FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. THOMAS WEISEL PARTNERS, LLC (CRD No. 46237), and STEPHEN H. BRINCK, Jr., (CRD No. 2674123), Respondents.	Disciplinary Proceeding No. 2008014621701 Hearing Officer – Rochelle S. Hall **EXTENDED HEARING PANEL DECISION** November 8, 2011

For failing to have adequate supervisory systems and procedures, in violation of Conduct Rules 3010 and 2110, Respondent TWP is fined $200,000. TWP was also ordered to pay the costs of the hearing. Enforcement failed to prove that Respondents Brinck and TWP made fraudulent sales of auction rate securities to customers in violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act, and Conduct Rules 2120 and 2110. Enforcement also failed to prove that Respondent TWP provided false information to FINRA in violation of Rules 8210 and 2110; or that TWP gave false and misleading information to customers in violation of Conduct Rules 2110 and 2010. Accordingly, those charges are dismissed.

Appearances

For the DEPARTMENT OF ENFORCEMENT: Jeffrey P. Bloom, Senior Special Counsel, Daniel D. McClain, Director, and Gary M. Lisker, Senior Counsel, Washington, DC.

For RESPONDENT THOMAS WEISEL PARTNERS, LLC: Robert A. Sacks, Diane L. McGimsey, and Alexa M. Lawson-Remer, of SULLIVAN & CROMWELL, LLP, Los Angeles, California.

For RESPONDENT STEPHEN H. BRINCK, JR.: Barry R. Goldsmith, David Debold, Geoffrey C. Weien, and Aileen M. Cannon, of GIBSON, DUNN & CRUTCHER LLP, Washington, DC.

DECISION

I. PROCEDURAL HISTORY[1]

The investigation that led to the filing of the Complaint developed during a FINRA[2] sweep of brokerage firms to understand how auction rate securities ("ARS") were sold.[3] On April 28, 2010, the FINRA Department of Enforcement filed a four-cause Complaint with the Office of Hearing Officers. The First Cause of Action alleged that Respondents Thomas Weisel Partners, LLC ("TWP") and Stephen H. Brinck, Jr. ("Brinck") violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, as well as NASD Conduct Rules 2120 and 2110, by fraudulently "stuffing" ARS from the account of TWP's corporate parent into the accounts of three TWP customers, shortly before the ARS market froze in February 2008. The Second Cause of Action alleged that TWP violated Conduct Rules 2110 and 2010 by providing false and misleading information to two of those customers in order to obtain the customers' retroactive consent for the ARS transactions. The Third Cause of Action alleged that TWP violated Procedural Rule 8210 and Conduct Rule 2110 by providing false information to FINRA in response to FINRA's request for information about the ARS transactions. The Fourth Cause of Action alleged that TWP violated Conduct Rules 3010 and 2110 by failing to establish and maintain systems and procedures governing principal transactions effected by the firm.

[1] In this decision, "Tr." refers to the transcript of the hearing; "CX" to Enforcement's exhibits; "RX" to Respondent's exhibits; and "Stip." to the parties' stipulations.

[2] As of July 30, 2007, NASD began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA include, where appropriate, NASD. On December 15, 2008, certain consolidated FINRA rules replaced parallel NASD rules. In that process, Rule 2110 was re-numbered to 2010, which is substantially identical to its predecessor. *See* Regulatory Notice No. 08-57, FINRA Notices to Members, 2008 FINRA LEXIS 50 (Oct. 2008). This decision refers to the NASD rules that were in effect at the time of the Respondents' alleged misconduct and cited in the Complaint as the basis for the charges against them.

[3] Tr. at 93, 96 (Doolittle).

On June 1, 2010, the Respondents filed their Answers, which denied the allegations in the Complaint.

The hearing was held January 31, 2011, through February 8, 2011, in San Francisco, California, before an Extended Hearing Panel ("Hearing Panel") composed of the Hearing Officer, a former member of the District 3 Committee, and a former member of the District 10 Committee. Enforcement called nine witnesses and TWP called five witnesses. Brinck testified on his own behalf, but did not call any other witnesses. The Hearing Panel accepted into evidence 107 exhibits submitted by Enforcement and 301 exhibits submitted by TWP.[4] Brinck adopted all of the exhibits submitted by Enforcement and TWP, and did not submit any additional exhibits.[5]

Based upon a review of the entire record, the Hearing Panel makes the following findings of fact and conclusions of law.

II. BACKGROUND

A. Respondents

1. Thomas Weisel Partners, LLC

TWP has been registered with FINRA since 1999. During 2008 and 2009, it was a wholly owned broker-dealer subsidiary of Thomas Weisel Partners Group, Inc. ("TWPG"). It is now a wholly-owned subsidiary of Stifel Financial Corp.[6] In 2007 and 2008, TWP's private client department ("PCD") provided services to both individual and corporate clients. During that period, PCD generated less than ten percent of TWP's revenues and employed 50 to 60 of

[4] Tr. at 80, 1222; Stip. ¶ 2.
[5] Proposed Exhibit List of Stephen H. Brinck.
[6] Tr. at 1314-15; CX-106.

the firm's 750 employees.[7] At December 31, 2010, TWP's excess net capital was $3.9 million. By the time of the hearing, TWP had approximately 20 employees.[8]

2. Stephen H. ("Henry") Brinck, Jr.

Henry Brinck was registered with FINRA from 1995 through April 2010. From July 1999 until July 2008, Brinck was a registered representative and registered investment adviser who worked on the Fixed Income Desk at TWP in San Francisco.[9] Brinck began working in the securities industry in 1995 in an entry-level position at Montgomery Securities, which was founded and run by Thomas Weisel ("Weisel").[10] Brinck stayed with Weisel when Bank of America bought Montgomery Securities in 1997, and then followed Weisel when he founded TWP in 1999. By 2008, Brinck was supervisor of corporate cash accounts on the Fixed Income Desk.[11]

At the hearing, several former TWP clients testified that they had a "very favorable view" of Brinck, perceiving him to be a "conscientious," "responsive," and "professional" advisor, who did not exceed clients' investment guidelines.[12] Mardi Finegan ("Finegan"), who is currently TWP's Chief Compliance Officer, said that Brinck took his compliance obligations seriously and never once gave her reason to think otherwise.[13] Paul Clark ("Clark"), who reported to Brinck, testified that Brinck was a "very professional and very courteous" colleague who treated his clients fairly and never favored one client to the detriment of another.[14] The Hearing Panel found these witnesses to be credible.

