly found that Hallmark and Toland failed to demonstrate that Toland's continued association with Hallmark would be in the public interest. Further, it is undisputed that the NAC clearly articulated and explained the bases for denying the Application. Finally, FINRA acted in accordance with its rules and in a manner consistent with the Exchange Act, and the Hearing Panel did not abuse its discretion in refusing to postpone the October 2013 hearing. Toland's argument that the Hearing Panel abused its discretion has no merit.[11] Accordingly, the Commission should uphold the NAC's decision.

A. The Specific Grounds for the NAC's Denial Exist in Fact

The record demonstrates, and Toland does not dispute, that the specific grounds upon which FINRA denied the Application exist in fact. First, it is undisputed that the 2009 Order rendered Toland statutorily disqualified. *See* Exchange Act Section 3(a)(39)(F) (providing that an individual is subject to a statutory disqualification if he willfully makes in any application or report filed with FINRA a false or misleading statement of material fact, or omits to state a material fact required to be disclosed). FINRA's By-Laws provide that a person subject to

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[11] Toland does not assert, and the record does not demonstrate, that FINRA's denial of the Application imposes an unnecessary or inappropriate burden on competition.

statutory disqualification is ineligible for membership unless he obtains special relief from FINRA to become associated with a member through the eligibility process. *See* Art. III, Sections 3(b) and (d) of FINRA's By-Laws. Pursuant to that process, Hallmark applied to FINRA to request that Toland be permitted to continue to associate with the Firm in spite of his statutory disqualification.

Second, the factors relied upon by the NAC to deny the Application—Toland's continued and repeated failures to disclose on his Form U4 judgments and liens subsequent to the 2009 Order, the Firm's disciplinary and regulatory history, and concerns regarding Toland's supervisors and inadequacies with the proposed heightened supervisory plan—all "exist in fact" and are amply supported by the record.

Toland has never contested the existence of such factors. Rather, he attempts to minimize them by implying that had he chosen to participate in the October 2013 hearing, "a number of substantive and potentially mitigating factors" may have come to light, at least with respect to certain of the reasons underlying the NAC's denial. *See* Brief at 12-13. For example, Toland points to his father's death in 2011 after several years of illness (which "had a serious financial impact on Toland"), his son's years of therapy for various disabilities, and his separation and divorce from his wife during the time period in question, presumably in defense of his abysmal compliance with FINRA's reporting obligations. While these circumstances may explain why judgments and liens arose against Toland in the first instance, they do not explain why Toland failed to disclose them on his Form U4, particularly after he had already been disciplined by FINRA for failing to disclose his bankruptcy filing. Moreover, Toland had the opportunity, and declined, to present these facts at the October 2013 hearing.

Similarly, Toland states that with regard to the Firm's disciplinary history, he would have demonstrated that FINRA recently concluded an eight-month cycle examination that the Firm "completed . . . with flying colors" and "was neither fined nor sanctioned in any way and was simply directed to take certain corrective actions." Brief at 12-13. In denying the Application, however, the NAC did not consider (or even reference) this examination. *See* RP 1147-48. Moreover, the fact that the Firm may have had a recent examination that resulted in something less than a formal disciplinary action against it, even if true, does not change its prior regulatory and disciplinary history that included failures to comply with FINRA's reporting and disclosure requirements. Finally, the NAC held that Toland's repeated failures to disclose numerous judgments and liens—which are undisputed—were, on their own, sufficiently egregious to warrant the Application's denial. *See* RP 1147.

The NAC's decision to deny the Application is soundly supported by the record, and the NAC considered all appropriate factors pursuant to Commission precedent and articulated clearly the bases for its denial. Toland's intimations that had he chosen to participate in the hearing, the end result may have been different, are completely unfounded.

B. The NAC's Review and Denial of the Application Were Fair and in Accordance with FINRA Rules

Toland is also unable to demonstrate that in denying the Application, FINRA failed to follow its procedures or otherwise acted unfairly. Specifically, Toland's argument that the Hearing Panel abused its discretion by denying his request to postpone the October 2013 hearing, and thus denied him the opportunity to "defend" himself, is without merit.[12]

