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 MOTION FOR STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Decisions **Pages**

SEC Decisions and Releases

Federal Statutes

NASD/FINRA Rules, By-Laws and Notices

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I. INTRODUCTION

Mitchell T. Toland wilfully failed to disclose his personal bankruptcy filing, and thus became statutorily disqualified from participating in the securities industry, pursuant to a settlement with FINRA entered in September 2009. At the time, Toland expressed to FINRA ignorance of his obligation to disclose bankruptcy filings, judgments, and liens filed against him, but assured FINRA that he would comply with its reporting rules going forward.

Toland's assurances quickly proved to be empty rhetoric. During FINRA staff's review of the Membership Continuation Application (the "Application") filed by Hallmark Investments, Inc. ("the Firm") seeking to permit Toland to continue to associate with the Firm, FINRA discovered that Toland inexplicably failed to disclose 11 additional judgments and liens against him totaling more than $490,000. A number of these judgments and liens arose *after* Toland's purported contrition for his previous disclosure failure, and *after* his 2009 disqualifying

settlement order. For years, Toland intentionally deprived his customers and the investing public of crucial information concerning his own finances, a prolonged pattern of not paying his debts, and his inability to manage his financial affairs. Consequently, FINRA's National Adjudicatory Council ("NAC") denied the Application and found that Toland's continued participation in the securities industry would present an unreasonable risk of harm to the market or investors.[1]

Toland does not contest that his compliance with FINRA's reporting requirements has been abysmal. To date, including in his Motion for Stay (the "Motion"), Toland has not offered any explanation for these failures (particularly in light of the 2009 disqualifying settlement order and his express assurances that he would comply with FINRA's reporting requirements going forward). Instead, Toland requests a stay of the NAC's denial based solely upon an alleged procedural error committed by the hearing panel of FINRA's Statutory Disqualification Committee (the "Hearing Panel"). Specifically, Toland argues that the Hearing Panel abused its discretion when it refused to postpone the hearing in this matter—a hearing that had already been postponed several times on an Application that had been pending for almost four years.

The Commission should reject Toland's narrow procedural argument and deny the Motion. The procedural history of these proceedings shows that the Hearing Panel did not act arbitrarily, and exposes Toland's procedural argument for what it is—an attempt to deflect attention from his continued and repeated disregard for FINRA's rules and the NAC's well-supported conclusion that his continued participation in the securities industry presents an unreasonable risk of harm to the market or investors. Toland has not shown that the Hearing

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[1] A copy of the NAC's February 19, 2014 decision is attached as Appendix A. References to the NAC's decision will be cited as "Decision at ___."

Panel abused its discretion by refusing to postpone the hearing in this matter, or otherwise failed to conduct these proceedings fairly and in accordance with FINRA's rules.

In fact, the record shows that over the course of several years, FINRA and the Hearing Panel bent over backwards to accommodate Toland and the Firm. Several times prior to the February 2013 discovery by FINRA's Department of Member Regulation ("Member Regulation") of Toland's continuing misconduct, Member Regulation and Toland jointly agreed to postpone the hearing on the Application. The first such instance, in November 2011, permitted the Firm to find a suitable replacement backup supervisor for Toland. The second such instance, from March 2012 through early 2013, permitted a newly hired proposed backup supervisor to pass the general securities principal examination.

After Member Regulation discovered Toland's 11 additional undisclosed judgments and liens in 2013, and an August 2013 hearing date had been agreed to by the parties, Toland requested another postponement of the hearing so that his attorney could assist with his daughter's move to college. The Hearing Panel granted that request, over Member Regulation's objection, and set the hearing for October 17, 2013 in Washington, D.C.

In early October 2013, Toland's counsel once again asked to postpone the hearing in this matter, 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 Toland by moving the location of the hearing to New York (close to Toland and his mother's residence). Toland rejected this accommodation, and rejected a subsequent opportunity to participate in the hearing by telephone.

The Hearing Panel provided Toland with ample opportunity to participate in a hearing and to present evidence to support the Firm's efforts for Toland to remain associated with it

notwithstanding his statutory disqualification. Toland has not demonstrated that the Hearing Panel abused its discretion in denying the last in a string of postponement requests, particularly where, as here, the Application had been pending for almost four years and important information concerning Toland's continued misconduct had recently come to light. Toland has not satisfied the high standard of proof necessary to grant a stay of the NAC's denial, and FINRA urges the Commission to deny Toland's request.

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.[2] Decision at 3-4. 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. Decision at 4. 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. Decision at 3-4.

In connection with FINRA's investigation into Toland's misconduct, FINRA staff interviewed him in June 2008. 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

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[2] 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. Decision at 4.

on his Form U4.[3] 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." Decision at 4.

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. Decision at 6. 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;
- 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); 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 of these judgments and liens. Rather, his position appears to be that his failure to disclose these judgments and liens was somehow the result of several life events that impacted his finances. *See* Motion at 11, n.9. Regardless of the

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[3] 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?"

circumstances surrounding Toland's financial situation, it is 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. Defiantly, Toland still has not disclosed certain tax liens on his Form U4. *See* Decision at 6.

B. Toland's Employment History

Toland first registered in the securities industry as a general securities representative (Series 7) in June 1990. Decision at 4. Toland joined the Firm in October 2005. Decision at 5. Previously, he was associated with 15 different firms.

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 has been completed. *See* FINRA By-Laws, Art. 3, Sec. 3(c).

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, through and including the hearing on the Application and the NAC's decision to deny the Application.

D. Toland's Regulatory History

Toland has had two arbitration awards entered against him. Decision at 5. 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. The firm alleged that Toland failed to repay forgivable loans. Toland did not pay this award, as he received a bankruptcy discharge of his debts.

In January 2005, an arbitration panel awarded Toland's former employing firm compensatory damages of $29,300, plus interest. The firm alleged that Toland failed to repay a forgivable loan and defamed his employer. Toland did not pay this award, as he received a bankruptcy discharge of his debts.

Additionally, five customers filed complaints against Toland from November 1992 through July 1998. 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. Decision at 5-6.

III. PROCEDURAL HISTORY

A. Initial Proceedings and Postponements of the Hearing

The Firm filed the Application on December 2, 2009. Decision at 1. In February 2011, without knowledge of Toland's additional undisclosed judgments and liens, Member Regulation recommended that Toland's proposed continued association with the Firm be approved.[4] Decision at 2. 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 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

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[4] Member Regulation recommended approval of the Application pursuant to FINRA Rule 9523(a), which provides that 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.

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. Decision at 2.

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 this hearing, however, Toland's proposed backup supervisor received a Wells notice. Without knowledge of Toland's additional undisclosed judgments and liens, Member Regulation and the Firm agreed to postpone the hearing to allow the Firm time to find a more suitable backup supervisor.

In March 2012, the Firm informed Member Regulation that it had hired Michael Kleiner ("Kleiner") to serve as Toland's backup supervisor. Kleiner, however, was not registered as a general securities principal. Member Regulation therefore agreed, again without knowledge of Toland's undisclosed additional judgments and liens, to allow Kleiner time to qualify as a principal before rescheduling this matter for a hearing.[5] 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. Decision at 6.

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[5] Toland 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). Toland's argument 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.

FINRA subsequently provided notice that the hearing would take place on June 5, 2013; the hearing was moved to August 15, 2013.[6] 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. The Hearing Panel granted this request, over Member Regulation's objection, and rescheduled the hearing for October 17, 2013, in Washington, D.C. The Hearing Panel also advised the parties that any proposed exhibits and witness lists must be filed and served no later than October 3, 2013. Decision at 3.

On October 2, 2013, Toland's counsel requested yet another postponement of the hearing in this matter. 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." Member Regulation opposed any continuance, but indicated that it was willing to travel to New York or New Jersey, where Toland resides, for the hearing.

The Hearing Panel declined to postpone the hearing, but agreed to move the hearing to New York as a reasonable accommodation to Toland. Toland's counsel subsequently informed the Hearing Panel that Toland would not attend the hearing in New York. The Hearing Panel advised the parties that the hearing would occur as scheduled, albeit by telephone, on October 17, 2013. Member Regulation participated in the telephonic hearing. Toland, Toland's proposed primary supervisor, and Toland's counsel did not. Decision at 3.

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.

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6 It is undisputed that the June hearing date was moved without issue. Decision at 2.

Decision at 17. The NAC analyzed the Application pursuant to Commission precedent, 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, at *21 (May 12, 2006).[7] Decision at 12-17.

