

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Thomas Weisel Partners, LLC
San Francisco, CA,

and

Stephen H. Brinck, Jr.,
San Rafael, CA,

Respondents.

DECISION

Complaint No. 2008014621701

Dated: February 15, 2013

Enforcement failed to prove that respondents engaged in fraudulent sales of auction rate securities and that the firm falsely answered FINRA requests for information and misrepresented material information to a customer. Held, dismissal affirmed.

Appearances

For the Complainant: Jeffrey P. Bloom, Esq., and Thomas B. Lawson, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: Robert A. Sacks, Esq., Diane L. McGimsey, Esq., Sullivan & Cromwell LLP, for Thomas Weisel Partners, LLC; Barry R. Goldsmith, Esq., Geoffrey C. Weien, Esq., Gibson Dunn, for Stephen H. Brinck, Jr.

Decision

FINRA's Department of Enforcement ("Enforcement") appeals a FINRA Hearing Panel's November 8, 2011 decision finding that Enforcement failed to prove that Thomas Weisel Partners, LLC ("TWP" or the "Firm") and Stephen H. Brinck, Jr. ("Brinck") engaged in fraudulent sales of auction rate securities to two Firm customers. Enforcement also appeals the Hearing Panel's findings that it failed to prove that the Firm provided false information in response to FINRA requests for information and provided false and misleading information to a

Firm customer.¹ After a thorough review of the record and consideration of appellate briefs and oral arguments, we find that the record does not support the facts alleged in the complaint and that the evidence does not demonstrate scienter. We therefore affirm the Hearing Panel's dismissals.

I. Background

A. Brinck

Brinck entered the securities industry in 1995 as a general securities representative. In 2007, he also registered as a general securities and options sales supervisor. Brinck associated with TWP from September 1999 through August 2008, when he voluntarily terminated his association to join another firm. From August 1999 through July 2008, Brinck was a registered representative and registered investment adviser on the Fixed Income Trading Desk ("Desk") at TWP's San Francisco office. Brinck is not currently associated with a member firm.

B. TWP

TWP became a FINRA member in 1999. During the period at issue in this case, late 2007 and early 2008, TWP was a wholly owned broker-dealer subsidiary of Thomas Weisel Partners Group, Inc. ("TWPG"). In July 2010, it became a wholly owned subsidiary of another member firm.

In 2007 and 2008, TWP's Private Client Department ("PCD") serviced both high-net-worth individual client accounts and corporate cash client accounts. Brinck described TWP's corporate cash customers as corporations that invested their operating or excess cash with TWP to generate returns. PCD generated less than 10 percent of TWP's revenues and employed approximately 60 of the Firm's 750 employees.² Within PCD, the Desk effected fixed income trades for high-net-worth individual clients and managed approximately 15 corporate cash client accounts. Five individuals worked on the Desk: Brinck, Chris Bender ("Bender"), Paul Clark ("Clark"), Mason McCabe ("McCabe"), and Alexandra Lynn Rueb ("Rueb"). Bender supervised trading for high-net-worth individual clients, and Brinck supervised the corporate cash group. Clark and McCabe reported to Brinck. During part of the relevant period, Rueb reported to Brinck and, in early 2008, began reporting to Bender instead of Brinck. Bender and Brinck reported to Jeff Handy ("Handy"), the head of PCD.

Corporate cash customers paid TWP monthly fees based on assets under management. TWP exercised discretionary trading authority over all corporate cash accounts and managed

¹ The Hearing Panel also found that TWP maintained inadequate supervisory systems and procedures, in violation of NASD Rules 3010 and 2110, which were the rules that existed at the time of TWP's misconduct. For these violations, the Hearing Panel fined the Firm \$200,000 and imposed \$11,029 in costs. Neither Enforcement nor TWP appealed these findings and sanctions. These findings and sanctions therefore are not under review and are final.

² Subsequent to the period at issue, TWP drastically reduced its size to 20 employees.

them in accordance with the accounts' written investment policies, which generally included the objectives of liquidity and preservation of capital and required a minimum AAA credit rating for most asset classes.

