

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 60328 / July 17, 2009

Admin. Proc. File No. 3-13334

In the Matter of
TIMOTHY H. EMERSON, JR.

c/o Brian P. Sweeney, Esq.
520 S. Florida
Lakeland, FL 33801

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DENIAL OF
MEMBERSHIP CONTINUANCE APPLICATION

Registered securities association denied member's application to permit continued employment of individual subject to a statutory disqualification. *Held*, the application for review is *dismissed*.

APPEARANCES:

Brian P. Sweeney, for Timothy H. Emerson, Jr.

Marc Menchel, Alan Lawhead, and Deborah F. McIlroy, for the Financial Industry
Regulation Authority, Inc.

Appeal filed: January 14, 2009

Last brief received: April 21, 2009

I.

Timothy H. Emerson, Jr., a general securities representative, appeals from the denial by Financial Industry Regulation Authority, Inc. ("FINRA") of an application (the "Application") by Brookstone Securities, Inc. ("Brookstone" or the "Firm"), a FINRA member firm, requesting

permission for Emerson to continue associating with the Firm despite Emerson's statutory disqualification.¹ We base our findings on an independent review of the record.

II.

The parties do not dispute the relevant facts on appeal. In June 2005, Emerson was arrested for driving under the influence of alcohol ("DUI") in the state of Kansas and was initially charged with a misdemeanor. However, because Emerson had three previous DUI convictions, the charge was upgraded to a felony in August 2005.² Emerson pleaded guilty on September 6, 2006, and a state court sentenced Emerson to ninety days in jail and twelve months of post-release treatment, along with a \$2,500 fine. Emerson served his jail sentence, paid his fine, and completed the required treatment. Emerson testified at his statutory disqualification hearing that he continues to be active in Alcoholics Anonymous, has a sponsor in the program, and has maintained his sobriety since April 2006.

Because of the felony conviction, Emerson became subject to a ten-year statutory disqualification under Section 3(a)(39)(F) of the Securities Exchange Act of 1934 and FINRA's By-Laws.³ As a statutorily disqualified person, Emerson is not eligible to associate with a FINRA member firm without FINRA's consent.⁴

A. Emerson's Employment History

1. Dean Witter

After becoming qualified as a general securities representative in September 1989, Emerson joined Dean Witter Reynolds, Inc. ("Dean Witter"). Emerson worked at Dean Witter for approximately nine and one-half years before Dean Witter terminated him in March 1999.

¹ On July 26, 2007, the Commission approved a proposed rule change filed by National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and the member-regulation, enforcement, and arbitration functions of the New York Stock Exchange. *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517 (SR-NASD-2007-053). Because FINRA denied Brookstone's application after the consolidation, references to FINRA will include references to NASD.

² Emerson's prior three DUI convictions, which were misdemeanors, occurred in 1995, 1987 and 1985 – all in Kansas.

³ 15 U.S.C. § 78c(a)(39)(F); FINRA By-Laws, Art. 3, § 4 (2009).

⁴ FINRA By-Laws, Art. 3, § 3 (b), (d).

The record does not contain a copy of the Uniform Termination Notice for Securities Industry Registration ("Form U5") that Dean Witter filed when it discharged Emerson. The record does show, however, that, before Dean Witter discharged him, the firm had questioned Emerson about accounts involving retired persons purchasing initial public offerings.

The record also includes Emerson's Uniform Application for Securities Industry Registration ("Form U4"), dated June 27, 2006, which indicates that two customers filed complaints against Emerson for unsuitable recommendations. The first complaint, filed the same month Emerson was terminated (March 1999), alleged that Emerson had made unsuitable investment recommendations resulting in purported losses to the client of \$52,000. Dean Witter settled that complaint in April 1999 for \$35,433. The next complaint, filed in July 1999, alleged that Emerson had engaged in an unsuitable strategy of investing in initial public offerings, which purportedly cost the customer \$59,000. Dean Witter settled that complaint for \$20,000 in August 1999.⁵

Emerson testified at the statutory disqualification hearing that these customer complaints were due to the aggressive business "culture" at Dean Witter, which encouraged him to "raise assets under management [and] grow [his] accounts." Emerson claimed that he has "drastically changed [his] business" since then by decreasing the number of households he serves and focusing "only on high net worth individuals that had excellent investor experience."