First, the NAC concluded that Toland continued to engage in misconduct subsequent to the 2009 Order. Decision at 13-14. 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." Decision at 13. 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." Decision at 14.

Second, the NAC held that the Firm's disciplinary and regulatory history also warranted denial of the Application. Decision at 14-15. 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

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[7] These cases generally provide that in situations where an individual's misconduct has already been addressed by the Commission or FINRA, and sanctions have been imposed for such misconduct, FINRA should not consider the individual's underlying misconduct when it evaluates a statutory disqualification application. Instead, the Commission instructed 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. 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.

with the Indiana Securities Division involving reporting and disclosure violations. Decision at 14-15. The NAC also pointed to another recent settlement in which the Firm consented to findings that the Firm failed to establish appropriate supervisory procedures regarding email review, and other disciplinary actions. 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." Decision at 15.

Third, the NAC found that Toland's proposed supervisors and the proposed supervisory plan were inadequate. Decision at 15-16. The NAC expressed concerns that Burns did not have sufficient time to supervise a statutorily disqualified individual. Decision at 15. 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 had any supervisory experience, and that the supervisory plan contained several deficiencies. Decision at 16. Consequently, the NAC denied the Application.

The NAC also considered, and rejected, Toland's argument that the Hearing Panel unfairly refused to postpone the October 17, 2013 hearing. Decision at 16-17. The NAC concluded that the Hearing Panel conducted the proceedings fairly and in accordance with FINRA's rules and the Securities Exchange Act of 1934, 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. Decision at 17.

On March 11, 2014, Toland appealed the NAC's denial and filed the Motion.

IV. ARGUMENT

The Commission should deny Toland's request to permit him to work at the Firm pending the Commission's review of this appeal. The NAC carefully considered that Toland continued to flout his obligations under FINRA's rules to timely disclose judgments and liens subsequent to the 2009 Order, the Firm's problematic regulatory history, and the inadequacy of Toland's proposed supervisors and supervisory plan. The NAC appropriately concluded that Toland's continued participation in the securities industry would present an unreasonable risk of harm to the market or investors.

The NAC also properly rejected applicants' argument concerning the purported unfairness of FINRA's proceedings because the Hearing Panel refused to postpone the October 2013 hearing. A hearing on the Application, pending since December 2009, was finally conducted in October 2013. Toland and the Firm were granted several continuances of the hearing on the Application, including one over the objection of Member Regulation. FINRA further attempted to accommodate Toland in October 2013 when he informed FINRA that his mother was ill. Rather than participate in a hearing in New York or by telephone, Toland and the Firm instead chose not to attend the long overdue hearing on this matter. Indeed, neither Toland nor the firm provided any evidentiary support for the Application. Toland has not proven that

the Hearing Panel abused its discretion when it conducted the hearing, and the Commission should reject the Motion.

A. The Standard for Considering a Request to Stay

"[T]he imposition of a stay is an extraordinary and drastic remedy," and the moving party has the burden of establishing that a stay is appropriate. *William Timpinaro*, Exchange Act Release No. 29927, 1991 SEC LEXIS 2544, at *6 & nn.12, 13, & 14 (Nov. 12, 1991). In balancing the harms that would result from the grant or denial of a stay, the Commission requires that an applicant establish four criteria: (1) a strong likelihood that he will prevail on the merits; (2) that, without a stay, he will suffer irreparable harm; (3) whether there would be substantial harm to other parties if a stay were granted; and (4) whether the issuance of a stay would serve the public interest. *John Montelbano*, Exchange Act Release No. 45107, 2001 SEC LEXIS 2490, at *12 & n.17 (Nov. 27, 2001) (internal citation omitted). Toland has not shown that the extraordinary relief that he seeks is warranted.

B. Toland Has Not Shown a Strong Likelihood of Success on the Merits

Toland has not shown a strong likelihood that he will succeed on the merits of his appeal.[8] Statutorily disqualified persons, such as Toland, should not be permitted to participate in the securities industry absent a finding by a self-regulatory organization that such participation

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[8] Toland appears to base his entire appeal, as well as the likelihood that he will succeed on the merits of his appeal for purposes of the Motion, on his argument that the Hearing Panel abused its discretion by refusing to postpone the October 2013 hearing. Toland states that "arguments pertaining to whether Toland would likely prevail at an ultimate hearing on the merits may not be technically germane," although he suggests that certain facts in the NAC's denial are inaccurate or skewed. *See* Motion at 11, n.9. Toland carries the burden of proof in connection with the Motion, and he has not described with particularity what evidence he would have presented in support of the Application to refute the factors relied upon by the NAC in denying the Application. Regardless, Toland is unlikely to prevail with either his narrow procedural argument or any eventual (or implied) argument that the NAC erroneously denied the Application.

is in the public interest. *See* 15 U.S.C. § 78o-3(g)((2). Under this framework, FINRA has the authority to evaluate whether the disqualifying event and the firm sponsoring the application will uphold high business standards. *M.J. Coen*, 47 S.E.C. 558, 563-64 (1981).

Exchange Act Section 19(f) sets forth the applicable standard of review for this appeal. To succeed on appeal, Toland must show that one of the following criteria have not been met: (1) the "specific grounds" upon which FINRA based its denial "exist in fact;" (2) FINRA's denial is in accordance with its rules; and (3) FINRA's rules are consistent, and were applied in a manner consistent with, the purposes of the Exchange Act. *See* 15 U.S.C. § 78s(f). If all three criteria have been satisfied, then the Commission "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 id.* 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 Release No. 62898, 2010 SEC LEXIS 2977, at *46 (Sept. 13, 2010).

1. The NAC Properly Denied the Application on its Merits

The record demonstrates, and Toland does not dispute, that the specific grounds upon which FINRA denied the Application exist in fact. The NAC carefully considered that Toland has engaged in misconduct since the 2009 Order, the very same misconduct underlying that order. *See Van Dusen*, 47 S.E.C. at 671. The NAC properly weighed the seriousness of Toland's repeated failures to disclose on his Form U4 judgments and liens, and that Toland deprived customers and the investing public of important information concerning his financial difficulties.

The NAC also properly considered the Firm's disturbing history of regulatory issues, which included the Firm's failure to comply with FINRA's reporting and disclosure obligations. *See id.* Since 2009, the Firm has been the subject of two FINRA settlements, a state regulatory proceeding involving supervisory failures, three FINRA Cautionary Actions, and Commission examination findings that identified weaknesses and deficiencies concerning the Firm's compliance with the federal securities laws (including matters related to Toland's handling of several customer accounts).[9]

Finally, in denying the Application the NAC properly considered the inadequacy of the Firm's proposed supervisors and supervisory plans. *Id.*; *Citadel Sec. Corp.*, 57 S.E.C. 502, 509 (2004) ("[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.") (internal quotation omitted). The NAC expressed concerns that Burns, the subject of a state order finding that he failed to supervise a registered representative, lacked the time to supervise Toland. The NAC's concerns were amplified by the fact that Burns had been the Firm's chief compliance officer since 2005, during which time the Firm engaged in the misconduct identified by the Commission, FINRA, and Indiana. The NAC also found that the record did not show that Kleiner, the proposed backup supervisor, has any supervisory experience. *See Timothy P. Pedregon*, Exchange Act Release No. 61791, 2010 SEC LEXIS 1164, at *27-28 (Mar. 26, 2010) (finding troubling the assignment of an unqualified individual to serve as a backup supervisor).

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[9] Toland states that "with regard to the Firm being painted as the 'evil empire' by FINRA," FINRA recently concluded an eight-month cycle examination after which the Firm "was not fined or sanctioned in any way." Motion at 11, n.9. *Id.* In denying the Application, however, the NAC did not consider (or even reference) this examination. *See* Decision at 14-15. Moreover, 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* Decision at 14.

Further, the NAC identified several deficiencies with the Firm's proposed supervisory plan. *See id.* at *27 (holding that an applicant must establish that it will be able to adequately supervise a statutorily disqualified individual by imposing a stringent plan of heightened supervision).

The NAC's decision to deny the Application is soundly supported by the record, and Toland has not provided any credible argument or evidence that he has a strong likelihood of success on the merits of the underlying denial of the Application.

2. Toland's Procedural Argument Lacks Merit

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 is without merit.[10]

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). 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*, 52 S.E.C. at 560 (internal citations 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

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[10] Toland does not dispute that he received proper notice of the hearing in accordance with FINRA's rules.

other principal could not leave the firm 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).