In 2007 and 2008, corporate cash revenues at TWP totaled slightly more than \$1 million annually, which was significantly less than one percent of TWP's overall revenue in each of those years. TWP disbanded its corporate cash department in the fall of 2009.

C. Auction Rate Securities

Many of TWP's corporate cash customers invested in auction rate securities ("ARS"), which are long-term bonds issued by municipalities, corporations, and student loan entities. See *FINRA Investor Alert – Auction Rate Securities: What Happens When Auctions Fail*, available at <http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/Bonds/P038207> [hereinafter "*FINRA Investor Alert – Auction Rate Securities*"]. ARS sell at par, generally in lots of \$25,000, and they provide interest rates or dividend yields that are periodically reset through auctions held every seven, 28, or 35 days. *Id.* ARS are usually issued with maturities of 30 years. *Raymond James Assocs., Inc.*, Exchange Act. Rel. No. 64767, 2011 SEC LEXIS 2240, at *4-5 (June 29, 2011). During the relevant period, one or more broker-dealers generally acted as underwriters for ARS offerings and were responsible for managing the auction process as remarketing broker-dealers. *Id.* at *5-6.

Other broker-dealers, like TWP, participated in auctions on behalf of their customers by submitting orders to remarketing broker-dealers during the auction process. Under the typical procedures for an ARS auction, investors who wished to purchase ARS submitted bids that included the minimum interest or dividend rate that they would accept and the amount they wished to purchase. *Id.* at *4-5. Holders of ARS can choose to hold their securities until the next auction or submit an offer to sell. *Id.* at *5. Bids (buy orders) with the lowest interest or dividend rates get accepted first, followed by successively higher bids until all of the securities offered at an auction are sold. *FINRA Investor Alert – Auction Rate Securities*. The highest rate accepted in the auction is the clearing rate and becomes the interest or dividend rate that applies to all the ARS until the next auction. *Id.*

ARS typically can be bought or sold only at auctions. *Raymond James*, 2011 SEC LEXIS 2240, at *4. If an auction occurs and not enough bids are submitted to cover the securities offered for sale, then the auction fails. *Id.* at *5. In many instances, ARS underwriters and remarketing broker-dealers submitted their own bids to prevent the auctions from failing and to maintain an orderly market. *Id.* at *6. In a failed auction, investors who wanted to sell their ARS securities but were unable to do so generally must hold their securities until the next auction, and the issuer must pay the holders a maximum or "penalty" interest rate. *Id.* Brinck testified that corporate cash investors typically were interested in ARS as an investment because of the high yields that they offered, which were generally better than the yields offered by comparable investments.

The vast majority of the ARS that TWP sold, and all of the ARS involved in this case, were issued by student loan organizations. The underlying collateral for these student loan ARS ("SLARS") were individual student loans backed by the Federal Family Education Loan Program. All of the SLARS involved in this case were rated AAA. Some AAA-rated SLARS

had achieved their ratings by obtaining insurance policies issued by various insurers. These ratings-insured SLARS were referred to as "enhanced." Other SLARS did not rely on insurance to maintain AAA ratings. These SLARS were referred to as "natural." TWP provided all of its customers, including corporate cash customers, with confirmations of all SLARS purchases and sales.

In the fall of 2007, auctions for certain ARS involving underlying assets less secure than the student loans backed by the federal government underlying SLARS, such as mortgage-related ARS and others involving structured products, began to fail. SLARS, however, were viewed as secure because their underlying principal was guaranteed by the U.S. Department of Education. In fact, no SLARS auctions had failed in 2007 and through February 11, 2008. On February 12, 2008, there was a widespread failure of all ARS auctions including SLARS.

D. TWP's Parent Account

In 2006, the Desk opened a corporate cash account for TWP's parent company, TWPG. The Firm admitted that, from the account's inception (which occurred before Brinck joined TWP), TWP mistakenly failed to code the TWPG account as a proprietary account. TWP treated the TWPG account as it treated all other corporate cash accounts. For example, the Desk made a "sales pitch" to get the account, entered into the standard account agreement with TWPG, established standard written investment policies, and provided TWPG with the same trade confirmations, account statements, and reports that it sent to all other corporate cash customers. TWP admitted that its failure properly to designate TWPG's account as a principal account caused it to violate Section 206(3) of the Investment Advisers Act, which required TWP to obtain written consent from customers before entering transactions between a proprietary account, such as the TWPG account, and other accounts managed by TWP.