2. Wachovia Securities

Approximately a month after being dismissed from Dean Witter, Emerson became associated with Wachovia Securities, Inc. ("Wachovia").⁶ After working for Wachovia for approximately seven years, the firm terminated Emerson on May 15, 2006. The Form U5 filed by Wachovia states that Emerson was terminated for "violating firm policy" and adds that Emerson "took discretion in client accounts."

The questionable trades were apparently done for a deceased account holder's widow, at the request of the widow's attorney. NYSE Regulation Inc. ("NYSE Regulation") investigated the matter and concluded that Emerson had allowed the widow to withdraw funds from her deceased husband's account without the necessary written authorization. NYSE Regulation decided not to take any formal disciplinary action, however, because Emerson had no previous

⁵ In January 2000, two other customers filed complaints, alleging that Emerson had mismanaged their accounts while at Dean Witter. Dean Witter denied those complaints.

⁶ According to Emerson's Form U4, Emerson joined Everen Securities, Inc. ("Everen") after leaving Dean Witter. Everen, however, later apparently merged with First Union Securities, Inc., which, in turn, merged with Wachovia. For simplicity's sake, this opinion refers to these entities collectively as Wachovia.

disciplinary history, he had cooperated with the investigation and admitted wrongdoing, the customer had not suffered harm, and Wachovia had terminated Emerson's employment.⁷

It was during his time at Wachovia that Emerson was arrested for his fourth DUI. Although Emerson notified Wachovia of the initial arrest, he apparently failed to notify Wachovia when the DUI was upgraded to a felony – a point he does not dispute on appeal. In fact, Emerson submitted a deposition transcript to FINRA in which a former Wachovia compliance officer testified that Emerson had notified him of the misdemeanor arrest, but that he could not remember Emerson ever telling him that the misdemeanor DUI charge had been upgraded to a felony. Emerson's Form U4 was also not amended to reflect the upgrade to a felony DUI, as FINRA rules require.⁸

3. Brookstone

Emerson joined Brookstone on June 30, 2006, approximately one month after being discharged from Wachovia and two months before he pleaded guilty to the felony DUI. Brookstone has twenty-nine branch offices, twenty offices of supervisory jurisdiction ("OSJs"), fourteen registered principals, and eighty-five registered representatives.

B. Brookstone's Membership Continuation Application

On November 11, 2006, approximately two months after Emerson pleaded guilty to felony DUI, Brookstone applied to the FINRA Department of Registration and Disclosure to

⁷ In November 2006, several months after Emerson left Wachovia, two joint account holders filed a complaint against Emerson, alleging that he had engaged in unauthorized trading from 2002 until 2005 and claiming \$8,000 in losses. The same customers filed what appears to be a nearly identical complaint in January 2007. In both cases, Wachovia denied the complaint "in its entirety," stating that Wachovia's "review of the matter revealed no evidence of wrongdoing." Emerson testified that his ex-wife and her mother instituted these complaints and that they had no substance.

⁸ Form U4 asks members, in part, to disclose whether they have been charged or convicted of a felony. FINRA and other self-regulatory organizations use Forms U4 as one of the bases to determine the fitness of applicants for registration as securities professionals. FINRA Membership Rule IM-1000-1 requires members to correct information in connection with membership or registration as a registered representative that is so "incomplete or inaccurate so as to be misleading." FINRA Manual at 16,111 (2009); *see also Jason A. Craig*, Exchange Act Rel. No. 59137 (Dec. 22, 2008), 95 SEC Docket 12694, 12694 (affirming a bar where applicant failed to disclose on his Form U4 that he had been charged with four felonies and had been convicted of a misdemeanor); *Thomas A. Alton*, 52 S.E.C. 380, 382 (1995) (affirming a bar where applicant's Form U4 contained misrepresentations about a perjury conviction), *aff'd*, 105 F. 3d 664 (9th Cir. 1996) (table).

permit Emerson to continue to associate with the Firm as a general securities representative. As part of its application, Brookstone submitted a heightened supervisory plan in which Brookstone proposed, in part, that Emerson would move from his current workplace in his home to Brookstone's OSJ in Overland Park, Kansas, where Russell Fieger, a principal and active producer at the Firm, would be Emerson's primary supervisor. Brookstone also proposed that Emerson's daily trades would be reviewed and approved by David Locy, the Firm's chief compliance officer. Because Locy would not be in the same OSJ as Emerson, Brookstone proposed that Locy would review the trades through the Firm's electronic surveillance software.