A hearing panel in a statutory disqualification proceeding is authorized to postpone or adjourn any hearing. *See* FINRA Rule 9524(a)(5). The Commission has stated that, "[i]n NASD proceedings, the trier of fact has broad discretion in determining whether to grant a request for a continuance." *See Robert J. Prager*, 58 S.E.C. 634, 664 (2005); *Falcon Trading Group, Ltd.*, 52 S.E.C. 554, 560 (1995) (rejecting applicants' argument that hearing panel improperly denied their request to continue hearing and stating that "the trier of fact has broad discretion in determining whether a request for continuance should be granted, based upon the particular facts and circumstances presented"), *aff'd*, 102 F.3d 579 (D.C. Cir. 1996). In reviewing a denial of a request to continue or postpone a hearing, the Commission's "inquiry is limited to determining whether the denial constituted an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Falcon Trading Group*, 52 S.E.C. at 560 (internal quotations omitted); *see also Whiteside & Co.*, 49 S.E.C. 963, 967 (1988) (rejecting argument that FINRA was required to grant a second postponement of a hearing because the firm's chairperson was seriously ill and the firm's only other principal could not leave the firm

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[12] Toland does not dispute that FINRA's Office of General Counsel notified the parties of the October 17, 2013 hearing on August 5, 2013, in accordance with FINRA's rules and procedures. *See* FINRA Rule 9524(a)(2) (providing that the Hearing Panel shall give the parties at least 14 business days' notice of any hearing). That letter also advised the parties that any exhibits should be filed by October 3, 2013. RP 1019. Neither Toland nor the Firm filed any exhibits.

unattended; "[t]he law does not require unlimited postponements of judicial proceedings, and the NASD has broad discretion as to whether or not a continuance should be granted"), *aff'd*, 883 F.2d 7 (5th Cir. 1989).[13]

Toland has not demonstrated that, under the circumstances, the Hearing Panel abused its broad discretion by refusing to postpone the October 2013 hearing. While Toland focuses on the Hearing Panel's denial of his request and the unfortunate circumstances surrounding that request in a vacuum, this short-sighted view ignores the fact that serious continuing misconduct by Toland had been discovered several months prior to this request, which he has *never* explained or even addressed. Rather than being a single, "modest" request for an adjournment, Toland's final postponement request was the last in a series of postponements and was made at a time when the Application had already been pending (and Toland had been continually working) at the Firm for almost four years.

Moreover, while Member Regulation initially agreed to postpone hearings to accommodate Toland and the Firm, the situation changed in 2013 when it discovered that Toland had 11 additional, undisclosed judgments and liens totaling more than $490,000. While Toland

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[13] Toland, ignoring the Commission's decision in *Whiteside* and the obvious similarities between that case and the present circumstances, argues that the facts of *Prager* and *Falcon Trading* are not even remotely analogous to this case. *See* Brief at 9-10. Toland is misguided. In *Prager*, the Commission reiterated that a hearing panel has broad discretion in determining whether to grant a continuance, and found that a FINRA hearing panel did not abuse its discretion by refusing to grant a continuance of a hearing (the first such request made by the applicant). *Prager*, 58 S.E.C. at 664. If anything, *Prager* demonstrates that here, the Hearing Panel, which had granted a previous continuance request in a matter than had already been continued several times to accommodate Toland and Hallmark, appropriately exercised its discretion in denying Toland's last request. Likewise, in *Falcon Trading*, the Commission found that a FINRA hearing panel did not abuse its discretion by denying applicants' continuance request (their first), which applicants urged was necessary to allow them time to retain counsel. *Falcon Trading*, 52 S.E.C. at 560-61. Here, Toland's final postponement request was the last in a series of requests on an Application that had been pending for nearly four years, where Member Regulation had recently discovered Toland's continuing misconduct.

expresses astonishment that FINRA suddenly "put its foot on the gas" and urged an expedient hearing once it discovered that Toland had engaged in continued and repeated misconduct, Member Regulation's discovery of Toland's continuing misconduct and unwillingness or inability to follow FINRA's rules completely changed the posture of these proceedings and raised serious investor protection concerns. When Member Regulation discovered further misconduct in February 2013, an expeditious resolution of the Application became vital given Toland's wanton disregard for important FINRA rules. The Hearing Panel, and subsequently the NAC, considered all of these facts, and came to the reasoned conclusion that under the circumstances the hearing should proceed on October 17, 2013.