Toland has not demonstrated that, under the circumstances, the Hearing Panel abused its 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 the request in a vacuum, this myopic view ignores the fact that serious continuing misconduct by Toland had been discovered several months prior to this request. 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. 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. At that time, an expeditious resolution of the Application became vital given Toland's wanton disregard for important FINRA rules.[11] The Hearing Panel, and

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[11] This point appears to be lost on Toland, who questions "FINRA's apparent disinterest, until recently, in moving these proceedings expeditiously." Motion at 13. Moreover, Toland's hands are far too dirty for him to complain about how these proceedings purportedly dragged on. Had Toland 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, as he was

[Footnote continued on the next page]

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.

Further, rather than flatly rejecting Toland 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,[12] and 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. Toland simply stated, repeatedly, that he was unavailable—period. The Hearing Panel, faced with serious allegations of blatant and continued misconduct identical to the misconduct underlying the 2009 Order, did not act 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.

* * *

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. The NAC's denial was consistent with its rules and the purposes of the Exchange Act, Toland and the Firm had more than ample opportunity to participate in FINRA's proceedings, and the record contains no indication that the

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[cont'd]
permitted to continue to work at the Firm while these proceedings remained pending. *See infra* Part II.C.

[12] Toland states that his attorney informed Member Regulation that an eight to 10 week adjournment would suffice. Motion at 6, n.5. 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.

NAC's denial constitutes an inappropriate burden on competition. Toland therefore has no likelihood that he will prevail on the merits.

C. Toland Has Not Demonstrated That a Denial of the Stay Request Will Impose Irreparable Harm

Toland must also show that complying with the NAC's decision will impose injury that is "irreparable as well as certain and great." *Whitehall Wellington Invs., Inc.*, Exchange Act Release No. 43051, 2000 SEC LEXIS 1481, at *5 (July 18, 2000). The Commission has emphasized numerous times that the disruption and economic harm caused by not being able to work pending resolution of a matter does not outweigh the need to protect the public interest. "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough." *Timpinaro*, 1991 SEC LEXIS 2544, at *8.

Toland has not shown that he will suffer irreparable harm. Toland attempts to circumvent the above-cited precedent by couching his alleged harm as the loss of his "reputation" and "substantial good will with his clients." Motion at 12. Toland's unsubstantiated argument concerning these potential losses does not amount to an injury that is "irreparable as well as certain and great." *See Timpinaro*, 1991 SEC LEXIS 2544, at *17 (denying motion to stay where petitioners did not substantiate claim that their businesses would be destroyed absent a stay). Moreover, the Commission has previously rejected arguments that harm to one's reputation constitutes irreparable harm. *See Michael A. Rooms*, Admin. Proceeding File No. 3-11621 (Nov. 17, 2004), copy attached as Appendix B (denying stay and finding no irreparable harm where petitioner argued that denial of a stay would damage his finances and reputation).

Indeed, the alleged harm to Toland's reputation and customer goodwill is indistinguishable from the harm to every person who is subject to a statutory disqualification (and, for that matter, a disciplinary sanction imposed by a self-regulatory organization) and faced with the loss of employment and the collateral effects on his reputation and clientele.[13] *Richard L. Sacks*, Exchange Act Release No. 34-57028, 2007 SEC LEXIS 3019, at *9-10 (Dec. 21, 2007) (denying stay despite petitioner's claim that denial would destroy his business). The Commission should reject Toland's expansive and unsupported view of what constitutes irreparable harm.

Even if Toland could show irreparable injury, which he cannot, the Commission should still deny the Motion. A showing of irreparable injury is not, standing alone, sufficient grounds upon which to grant a stay, particularly given the strength of the other three factors that overwhelmingly weigh against Toland. As discussed below, the potential harm to the public interest outweighs any injury to Toland's purported reputation and customer good will.

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[13] Toland states that, in the context of preliminary injunctions, the "Second Circuit has recognized that the threatened loss of customers' good will and damaged reputation is irreparable harm." Motion at 11. The cases cited by Toland, however, do not involve FINRA's denial of an application similar to Toland's, an action by FINRA against a regulated entity or individual, or a request to stay a sanction imposed by a self-regulatory organization. *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904 (2d Cir. 1990), for example, involved a contractual dispute between private parties, and the court stated that "terminating the delivery of a unique product to a distributor whose customers expect and rely on the distributors for a continuous supply of that product almost inevitably creates irreparable damage to the good will of the distributor. . . .This is particularly evident when many of the distributor's customers . . . have threatened to stop dealing with the distributor if it cannot continue to supply that product." *Id.* at 908. The facts of this case, and the alleged and unsubstantiated harm that Toland may suffer if the Motion is denied, are distinguishable. *See also Jacobson Co. v. Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977) (restraining defendant from terminating plaintiff as an authorized dealer of defendant's products); *Fonas Corp. v. Decard Services, Inc.*, 787 F. Supp 44 (E.D.N.Y. 1992) (enjoining defendant from selling, copying, or using plaintiff's software and infringing on plaintiff's copyright); *Towers Financial Corp. v. Dunn & Bradstreet, Inc.*, 803 F. Supp. 820 (S.D.N.Y. 1992) (granting a temporary restraining order to prevent magazine from publishing an allegedly false and misleading report).

D. Denial of the Stay Request Will Avoid Potential Harm to Others and Will Serve the Public Interest

Turning to the third and fourth criteria in deciding whether to grant a stay, the balance of equities weighs heavily against staying the effectiveness of the NAC's decision. The public interest strongly favors protecting investors based on the NAC's conclusions. Toland has a long history of ignoring FINRA's reporting obligations, and brazenly continued this pattern after the 2009 Order and his purported promises, made in 2008, that going forward he would properly disclose judgments and liens on his Form U4. For years, Toland hid from FINRA and, ultimately, investors, his history of unpaid debts and judgments.[14]

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. Permitting Toland to engage as an

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[14] Toland argues that "given the amount of time these proceedings have taken . . . it is clear that FINRA could not have believed that Toland's continued association presented an imminent risk of unreasonable harm to investors." The Commission should reject these arguments. As stated above, Member Regulation initially agreed to several postponements of the hearing (each of which benefited Toland) without knowledge of Toland's continuing misconduct. Moreover, once FINRA discovered Toland's intervening misconduct, it sought a prompt hearing. Toland should not receive the benefit of any assumption regarding his purported risk to investors during the time before Member Regulation discovered his intervening misconduct. If anything, Member Regulation's actions subsequent to its discovery indicate just how large of a risk it perceived Toland to be.

active participant in the securities industry places the markets and public customers at risk. Similarly, the Firm has a troubling regulatory history (which likewise includes problems with FINRA's disclosure and reporting rules), and it proposed inadequate heightened supervisory procedures and inadequate (and, in the case of Kleiner, unqualified) supervisors for Toland.

Toland argues that his "virtually unblemished record for the past two decades," as evidenced by "only" having five customers file complaints against him, shows that no party will suffer any harm if a stay is issued. Motion at 14. Toland's characterization of his record is wildly off the mark, and conveniently ignores the 2009 Order (and accompanying 45-day suspension and $5,000 fine) and his audacious and continuing failures to comply with FINRA's reporting requirements. In balancing the potential injury to Toland against the possibility of harm to the public, the necessity of protecting the public far outweighs any potential injury to Toland. The Commission will further the public interest by denying Toland's stay request.

V. CONCLUSION

The Commission should deny Toland's request to stay the effectiveness of the NAC's February 19, 2014 decision. Toland has failed to demonstrate that he has a strong likelihood of succeeding on the merits. He is unlikely to show that the Hearing Panel abused its discretion by refusing to grant the last in a series of requests to postpone the hearing on the Application. Further, the specific grounds upon which FINRA based its denial exist in fact, FINRA conducted these proceedings in accordance with its rules, and FINRA's rules were applied in a manner consistent with the purposes of the Exchange Act. Toland has also failed to show that he will suffer irreparable harm if the stay is not granted, and the public interest and the protection of

investors will not be served by permitting Toland to work at the Firm during the Commission's review of the NAC's decision. The Commission therefore should deny Toland's request.

Respectfully submitted,

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March 19, 2014

CERTIFICATE OF COMPLIANCE

I, Andrew J. Love, certify that this Brief of FINRA in Opposition to Request for Stay complies with the limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 6,854 words.