On March 6, 2008, a two-person Hearing Panel of FINRA's Statutory Disqualification Committee held a hearing to consider the Application. During the hearing, Locy testified that the Firm currently employs eight representatives, including Emerson, who, due to certain disclosures on their Forms U4, are subject to Brookstone's own heightened supervisory procedures. When asked about representatives who work from home – which Emerson has apparently been doing since he started at the Firm in June 2006 – Locy explained that only persons with a "clean" Form U4 are allowed to work from their home. When asked to explain why Emerson had been allowed to work from home given his statutory disqualification, Locy responded "I guess I can't answer that."⁹

The Hearing Panel also heard from Fieger about his proposed role supervising Emerson. Fieger stated that he currently supervises nine registered representatives but has not supervised a statutorily disqualified person before. He also explained that he had given only a " cursory review" to Emerson's business and that he had known Emerson for only twenty-four hours before his testimony.

On December 17, 2008, the National Adjudicatory Council ("NAC") denied Brookstone's application for Emerson to continue to be associated with Brookstone. The NAC found that allowing Emerson to continue to be associated with Brookstone was "not in the public interest, and would create an unreasonable risk of harm to the market or investors." The NAC expressed concern (i) that insufficient time had elapsed since Emerson's felony conviction, (ii) that Emerson had failed in his obligation to notify Wachovia promptly that the DUI charge had been upgraded to a felony, (iii) that Emerson's regulatory history of prior customer complaints demonstrated "a lack of respect for authority and an inability to conform to the regulatory atmosphere of the securities industry," (iv) that Brookstone's proposed supervisory plan was inadequate, and (v) that Brookstone had failed to establish its ability to comply with that plan. This appeal followed.

⁹ Locy testified that, under the Firm's then-current supervision of Emerson, Locy would visit Emerson at home and review Emerson's files and correspondence. Locy also testified that, while Locy's headquarters was in Lakeland, Florida, his "time is split between Kansas City and Lakeland."

III.

Section 19(f) of the Exchange Act sets forth the standards that govern our review of FINRA's denial of the Application.¹⁰ We must dismiss Emerson's appeal if we find (i) that the specific grounds on which FINRA based its action exist in fact, (ii) that the denial is in accordance with FINRA rules, and (iii) that those rules were applied in a manner consistent with the purposes of the Exchange Act, unless we determine that FINRA's action imposes an unnecessary burden on competition.¹¹ In a FINRA proceeding such as this, "the burden rests on the applicant to show that, despite the disqualification, it is in the public interest to permit the requested employment."¹²

We find, and Emerson does not dispute on appeal, that the grounds on which FINRA based its decision exist in fact, including (i) that Emerson was convicted of a felony DUI in 2006, (ii) that Emerson's felony conviction was a statutorily disqualifying event,¹³ (iii) that Emerson has three previous DUI convictions, (iv) that Emerson failed to notify Wachovia that the DUI had been upgraded to a felony, (v) that Emerson was the subject of several customer complaints, (vi) that Emerson's two previous employers discharged him, (vii) that Brookstone allowed Emerson to work from home in contravention of its own internal procedures, and (viii) that the NAC opinion correctly stated the facts and circumstances surrounding Brookstone's proposed supervision of Emerson.

We also find that FINRA's denial of the Application was in accordance with FINRA's rules. For example, we find, and Emerson does not dispute, that FINRA may deny a statutorily disqualified person's association with a member firm and that FINRA conducted an eligibility hearing during which FINRA afforded Emerson an opportunity to be heard.¹⁴

¹⁰ 15 U.S.C. § 78s(f).

¹¹ *Id.*

¹² *Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992).