E. Corporate Cash Customers Medicis/Dermavest and Hot Topic

Corporate cash customer Medicis Pharmaceutical Corp. ("Medicis") is a pharmaceutical and medical device company, and Dermavest, Inc. ("Dermavest") is one of its investment subsidiaries. Both held accounts at TWP in 2007 and 2008. They were, in essence, one customer with multiple accounts whose investment objectives were preservation of principal and interest income. Medicis/Dermavest's accounts were used to provide liquidity for strategic acquisitions. SS was Medicis/Dermavest's corporate controller during the relevant period, and he served as TWP's main contact for the corporate cash accounts. He and his staff oversaw Medicis/Dermavest's investment portfolios at TWP, and Brinck was their main contact. SS received confirmations for all trades that TWP executed in Medicis/Dermavest's accounts, and he reviewed account statements monthly.

Hot Topic, Inc. ("Hot Topic") is a music store and pop culture retail outlet generally located in shopping malls. MY, Hot Topic's controller, testified that he was Hot Topic's primary point of contact with TWP. MY interacted mainly with Brinck. MY described Hot Topic's risk tolerance as low and its investment objectives were safety, security, liquidity, and maximizing returns. MY had access to online account statements and received paper statements monthly. Hot Topic received confirmations of all trades that TWP executed in its account.

II. Procedural History

Enforcement's investigation of TWP began during an on-site visit in September 2008, which was part of a broader review of firms that regularly bought and sold ARS.

Enforcement filed a complaint in April 2010, alleging in cause one that Brinck and TWP violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 thereunder, and NASD Rules 2120 and 2110. Specifically, Enforcement alleged that TWP and Brinck "stuffed" or sold SLARS valued at approximately \$15.7 million from TWPG's account into the accounts of corporate cash customers Medicis/Dermavest and Hot Topic to obtain cash for TWPG to pay corporate bonuses.³ Enforcement further alleged that Medicis/Dermavest and Hot Topic were unaware of the transactions and, days earlier, Brinck told the customers that he was selling all SLARS in their accounts and the accounts of other corporate cash customers because of concerns about SLARS. Enforcement also alleged that the transactions were contrary to Medicis/Dermavest's and Hot Topic's explicit instructions to sell their SLARS positions. Enforcement further alleged that TWP thereafter made false and misleading statements to the customers about the January 29 transactions in an effort to induce the customers to forfeit their rights of redress against TWP for the sales.

Enforcement alleged in cause two that TWP violated NASD Rule 2110 and FINRA Rule 2010 by providing false and misleading information to Medicis/Dermavest at a December 8, 2008 meeting and in a February 9, 2009 letter to induce the customer to forfeit its rights to pursue redress for TWP's alleged misconduct under cause one.

Enforcement alleged in cause three that TWP violated NASD Rules 8210 and 2110 by providing false information to FINRA in response to FINRA's requests for information regarding the January 29, 2008 sales of SLARS from TWPG's account to the accounts of Medicis/Dermavest and Hot Topic. Specifically, Enforcement alleged that, in a November 21, 2008 letter, TWP falsely stated that the Desk's strategy on January 23, 2008 and thereafter to sell all SLARS from all corporate cash accounts was consistent with its January 29, 2008 sales of SLARS from the TWPG account to Medicis/Dermavest's and Hot Topic's accounts. The complaint alleged that the January 29 sales were in fact inconsistent with the strategy to sell SLARS from the corporate cash accounts because the January 29 cross sales resulted from concerns about the SLARS market and TWPG's need for cash to pay bonuses.

Finally, Enforcement alleged in cause four that TWP violated NASD Rules 3010 and 2110 by failing to establish and maintain a supervisory system and procedures governing principal transactions effected by the Firm and that, as a result, transactions that had the potential to and in fact did pose a serious conflict of interest, including the January 29, 2008 sales to Medicis/Dermavest and Hot Topic, were not subject to effective supervisory review.