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[7] Tr. at 85-86 (Doolittle), 1317-18 (Fisher).
[8] Tr. at 85-86 (Doolittle), 1316-20 (Fisher).
[9] Tr. at 224, 390 (Brinck); CX-107.
[10] Tr. at 389–90 (Brinck).
[11] Tr. at 391 (Brinck), 645, 662 (Clark).
[12] Tr. at 353–54 (Yoshida), 853 (Songstad), 1175 (Ranganathan).
[13] Tr. at 1061 (Finegan).
[14] Tr. at 623–24 (Clark).

In late 2007, Brinck began searching for a position with greater responsibilities. In mid-2008, he left TWP to become Managing Director and Head of Fixed Income at First Republic Investment Management, where he remained until resigning in 2010.[15]

B. Auction Rate Securities

ARS, which were first offered in 1984, are long-term bonds issued by municipalities, student loan entities, and corporations. ARS have interest rates or dividend yields that periodically reset through Dutch auctions. One or more broker-dealers typically have the lead responsibility for underwriting the ARS offering and managing the auction process ("remarketing broker-dealers"). Other broker-dealers, such as TWP, participate in the auction on behalf of their customers by submitting orders to the remarketing broker-dealers. In the Dutch auction process, existing ARS holders and potential buyers specify the number of shares they seek to purchase and the lowest interest rate or dividend they are willing to accept. Participating broker-dealers then submit those orders to the auction agent, and the auction clears at the lowest rate bid that is sufficient to cover all of the ARS for sale. That rate applies to all of the ARS in the auction until the next auction. In 2007 and 2008, ARS auctions were typically held every 7, 28, or 35 days, depending on the particular security. If a customer wanted to sell ARS between auctions, the two main ways of doing so were to attempt to sell the ARS to a remarketing broker-dealer, or to find a direct buyer for the ARS.

If there is not sufficient demand from buyers to purchase all of the securities tendered for sale in an auction, the auction "fails," and no buy or sell orders are filled. Prior to February 2008, the broker-dealers that underwrote and distributed ARS routinely placed bids in auctions for their own accounts to prevent auctions from failing. Those broker-dealers were not obligated

[15] Tr. at 386–87 (Brinck).

to place bids, however, and could refrain from submitting supporting bids at any time. In February 2008, remarketing broker-dealers stopped submitting supporting bids, and ARS auctions began failing.[16]

C. Student Loan Auction Rate Securities

TWP invested its customers, both individual and corporate, primarily in student loan auction rate securities ("SLARS")—ARS whose underlying collateral were individual student loans backed by the Federal Family Education Loan Program ("FFELP"). SLARS were viewed as secure because some or all of the underlying principal was guaranteed by the U.S. Department of Education. Prior to the widespread auction failures in February 2008, there had never been a single failure of a single auction in SLARS.[17] Some SLARS had AAA ratings that were achieved by obtaining insurance policies issued by Ambac and MBIA. These ratings-insured SLARS were referred to as "enhanced," while those SLARS that did not need insurance to achieve their AAA ratings were referred to as "natural."[18]

D. The Fixed Income Desk

Within PCD, the Fixed Income Desk ("Desk" or "Fixed Income") was the subgroup responsible for effecting fixed income trades for individual clients, managing discretionary private client accounts, and managing discretionary "corporate cash accounts." Corporate cash accounts were held by corporate customers who invested their operating or excess cash for TWP to manage.[19] In 2007 and 2008, the Desk managed corporate cash accounts for approximately 15 companies.[20] The Desk used discretionary authority to manage the corporate cash accounts in accordance with the accounts' written investment policies. The investment policies generally

[16] RX-298; Enf. pre-hearing brief at 3-4; TWP pre-hearing brief at 6.
[17] Tr. at 158 (Doolittle), 230, 458 (Brinck).
[18] Tr. at 249-51 (Brinck), 651-53 (Rueb).

contained investment objectives of liquidity and preservation of capital.[21] In 2007 and 2008, corporate cash revenues totaled just over $1 million, significantly less than one percent of TWP's overall revenue in each of those years.[22] Fees paid by corporate cash customers were based solely on assets under management.[23] In the fall of 2009, TWP disbanded its corporate cash business.[24]

At the time of the transactions at issue, five employees worked on the Desk. Brinck ran the corporate cash group. Chris Bender ("Bender") was in charge of fixed income accounts for high net worth individuals. Mason McCabe ("McCabe") and Clark reported to Brink. Alexandra "Lynn" Rueb ("Rueb") initially reported to Brinck, but in early 2008 was working with Bender on managed private client accounts and assisting Brinck only on occasion. Brinck and Bender reported to Jeff Handy ("Handy"), who was then TWP's head of PCD.[25]

E. TWPG's Corporate Cash Account

Beginning in 2006 and continuing through 2008, the Desk managed a corporate cash account for TWPG. Respondents concede that because TWPG was TWP's parent, its account should have been coded as a principal account; however, it was mistakenly assigned a regular customer account code. Several witnesses testified that this mistake most likely occurred because the account was treated, from its opening, like the other corporate cash accounts.[26] For example, Brinck and Handy made a sales pitch and competed with other investment advisors to win the TWPG account. As it had with other corporate cash accounts, TWP entered into an

[19] Tr. at 86 (Doolittle).
[20] Tr. at 227-28 (Brinck).
[21] Tr. at 228 (Brinck).
[22] Tr. at 1321 (Fisher).
[23] Tr. at 862 (Songstad).
[24] Tr. at 85-86 (Doolittle), 1316-20 (Fisher).
[25] Tr. at 86-7 (Doolittle), 225-27 (Brinck), 392 (Brinck), 1235 (Aaron), 1316 (Fisher).
[26] Tr. at 426 (Brinck), 1031 (Baylor), 1042 (Finegan).

account agreement with TWPG, established written investment policies, and sent TWPG the same type of account statements and investment performance reports that were sent to other corporate cash customers.[27]

TWP's failure to designate TWPG's account as a principal account was significant because under Section 206(3) of the Investment Advisers Act, TWP was required to obtain written consent from the customers before entering transactions between TWPG and accounts managed by TWP. Brinck understood the requirement to obtain prior written consent before executing a cross-trade involving a principal account.[28] But neither he nor any other member of the Desk ever obtained prior consent when crossing securities with the TWPG account because they did not recognize the TWPG account as a principal account. Their failure to obtain prior consent had nothing to do with whether TWPG was providing liquidity to or obtaining liquidity from another customer; the Desk always treated TWPG as a regular client account, and therefore always (mistakenly) failed to get the proper consent.[29]