¹³ Section 3(a)(39)(F) of the Exchange Act provides that "[a] person is subject to a 'statutory disqualification' . . . if such person . . . has been convicted of any . . . felony within ten years of the date of the filing of an application" 15 U.S.C. § 78c(a)(39)(F).

¹⁴ See FINRA By-Laws, Art. 3, § 4 (stating that a person is "subject to a 'disqualification' with respect . . . to association with a member, if such person is subject to any 'statutory disqualification'") & § 3(d) (stating that a person may file an application requesting relief from ineligibility from association with a member and that FINRA "may conduct such inquiry or investigation into the relevant facts and circumstances as it, in its discretion, considers necessary to its determination" of whether to approve such an application); see also FINRA Code (continued...)

We further find that FINRA applied its rules in a manner consistent with the Exchange Act when it denied the Application. Under the Exchange Act, FINRA may deny a firm's application for associating with a statutorily disqualified person if FINRA determines that a person's association with a member firm would be inconsistent with the public interest and the protection of investors.¹⁵ We have accordingly held that, for FINRA's denial of an application to be consistent with the Exchange Act, FINRA "must explain how the particular felony at issue, examined in light of circumstances relating to the felony, creates an unreasonable risk of harm to the market or investors."¹⁶ Here, FINRA provided such an explanation by appropriately weighing all the facts and circumstances surrounding Emerson's felony conviction and Brookstone's proposed supervisory plan.

FINRA first considered the time between Emerson's felony conviction and Brookstone's application. FINRA "appreciated that Emerson has taken steps to deal with his addiction," but concluded that insufficient time had elapsed "to demonstrate that the change in his behavioral pattern is fundamental and long-lasting and that he can conduct himself in a responsible and compliant fashion in the securities industry." We agree. Emerson's felony conviction was less than three years ago, and we have upheld the denial of applications where the time elapsed since the applicant's conviction was more than twice as long.¹⁷

FINRA also concluded that Emerson failed to notify Wachovia promptly that his DUI had been upgraded to a felony. As explained earlier, Emerson's Form U4 did not reflect the upgraded DUI charge, and Emerson's compliance officer at Wachovia could not corroborate Emerson's claim that he had notified Wachovia of the upgrade. FINRA noted that the upgrade of Emerson's DUI was "a particularly important fact to have disclosed to [Wachovia] because a felony

¹⁴ (...continued)
of Procedure, Rules 9520-25 (setting forth parameters of eligibility proceedings).

¹⁵ Section 15A(g)(2) of the Exchange Act, 15 U.S.C. § 78o-3(g)(2); *see also Frank Kufrovich*, 55 S.E.C. 616, 624 (2002) (describing steps NASD must take when denying an application to be consistent with the purposes of the Exchange Act); FINRA By-Laws Art. 3, § 3(d) ("The Board may, in its discretion, approve the continuance in membership, and may also approve the association or continuance of association of any person, if the Board determines that such approval is consistent with the public interest and the protection of investors.").

¹⁶ *Stephen L. Keidaish*, 54 S.E.C. 983, 987 (2000); *see also Kufrovich*, 55 S.E.C. at 625-26 (concluding that "NASD had properly discharged its Exchange Act obligation" by weighing facts such as the nature and recency of the applicant's conviction, his previous disciplinary history and the proposed supervision plan).

¹⁷ *See, e.g., William J. Haberman*, 53 S.E.C. 1024, 1030 (1998) (finding representative's association with member firm to be "not in the public interest" where representative's felony conviction was "only six years ago").

conviction results in a person being subject to statutory disqualification." FINRA and other self-regulatory agencies rely on Form U4 "to monitor and determine the fitness of securities professionals."¹⁸ We have thus repeatedly stated, "[t]he candor and forthrightness of [individuals making these filings] is critical to the effectiveness of this screening process."¹⁹ Here, we find, and Emerson does not dispute on appeal, that Emerson failed in his duty to notify Wachovia promptly of the felony charge or to ensure that his Form U4 was accurate. Emerson's failure to fulfil these obligations raises questions about his ability to maintain his obligations under the securities laws.