³ The trades at issue occurred on January 29, 2008, a date between scheduled auctions for all of the SLARS at issue. TWP executed five cross sales of SLARS totaling \$9,400,000 from TWPG's account to Medicis/Dermavest's accounts. TWP executed two cross sales of SLARS totaling \$6,300,000 from TWPG's account to Hot Topic's account.

Brinck and TWP admitted that they failed to comply with Section 206(3) of the Investment Advisers Act (not alleged in the complaint) by failing to obtain Hot Topic's and Medicis/Dermavest's prior approval of January 29, 2008 sales of SLARS from TWPG's account to Medicis/Dermavest's and Hot Topic's accounts. They denied, however, that they engaged in fraudulent conduct or acted with fraudulent intent with respect to their failure to comply with the Investment Advisers Act or any other conduct alleged in the complaint. TWP denied the allegations that it provided false information to Medicis/Dermavest and that it falsely responded to FINRA requests for information.

After a six-day hearing, on November 8, 2011, the Hearing Panel found that TWP maintained inadequate supervisory systems and procedures, as alleged in cause four. For violations under cause four, the Hearing Panel fined TWP \$200,000 and assessed costs. The Hearing Panel dismissed all remaining allegations, including all allegations of misconduct against Brinck. Enforcement appealed the Hearing Panel's dismissal of causes one through three. TWP did not appeal the Hearing Panel's findings or sanctions under cause four, so cause four is not under review, and the sanctions imposed under cause four are final.

This review of the Hearing Panel's dismissal of causes one, two, and three followed.

III. Discussion

We affirm the Hearing Panel's dismissal of causes one, two, and three.

A. The Preponderance of the Evidence Does Not Support a Finding of Fraud

Rule 10b-5 states that it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange: (a) to employ any device, scheme, or artifice to defraud; (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. Enforcement argued that the evidence would demonstrate: (1) a material misrepresentation or omission; (2) in connection with the purchase or sale of a security; and (3) scienter. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996) (holding that, to find a violation of Exchange Act Section 10(b) and Rule 10b-5 thereunder the adjudicator must find a material misrepresentation or omission in connection with the purchase or sale of a security and scienter). NASD Rule 2120 (now FINRA Rule 2020) parallels Rule 10b-5, and provides that no member shall effect any transactions, or induce the purchase or sale of any security, by means of any manipulative, deceptive or fraudulent device.

The Supreme Court has defined scienter as the "intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Scienter may be established by a showing that the respondent acted recklessly. *See DWS Sec. Corp.*, 51 S.E.C. 814, 820 (1993). "Recklessness" has been defined by a majority of the federal circuit courts of appeals as being "not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Hollinger v. Titan*

Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990); *Sunstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977); *see also SEC v. Falstaff Brewing Co.*, 629 F.2d 62, 77 (D.C. Cir. 1980) (knowledge of what one is doing, not the legal definition, is sufficient to demonstrate scienter).

The correct standard of proof to be applied to FINRA disciplinary actions, including cases involving anti-fraud violations, is the preponderance of the evidence standard. *See Sandra K. Simpson*, 55 S.E.C. 766, 798 (2002); *Jay Michael Fertman*, 51 S.E.C. 943, 949 (1994); *see also Gonchar v. SEC*, 409 F. App'x 396, 398-99 (2d Cir. 2010) (affirming SEC order that sustained the NAC's decision and rejecting the petitioners' argument that the SEC erred in applying a preponderance of the evidence standard of proof in a fraud case). Enforcement bore the burden of proving by a preponderance of the evidence that the facts that it alleged occurred and that Brinck and TWP acted with scienter. Applying this standard, we find that the evidence does not prove fraud.