Toland downplays or ignores these facts and repeatedly argues that FINRA is to blame for the lengthy delay in these proceedings. *See* Brief at 9, 11, 13. To the extent that this argument has any relevance to whether the Hearing Panel abused its discretion, Toland is mistaken. Prior to discovering that Toland continued to flout FINRA's reporting rules, Member Regulation agreed to continue the hearing on the Application to accommodate Toland and the Firm and allow them to find an adequate backup supervisor (which they never did). Moreover, Toland's hands are far too dirty for him to complain about how these proceedings "have spanned a number of years, through no fault of Toland." Brief at 11. Had Toland complied with his reporting obligations and disclosed all 11 judgments and liens on his Form U4, rather than keep them hidden (including while his Application remained pending and he was obligated to keep information in the Application current), Member Regulation undoubtedly would have proceeded more expeditiously than it did initially. Toland directly benefited from the numerous delays and the more than four years that passed from the filing of the Application until the NAC's denial, as

he was permitted to continue to work at the Firm while these proceedings remained pending. *See supra* Part II.C.

Finally, rather than flatly rejecting Toland's final request to postpone the hearing and requiring him to travel to Washington, D.C., the Hearing Panel accommodated Toland by moving the hearing's location to New York. Toland rejected this accommodation, and also did not participate by phone when given that opportunity. Toland did not offer the Hearing Panel any reasonable proposed alternate dates for a hearing,[14] did not fully explain why only he could assist his mother (or make alternative arrangements) for the relatively brief time that a hearing would occupy, and did not explain why neither he nor his counsel participated by phone. Toland simply stated, and continues to state, that he was unavailable—period—while at the same time professing that he was not thumbing his nose at FINRA or attempting to undermine the seriousness of the proceeding. The Hearing Panel, faced with serious allegations of blatant and continued misconduct identical to the misconduct underlying the 2009 Order, did not act

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[14] Toland continues to complain that the decision inaccurately states that he did not provide any alternative dates for a hearing other than to suggest that Toland would be available in 18 weeks once his mother's treatments were completed. Brief at 2, 6. Toland further states that his attorney informed Member Regulation that an eight to 10 week adjournment would suffice. The record shows that the information provided to the Hearing Panel concerning a new date is accurate. *See* RP 1026. Regardless, an additional eight to 10 week postponement of a hearing that had already been postponed numerous times, on an Application that had been pending since December 2009 and where Toland indisputably engaged in egregious intervening misconduct, is hardly a "modest" request.

Further, Toland argues that the Hearing Panel "did not, under the circumstances, accommodate Toland in any way" and that conducting the hearing in New York "was self-serving" and "short-sighted." *See* Brief at 9, 10. Toland's characterization of the Hearing Panel's actions is hardly surprising given that he continues to broadly assert that it was "impossible" for him to participate in a hearing on October 17, 2013, under any circumstances. *See* Brief at 11. Regardless, under the facts and circumstances of this case, the Hearing Panel appropriately balanced the need to conduct the long-awaited hearing in this matter, where Toland's serious continued violations of FINRA rules had been discovered, with Toland's personal situation.

arbitrarily by refusing to again postpone a long overdue hearing on the Application, and acted well within its authority and the bounds of fairness to accommodate Toland in the way that it did. Toland has failed to demonstrate otherwise, and the Commission should dismiss this appeal.

C. The NAC Applied FINRA's Rules in a Manner Consistent with the Purposes of the Exchange Act

Finally, the NAC's denial of the Application was entirely consistent with the purposes of the Exchange Act. A central purpose of the Exchange Act is to promote market integrity and enhance investor protection. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 658 (1997) (stating that in passing the Exchange Act, one of Congress's animating objectives was "to ensure honest securities markets and thereby promote investor confidence"). In this vein, FINRA was formed to "adopt, administer, and enforce rules of fair practice," "[t]o promote . . . high standards of commercial honor," and "to promote just and equitable principles of trade for the protection of investors." FINRA Manual, Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc., Objects or Purposes (Third) (1) and (3) (July 2, 2010). Within the structure created by the Exchange Act, FINRA promulgates and enforces rules to "protect investors and the public interest."[15]

The Commission has found it "appropriate to recognize the NASD's evaluation of appropriate business standards for its members . . . [p]articularly in matters involving a firm's employment of persons subject to a statutory disqualification." *See Halpert & Co.*, 50 S.E.C. 420, 422 (1990); *Am. Inv. Serv., Inc.*, 54 S.E.C. 1265, 1271 (2001). As the Commission stated in *Haberman*, "NASD may, in its discretion, approve association with a statutorily disqualified

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[15] "Under the Maloney Act, the NASD is authorized to regulate itself by prohibiting and preventing fraud and unethical conduct by its members and by promoting in them professionalism and technical proficiency, much as would any association of professionals seeking to better itself and instill confidence in the public." *Jones v. SEC*, 115 F.3d 1173, 1182 (4th Cir. 1997).

person only if the NASD determines that such approval is consistent with the public interest and the protection of investors." 53 S.E.C. at 1027 n.7. In reviewing an application to permit a statutorily disqualified person to remain associated with a member firm, the NAC follows the factors enumerated in Article III, Section 3(d) of FINRA's By-Laws by reviewing:

> the relevant facts and circumstances as it, in its discretion, considers necessary to its determination, which, in addition to the background and circumstances giving rise to the failure to qualify or disqualification, may include the proposed or present business of a member and the conditions of association of any current or prospective associated person.