FINRA next considered Emerson's personal history, which, as discussed earlier, includes several customer complaints (two of which Dean Witter settled), discharges from his two previous employers, and repeated DUI convictions. FINRA reasonably concluded that this history demonstrated "a lack of respect for authority and an inability to conform to the regulatory atmosphere of the securities industry." Even where prior misconduct is not recent, it still "reflects poorly on [an applicant's] judgment and trustworthiness."²⁰

FINRA also reviewed Brookstone's proposed supervisory plan. In assessing a supervisory plan, "we require . . . stringent supervision for a person subject to a statutory disqualification."²¹ Here, FINRA concluded that the proposed plan lacked such stringent supervision, and we agree. For example, Brookstone proposed that Emerson's primary supervisor would be Fieger, who has never supervised a statutorily disqualified person before. We are concerned with the adequacy of this plan, because of both Fieger's lack of experience supervising statutorily disqualified persons and Fieger's lack of familiarity with Emerson and his business. FINRA also reasonably "question[ed] whether Fieger has sufficient time to devote to the heightened supervision of a statutorily disqualified individual" given that Fieger supervised nine other people. FINRA also noted that Locy, rather than Fieger, would be responsible for the review and approval of Emerson's daily trades. Locy, however, does not work in the same location as Emerson. As we

¹⁸ *Alton*, 52 S.E.C. at 382.

¹⁹ *Rosario R. Ruggiero*, 52 S.E.C. 725, 728 (1996) (quoting *Alton*, 52 S.E.C. at 382) (alteration in original) (dismissing appeal where statutorily disqualified person had failed to amend his Form U4 within ten days of statutorily disqualifying event). Moreover, NASD issued a Notice to Members in 1987 making clear that the Form U4 must be amended within ten days after an event creating a statutory disqualification. NASD Notice to Members 87-65. NASD further warned that the late amendment of a Form U4 may be grounds for denying an application to permit a statutorily disqualified person to remain associated with a member. *Id.*

²⁰ *Kufrovich*, 55 S.E.C. at 628 (concluding that prior misconduct, even if not recent, still reflects poorly on a statutorily disqualified person).

²¹ *Haberman*, 53 S.E.C. at 1032 (finding fault with a supervisory plan where sole compliance officer would have insufficient contact with statutorily disqualified person).

have previously concluded, a supervisory plan lacks the necessary intensive scrutiny when the supervisor will not be in close, physical proximity to the statutorily disqualified person.²²

Emerson, for his part, does not challenge FINRA's conclusion that Brookstone's heightened supervisory procedures are inadequate as presently drafted. He instead asks the Commission to "act as a mediator, perhaps finding those terms to which FINRA will agree." He contends that "Applicants have remained willing to accept a supervisory agreement that would satisfy FINRA's concerns, and yet do so to this day, but FINRA has offered no suggestions, seeking only to reject Brookstone's drafts, without offering any additions." Drafting a supervisory plan, however, is neither the Commission's nor FINRA's role. The burden is instead on Emerson to show that his continued employment in the securities industry would be in the public interest.²³ Brookstone is nevertheless free to revise its proposed supervisory plan in any subsequent application that Brookstone may decide to make.

In addition to citing the plan's shortcomings, FINRA also expressed concern with whether Brookstone would comply with the proposed supervisory plan. As noted earlier, Brookstone allowed Emerson to work from home despite Brookstone's own internal rules for individuals subject to heightened supervision. FINRA concluded, and we agree, that "[s]uch inattention to the requirements of heightened supervision is not acceptable in statutory disqualification matters."²⁴

We accordingly find that FINRA's basis for denying Brookstone's application to continue associating with Emerson exists in fact, that FINRA acted fairly and in accordance with its rules, which are and were applied in a manner consistent with the purposes of the Exchange Act, and that FINRA's action imposed no undue burden on competition.

IV.

Emerson presents a variety of arguments about why we should reverse FINRA's denial of the Application. Most of these arguments center on Emerson's assertion that his DUI conviction is not related to the securities industry. Emerson argues, for instance, that, while he "may have

²² See, e.g., *Kufrovich*, 55 S.E.C. at 629 (finding supervisory plan to be inadequate, in part, because the supervisor would "not be physically present in close proximity . . . during all working days"); *Haberman*, 53 S.E.C. at 1031-32 (finding supervisory plan to be inadequate where supervisor's travel schedule would cause him and the disqualified representative to "have insufficient contact with each other").