In cause one of the complaint, Enforcement alleged that the following acts resulted in fraud: On January 29, 2008, TWP and Brinck "stuffed" or sold SLARS from TWPG's account to the accounts of Medicis/Dermavest and Hot Topic for approximately \$15.7 million to obtain cash for TWPG to pay corporate bonuses. Medicis/Dermavest and Hot Topic allegedly were unaware of the transactions and, days earlier, Brinck had told the customers that he was selling all SLARS in their accounts and the accounts of other corporate cash customers because of concerns about SLARS. The January 29, 2008 transactions also were contrary to Medicis/Dermavest's and Hot Topic's explicit instructions to sell their SLARS positions. TWP thereafter made false and misleading statements to Medicis/Dermavest about the January 29 transactions in an effort to induce Medicis/Dermavest to forfeit their rights of redress against TWP for the sales. In prehearing and post-hearing briefs, Enforcement further articulated its theory of fraud. Enforcement argued that TWP's and Brinck's failure to disclose to Medicis/Dermavest and Hot Topic all relevant facts, specifically TWP's conflict of interest in selling SLARS from TWPG's account to the accounts of Medicis/Dermavest and Hot Topic and that these sales contradicted its strategy to divest corporate cash accounts from SLARS, before executing the January 29, 2008 sales, was fraudulent.

We do not find that the preponderance of the evidence proves that the facts occurred as alleged. Nor do we find that the evidence demonstrates that Brinck acted with scienter.

I. The Evidence Does Not Establish that Brinck Began Selling SLARS in Hot Topic's and Medicis/Dermavest's Accounts and the Accounts of All Corporate Cash Customers Because of Concerns about SLARS

a. Brinck and the Desk Believed Generally that the SLARS Market Was Stable

In the fall of 2007, Brinck became aware that segments of the ARS market had become strained and that certain ARS auctions, other than SLARS auctions, had failed. The auction failures that had occurred generally involved mortgage-related ARS. No one at TWP, however, believed or saw any indication that SLARS were at increased risk of becoming illiquid.

TWP generally dealt with a small group of underwriters for its SLARS purchases. Brinck and his staff on the Desk maintained regular contact with individuals at these firms to stay current on developments in the SLARS market. Brinck testified that in late 2007 and early 2008, the underwriters never expressed any concern to him about the SLARS market. To the contrary, they indicated that the SLARS market was stable. Clark and Rueb similarly testified that they had received many reassurances from the underwriters as to their continued support of the SLARS market. Emails within TWP, emails from Desk employees to corporate cash clients, and the testimony of individuals who worked on the Desk all support the finding that TWP reasonably did not expect SLARS auctions to fail and that the Desk continued to believe in SLARS as a valuable investment.

In support of Enforcement's claim that Brinck had concerns regarding SLARS, Enforcement entered into evidence several emails from Brinck to corporate cash customers other than Medicis/Dermavest and Hot Topic in which he recommended slowly divesting from SLARS on regularly scheduled auction dates. Enforcement quoted passages from these emails, in which Brinck expressed some "concern" over SLARS. We find that considering only selected passages from the emails may result in their being read out of context. When reviewed as a whole, Brinck's emails demonstrated little concern for the stability of the SLARS market overall and expressed a belief in the continued safety and liquidity of SLARS securities.⁴

Enforcement also offered the testimony of MR, the former chief financial officer of corporate cash customer RR, to demonstrate Brinck's alleged concerns regarding SLARS. Enforcement argued that the Hearing Panel erred by failing to discuss MR's testimony in its decision. We considered MR's testimony and, overall, we give it little weight. First, although MR no longer worked for RR at the time of her testimony, RR was the opposing party in an arbitration action against TWP to recover losses from RR's SLARS investments, thus casting doubt on her reliability. Second, nothing MR said contradicts our reasons for finding that the evidence presented does not prove fraud. MR had no knowledge of Brinck's actions in Medicis/Dermavest's and Hot Topic's accounts. She testified that, on January 24, 2008, Brinck recommended slow and orderly sales of SLARS from RR's account on regularly scheduled auction dates. MR also stated that, at that time, Brinck provided positive reassurances regarding the SLARS market, stated that the possibility of auction failure was remote, and indicated that