F. The Desk's Procedures for Creating Liquidity For Clients

The Desk generally created liquidity for clients invested in ARS by selling a client's ARS at regularly-scheduled auctions. Waiting to sell at auction was not always possible, however, because clients often had an immediate need for cash or provided only two to three days' notice of an impending cash need. The Desk employed two standard practices for obtaining inter-auction liquidity. First, the Desk contacted broker-dealers and requested that they buy ARS between auctions. Although broker-dealers sometimes agreed to this request, it was not typical for them to do so. Therefore, the Desk commonly obtained some or all inter-auction liquidity for

[27] Tr. at 421, 427 (Brinck), 989-90, 1031 (Baylor); RX-194, 196.
[28] Tr. at 566 (Brinck).
[29] Tr. at 146 (Doolittle), 426-28, 566-67 (Brinck), 625 (Clark).

clients by crossing ARS from the account of the client that requested liquidity with the account(s) of client(s) with cash available and for whom those ARS were deemed to be worthwhile investments.[30]

In managing the corporate cash accounts, each morning, the Desk printed "the reset rate report," which identified every ARS held by TWP clients and the associated auction date. The Desk would then call all of the underwriters or remarketers that TWP transacted with to verify TWP's records and to submit an order. There were three possible orders: sell, roll at market rate or roll at a particular rate.[31] Although an ARS would automatically roll at the market rate if no order was entered, the Desk never intentionally failed to place an order. Rather, for each particular auction, the Desk made an affirmative investment decision and took an affirmative action to effectuate the order.[32]

In order to provide liquidity for its corporate cash account customers between auctions, the desk routinely executed cross trades. The TWPG account was treated the same as all of the other corporate cash accounts. From 2006 through January 28, 2008, the Desk executed over 100 cross transactions, 18 of which involved the TWPG account. Of the crosses involving the TWPG account that occurred before January 29, 2008, TWPG provided liquidity to other customers in 14 of the 18 transactions.[33] Trading records showed that TWPG provided liquidity to other clients through cross transactions whenever those other clients had a cash need.[34] Such trades were so common that just two weeks before the cross trades in which TWP is alleged to

[30] Tr. at 543-44 (Brinck), 633-34 (Clark), 669-70 (Rueb).
[31] Tr. at 552-53 (Brinck), 620 (Clark).
[32] Tr. at 551-53 (Brinck).
[33] Tr. at 144-45 (Doolittle); RX-216, 217.
[34] Tr. at 149–50 (Doolittle).

have "stuffed" ARS into HT's account, TWPG *bought* ARS from HT in order to provide liquidity to HT.[35]

III. CAUSES OF ACTION

A. Fraud--TWP and Brinck

In its First Cause of Action, Enforcement alleged that TWP and Brinck violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as NASD Conduct Rules 2110 and 2120, and IM-2310-2, by fraudulently selling SLARS from TWPG's account to three of TWP's corporate customers. Enforcement alleged that, shortly after January 23, 2008, Brinck, concerned about the safety and liquidity of SLARS, decided that all of the SLARS held in TWP's corporate cash customer accounts should immediately be sold. Enforcement further alleged that despite this decision, during the time TWP was selling SLARS out of corporate cash accounts, Brinck caused three corporate cash accounts--MD, DV, and HT-- to *purchase* approximately $15.7 million worth of SLARS from TWPG. Enforcement alleged that Brinck "stuffed" the SLARS into the customers' accounts in order to raise cash so that TWPG would be able to pay bonuses to its employees. When the SLARS market froze in February 2008, MD, DV, and HT were left with $13,300,000 worth of illiquid SLARS.

TWP and Brinck denied that Brinck made a decision after January 23 to sell the SLARS because of concerns about their safety or liquidity, or that Brinck intended for all of the SLARS to be sold off immediately. Instead, TWP and Brinck always believed that SLARS were secure and liquid investments, and anticipated that the SLARS would be sold in due course, as they came up for auction. TWP and Brinck argued that cross trades among TWP's corporate cash

[35] Tr. at 149–50 (Doolittle), 367-69 (Yoshida); RX-40, 44, 281.

accounts were routinely done to obtain inter-auction liquidity for customers, and that TWPG's plan to pay bonuses was irrelevant to Brinck's decision to sell the SLARS to MD, DV and HT.

For the reasons discuss below, the Hearing Panel found that Enforcement failed to prove by a preponderance of the evidence that TWP and Brinck were liable as charged.

TWP and Brinck Believed SLARS Were Safe and Liquid Investments

Contrary to what Enforcement alleged, the Hearing Panel found that TWP and Brinck were not worried about the safety or liquidity of SLARS when they sold SLARS to their customers in February 2008.

Around the third quarter of 2007, the Desk had learned that auctions for certain ARS that had exposure to mortgage-related products or structured financing had failed. The Desk did not deal in those types of ARS and did not believe that those failures would affect the SLARS that its clients were invested in.[36] Nevertheless, out of an abundance of caution, the Desk began to closely monitor the ARS held by its clients to ensure that there were no liquidity or credit issues.[37] The result was that, from mid-2007 through the date of the failures, the Desk remained completely comfortable with the ARS that it purchased for its clients.[38]

The Desk's confidence in the soundness of SLARS was bolstered by its communications with the broker-dealers that underwrote the SLARS offerings. A representative of RBC reassured Brinck at least once a week that the SLARS market was "absolutely fine."[39] Representatives of Merrill Lynch told Rueb that "they would stand behind the auction rate securities, the student loan, and the AAA auction rate securities."[40] On January 4, 2008, another RBC representative told Clark: "we plan to support all auctions in our book." Nearly three

[36] Tr. at 232-33 (Brinck), 680 (Rueb); RX-63.
[37] Tr. at 233, 409 (Brinck), 649-50 (Rueb).
[38] Tr. at 463-64 (Brinck), 678-80, 696-97 (Rueb), 787 (Bender).

weeks later, the RBC representative told Clark that it had no failed auctions, did not anticipate any failed auctions, and planned to continue supporting the auction process. On February 1, 2008, a representative of RBC told Clark that RBC was "fully committed" to the auction rate market and supporting ARS auctions.[41] Research reports issued by Merrill Lynch as late as February 8, 2008, continued to recommend ARS, in particular SLARS.[42] Testimony from members of the Desk and its clients, as well as contemporaneous emails, demonstrated the Desk's continued confidence in SLARS before the market froze.[43]