²³ See *supra* note 12 and accompanying text.

²⁴ Although Brookstone and its predecessor were the subject of several letters of caution, FINRA did not rely on Brookstone's disciplinary history when denying the Application and, in fact, "note[d] the lack of formal disciplinary history for the Firm."

had the poor judgment to drive while drunk," such behavior, he contends, "has no logical correlation with the integrity or probity required to manage client accounts." In making this claim, Emerson asks that the Commission "be cognizant of the fact that drunks have long served in the [securities] industry."

The Exchange Act, however, makes no distinction between felonies that are securities related and those that are not. Instead, a person becomes subject to a statutory disqualification for "any" felony committed within ten years of an application.²⁵ As we have noted before, "[t]he fact that [applicant's] misconduct did not occur in the securities industry does not weigh in his favor."²⁶ Moreover, FINRA's decision is not, as Emerson seems to contend, solely about Emerson's DUI conviction. Rather, FINRA considered all of the circumstances around Emerson's conviction, including the time elapsed since Emerson's conviction, Emerson's other disciplinary incidents, and the shortcomings in Brookstone's then-current supervision of Emerson and its proposed supervisory plan. FINRA's consideration of these various circumstances is, as discussed above, consistent with the Exchange Act and long-standing precedent.

Emerson alternatively argues that "[i]t is unconstitutionally overbroad for Emerson to be denied a right to work based solely on a felony that is unrelated to the occupation to which he is applying." In support, Emerson quotes various Supreme Court cases for the proposition that the right to work is a fundamental liberty guaranteed by the Fourteenth Amendment of the U.S. Constitution.²⁷ Emerson's constitutional arguments are wrong for multiple reasons.

²⁵ See *supra* note 13.

²⁶ *Halpert*, 50 SEC at 422 (dismissing appeal where appellant was statutorily disqualified because of a conviction for credit card fraud); see also *Kufrovich*, 55 S.E.C. at 617, 630 (dismissing appeal where appellant was statutorily disqualified because of a conviction for "enticing and attempting to entice a minor to engage in an unlawful sexual act" and "traveling interstate with intent to engage in a sexual act with a minor").

²⁷ Quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 322 (1976) (Marshall, J., dissenting) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (stating that the liberty guaranteed by the Fourteenth Amendment includes "the right of the individual to contract [and] to engage in any of the common occupations of life" (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)))); *Smith v. Texas*, 233 U.S. 630, 636 (1914) ("Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his power of mind and body in any lawful calling."); *Butcher's Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring) ("The right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase 'pursuit of happiness' in the declaration of independence."); *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the
(continued...)

We have repeatedly noted that, as a general matter, self-regulatory organizations ("SROs") are not state actors and thus are not subject to the Constitution's due process requirements.²⁸ Furthermore, even if SROs such as FINRA were subject to due process requirements, "[t]he Supreme Court characterizes the ability to pursue a particular line of employment as a fundamental right only in the limited context of the [U.S. Constitution's] privileges and immunities clause . . . where a state government attempts to limit employment opportunities to state or municipal residents."²⁹ FINRA's action here does not involve such an attempt to limit employment opportunities to particular residents, nor does Emerson make such a claim. Emerson notes in his brief that, even with the statutory bar in place, he is presently "practicing as a financial advisor at Cornerstone Securities, LLC."³⁰

Moreover, FINRA's action is not, as Emerson describes it, "a life sentence." FINRA has not expelled Emerson from the securities industry, nor has FINRA imposed a penalty or remedial sanction.³¹ FINRA's action "merely denies [Emerson] relief from a previously existing

²⁷ (...continued)

very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.").