⁴ For example, on January 22, 2008, Brinck emailed members of TWP's fixed income department that they should reiterate to their customers "we remain confident in the liquidity and credit quality of all portfolios." On January 23, 2008, Clark and Brinck exchanged emails regarding the assurances that Clark had received that day from his contact at another broker-dealer stating that they have had no auction failures and do not expect any. On January 24, 2008, Clark responded to questions from TWP representatives in PCD by stating "we anticipate no liquidity issues, there is a very very small chance of a failed auction. All of the broker/dealers we do business with have stated that they have every intention of supporting the auction[s]." Even Brinck's emails to corporate cash clients on January 24 and 25, 2008 recommending a slow divestment of SLARS at regularly scheduled auctions reiterated that TWP had encountered no evidence of potential failed auctions in SLARS and that no liquidity or credit problems were expected. As late as February 1, 2008, Clark emailed the Desk to state that a particular SLARS underwriter was fully committed to supporting its auctions.

TWP was “not at all concerned with liquidity.” MR also testified that she found Brinck to be a professional and reliable financial adviser who never went outside the parameters of RR’s investment policies.

The record does not prove that TWP or Brinck were concerned about the SLARS market and that such concern caused them to sell SLARS from the accounts of corporate cash customers. Rather, as described below, Brinck and other members of the Desk had several explanations for Brinck’s recommendations to sell in corporate cash accounts. Brinck and other Desk employees contend that Brinck first recommended selling enhanced SLARS and later recommended selling all SLARS from corporate cash accounts. We, like the Hearing Panel, find that Brinck made two distinct decisions regarding the sales of SLARS in the corporate cash accounts.⁵ First, he recommended that corporate cash customers sell enhanced SLARS at regularly scheduled auctions. Subsequently, he recommended that corporate cash customers sell all SLARS (enhanced and natural) at regularly scheduled auctions.

b. The January 23, 2008 Decision to Sell Enhanced SLARS

On January 23, 2008, Brinck directed that the Desk begin selling enhanced SLARS from all corporate cash accounts, including Medicis/Dermavest’s and Hot Topic’s accounts. Brinck learned that certain insurance companies that provided rate insurance for enhanced SLARS would be downgraded from AAA to AA and feared that the corresponding SLARS also could be downgraded. If downgraded, these enhanced SLARS would no longer comply with the investment guidelines of many of the corporate cash accounts, which required AAA-rated investments. Although Brinck remained unconcerned about the liquidity and credit quality of enhanced SLARS despite the downgrade of their insurers, in an abundance of caution, Brinck decided on January 23 to divest corporate cash accounts of enhanced SLARS holdings.⁶

⁵ The Hearing Panel explicitly found credible Brinck’s contention that he made two separate decisions regarding selling SLARS from corporate cash accounts. We find no basis in the record for disturbing this credibility finding, as it is supported by Clark’s, Rueb’s and Bender’s testimony and the content of several emails. *See Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135, 2009 SEC LEXIS 4168, at *53 (Dec. 10, 2009) (finding that the credibility determination of an initial fact finder is entitled to considerable weight and deference and generally can be overcome only where the record contains substantial evidence for doing so).

⁶ Brinck’s January 23, 2008 email communicated this decision to PCD staff. Brinck noted that TWP’s corporate cash customers required AAA-rated investments in their portfolios and stated, in part:

We remain unconcerned about the liquidity and credit quality of these auction programs but some of these state sponsored non-profit companies that facilitate student loans obtained their AAA rating based on insurance . . . As a result a downgrade to the monoline insurer, however irrelevant to the fundamental credit quality of the issue, may prompt a similar move to downgrade the auction.

Despite what we feel to be totally secure credits and ample market liquidity . . . we have decided to remove government guaranteed [SLARS] product from our

[Footnote continued on next page]

Brinck therefore directed Desk employees to begin reviewing SLARS offering statements to determine which were enhanced and which were natural. Brinck and other Desk employees testified that it was not readily apparent whether a particular SLARS security was enhanced or natural without a detailed review of the security's offering statement. Brinck and his staff quickly determined that each review required between one and four hours to complete. Given the variety of SLARS that TWP's corporate cash clients held, this proved to be a time-consuming exercise for Desk employees who continued also to have other responsibilities to their clients.