Furthermore, the Desk continued purchasing SLARS for its individual clients, including employees and family members of employees. Unlike the corporate cash accounts, these individual clients were not subject to investment guidelines requiring all investments to be AAA rated. Accordingly, the Desk continued to purchase and roll ARS in discretionary and non-discretionary PCD accounts up to the day of the auction failures. Doolittle, Enforcement's investigator, testified that from January 23 to the date of the failures, the amount of ARS that TWP purchased or rolled for its clients exceeded the amount of sales by approximately $100 million.[44] Trading records show that the Desk purchased or decided to roll roughly $345 million in ARS during the time Enforcement alleged that the Desk had "serious concerns" about the ARS market.[45] The purchases and rolls for PCD clients included some of the very same securities that were being sold out of corporate cash accounts.[46]

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[39] Tr. at 444 (Brinck).
[40] Tr. at 679-80 (Rueb).
[41] RX-53, 55, 56.
[42] RX-292, 294.
[43] Tr. at 447 (Brinck); RX-18, 20, 21, 30, 32.
[44] Tr. at 154 (Doolittle).
[45] RX-215, 297.
[46] Tr. at 154 (Doolittle).

Between January 17 and February 11, 2008, the Desk also purchased over $5 million in ARS on behalf of TWP employees and relatives of TWP employees. Those purchases included a January 22 purchase on behalf of Rueb's mother, based on Rueb's recommendation, and a February 8 purchase for Ross Investments, Thomas Weisel's personal investment account.[47]

Brinck's January 23 Decision to Sell Enhanced SLARS

On or about January 23, 2008, the Desk met to discuss the possibility that Ambac and MBIA (which issued insurance to enhance certain ARS' ratings) would lose their own AAA ratings, and would thereby cause enhanced ARS ratings to be downgraded. The Desk employees were concerned that such downgrades would cause enhanced ARS to fall outside of corporate cash investment policies, which required all investments to be AAA rated. Rather than risk this possibility, Brinck decided, after full discussion with other Desk members, to begin selling enhanced ARS from corporate cash accounts on their scheduled auction dates, which extended out more than a month.[48] Brinck announced this decision in a January 23 email to the PCD.[49] Although Brinck acknowledged that the email doesn't articulate clearly the Desk's decision to sell only enhanced ARS, members of the Desk testified that they understood the decision being referred to in the email was the decision to sell only enhanced ARS.[50] The Hearing Panel found these witnesses' testimony to be credible.

The Desk also planned to notify corporate cash clients whose accounts would be impacted by the decision.[51] Rueb testified that she overheard telephone conversations between Brinck and corporate cash customers in which he explained the distinction between enhanced

[47] Tr. at 157 (Doolittle), 679 (Rueb); RX-218, 297.
[48] RX-187; Tr. at 255, 458, 465-66 (Brinck), 592-94 (Clark), 651-52, 707-08 (Rueb), 747-48 (Bender).
[49] RX-18; Tr. at 256 (Brinck), 729 (Rueb).
[50] Tr. at 256 (Brinck), 729-30 (Rueb).
[51] Tr. at 256-57 (Brinck), 654 (Rueb).

and natural ARS, and the problem that might occur if Ambac or MBIA lost their AAA credit ratings.[52]

Brinck's "Second Decision" to Sell All SLARS

To implement Brinck's first decision to sell enhanced SLARS from corporate cash accounts, others on the Desk researched the SLARS held by corporate cash clients in an effort to determine which SLARS were enhanced.[53] It soon became apparent that the lengthy and dense ARS offering statements yielded no easy answer. Brinck, Rueb, and Bender all testified that the process was difficult and laborious and that the staff often reached uncertain conclusions and burned up valuable time that could have been better spent servicing TWP's clients.[54] In the meantime, clients were contacting Brinck and asking for help with accounting and classification questions peculiar to various SLARS.[55] Recent changes in accounting rules were prompting clients' auditors to question both the balance sheet classification and valuation methodology of the SLARS that Brinck's clients held.[56]

Brinck became increasingly frustrated with the extra time and effort that he and his clients were forced to spend addressing the administrative uncertainties of this asset class.[57] In light of these factors, Brinck abruptly announced to the Desk employees, in a moment of frustration, that the gradual sell-off of enhanced SLARS from corporate cash accounts would extend to all SLARS (not just to the enhanced ones).[58] Brinck testified, "[W]e sold all auction rate securities because we had grown, enormously frustrated is probably an understatement, with the accounting burden, the auditing burden, the general information burden. Our clients were

[52] Tr. at 701-02 (Rueb).
[53] Tr. at 291–92 (Brinck), 691–92, 694-95 (Rueb).
[54] Tr. at 291–92, 468–72 (Brinck), 694–95 (Rueb), 749–50 (Bender); RX-243.
[55] RX-21, 78; Tr. at 240, 454–57, 473–77, 518–19 (Brinck).
[56] Tr. at 473 (Brinck).
[57] Tr. at 518 (Brinck).

burdened with it. Our job was to make things easier, and it didn't seem to be making things easier for anybody, so I threw up my hands and said, let's just sell them all."[59]

Desk employees testified that this so-called "second decision" was a separate decision to begin a gradual divestiture of all ARS for corporate cash accounts as auction dates came up.[60] Brinck's email communications to his clients over the following days did not clearly articulate both of the separate decisions, but were consistent with the description given by the Desk employees.[61] In accordance with this second decision, Brinck did not direct the Desk to sell SLARS immediately in a fire sale; instead, the Desk began gradually selling off the corporate account SLARS holdings as each new auction date arose. Because the auctions usually occurred every 28 or 35 days, the Desk anticipated that each corporate cash account would be divested of SLARS in about a month's time.[62]

Because the SLARS in corporate cash accounts had different auction dates, the exact date of final divestiture varied by client.[63] On February 6, 2008, Desk employee Mason McCabe advised Brian Songstad, MD/DV's[64] assistant controller, that all of MD/DV's ARS would be liquidated "by [the end of] February."[65] The trading records and related documents reveal that, according to the schedule for expected auctions, the Desk anticipated that MD/DV would gradually draw down its $102 million in ARS by February 27, 2008. HT would gradually draw down its $26 million ARS holdings by March 3, 2008.[66]

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[58] Tr. at 478–81 (Brinck), 694–95 (Rueb), 790 (Bender).
[59] Tr. at 290, 477 (Brinck).
[60] Tr. at 467–68 (Brinck), 708 (Rueb), 877, 855–56, 880–81 (Songstad).
[61] RX-26, 32.
[62] CX-40; Tr. at 708 (Rueb), 830–31 (Songstad), 880–81 (Songstad), 926 (Barley).
[63] RX-26, 27, 28.
[64] Songstad explained that MD and DV were not separate operating entities. Rather, DV served merely as an investment vehicle for MD. Tr. at 812.
[65] RX-34.
[66] RX-40, 43, 46.