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Dated: March 19, 2014

APPENDIX A

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In The Matter of The Continued Association of Mitchell T. Toland as a General Securities Representative with Hallmark Investments, Inc.	Notice Pursuant to Section 19(d) Securities Exchange Act of 1934 SD-1812 February 19, 2014

I. Introduction

On December 2, 2009, Hallmark Investments, Inc. ("the Firm"), submitted a Membership Continuance Application ("MC-400" or "the Application") to FINRA's Department of Registration and Disclosure. The Application seeks to permit Mitchell T. Toland ("Toland"), a person subject to a statutory disqualification, to continue to associate with the Firm as a general securities representative. On October 17, 2013, a subcommittee ("Hearing Panel") of FINRA's Statutory Disqualification Committee held a telephonic hearing on the matter. Lorraine Lee-Stepney, Ann-Marie Mason, Esq., and Bernard Canepa, Esq., appeared on behalf of FINRA's Department of Member Regulation ("Member Regulation"). As described in more detail below, Toland, his proposed primary supervisor, Michael Burns ("Burns"), and Toland's counsel did not attend the hearing.

For the reasons explained below, we deny the Firm's Application.[1]

[1] Pursuant to FINRA Rule 9524(a)(10), the Hearing Panel submitted its written recommendation to the Statutory Disqualification Committee. In turn, the Statutory Disqualification Committee considered the Hearing Panel's recommendation and presented a written recommendation to the National Adjudicatory Council ("NAC").

II. Procedural History

In February 2011, Member Regulation recommended that the Chairperson of the Statutory Disqualification Committee, acting on behalf of the NAC, approve Toland's proposed continued association with the Firm pursuant to FINRA Rule 9523.[2] The Chairperson rejected Member Regulation's recommendation in March 2011 because: (1) the Firm's president, owner, and proposed backup supervisor at the time, Steven Dash ("Dash"), had disciplinary history (including a two-month suspension), numerous customer complaints filed against him, and had recently filed for bankruptcy; (2) Toland's proposed primary supervisor, Burns, supervised 15 other registered representatives and served as the Firm's chief compliance officer; and (3) FINRA staff raised concerns in connection with the Firm's ongoing 2010 cycle examination, including whether registered individuals conducted business at the Firm while suspended.[3]

The Firm subsequently sought approval of the Application pursuant to FINRA Rule 9524, and a hearing in this matter was scheduled for November 10, 2011. Several weeks prior to this hearing, however, Toland's proposed backup supervisor received a Wells notice. The Firm and Member Regulation thus agreed to postpone the hearing to allow the Firm to find a more suitable backup supervisor.

In March 2012, the Firm informed Member Regulation that it had hired Michael Kleiner ("Kleiner") to serve as Toland's backup supervisor. Kleiner, however, was not registered as a general securities principal. Member Regulation therefore agreed to allow Kleiner time to qualify as a principal before rescheduling this matter for a hearing. After Kleiner eventually qualified as a principal in January 2013, FINRA's Office of General Counsel provided notice that the hearing would take place on June 5, 2013. The hearing was subsequently moved to August 15, 2013.[4]

On July 22, 2013, Toland's counsel requested an adjournment of the August 15 hearing because he unexpectedly needed to assist his daughter's move to college. This request was granted, over Member Regulation's objection, and the hearing was rescheduled for October 17, 2013.

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[2] FINRA Rule 9523(a) 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. As described below, Member Regulation now recommends that the Application be denied. *See infra* Part VI.

[3] Member Regulation represents that it informed the Firm why the Chairperson rejected the Application.

[4] Toland's counsel asserts, and nothing in the record contradicts, that he had not been consulted by Member Regulation prior to setting the June 5 hearing date and was unavailable on that date.

On October 2, 2013, Toland's counsel requested another postponement of the hearing in this matter. Counsel explained that Toland's elderly 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." Member Regulation opposed any continuance, but indicated that it was willing to conduct the hearing in New York or New Jersey, where Toland resides. On October 4, 2013, the Hearing Panel declined to postpone the hearing, but agreed that, under the circumstances, it would move the location of the hearing as a reasonable accommodation to Toland.[5] By letter dated October 15, 2013, Toland's counsel informed the Hearing Panel that Toland was unable to attend the hearing in New York and "has been deprived of due process." FINRA's Office of General Counsel subsequently advised the parties that the hearing would occur as scheduled, albeit by telephone, on October 17, 2013. Member Regulation participated in the telephonic hearing.[6] Toland, Toland's proposed primary supervisor, and Toland's counsel did not.

III. The Statutorily Disqualifying Event

Toland is statutorily disqualified due to a FINRA Order Accepting Offer of Settlement dated September 22, 2009 (the "2009 Order"), finding that Toland willfully failed to disclose material information on his Uniform Application for Securities Industry Registration or Transfer ("Form U4").[7] Specifically, Toland failed to disclose that he filed for bankruptcy in October

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[5] FINRA staff also reached out to applicant's counsel for a convenient start time on October 17, 2013.

[6] Although FINRA's Office of General Counsel advised the parties, in a letter dated August 5, 2013, that any proposed exhibits and witness lists must be filed and served no later than October 3, 2013, neither the Firm nor Toland submitted any proposed exhibits in support of the Application. *See also* FINRA Rule 9524(a)(3)(B) (providing that the parties shall exchange and file exhibit and witness lists not less than 10 business-days before the hearing).

[7] Section 3(a)(39)(F) of the Securities Exchange Act of 1934 ("Exchange Act") provides that a person is subject to statutory disqualification if he has willfully made a false or misleading statement of material fact, or has omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization.

2005.[8] FINRA suspended Toland in all capacities for 45 days and fined him $5,000. Toland served the suspension and paid the fine in full.

Toland's statement filed in support of the Application explained that he filed a bankruptcy petition on October 12, 2005, and, on that same date, submitted his initial Form U4 to the Firm. Toland stated that, "[b]ecause of the simultaneous occurrence of these two events, and the stress that was attendant to [filing for bankruptcy], I did not think to change the information on the U-4 (which had been filled out just a couple of days earlier.)" Toland further stated that, although he subsequently amended his Form U4, he did not thoroughly review the form to properly reflect his bankruptcy filing. At a June 2008 investigative interview conducted by FINRA in connection with Toland's failure to disclose his bankruptcy filing, Toland testified that he did not know he had to disclose a bankruptcy filing, or any liens and judgments filed against him, on his Form U4. He 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]f I did know that [the bankruptcy] had to be on [the Form U4], I absolutely would have taken care of it properly. . . I will try and be the best I can."[9]

IV. Background Information

A. Toland

1. Employment History

Toland first registered in the securities industry as a general securities representative in June 1990. He also passed the uniform securities agent state law examination in July 1990.

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[8] 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?" 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. Toland updated his Form U4 to reflect the bankruptcy filing in April 2008.

[9] 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. During Toland's investigative interview, FINRA staff directed Toland to Question 14.M on the Form U4, which asks, "Do you have any unsatisfied judgments or liens against you?" Toland stated that he didn't properly read the question when he filled out his Form U4 and apologized for the oversight.

Toland was associated with 15 different firms between February 1990 and October 2005. He has been associated with the Firm since October 2005.[10]

Toland also serves as a consultant to Hallmark Holdings Investment Corp. ("Hallmark Holdings"), an investment-related holding company that is the Firm's parent company.[11] He is also an employee of Rushmore Consulting Group, LLC, where he developed the company's communications systems and continues to service them.

2. Arbitration Awards and Customer Complaints

Toland has had two arbitration awards entered against him.[12] 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. The firm alleged that Toland breached three promissory notes he executed in connection with forgivable loans.

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.

Five customers have filed complaints against Toland. In July 1998, a customer filed a complaint against Toland alleging unauthorized trading, unauthorized use of margin, and unsuitable recommendations. FINRA's Central Registration Depository ("CRD"®) indicates that no further action was taken in connection with this matter.

In March 1995, a customer filed a complaint against Toland alleging that the customer's account declined more than $100,000, without any specific allegations of wrongdoing. Toland's employing firm reviewed the complaint and found it to be without merit.

In January 1993, a customer filed a complaint against Toland alleging mismanagement of his account. The customer alleged damages of $17,838. Toland's employing firm reviewed the complaint and found it to be without merit.

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[10] FINRA has interpreted Article III, Section 3(c) of FINRA's By-Laws to permit individuals who become statutorily disqualified while they are employed to continue working pending the outcome of the statutory disqualification process. Toland became statutorily disqualified upon entry of the 2009 Order while employed at the Firm, and he has continued to work at the Firm during this proceeding.

[11] Member Regulation represents that it asked for additional information concerning Toland's activities at Hallmark Holdings, but it did not receive any response.