²⁸ See, e.g., *Scott Epstein*, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13855 ("[I]t is well-established that self-regulatory organizations ("SROs") are not subject to the Constitution's due process requirements."); *Mark H. Love*, 57 S.E.C. 315, 322 n.13 (2004) ("We have held that NASD proceedings are not state actions and thus not subject to constitutional requirements."); *William J. Gallagher*, 56 S.E.C. 163, 168 n.10 (2003) ("[W]e note that many courts and this Commission have determined that self-regulatory organizations such as the NASD are not subject to . . . constitutional limitations applicable to government agencies."); see also *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 NASD is not a governmental actor).

²⁹ *Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.2d 929, 932 (10th Cir. 1989); see also *Edelstein v. Wilentz*, 812 F.2d 128, 132 (3d Cir. 1987) ("The Constitution does not create fundamental interests in particular types of employment." (citing *Murgia*, 427 U.S. at 313)).

³⁰ The record is unclear about what Emerson's duties are at Cornerstone as a financial advisor. According to Emerson, Cornerstone is an advisory firm registered in Kansas, Missouri, and Texas. The record indicates that Fieger is also associated with Cornerstone. Fieger explained during the hearing that Cornerstone is a registered investment advisory firm, while Brookstone is the broker-dealer. Investment advisors are not subject to FINRA jurisdiction.

³¹ See *Dennis Milewitz*, 53 S.E.C. 701, 707 (1998) ("NASD's consideration of the
(continued...)

disqualification."³² Emerson's DUI felony will no longer be a statutorily disqualifying event once ten years have elapsed from the date of Emerson's conviction. In the intervening time, Emerson and Brookstone are free to submit a revised application. Emerson can also seek to associate with a different firm, under a different supervisory arrangement.

In addition to Emerson's constitutional arguments, Emerson also argues that FINRA lacked subject matter jurisdiction to deny the Application. Emerson contends that he has been unable to procure a copy of the application NASD submitted "during 1938-1939" to become a registered securities association and that, if no application exists, "NASD was not validly formed as a national securities association." However, as we found in 1939 when approving NASD's application to become registered as a national securities association, "NASD filed an application, pursuant to Rule X-15AA-1 and the provisions of Form X-15AA-1, for registration as a national securities association under Section 15A of the Securities Exchange Act of 1934, as amended."³³ Emerson's apparent inability to obtain a copy of an approximately seventy-year-old application does not alter our finding that NASD filed an application, which we approved. Moreover, NASD became FINRA when NASD's member firm regulatory functions were consolidated with NYSE Regulation, Inc. We approved the proposed rule change effecting this consolidation on July 26, 2007.³⁴ As a result, Brookstone's application is not governed by NASD, but by FINRA. We accordingly see no merit in Emerson's contention that FINRA lacked subject matter jurisdiction to consider the Application.

Emerson also argues that FINRA was biased against him in reaching its decision. According to Emerson, Brookstone ran a candidate in FINRA's Board of Governors election against a FINRA-nominated candidate. Emerson asserts that, while campaigning, "Brookstone's

³¹ (...continued)

applicant's disciplinary history prior to the statutory disqualification, including misconduct for which sanctions were imposed previously, does not amount to a further penalty for that prior misconduct."); *Halpert & Co.*, 50 SEC 420, 422 (1990) (noting that NASD's denial of membership was not "imposing a penalty on applicants in this matter or even a remedial sanction").

³² *Milewitz*, 53 S.E.C. at 706; *see also Halpert*, 50 SEC at 422 (stating that the denial of an application is a denial only of the "request *at this time* for relief from [his] previously incurred disqualification" (emphasis added)).

³³ *Application by NASD for Registration as a Nat'l Sec. Assoc.*, 5 S.E.C. 627, 627 (1939).

³⁴ *See* Exchange Act Rel. No. 56146 (July 26, 2007), 72 Fed. Reg. 42,190 (Aug. 1, 2007) (SR-NASD-2007-053) (approving proposed rule change that "NASD filed" and that "amend the NASD By-Laws to implement the governance and related changes to accommodate the consolidation of the member regulatory functions of NASD and NYSE Regulation, Inc.").

candidate argued loudly and strongly in stinging oratory against FINRA's culture and practices." Emerson additionally alleges that his counsel in the present appeal "sent a critical letter to Marcia Asquith [FINRA's corporate secretary] condemning FINRA's management of the election." Asquith, in her role as secretary, later signed NAC's decision denying Emerson's application. Emerson now claims that Asquith's signature on NAC's decision, combined with comments made during the Board of Governors campaign, gives FINRA "ample justification to be biased against Appellants."