The Commission has stated that FINRA complies with the Exchange Act in denying an application such as Toland's when it bases its determination on a "totality of the circumstances" and explains "the bases for its conclusion." *See Arouh*, 2010 SEC LEXIS 2977, at *46; *Timothy H. Emerson*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *14 (July 17, 2009); *see also Van Dusen*, 47 S.E.C. 668.

The NAC properly found that Toland and Hallmark failed to demonstrate that Toland's continued association with the Firm would be in the public interest, and the NAC provided a convincing rationale as to why Toland represented an unreasonable risk of harm to the market or investors. The NAC appropriately considered that Toland continued to engage in serious misconduct subsequent to the 2009 Order, misconduct identical to the misconduct underlying the 2009 Order. Indeed, the NAC found that Toland's subsequent disclosure failures were, "on their own, sufficiently egregious to warrant denial of the Application." RP 1147. The Commission, in emphasizing the critical role that Form U4 plays in the screening process used to determine who may enter (and remain in) the industry, has stated that a registered representative's financial problems "raise concerns about whether [he] could responsibly manage his own financial affairs, and ultimately cast doubt on his ability to provide trustworthy financial advice and services to

investors relying on him to act on their behalf as a securities industry professional." *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *32 (Nov. 9, 2012). Toland has repeatedly demonstrated that he is unwilling to comply with his reporting obligations and provide his customers and the investing public with vital information concerning his financial affairs.

The NAC also appropriately concluded that Hallmark's troubling regulatory history (which likewise includes problems with FINRA's disclosure and reporting rules) and its proposed inadequate heightened supervisory procedures and inadequate (and, in the case of Kleiner, completely unqualified) supervisors for Toland further supported denying the Application. The Commission has consistently emphasized the need for "stringent supervision" of statutorily disqualified persons. "[I]n determining whether to permit the employment of a statutorily disqualified person, the quality of the supervision to be accorded that person is of utmost importance. We have made it clear that such persons must be subject to stringent oversight by supervisors who are fully qualified to implement the necessary controls." *Citadel Sec. Corp.*, 57 S.E.C. 502, 509-10 (2004) (internal quotations omitted).

Here, Toland does not seriously challenge the NAC's reliance upon the Firm's regulatory history as a reason for denying the Application, and he does not even mention the problems with his proposed supervisors and the proposed supervisory plan. Toland has failed to show that the NAC applied FINRA's rules in a manner inconsistent with the purposes of the Exchange Act.

* * *

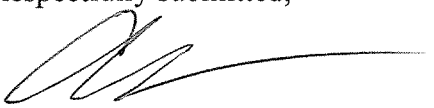
The bases for the NAC's denial "exist in fact," and the Hearing Panel did not abuse its discretion by refusing to postpone the October 2013 hearing. Toland and the Firm had more than ample opportunity to participate in FINRA's proceedings. The NAC's denial was consistent

with FINRA's rules and the purposes of the Exchange Act, and the record contains no indication that the NAC's denial constitutes an inappropriate burden on competition.

V. CONCLUSION

The Hearing Panel did not abuse its broad discretion in refusing to grant the last in a series of requests to postpone the hearing on the Application, when FINRA had recently discovered serious, intervening misconduct on Toland's behalf. Toland has not presented any arguments or evidence warranting reversal of the NAC's denial, and the record unequivocally shows that Toland and Hallmark were afforded ample opportunity to participate in these proceedings in accordance with FINRA's rules. The Commission should therefore dismiss Toland's appeal.

Respectfully submitted,



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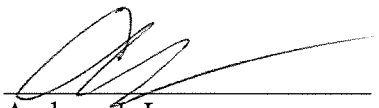
June 19, 2014

CERTIFICATE OF COMPLIANCE

I, Andrew J. Love, certify that this Brief in Opposition to Application for Review (File No. 3-15794) complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 7,202 words.



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