[12] Toland did not pay either arbitration award, as he received a bankruptcy discharge of these debts. *See infra* Part IV.A.3.

In December 1992, customers filed a complaint against Toland alleging unauthorized transactions. The matter was settled for $1,000.

In November 1992, a customer filed a complaint against Toland alleging an unauthorized transaction. The matter was settled for $2,500. CRD does not indicate whether Toland contributed personally to this settlement.[13]

3. Bankruptcy

On October 12, 2005, Toland filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York. Toland received a discharge of his debts in April 2006.

4. Additional Judgments and Liens

Member Regulation asserts that in February 2013, subsequent to the rejection of its initial recommendation to approve the Application, it discovered that Toland had failed to disclose numerous outstanding judgments and liens totaling more than $490,000. The record shows that these judgments and liens consist of the following: (1) a tax lien in the amount of $28,004 filed by New Jersey in January 2008; (2) a tax warrant in the amount of $15,965 filed by New York in December 2008; (3) a tax warrant in the amount of $10,140 filed by New York in September 2010; (4) a tax warrant in the amount of $731 filed by New York in November 2010; (5) a judgment in the amount of $22,951 obtained by Columbia Grammar & Preparatory School in February 2011; (6) a judgment in the amount of $614 obtained by Midland Funding LLC in July 2011;[14] (7) four federal tax liens totaling $386,838 filed by the IRS in May 2012 (for tax years 2003 through 2010);[15] and (8) a federal tax lien in the amount of $25,000 filed by the IRS in June 2012 (for tax year 2011).

After Member Regulation brought the undisclosed liens to Toland's attention, he eventually disclosed on his Form U4 certain of these liens on July 11, 2013, although he has not yet disclosed the three tax warrants filed by New York State. FINRA is currently conducting a cause examination regarding Toland's failure to disclose these judgments and liens.

The record shows no other disciplinary or regulatory proceedings, complaints, or arbitrations against Toland.

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13 A prior employing firm reported three additional complaints involving Toland. From September 1999 through July 2001, the firm received three written customer complaints alleging that Toland failed to follow instructions or engaged in unauthorized trading. The firm resolved one of these complaints with the complaining customer. The record does not indicate how the firm resolved the other two complaints.

14 Although Toland provided evidence that he paid this judgment in July 2013, he did not disclose it on his Form U4 when it was outstanding.

15 These four liens were subsequently consolidated into a single lien.

B. The Firm

The Firm is based in New York City, and it has been a FINRA member since September 2005. It currently employs three registered principals, six registered representatives, and eight other individuals. Dash is the Firm's president and founder.

1. Regulatory Actions

In January 2013, the Firm entered into a Letter of Acceptance, Waiver and Consent ("AWC") with FINRA for violations of Exchange Act Rules 15c3-1 and 17a-11, FINRA Rule 2010, and NASD Rule 3010. Without admitting or denying the allegations, the Firm consented to findings that it failed to establish a reasonable supervisory system and procedures for retaining and reviewing email and conducted a securities business without sufficient net capital for three months in 2010. As a result, FINRA censured the Firm and fined it $15,000.

In January 2013, the Firm, Dash, Burns, and another individual at the Firm, Stephen Zipkin ("Zipkin"), executed a Consent Agreement with the Indiana Securities Division. Indiana alleged that: (1) Zipkin conducted business in the state without being registered; (2) Dash made an untrue statement of material fact to a customer by representing that he, and not Zipkin, was the customer's broker; (3) Zipkin made false statements to Indiana Securities Division staff that he did not contact a customer; and (4) the Firm and Burns failed to properly supervise its agents. Without admitting or denying the allegations, the Firm and the named individuals agreed to pay, jointly and severally, $20,000 in restitution to the customer and a $10,000 civil penalty. Further, Dash agreed to withdraw his registration in the state and not reapply for reinstatement until December 31, 2013. The Firm did not disclose this matter on its Uniform Application for Broker-Dealer Registration ("Form BD"), and Dash did not disclose the matter on his Form U4.

In February 2009, FINRA accepted an Offer of Settlement from the Firm and Dash. The Offer of Settlement found that the Firm and Dash violated NASD Rules 1017(a) and 2110 and IM-1000-1 in connection with the Firm's membership application, which was incomplete or inaccurate so as to be misleading, and that they failed to file an application to approve a change in the Firm's ownership. FINRA fined the Firm $15,000, censured it, and suspended Dash in all capacities for two months.[16]

2. Routine Examinations

The Firm's 2012 examination is pending.

On January 24, 2012, and in connection with an examination of the Firm in July 2011, the SEC identified deficiencies and weaknesses regarding the Firm's compliance with the federal

[16] In March 2013, FINRA also accepted a Minor Rule Violation Letter from the Firm for violating Exchange Act Rule 17a-5(d) by filing its audited financial statements eight days late. FINRA fined the Firm $2,500.

securities laws and FINRA rules. The SEC found that, among other things, the Firm failed to establish written supervisory procedures ("WSPs") related to the review of customer accounts that received large amounts of penny stocks and registered representatives' use of outside email accounts. The SEC also found evidence of excessive trading and unsuitable recommendations in 17 customer accounts, two of which belonged to Toland's customers. The commissions and markups or markdowns earned by Toland on these two customer accounts totaled approximately $178,000 (which comprised approximately 72% of Toland's total commissions during the 16-month review period). The Firm responded in writing and asserted that the "larger commissions reflected the more intrinsic value added to management of their accounts." The Firm also asserted that the customers' objectives for the accounts at issue changed from balanced/conservative growth to speculation (and thus the trading was allegedly consistent with the customers' objectives).

In June 2011, FINRA issued the Firm a Cautionary Action. FINRA cited the Firm for the following deficiencies: filing inaccurate FOCUS reports; failing to comply with net capital requirements; charging customers excessive commissions; and failing to timely file Form U4 amendments (including for Toland's disclosure of the 2009 Order). FINRA also cited the Firm for failing to ensure that Toland and Dash did not engage in activities requiring registration while they were suspended. Specifically, the Firm's trade blotter disclosed 16 trades under Toland's registered representative code and 76 under Dash's code while both were suspended. The Firm responded that other registered representatives used Toland's and Dash's codes to perform trades for Toland's and Dash's customers while they were suspended and neither Toland nor Dash received any compensation for the trades.

In February 2010, FINRA issued the Firm a Cautionary Action. The Cautionary Action cited the Firm for the following deficiencies: failing to retain signed copies of Forms U4 for two newly hired employees; failing to provide a copy of Uniform Termination Notices for Securities Industry Registration to two terminated employees; failing to update its Form BD to reflect Dash's suspension; failing to implement supervisory procedures for performing Office of Foreign Assets Control checks on new customer accounts; and failing to properly record assets and liabilities. The Firm responded in writing and stated that it had corrected the noted deficiencies.

3. Arbitrations and Customer Complaints

In February 2012, a claimant filed an arbitration claim against the Firm, which alleged that the Firm charged her unreasonable commissions. The claimant sought $2,500 in damages. The Firm settled the claim for $4,500.

In December 2010, a claimant filed an arbitration claim against the Firm, Dash, and Burns. The claimant alleged that the recommendation of securities issued by Hallmark Holdings was unsuitable. The customer also alleged fraud, misrepresentation, self-dealing, and a failure to supervise. A FINRA Dispute Resolution arbitration panel denied the customer's claims. The arbitration panel, however, ordered that the respondents pay the claimant $75,000 (jointly and severally) as a sanction for failing to produce documents.

In December 2008, a claimant filed an arbitration claim against the Firm, which alleged, among other things, that it traded excessively in the customer's account and failed to supervise. The claimant sought $70,000 in damages, and the Firm settled the claim for $20,000.

In November 2008, a claimant filed an arbitration claim against the Firm, Dash, and Zipkin. The claimant alleged that respondents made unsuitable recommendations and engaged in excessive trading. The claimant sought $157,000 in damages. The Firm settled the claim for $50,000, and Dash and Zipkin each paid an additional $7,500 to the claimant to settle the claim.

Finally, the record shows that in January 2008 a customer complained of unauthorized trading in his account. The record does not indicate whether this claim has been resolved.

The record shows no additional complaints, disciplinary proceedings, or arbitrations against the Firm.

V. Toland's Proposed Business Activities and Supervision

The Firm proposes to continue to employ Toland in its New York City office as a general securities representative, and it will continue to compensate Toland on a commission basis.