The only connection between Asquith and NAC's denial of Emerson's application is that Asquith signed the NAC decision in her role as corporate secretary, "On Behalf of the National Adjudicatory Council." As we have stated in the past, the secretary's role is purely administrative,³⁵ and the record contains no evidence that Asquith was in any way influenced by Emerson's counsel's letter or that she, in turn, influenced FINRA's decision. Similarly, the record does not indicate that any actions were taken, or comments made, during the Board of Governors election that influenced FINRA's decision.

Emerson finally makes a variety of other, vague arguments about FINRA's "forced membership," which he broadly claims is "a violation of Appellants' right to freedom of contract, a restraint of free trade under federal Anti-Trust Acts and a violation of Appellants' rights to freedom of speech and association under the United States and Florida Constitutions." Emerson also argues that FINRA's decision unconstitutionally addresses "questions for each state under the Tenth Amendment that should not be cut off by federal paternalism." As we noted above, however, FINRA is not a state actor and is thus not subject to the Constitutional requirements Emerson cites.³⁶ The Supreme Court has also deemed the antitrust laws to be repealed to the extent necessary for the securities laws to function in the manner Congress envisioned, and courts have noted that a nationwide federal rule is preferable to a state-by-state approach when it comes to the securities laws.³⁷ More problematic for Emerson's arguments, however, is that he

³⁵ See, e.g., *Perpetual Sec., Inc.*, Exchange Act Rel. No. 56613 (Oct. 4, 2007), 91 SEC Docket 2489, 2497 n.21 ("NASD's Secretary signs the NAC decision 'on behalf of the [NAC],' not in her personal capacity. Her role is purely administrative. The decision was issued by the NAC."); *Conrad C. Lysiak*, 51 S.E.C. 841, 847 (1993) ("The NASD's Secretary's signing of the decision is a purely ministerial act.").

³⁶ See *supra* note 28 and accompanying text; see also *Martin Lee Eng*, 55 S.E.C. 91, 95 (2001) (holding that the First Amendment is not applicable to the NASD).

³⁷ See *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 688-691 (1975) (stating that the "[i]mplied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work as it was intended"); *Eichenholtz v. Brennan*, 52 F.3d 478, 486 (3d Cir. 1995) ("In cases involving the federal securities laws, we believe that a nationwide federal rule is preferable"); *Bluebird Partners, L.P. v. First Fid. Bank*, 896 F. Supp. 152, 156 (S.D.N.Y. 1995) (noting "that the policy (continued...)

does not cite any authority or provide any basis or rationale for his assertions. He does not explain, for instance, what speech is being infringed or in what way FINRA's decision implicates the Florida constitution. As other courts have admonished, "we cannot 'manufacture arguments for an appellant.'"³⁸ We accordingly decline to address Emerson's arguments not addressed by legal argument or citation.

V.

For these reasons, we dismiss this review proceeding.

An appropriate order will issue.³⁹

By the Commission (Commissioners CASEY, AGUILAR, WALTER, and PAREDES);
Chairman SHAPIRO not participating).

Elizabeth M. Murphy
Secretary

³⁷ (...continued)

of protecting investors that underlies federal securities laws . . . is best served by applying a uniform federal rule").

³⁸ *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (citing *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)) (declining to address arguments not accompanied by legal argument).

³⁹ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No.

Admin. Proc. File No. 3-13334

In the Matter of

TIMOTHY H. EMERSON, JR.

c/o Brian P. Sweeney, Esq.
520 S. Florida
Lakeland, FL 33801

For Review of Action Taken By

FINRA

ORDER AFFIRMING ACTION OF NATIONAL SECURITIES EXCHANGE

On the basis of the Commission's opinion issued this day, it is

ORDERED that the review proceeding of the application by Brookstone Securities, Inc. to continue to employ Timothy H. Emerson, Jr., as a registered representative is hereby dismissed.

By the Commission.

Elizabeth M. Murphy
Secretary