The Hearing Panel found that, contrary to Enforcement's allegations, Brinck's decision to sell enhanced SLARS, and Brinck's subsequent decision to sell all SLARS, were not due to concerns about the safety or liquidity of SLARS. Further, the Hearing Panel found that Brinck's so-called "second decision" was not to divest of all SLARS immediately, as Enforcement alleged, but to divest of the SLARS as they came up for auction in due course.

The January 29, 2008 Cross Transactions

TWPG's Request for Cash

On January 2, 2008, TWPG acquired Westwind Partners, a Canadian broker-dealer. In connection with that acquisition, TWPG adopted a new plan for paying bonuses. Prior to the acquisition, certain TWP employees received their annual bonus in two payments, one payment in February and one payment in July. In December 2007, TWPG decided to move those TWP employees to a single annual bonus payment by "accelerating" the July 2008 payment to become part of 2007 year-end bonuses, which were scheduled to be paid in February 2008.[67]

On December 19, 2007, Ryan Stroub ("Stroub"), TWPG's corporate controller at the time of the transactions, advised Brinck in an email that TWPG would need "$25 million in Feb." He did not tell Brinck the purpose for the request or the exact day the payment would be needed. Brinck replied that the TWPG account was "plenty liquid for 25 in February."[68] On January 22, 2008, Stroub followed up with Brinck, informing him that the "timing should be approximately end of January so that it is effective for our FOCUS filing."[69] Stroub testified that TWP's December FOCUS report showed that the Firm's excess net capital had declined, and

[67] Tr. at 995-97 (Baylor); RX-3.
[68] RX-4; Tr. at 995 (Baylor).
[69] RX-9.

Stroub wanted to increase it in time to report it on TWP's January 2008 report. Stroub knew that required net capital amounts can include both cash and allowable assets, such as ARS.[70]

Stroub testified that when he requested the $25 million, he knew that the TWPG account was invested in ARS and municipal bonds, but did not know when the ARS were set to auction. Had he been told that the cash could not be provided by the end of January, he could have increased TWP's net capital by contributing TWPG's ARS or bonds, or by transferring cash from other accounts, including one that held over $200 million in convertible bonds. In other words, TWPG did not *need* to liquidate ARS positions to pay bonuses; TWP already had $50 to $60 million in cash that it could have used to pay bonuses, and Westwind Partners had more than $20 million in cash that TWP could have drawn from.[71] The Desk ultimately provided TWPG with the $25 million it had requested. Nobody informed Stroub or anyone else at TWPG, or anyone in senior management of TWP, that the Desk had effected the January 29 crosses in order to provide some of the funds.[72]

The contention that Brinck "stuffed" the ARS into customer accounts because he needed to raise cash quickly so that TWPG could pay bonuses, was central to Enforcement's case. The evidence presented at the hearing, however, did not support Enforcement's theory. Stroub and David Baylor ("Baylor"), TWPG's then chief financial officer and chief operating officer, testified that they never told Brinck why TWPG wanted the cash.[73] Brinck knew that he was not eligible to receive a bonus.[74] Other Desk employees testified that at the time TWPG requested

[70] Tr. at 946-47 (Stroub).
[71] Tr. at 948-50, 963 (Stroub), 1002-03 (Baylor); RX-150.
[72] Tr. at 947-48 (Stroub), 186-87 (Doolittle).
[73] Tr. at 948-50 (Stroub), 1002-3 (Baylor).
[74] Tr. at 398 (Brinck).

the cash, they did not know what the money was for.[75] They did not learn until after the crosses had been executed that the cash had been used to pay bonuses.[76]

The Execution of the January 29 Cross Transactions

On or about January 22, 2008, TWPG's corporate cash account contained approximately $136,000 in money market funds and approximately $40.3 million in ARS scheduled to auction at various dates between February 6 and February 20.[77] In order to meet TWPG's request for cash, the Desk utilized its two standard practices for providing clients with inter-auction liquidity. The Desk sold approximately $9 million of TWPG's ARS back to remarketing broker-dealers. The Desk then sold $15,700,000 worth of "natural" SLARS in cross transactions from the TWPG account to MD/DV and HT--$9,400,000 to MD/DV, and $6,300,000 to HT.[78] Before approving the cross trades, Brinck made certain that the trades were appropriate. This involved, as an initial matter, ensuring that the crosses would not involve enhanced ARS.[79] As of January 28, TWPG held 11 ARS in its account, three of which were enhanced. The Desk crossed only the natural SLARS and kept the three enhanced ARS—the ones perceived to be at risk of downgrade—in the TWPG account.[80] The Desk also reviewed the yields on the securities and determined that they were appropriate for the MD/DV and HT accounts.[81] The interest rates on the crossed securities were substantially higher (up to 130 basis points) than the reset yields of ARS being sold on that day.[82]

[75] Tr. at 622-23 (Clark), 702-3 (Rueb).
[76] Tr. at 703 (Rueb), 792 (Bender).
[77] RX-68, 150, 220.
[78] CX-11; Tr. at 601 (Clark), 658-59(Rueb).
[79] Tr. at 570-71 (Brinck).
[80] RX-68, 150; CX-11.
[81] Tr. at 570-71 (Brinck); RX-250, 251.
[82] Tr. at 169-70 (Doolittle); RX-250, 251.

The cross trades were executed in the same manner as cross transactions had been executed for years.[83] The trades were done in accordance with firm policy, reviewed daily by sales supervision (whose personnel were located in the same room as the Desk),[84] and subject to TWP's compliance department's periodic audits of the Desk's trades.[85]

In accordance with preexisting discretionary trading authority, and consistent with the way he had always handled crosses, Brinck did not obtain the prior consent of MD/DV or HT before approving the transactions.[86] Brinck and TWP acknowledged that the TWPG account should have been treated as a principal account, and that the Desk therefore should have obtained prior consent to the crosses; however, no one on the Desk recognized that the crosses were wrongful.[87] There also was no evidence that the crosses were motivated by the fact that the party needing liquidity was TWPG, or that the money was to fund retention bonuses.