The Firm further proposes that Burns, who serves as the Firm's chief compliance officer, supervise Toland. Burns has been with the Firm since September 2005. He first registered as a general securities representative in November 1998, and he passed the uniform securities agent state law examination in December 1998. Burns qualified as a general securities principal in November 2004, as a registered options principal in May 2005, and as a municipal securities principal in July 2005. Prior to registering with the Firm, Burns was employed by three other firms since 1998.

Other than the Indiana action and December 2010 arbitration described in Part IV.B above, the record shows no additional complaints, disciplinary proceedings, or arbitrations against Burns.

The Firm submitted the following proposed heightened plan of supervision:[17]

1. The written supervisory procedures for the Firm will be amended to state that Burns is the primary supervisor responsible for Toland;

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[17] The items that are denoted by an asterisk are heightened supervisory conditions for Toland and are not standard operating procedures of the Firm.

2. If Burns is to be on vacation or out of the office, Kleiner will act as Toland's interim supervisor;[18]

3. If neither Burns nor Kleiner are able to be in the office for greater than two days, then Toland is not permitted to be in the office;

*4. Toland will not maintain any discretionary accounts;

*5. Toland will not act in a supervisory capacity;

6. Toland will be supervised by Burns in the home office located at 6 East 39th Street, Suite 500, New York, NY 10016, which is an OSJ;

7. Burns will review and pre-approve each securities account, prior to the opening of the account by Toland. Account paperwork will be documented as approved with a date and signature and maintained at the Firm's home office. The paperwork will be segregated for ease of review during any statutory disqualification examination;

8. Toland will not be permitted to accept any funds or securities from a client;

9. Toland will have no involvement with or access to the Firm's funds;

10. For the purposes of client communication, Toland will only be allowed to use an email account that is held at the Firm, with all emails being filtered through the Firm's email system; if Toland receives a client communication in his personal email account, then he will immediately forward it to the Firm;

11. Burns will review Toland's incoming written correspondence (which would include email communications) upon its arrival and will review outgoing correspondence before it is sent. With respect to email communications, this condition will not include any email communication that would prevent best execution of any trade; however, such communication would be subject to

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[18] Kleiner originally qualified as a general securities representative, and passed the uniform securities agent state law exam, in August 1993. Kleiner left the securities industry in 2001, during which time he was unemployed for approximately five years. When he was employed, he worked as a customer service representative, phone technician, and crew leader for the U.S. Census Bureau. Kleiner associated with the Firm in October 2011, requalified as a general securities representative in December 2011, and again passed the uniform securities agent state law exam in February 2012. He qualified as a general securities principal in January 2013. The record shows that four customers have filed complaints against Kleiner from August 1997 through October 2000. CRD indicates that Kleiner's firms denied three of the complaints. The record does not indicate how the fourth complaint was resolved. Other than these complaints, the record shows no criminal, disciplinary or regulatory proceedings, complaints, or arbitrations against Kleiner.

post-use review. Burns will keep a written record evidencing review and approval of all of Toland's correspondence;

12. Burns will intermittently monitor 10% of Toland's conversations on a monthly basis and will keep a written record documenting such monitoring. The written record will be kept segregated for ease of review during any statutory disqualification examination;

13. Burns will observe Toland's work activities and will review any records Toland generates;

*14. Burns will review and approve Toland's order tickets before they are executed; Burns or his designee will evidence his/her review by initialing the order ticket;

*15. Burns will randomly review 10% of Toland's client files on a monthly basis. Burns will indicate the findings of his review in a memo, which will be kept segregated for ease of review;

16. Toland must disclose to Burns in writing, prior to any outside sales activity, the time, place, and objective of any planned sales activity. Additionally, on a weekly basis, Toland must disclose to Burns, in writing, the details related to such outside sales activity. The disclosure must contain Toland's activity log, phone call log, appointment log, and a to-do list. Burns will retain all such documentation segregated for ease of review in a readily available location;

17. All complaints pertaining to Toland, whether verbal or written, will be immediately referred to Burns for review, and then to the Compliance Department. Burns will prepare a memorandum to the files as to what measures he took to investigate the merits of the complaint (e.g., contact with the customer and the resolution of the matter) and he will document the outcome of the customer complaint. Documents pertaining to complaints will be kept segregated for ease of review;

*18. For the duration of Toland's statutory disqualification, Hallmark must obtain prior approval from FINRA Member Regulation if it wishes to change Toland's responsible supervisor from Burns to another person; and

*19. Burns must certify quarterly (March 31st, June 30th, September 30th, and December 31st) to the Compliance Department of the Firm that he and Toland are in compliance with all of the above conditions of heightened supervision to be accorded Toland. Burns will document his performance of these special supervisory procedures by preparing and signing Compliance Checklists created by the Firm.

VI. Member Regulation's Recommendation

Member Regulation recommends that the Application be denied because, in its view: (1) Toland engaged in intervening misconduct by failing to disclose numerous outstanding judgments and liens, and such misconduct is similar to the misconduct underlying the 2009 Order; (2) recent examination findings and disciplinary actions against the Firm and its officers demonstrate an unwillingness or inability to comply with disclosure rules and be forthright with regulators and customers; and (3) the Firm and its proposed supervisors are unable to adequately supervise Toland, and the proposed backup supervisor lacks the necessary experience to supervise Toland.

VII. Discussion

We have carefully considered the entire record in this matter. Based on this record, and pursuant to the SEC's controlling decisions in this area, we deny the Firm's Application to continue to employ Toland as a general securities representative.

A. The Legal Standards

We recognize that, in connection with the 2009 Order, FINRA's Department of Enforcement ("Enforcement") weighed the gravity of Toland's failure to disclose his bankruptcy filing when it approved the Settlement Order in September 2009. Enforcement concluded that a 45-day suspension and $5,000 fine were appropriate sanctions for Toland's misconduct. Toland served this suspension and has paid the fine in full. In such circumstances, the SEC has instructed FINRA to evaluate a statutory disqualification application pursuant to the standards enunciated in the SEC's decisions in *Paul Van Dusen*, 47 S.E.C. 668 (1981), and *Arthur H. Ross*, 50 S.E.C. 1082 (1992). *See May Capital Group, LLC* (hereinafter "*Rokeach*"), Exchange Act Rel. No. 53796, 2006 SEC LEXIS 1068, at *21 (May 12, 2006) (holding that FINRA must apply *Van Dusen* standards to the membership continuance applications of statutorily disqualified individuals whose disqualifications resulted from FINRA enforcement action).

Van Dusen and *Rokeach* provide that in situations where an individual's misconduct has already been addressed by the SEC or FINRA, and certain sanctions have been imposed for such misconduct, FINRA should not consider the individual's underlying misconduct when it evaluates a statutory disqualification application. The SEC stated that when the period of time specified in the sanction has passed, in the absence of "new information reflecting adversely on [the applicant's] ability to function in his proposed employment in a manner consonant with the public interest," it is inconsistent with the remedial purposes of the Exchange Act and unfair to deny an application for re-entry. *Van Dusen*, 47 S.E.C. at 671.

The SEC also noted in *Van Dusen,* however, that an applicant's re-entry is not "to be granted automatically" after the expiration of a given time period. *Id.* Instead, the SEC instructed FINRA to consider other factors, such as: (1) "other misconduct in which the applicant may have engaged"; (2) "the nature and disciplinary history of the prospective employer"; and (3) "the supervision to be accorded the applicant." *Id.* Further, in *Ross*, the SEC established a narrow exception to the rule that FINRA confine its analysis to "new information." 50 S.E.C. at 1085. The SEC stated that FINRA could consider the conduct underlying a

disqualifying order if an applicant's later misconduct was so similar that it formed a "significant pattern." *Id.* n.10.

B. Application of the *Van Dusen* Standards

After applying the *Van Dusen* standards to this matter, we deny the Firm's Application to continue to employ Toland as a general securities representative. Applicant had the burden to demonstrate that, "despite the disqualification, it is in the public interest to permit the requested employment." *See Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992). Applicant did not file any exhibits or other documentation to support its Application and failed to appear at the hearing. Applicant failed to satisfy its burden.[19]

Regardless, based upon our independent review of the record in this matter, we find that the Application should be denied because Toland's continued association with the Firm would create an unreasonable risk of harm to the market or investors. Toland engaged in serious intervening misconduct, which is identical to the misconduct underlying the disqualifying settlement order. We further find that the Firm has a troubling disciplinary and regulatory history, particularly with respect to disclosure issues, and that the Firm has not demonstrated it can properly supervise a statutorily disqualified individual such as Toland. Consequently, we deny the Application.