c. The Second Decision to Sell All SLARS

At the same time, the Desk became inundated with calls from auditors for TWP's corporate cash customers preparing year-end accounting statements. The auditors had questions as to how to value SLARS in light of recent changes in accounting rules. The questions necessitated a closer review of the underlying assets for each issue. The Desk employees grew frustrated with the number of auditing questions that they received from auditors for their corporate cash clients and the time required to conduct reviews of underlying assets. Because the corporate cash clients felt that their auditors' questions were important and demanded answers, however, Brinck and his Desk team of three had no choice but to devote time and attention to providing answers. Brinck also felt uncertain about his staff's ability to answer all of the questions to the auditors' satisfaction. This prompted Brinck's second decision to sell all SLARS, not just the enhanced variety. Brinck testified that once he realized how much time the Desk staff had to devote to determining which SLARS were enhanced and which were natural and answering auditor questions, he decided that it was best, for the near term, to slowly and orderly divest the corporate cash accounts of their SLARS holdings on regularly scheduled auction dates. Brinck's recollection of these facts was in accord with the testimony of other Desk employees.

Brinck originally believed that his second decision to sell all SLARS, natural and enhanced, occurred after January 29. He testified, however, that his review of the emails and other documents contained in the record of this case convinced him that he may have made the second decision as early as January 25, but he could not be certain. Rueb testified that she could

[cont'd]

corporate accounts . . . We feel we are being extremely cautious. In general, auction market liquidity continues to steadily improve and dealer inventories are well below December highs.

Rueb testified that she and Bender disagreed with the decision to sell enhanced SLARS because they did not think that insurers would be downgraded and that everyone on the Desk believed in the safety, security, liquidity, and credit quality of SLARS. Bender testified that he believed that the credit quality of the enhanced SLARS was sufficient (even if the insurers were downgraded) to maintain SLARS in the corporate cash accounts.

not recall the exact date of the second decision, but believed that it occurred before January 29.⁷ The record is unclear as to the precise date of Brinck's second decision.

Although the Desk stopped buying SLARS in corporate cash accounts in late January 2008, it held at auction or purchased new SLARS in other accounts that did not have investment guidelines similar to the corporate cash accounts and did not require that all investments be rated AAA. These accounts included individual customer accounts and personal accounts belonging to some of the Firm's employees. From January 23 through February 12, 2008, the date of widespread auction failures, TWP's SLARS purchases and holds exceeded the amount of TWP's sales by approximately \$100 million.⁸

The preponderance of the evidence does not establish that Brinck began selling SLARS in Medicis/Dermavest's and Hot Topic's accounts and the accounts of all corporate cash customers because of concerns about the SLARS market. Rather, the evidence indicates that Brinck began selling enhanced SLARS first from corporate cash accounts because of concern that SLARS' insurers would be downgraded, and subsequently decided to sell all SLARS from corporate cash accounts for administrative reasons.

2. *The Evidence Does Not Establish that the January 29 Cross Trades Were Contrary to Medicis/Dermavest's and Hot Topic's Explicit Instructions to Sell and that Brinck Executed the Cross Trades to Obtain Cash for TWPG's Corporate Bonuses*

a. *The January 29 Cross Trades Were Not Contrary to the Customers' Explicit Instructions to Sell*

The record does not establish, by a preponderance of the evidence, that Medicis/Dermavest and Hot Topic clearly instructed TWP, before January 29, 2008, to sell all SLARS from their accounts and refrain from the discretionary purchasing of SLARS that TWP regularly conducted in those discretionary accounts.

Brinck attempted to reach each corporate cash customer to tell the customer about the Desk's decision to sell enhanced SLARS. He admitted that he was not very successful with communicating this decision. All of the corporate cash accounts were discretionary, so TWP generally did not have to obtain authority from these clients prior to executing individual trades. Brinck explained, however, that he wanted to alert these customers to the anticipated sales of

⁷ Rueb testified that she also opposed the decision to sell all SLARS because she believed that they offered attractive yields and sufficient safety.