The Desk did not try to hide the transactions from MD/DV and HT, as might be expected if they believed the transactions were wrongful. HT's controller testified that he reviewed trade confirmations and monthly statements that reflected the January 29 transactions.[88] In a March 31, 2008 email to Brinck, the controller noted the January 29 transactions, but did not question them.[89]

MD/DV also received trade confirmations, monthly account statements and holdings reports that reflected the January 29 transactions.[90] MD/DV's former assistant controller testified that, after speaking to Brinck, he understood that Brinck intended to divest of ARS

[83]Tr. at 144–50 (Doolittle), 705 (Rueb), 363 (Yoshida), 625 (Clark), 430–32, 439 (Brinck), 1072, 1109 (Finegan).
[84] Tr. at 1040–41, 1043-1044, 1056, 1058, 1090 (Finegan), 639–40 (Clark), 429–30, 1367 (Brinck); RX-171, 172.
[85]Tr. at 1050–53, 1058, 1078, 1092, 1095–96, 1106 (Finegan), 432, 1367–69 (Brinck).
[86] RX-215; Tr. at 287 (Brinck).
[87] Tr. at 287 (Brinck).
[88] Tr. at 313, 374 (Yoshida); RX-46.
[89] RX-49.
[90] Tr. at 817-818, 870-72 (Songstad); RX-281, 282.

gradually, as they came up for auction. He did not sense any urgency to sell the ARS. MD/DV's former assistant controller also testified that he received a February 21, 2008 report, which indicated that MD/DV had purchased ARS on January 29. He testified that at the time he received the report, he was focused on ARS because of the market failures, and that had he perceived the transaction to be inconsistent with his understanding of what the Desk was doing in the MD/DV accounts—gradually divesting from ARS—he would have mentioned this to Brinck. Yet, MD/DV's controller said nothing about the transaction.[91]

On July 13, 2009, understanding that because TWP had not obtained consent from the clients before crossing the ARS it had violated the Investment Advisers Act, TWP repurchased the $7 million still-outstanding ARS in MD/DV's accounts and the $6.2 million in HT's account at par.[92]

The Hearing Panel found that Enforcement failed to prove by a preponderance of the evidence that Brinck's January 29 approval of the cross trades between TWPG and TWP's customers was inconsistent with his earlier decision to gradually divest from ARS over the next month. Further, the Hearing Panel found that Enforcement failed to prove that Brinck's decision was motivated by concerns about the safety or liquidity of the SLARS, or by TWPG's intention to use the cash to pay bonuses.

B. Providing False Information to FINRA--TWP

Enforcement's Third Cause of Action[93] alleged that TWP violated Rules 8210 and 2110 by providing false information to FINRA in response to a request for information made pursuant to Rule 8210. Enforcement specifically alleged that the following statements, contained in

[91] Tr. at 855, 873-78 (Songstad).
[92] RX-202-213.

TWP's November 21, 2008, letter responding to a request for information from FINRA, were false:

- The Corporate Cash Management "strategy," reflected in Henry Brinck's emails, was not to liquidate all ARS positions. As explained below, the "strategy" was to sell "enhanced" auction rate securities and not to sell securities that were not enhanced or "natural" ARS.[94]
- The ARS positions sold for TWPG's account were "natural," not insurance-enhanced ARS and therefore not subject to the sell strategy. Simply put, the purchase of non-enhanced, natural ARS securities was entirely consistent with the strategy to sell enhanced ARS securities.[95]
- TWP understands that [a January 25, 2008, email containing] the phrase "begin divesting from auctions"…relate[s] to divesting from insurance-enhanced, rather than "natural" auction rate securities."[96]

Enforcement alleged that these statements were false because (1) the January 29, 2008, sales were inconsistant with the Fixed Income Desk's strategy, which at that time was to sell all ARS because of concerns about the market for ARS, and (2) the sales were made solely to obtain cash to pay for bonuses. The Hearing Panel found, for the reasons discussed in its findings with respect to the First Cause of Action, that Enforcement failed to prove its allegations by a preponderance of the evidence.

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[93] The events alleged in the Third Cause of Action occurred chronologically before the events alleged in the Second Cause of Action, and so are discussed before the Second Cause of Action.
[94] RX-95 at 3.
[95] RX-95 at 3-4.
[96] RX-95 at fn. 4.

C. Providing False and Misleading Information to Customers—TWP

In its Second Cause of Action, Enforcement alleged that TWP violated NASD Rule 2110 and FINRA Rule 2010 by providing false and misleading information to customers. Enforcement alleged that in a meeting on or about December 8, 2008, and in a letter dated February 9, 2009, TWP provided false, misleading, and unfounded information to TWP customers MD/DV in an attempt to obtain their retroactive consent for the cross trades that had been made on January 29.

The Hearing Panel found that Enforcement failed to prove these allegations by a preponderance of the evidence.

TWP's December 2008 Meeting With MD/DV

In December 2008, Handy (TWP's then head of PCD) and other TWP representatives met with Brian Barley (MD/DV's vice president of finance and operations) and other representatives of MD/DV's management seeking retroactive authorization for the January 29 cross trades.[97] Enforcement alleged that TWP falsely told MD/DV that the firm had discovered the transactions during an audit, rather than because of FINRA's investigation, and that the cross trades had been done in the normal course of business. Enforcement also alleged that TWP failed to tell MD/DV that the cross trades were done only because TWPG needed to pay bonuses, and that at the time of the trades TWP was selling all other ARS from corporate cash accounts because of concerns about the market.

Although subject to FINRA's jurisdiction, Handy was not called to testify at the hearing. Instead, in support of its allegations about what Handy said during his meeting with MD/DV representatives, Enforcement presented 13 lines from Handy's OTR, which was taken on April

[97] Tr. at 905-907 (Barley).

2, 2009. According to Handy's testimony at his OTR, Handy told MD/DV that TWP had discovered the January 29 cross trades during an "audit," and did not mention Enforcement's ongoing investigation.[98]

Barley (the only person present at the meeting who testified at the hearing) testified that he recalled that TWP representatives attended the meeting with Handy, but did not recall how many or who they were. Barley also "did not specifically remember" what was said about how TWP discovered the cross trades, but that it was "in the context of some kind of review."[99] During cross-examination, Barley testified that he did not recall the precise words used at the meeting, but that he recalled that "maybe it was internal or external, but some party discovered this, and that's kind of how it came to light." He acknowledged that it might have been mentioned that the cross trades came to light during an investigation and that FINRA might have been mentioned.[100]

Other than the fact that TWP was requesting some sort of "operational authorization," Barley recalled few details about the meeting.[101] He did recall, however, that nobody from MD/DV stated or suggested that the January 29 transactions were inconsistent with any investment instructions that they had given to TWP.[102]

During the meeting, Handy requested that the customers sign forms purporting to give consent to the January 29 transactions. The forms explained that the January 29 transactions were "principal" transactions and, under Section 206(3) of the Investment Advisers Act of 1940, TWP was required to disclose in writing and obtain customer consent for such transactions.[103]

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[98] CX-111 at 10-11.
[99] Tr. at 905, 907-908 (Barley).
[100] Tr. at 919 (Barley).
[101] Tr. at 912 (Barley).
[102] Tr. at 922-23 (Barley).
[103] CX-93.