1. Toland's Intervening Misconduct

Toland has continued to engage in misconduct subsequent to his disqualifying event. The record shows that, from early 2008 until July 2013, Toland failed to disclose on his Form U4 numerous judgments and liens totaling more than $490,000. Given 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.[20] This is particularly true given that, in June 2008, FINRA staff questioned Toland on his failure to disclose his bankruptcy and two arbitration awards, and expressly referenced, and asked Toland about, Question 14.M of Form U4 during that investigative interview. Toland testified that he did not properly read the question, apologized for the "oversight," and stated that "if [he] could change it again . . . [he] would put down "yes." Moreover, even when Toland finally updated his Form U4 in July 2013, he did not include all judgments and liens filed against him, omitting three tax warrants filed by New York

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[19] At the hearing, Member Regulation moved for a default denial of the Application. Although we find that applicant has not satisfied its burden of proof, under the circumstances, we decline to grant Member Regulation's motion and deny the Application on its merits.

[20] The record shows that Toland knew about certain of these undisclosed liens. For example, Toland's counsel informed Member Regulation in July 2013 that Toland had been making payments to Columbia Grammar & Preparatory School for two years, had been making payments on the New Jersey tax lien but had stopped, and had satisfied the $614 judgment against him.

State. Neither Toland nor the Firm have updated Toland's Form U4 to reflect the New York State tax warrants, even after being advised of these continuing disclosure failures by Member Regulation.

Toland, as a registered representative, was responsible for knowing the rules of the securities industry and for timely updating his Form U4. *See, e.g., Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993) ("Every person submitting registration documents [to FINRA] has the obligation to ensure that the information printed therein is true and accurate."), *aff'd*, 40 F.3d 1240 (3d Cir. 1994) (table). The SEC has emphasized that Form U4 "is critical to the effectiveness of the screening process used to determine who may enter (and remain in) the industry. It ultimately serves as a means of protecting the investing public." *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *25-26 (Nov. 9, 2012) (holding that representative's failure to disclose numerous judgments, liens, and bankruptcy filings violated FINRA's rules). 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." *Id.* at *32.

For years, Toland deprived customers and the investing public of material information concerning his financial difficulties and his ability to manage his own financial obligations. Toland's failures to disclose numerous judgments and liens after entry of the 2009 Order are simply inexcusable, run contrary to his remorseful testimony during the June 2008 investigative interview, and raise serious doubts that he is able, or willing, to comply with securities rules and regulations. We find that Toland's disclosure failures, including failing to disclose his 2005 bankruptcy, demonstrate a pattern of misconduct. *See Ross*, 50 S.E.C. at 1085. Regardless of the serious nature of Toland's original misconduct, his subsequent and repeated failures to disclose numerous outstanding liens and judgments during a four-year period are, on their own, sufficiently egregious to warrant denial of the Application.

2. The Firm's Troubling Disciplinary and Regulatory History

Pursuant to *Van Dusen* and its progeny, we also look to the nature and disciplinary history of the Firm. We find the Firm's disciplinary and regulatory history also warrant denial of the Application.

Similar to Toland, the Firm has a troubling history of failing to comply with FINRA's reporting and disclosure obligations. For instance, in February 2009, the Firm and Dash settled a FINRA action filed in connection with a misleading and inaccurate application to change the Firm's ownership. In February 2010, FINRA issued the Firm a Cautionary Action that cited it for, among other things, failing to update the Firm's Form BD to reflect that Dash had been suspended. Similarly, neither the Firm nor Dash disclosed the Indiana Consent Agreement on the Firm's Form BD or Dash's Form U4. That FINRA's 2011 Cautionary Action cited the Firm for failing to timely file Form U4 amendments, including for Toland's disclosure of the 2009 Order, does not instill confidence that the Firm can comply with FINRA's disclosure rules.

Moreover, in January 2013, the Firm consented to findings that it failed to establish a reasonable supervisory system and procedures for retaining and reviewing email, which are

important for the supervision of a statutorily disqualified individual such as Toland. Similarly, the Indiana Consent Agreement involved allegations that the Firm and Burns failed to adequately supervise an individual at the Firm. The SEC's 2012 examination report found that the Firm failed to establish WSPs related to reviewing customer accounts that receive penny stock and representatives use of email. The SEC also found evidence of excessive trading and unsuitable recommendations in two of Toland's customer accounts. In 2009, FINRA cited the Firm for failing to ensure that Toland and Dash did not engage in activities requiring registration while they were suspended, and the explanations provided by the Firm regarding the use of Toland's and Dash's registered representative codes while they were suspended raise additional questions and concerns.

The 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.

3. The Proposed Plan and Supervisors Are Inadequate

We also consider that the Firm's supervision of Toland pursuant to its proposed plan does not meet the stringent standards required to approve the Application. *See Timothy P. Pedregon*, Exchange Act Release No. 61791, 2010 SEC LEXIS 1164, at *27 (Mar. 26, 2010) (holding that an applicant must establish that it will be able to adequately supervise a statutorily disqualified individual by imposing a stringent plan of heightened supervision); *Citadel Sec. Corp.*, 57 S.E.C. 502, 509-10 (2004) ("[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.") (internal quotation omitted).

We are concerned that Burns, the Firm's chief compliance officer, does not have sufficient time to supervise a statutorily disqualified individual. The Application represents that Burns supervises 15 individuals at the Firm, and his position as the Firm's chief compliance officer may be time consuming.[21] *See Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *18-19 (July 17, 2009) (finding that FINRA reasonably questioned whether a proposed supervisor had sufficient time to supervise a statutorily disqualified individual when he already supervised nine other individuals). Our concerns are heightened given that the record shows Burns has served as the Firm's chief compliance officer since 2005, during which time the Firm's regulatory and disciplinary actions described herein occurred. Burns was also named in the Indiana action for failing to supervise.

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[21] Although the Application indicates that the Firm employed more registered representatives in December 2009 than it did in July 2013, Member Regulation asserts that Burns supervises every individual at the Firm. We further note that the Firm has been on notice since March 2011 that whether Burns has sufficient time to supervise Toland is a concern of the NAC. The record, however, does not show that the Firm has addressed this concern.

Further, the record does not demonstrate that Kleiner, the proposed backup supervisor, is qualified. He only recently became licensed as a principal and re-entered the securities industry after a more than 10-year absence. The record does not show that he has any supervisory experience. *See Pedregon*, 2010 SEC LEXIS 1164, at *27-28 (finding troubling the assignment of an unqualified individual to serve as a backup supervisor).

We also find that the proposed supervisory plan is deficient. For instance, the proposed plan does not contain any provisions aimed at preventing Toland from future violations of FINRA's disclosure rules.[22] The proposed plan also appears to permit Toland to be in the office and conduct business for up to two days with neither supervisor present. Further, with respect to Burns' review of Toland's customer files on a random basis once per month (item 15), a more specific or targeted review (such that all of Toland's customer accounts would be reviewed over the course of a calendar year) may be more appropriate under the circumstances. Were we otherwise inclined to approve this Application, which we are not, we would have given the Firm an opportunity to submit a revised plan that cures these noted deficiencies. As we have explained, however, Toland's intervening misconduct, as well as the Firm's regulatory history and Toland's proposed supervisors, are highly problematic. These facts alone warrant denial of this Application.

4. The Hearing Panel Did Not Abuse its Discretion

Finally, Toland's counsel has asserted that the Hearing Panel deprived Toland of his due process rights by refusing to grant his request to postpone the October 17, 2013 hearing. We find that the Hearing Panel did not abuse its discretion when it conducted the hearing in this matter on the scheduled date and time and reject Toland's arguments to the contrary.

As an initial matter, constitutional due process requirements do not apply to FINRA procedures because FINRA is not a state actor. *See D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (stating that it is a well-settled principle that FINRA is not a governmental actor); *Charles C. Fawcett*, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598, at *13-14 (Nov. 8, 2007) (same). In determining the fairness of FINRA's proceedings, adjudicators have looked to whether the proceedings were conducted in accordance with FINRA's rules and whether FINRA implemented its procedures fairly. *See Robert J. Prager*, 58 S.E.C. 634, 662-63 (2005). The record establishes that FINRA's actions in processing this matter were fair and in accordance with its procedures.

FINRA Rule 9524(a)(2) provides that the Hearing Panel shall give the parties at least 14 business days' notice of any hearing. FINRA's Office of General Counsel notified the parties of the October 17, 2013 hearing on August 5, 2013, in accordance with its rules and procedures.

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[22] The Firm indicated in the Application that Toland would be required to review his Form U4 quarterly. This requirement, however, is not set forth in the proposed plan, and given Toland's repeated failures to disclose matters on his Form U4, we are not convinced that this provision would, on its own, be sufficient.

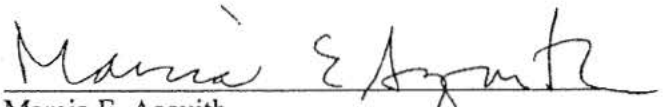
We also find that the Hearing Panel did not abuse its discretion by refusing to continue the October 17, 2013 hearing. FINRA Rule 9524(a)(5) provides that the Hearing Panel may postpone or adjourn any hearing. "In NASD proceedings, the trier of fact has broad discretion in determining whether to grant a request for a continuance." *Prager*, 58 S.E.C. 664; *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").

Under the circumstances, the Hearing Panel properly denied counsel's request for a continuance. The Firm filed the Application in December 2009, and the Subcommittee originally scheduled this matter for a hearing in November 2011. The parties agreed to continue the hearing on several occasions, and the Hearing Panel granted Toland's counsel's request to again postpone the hearing in August 2013, over Member Regulation's objection. Further, the Hearing Panel agreed to move the location of the hearing to accommodate Toland given the circumstances of his mother's illness, and it subsequently provided the parties with information to participate by telephone after applicant and Toland indicated that they would not participate in a hearing in New York. Toland, the Firm (through Burns or any other representative), and Toland's counsel did not participate in the telephonic hearing. Under these facts and circumstances, given that the Application had been pending for almost four years, the previously granted continuances of the hearing, the serious allegations of intervening and continuing misconduct by Toland, and Toland's continued employment in the securities industry while the Application has been pending, we find that the Hearing Panel properly denied applicant's request to postpone the October 17, 2013 hearing.[23]

VIII. Conclusion

In sum, we find that Toland's serious intervening misconduct, the Firm's disciplinary and regulatory history, and the Firm's inability to adequately supervise Toland pursuant to a stringent plan of supervision weigh heavily against approving the Application pursuant to Commission precedent. Accordingly, we find that it is not in the public interest, and would create an unreasonable risk of harm to the market or investors, for Toland to continue to associate with the Firm as a general securities representative. We therefore deny the Application.

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

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[23] We also note 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 treatment had been completed in 18 weeks.

APPENDIX B

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11621

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
November 17, 2004

In the Matter of the Application of

MICHAEL A. ROOMS

[redacted]

For Review of Disciplinary Action Taken by

NASD

ORDER DENYING STAY

Michael A. Rooms, who during the relevant period was a general securities principal and representative with Patterson Travis, Inc. ("the firm"), an NASD member, seeks a stay of NASD disciplinary action barring him from association with any member. NASD found that Rooms violated penny stock rules under the Securities Exchange Act of 1934 by failing to provide customers with required information and disclosures in connection with his sales of a penny stock, Turner Group, Inc. ("TG"). 1/ NASD also found that Rooms violated Procedural Rule 8210 2/ and Conduct Rule 2110 that requires adherence to just and equitable principles of trade by attempting to obstruct an NASD examination or investigation with respect to transactions in TG. NASD imposed the bar for the obstruction violation and stated that, in light of the bar, it need not impose the suspension it would otherwise have assessed for the penny stock violations.

Rule 15g-1(e) under the Exchange Act exempts "transactions that are not recommended" from penny stock disclosure requirements. NASD sent the firm a number

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1/ NASD found that Rooms violated Rule 15g-2, which requires that customers be given a disclosure document describing the risks of investing in penny stocks; Rule 15g-3, which requires disclosure of a stock's inside bid and ask quotations; and Rule 15g-5, which requires disclosure of a salesperson's compensation in connection with a transaction.

2/ Procedural Rule 8210 gives NASD the right to require a person associated with a member to provide information in connection with an NASD examination or investigation.

of Rule 8210 requests which, among other things, sought to determine whether certain sales of TG stock had been recommended. NASD found that Rooms was instructed by his supervisor to obtain signed non-solicitation forms stating that the sales had not been recommended from certain customers to whom he had sold TG stock; that Rooms was aware that NASD staff had requested this information as part of its examination or investigation; and that the firm intended to submit the forms to NASD. NASD also found that, although Rooms had recommended TG stock to these customers, he tried to persuade them to sign non-solicitation forms backdated to the date of sale, offered them free stock in exchange for their signatures, and, after obtaining one signed form, deleted the actual date of signing entered by the customer. In barring Rooms, NASD cited his egregious misconduct in deliberately seeking to mislead NASD, and the lack of any mitigating factors.

In determining whether to grant a stay, the Commission considers (1) whether there is a strong likelihood that the applicant will succeed on the merits of the appeal; (2) whether the applicant will suffer irreparable injury without a stay; (3) whether there will be substantial harm to the public if the stay were granted; and (4) whether a stay will serve the public interest. 3/ The applicant has the burden of demonstrating that a stay is warranted. 4/

Rooms points out that the Rule 8210 requests were not directed to him, and he asserts that he was never made aware of the contents of the requests directed to his firm. He accordingly argues that he could not have violated that rule, and that the sanction imposed on him should therefore be stayed since it will likely be overturned on appeal. He further asserts that the obstruction findings and the bar imposed on the basis thereof violate due process since he was not given fair notice that the conduct in which he engaged was prohibited.

NASD did not base its obstruction findings and sanction solely on Rooms' purported violation of Rule 8210. As noted above, NASD found that Rooms attempted to mislead NASD by pressuring customers to sign inaccurate and backdated non-solicitation forms, and that his conduct in this respect also violated Conduct Rule 2110 that requires adherence to just and equitable principles of trade. Thus, whatever the merits of Rooms' arguments with respect to Rule 8210, NASD has identified an additional basis for its findings and sanction. In addition, NASD found, contrary to Rooms' due process

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3/ See Cuomo v. Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1988).

4/ Id. at 978.

contention, that Rooms' conduct was inherently deceptive and, therefore, that Rooms must have been aware that he was violating just and equitable principles of trade.

While any final determination must await the Commission's consideration of the evidence in the record, it does not appear that, at this stage, Rooms has demonstrated a strong likelihood that he will prevail on appeal. Nor has Rooms shown that he will suffer irreparable injury if a stay is not granted. Rooms asserts that the bar imposed on him has resulted in severe financial loss and damage to his reputation. He further asserts that the bar has adversely affected his ability to support his family. However, these factors do not rise to the level of irreparable injury. 5/ This conclusion is buttressed by the fact that Rooms waited for three months after NASD's decision, and two months after filing his appeal with the Commission, before filing his motion for a stay.

Rooms asserts the public will not be harmed by a stay. He states that he no longer deals in penny stocks, and that no customer has ever filed a complaint against him. Rooms is currently associated with another NASD member firm. NASD did not impose a bar on him based on its findings of penny stock violations. Instead, it cited his egregious effort to undermine NASD's regulatory function by deliberately submitting false information to NASD. In light of NASD's findings that Rooms engaged in such serious misconduct, granting a stay could result in substantial harm to the public. Thus it does not appear that a stay would serve the public interest.

Accordingly, after consideration of the pertinent factors, IT IS ORDERED that the request of Michael A. Rooms for a stay of NASD's disciplinary action against him be, and it hereby is, denied.

For the Commission by the Office of the General Counsel, pursuant to delegated authority.

Jonathan G. Katz
Secretary

By: Margaret H. McFarland
Deputy Secretary

5/ See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Robert J. Prager, Securities Exchange Act Rel. No. 50634 (November 4, 2004), __ SEC Docket ___.

FINRA
Financial Industry Regulatory Authority

Andrew J. Love
Assistant General Counsel

Telephone: 202-728-8281
Facsimile: 202-728-8264

March 19, 2014

VIA MESSENGER

Elizabeth M. Murphy
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: In the Matter of the Application for Review of Mitchell T. Toland with Hallmark Investments, Inc., Administrative File No. 3-15794

Dear Ms. Murphy:

Please find enclosed for the above-referenced matter an original and three copies of FINRA's Opposition to Mitchell T. Toland's Motion for Stay. Please contact me at (202) 728-8281 if you have any questions.

Very truly yours,

Andrew J. Love

cc: Brad S. Maistrow, Esq.
Brad S. Maistrow P.C.
2 Colts Run
Marlboro, NJ 07746

Enclosures