The MD/DV representatives took the consents back to their legal department for review, and did not sign the consents.[104]

TWP's February 9, 2009, Letter to MD/DV

TWP, at MD/DV's request, set forth its understanding of the circumstances surrounding the January 29 cross trades in a letter, dated February 9, 2009.[105] Enforcement alleged that the letter falsely stated that the cross trades were consistent with the strategy of the Desk at the time; that TWP had discussed with MD/DV the difference between enhanced and natural ARS; that the transactions were appropriate for the MD/DV accounts; and that TWPG did not seek to "dump" the securities in the MD/DV accounts. Enforcement alleged that the statements were false and misleading because "the only reason for the January 29, 2008 transactions was to obtain cash to pay bonuses."[106]

The February 9 letter was prepared by TWP's outside counsel, Wayne Aaron ("Aaron"), a partner at Milbank, Tweed, Hadley and McCloy in New York. Aaron had drafted the letter based on the facts he had gathered in connection with TWP's November 21 response to FINRA. Handy, who signed the letter on behalf of TWP, confirmed to Aaron that TWP had not subsequently learned any different facts or circumstances.[107] Shortly after sending the letter, TWP informed the Staff of the letter and volunteered to provide them with a copy.[108]

For the reasons discussed in its findings concerning the First Cause of Action, the Hearing Panel found that Enforcement failed to prove by a preponderance of the evidence that the statements contained in the February 9 letter were false and misleading.

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[104] Tr. at 913 (Barley).
[105] CX-94.
[106] Complaint at ¶ 49.
[107] Tr. at 1218-19 (Aaron); RX-35.
[108] Tr. at 1220-21 (Aaron); RX-303.

D. Failing to Establish a Supervisory System--TWP

In its Fourth Cause of Action, Enforcement alleged that TWP violated Rules 3010 and 2110 by, from 2006 through 2008, failing to establish and maintain a supervisory system that was reasonably designed to achieve compliance with applicable securities laws and regulations. Specifically, Enforcement alleged that TWP failed to establish and maintain systems and procedures for governing principal transactions effected by the firm, including transactions between TWPG's account and customer accounts over which TWP exercised discretion.

TWP admitted that the transactions it made on behalf of TWPG's account are deemed to be principal transactions and that TWP should have obtained consent from the customers before making the trades. Nevertheless, TWP executed cross trades between TWPG and corporate cash customers for years without anybody reviewing them as principal transactions. Between October 10, 2006, and January 29, 2008, the Desk executed cross trades between TWPG and other accounts managed by TWP on 23 different occasions.[109]

TWP did not have applicable procedures for the Desk or PCD governing transactions between TWPG and other customers. TWP did not have procedures instructing the Desk to inform the customers in writing or obtain the customers' consent before those transactions were performed. [110] Acknowledging the lack of procedures, Finegan testified that they did not exist because nobody on the Desk or the PCD believed that TWP had any principal accounts.[111] TWP attributed this omission and universal ignorance within the firm solely to Brad Northcutt, a former sales supervisor. Brinck testified that Northcutt had determined in 2006 that TWP did

[109] CX-12.
[110] Tr. at 141-42 (Doolittle), 1059 (Finegan).
[111] Tr. at 1087-88 (Finegan).

not have to treat TWPG as a principal account.[112] Northcutt was not called to testify, and no explanation was given for why Northcutt came to the conclusion he did.

Beyond the overall lack of procedures, the reports generated for supervisory review provided no way for a reviewer to determine whether a particular trade done on the desk was a cross trade involving the TWPG account.[113] In addition, although he was exercising discretionary authority, Brinck performed the supervisory review of his own trades.[114]

IV. CONCLUSIONS OF LAW

A. Enforcement Failed to Prove that TWP and Brinck Committed Fraud

Enforcement charged TWP and Brinck with violations of Section 10(b) of the Exchange Act, Rule 10b-5, and NASD Rules 2120 and 2110 for effecting the crosses. To establish that TWP violated the antifraud provisions of the securities laws and NASD rules, Enforcement must prove by a preponderance of the evidence that TWP: (i) made a material misrepresentation or omission; (ii) in connection with the purchase or sale of a security; and (iii) acted with scienter.[115] "Scienter is 'a mental state embracing intent to deceive, manipulate, or defraud.'"[116] Scienter may be established by recklessness, defined as "an extreme departure from the standards of ordinary care," *id*. at 1094, which is "either known to the defendant or is so obvious that the actor must have been aware of it."[117] Recklessness sufficient to give rise to liability

[112] Tr. at 426-28 (Brinck).
[113] Tr. at 1078-81 (Finegan).
[114] CX-91; Tr. at 1083-84 (Finegan).
[115] *DOE v. Gerald J. Kesner*, Complaint No. 2005001729501, 2010 FINRA Discip. LEXIS 2, at *21 (NAC Feb. 26, 2010); *Basic, Inc. v. Levinson*, 485 U.S. 224, 231, 1988 U.S. LEXIS 1197 (1988); *Aaron v. SEC*, 446 U.S. 680, 701-02, 1980 U.S. LEXIS 107 (1980).
[116] *Aaron*, 456 U.S. at 686 n. 5; *SEC* v. *Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003) (quotation omitted).
[117] *SEC* v. *Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992).

under the securities laws is "a state of mind 'approximating actual intent, and not merely a heightened form of negligence.'"[118]

The Hearing Panel found that neither Brinck nor others on the Desk were concerned about the liquidity of the SLARS sold to MD/DV and HT, and had no reason to anticipate the market failure that occurred two weeks later. Based on the testimony and other evidence presented at the hearing, the Hearing Panel found that Brinck crossed the securities to satisfy a standard liquidity request from a customer (TWPG), and reasonably believed that the crosses were proper because (i) they were worthwhile investments for the clients (MD/DV and HT), (ii) he had no concerns about the credit worthiness or liquidity of the crossed ARS, and (iii) the ARS, consistent with a gradual divestiture of those securities, could give the clients an additional few weeks yield before those ARS were sold on their scheduled auction dates, which were set to occur within 8-22 days of the crosses.

The Hearing Panel found no evidence that either TWP or Brinck intended to defraud MD/DV and HT, or were reckless in selling the ARS to them. The Hearing Panel therefore found that Enforcement failed to prove by a preponderance of the evidence that TWP and Brinck committed fraud. The First Cause of Action is therefore dismissed.

B. Enforcement Failed to Prove that TWP Provided False Information to FINRA

NASD Procedural Rule 8210(a)(1) required members to "provide information orally, in writing, or electronically and to testify, under oath or affirmation … if requested, with respect to any matter involved in any investigation."[119] Enforcement alleged that TWP provided false responses to a FINRA request for information made pursuant to Rule 8210.

[118] *Novak* v. *Kasaks*, 216 F.3d 300, 312 (2d Cir. 2000).
[119] NASD Rule 8210 has since been superseded by FINRA Rule 8210.

The Hearing Panel found that Enforcement failed to prove by a preponderance of the evidence that the statements TWP made in its response to FINRA's Rule 8210 request were false or misleading. The Second Cause of Action is therefore dismissed.

C. Enforcement Failed to Prove that TWP Provided False Information to its Customers

FINRA Conduct Rule 2010 requires members and persons associated with members to "observe high standards of commercial honor and just and equitable principles of trade."[120] It is well established that intentionally giving false information to customers violates Rule 2010.[121]

The Hearing Panel found that Enforcement failed to prove that TWP's communications with MD/DV concerning the January 29 cross trades were inconsistent with just and equitable principles of trade. Enforcement inexplicably chose not to compel testimony from Handy (even though he was subject to FINRA's jurisdiction), who Enforcement contends made misstatements at the December 2008 meeting and in the February 9 letter. Handy signed the letter to MD/DV, but because he did not testify, there was no evidence to prove he knew or had reason to know any statements in the letter were false. Instead, Enforcement called only one witness (Barley) who attended the December 2008 meeting, and his recollection of the meeting was hazy. Barley provided evidence that directly contradicted Enforcement's allegations about the meeting, and he had never even seen the February 9 letter.

The Hearing Panel found that Enforcement failed to prove by a preponderance of the evidence that the statements TWP made in its meeting with MD/DV and in its letter to them were false or misleading. The Third Cause of Action is therefore dismissed.

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[120] FINRA Rule 2010 replaced NASD Rule 2110 effective December 15, 2008.

[121] *Simpson v. Bear, Stearns & Co.*, Complaint No. C07950030, 1997 NASD Discip. LEXIS 13, at *19 (NBCC, Jan. 29, 1997), citing *In re John F. Yakimczyk*, Exchange Act Rel. No. 31462, 51 SEC 56, 56, 1992 SEC LEXIS 3039, at *1-2 (1992); *see also Ramiro Jose Sugranes*, Exchange Rel. No. 35311, 52 SEC 156, 156-57, 1995 SEC LEXIS 234, at *1-4 (Feb. 1, 1995).

D. TWP Failed to Have Adequate Policies and Procedures in Place

NASD Rules 3010 and 2110 require member firms to "establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with the Rules of [FINRA]." A member must also "establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principal and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of [FINRA]."[122] NASD Rule 3010(a) requires firms to "establish and maintain a system to supervise activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD rules." Under NASD Rule 3010(b), these systems must be documented in the firm's written supervisory procedures. The procedures must be tailored to the specific nature of the business engaged in by the firm,[123] and must set out mechanisms for ensuring compliance and for detecting violations, and not merely set out what conduct is prohibited.[124]

The Hearing Panel found that TWP did not have adequate procedures for the Fixed Income Desk governing principal transactions because the firm did not believe the Fixed Income Desk handled any principal accounts. The Fixed Income Desk managed the TWPG account for several years and did numerous cross trades during that time. Despite that, numerous registered

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[122] NASD Rule 3010(b).
[123] *See* IM-3010-1.
[124] *Gary E. Bryant*, Exchange Act Rel.No. 32357, 51 S.E.C. 463, 470-71, 1993 SEC LEXIS 1347, at *19 (May 24, 1993); *John A. Chepak*, Exchange Act Rel. No. 42356, 54 S.E.C. 502, 506, 2000 SEC LEXIS 97, at *7 (Jan. 24, 2000); *A.S. Goldmen & Co.*, Exchange Act Rel. No. 44328, 55 S.E.C. 147, 166, 2001 SEC LEXIS 966, at *31-32 (May 21, 2001).

principals who managed the account or reviewed the trades, including Brinck and Finegan, failed to take action to change the handling of the TWPG account, review whether it should be coded as a principal account, or determine whether any particular rules needed to be applied to the account. Due to the lack of policies and procedures governing principal accounts, TWP customers who traded with TWPG did not receive prior notice of or give their consent for the trades.

The Hearing Panel found that TWP's supervisory failures violated NASD Rules 3010 and 2110.

V. SANCTION

TWP's Violation of Rules 3010 and 2110

The FINRA Sanction Guidelines ("Guidelines") for failure to supervise suggest a fine between $5,000 and $50,000.[125] The Hearing Panel found the Respondent's conduct to be egregious. The supervisory failure here was ongoing for several years and the procedures at issue relate to a specific statutory requirement put in place to avoid the type of apparent conflict in this case. Although the Respondents were not charged with violating the Investment Advisors Act, they essentially admitted that the firm violated that Act because of its failure to properly recognize TWPG as a principal account. The Desk was able to take advantage of discretionary authority given it by trusting customers without adequate oversight. Proper procedures and supervision could have prevented not only the transactions at issue, but this entire proceeding. For TWP's egregious violation of Rules 3010 and 2110, the Hearing Panel finds that a fine of $200,000 is appropriate.

[125] FINRA Sanction Guidelines at 105 (2011 ed.), www.finra.org/sanctionguidelines.

VI. ORDER

For the reasons set forth above, the First, Second, and Third Causes of Action of the Complaint are dismissed. For violating Rules 3010 and 2110, TWP is fined $200,000. TWP is also ordered to pay costs in the amount of $11,029.90, which includes a $750.00 administrative fee and the cost of the hearing transcript. The fine and costs shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter.[126]

_____
Rochelle S. Hall
Hearing Officer
For the Extended Hearing Panel

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