⁸ TWP's Desk decided to purchase or hold SLARS valued at \$345 million during this time. Some of these purchases and holds were in accounts owned by TWP employees. Enforcement argues that this evidence is irrelevant to its allegation of fraud. While we agree that this evidence, like much of the evidence discussed in this decision, would not alone negate a finding of fraud, when considered with other evidence in the record, it contradicts the theory that Brinck and TWP harbored concerns about SLARS and acted with scienter.

enhanced SLARS because the sales could drastically reduce the revenues that these accounts generated.

Both MY and SS testified before the Hearing Panel. SS testified that Brinck contacted him sometime around January 24, 2008 and left a message regarding the recommendation to gradually divest Medicis/Dermavest's SLARS holdings at regularly scheduled auctions.⁹ On the same day, SS communicated the recommendation to his superiors at Medicis/Dermavest in an email in which he stated "Brinck indicated that these investments are still deemed to be safe investments, but they are taking the absolute most cautious route and recommending getting out of this classification for at least the next few months until the market volatility stabilizes . . . TWP is going to begin the gradual divestiture of these assets. Please let me know if you would like to get a brief call scheduled . . . before they move out of this asset class." On January 25, 2008, Clark emailed Brinck that SS had called and said that, although he was still waiting to hear, start "divesting from auctions." SS also testified that his understanding was that TWP would gradually divest Medicis/Dermavest's accounts from SLARS at regularly scheduled auctions and that divestiture would not be complete until the end of February. SS did not recall discussing with Brinck the differences between enhanced and natural SLARS, but also testified that it was possible that, between January 24 and the date of the January 29 trades at issue, he had conversations with McCabe or Brinck that he could not recall. Rueb testified that during this period, she heard Brinck have telephone conversations with corporate cash clients regarding the differences between enhanced and natural SLARS, but she too could not recall details. SS confirmed that he did not expect Medicis/Dermavest's accounts to be completely divested of SLARS until the end of February 2008.

MY testified that, sometime in the end of January 2008, he learned from his contact at Lehman Brothers that certain ARS auctions had failed. He thereafter contacted Brinck and directed him to begin divesting ARS from Hot Topic's account at regularly scheduled auctions. MY expected to divest Hot Topic's SLARS holdings completely by early March 2008. MY acknowledged that the cross trades at issue, in which Hot Topic purchased SLARS from TWPG's account, occurred at approximately the same time as his directive to sell, but he could not recall with certainty whether they occurred before or after he directed TWP to sell Hot Topic's SLARS holdings. He testified that his call to TWP occurred in late January or early February 2008.

MY and SS testified that they did not consider the January 29, 2008 trades to be contrary to Medicis/Dermavest's and Hot Topic's interests or their directions to sell. They both stated that they received confirmations for the cross trades, and the trades were reported to them in the normal course on monthly account statements.¹⁰ Each testified that they were not troubled by the

⁹ Brinck recalled that his first recommendation was to sell only enhanced SLARS. SS could not recall a discussion of enhanced versus natural SLARS.

¹⁰ Brinck testified that he believed that standard brokerage statements did not adequately apprise the corporate cash clients of the status of their accounts. Brinck stated that he created a supplemental package of information that he provided monthly to Medicis/Dermavest, Hot Topic, and all of TWP's corporate cash clients. The package of information included a holdings

January 29, 2008 cross trades, never questioned Brinck or anyone at TWP as to why the trades occurred, and did not complain to TWP about the trades. Medicis/Dermavest and Hot Topic maintained their accounts with TWP subsequent to the January 2008 cross trades, and in mid-2009, TWP repurchased the SLARS back from these clients.¹¹

Moreover, the evidence supports Brinck's explanations as to why the January 29 trades were not contrary to Medicis/Dermavest's and Hot Topic's investment strategies and that the investments benefitted Medicis/Dermavest and Hot Topic. Brinck testified that the rates of return on the SLARS that Medicis/Dermavest and Hot Topic purchased from the TWPG account were greater than the reset rates and the rates on SLARS sold at regularly scheduled auctions on that day. He thus contended that the January 29, 2008 cross trades generated positive income for the Medicis/Dermavest and Hot Topic accounts. Brinck argued that, because the Desk had no credit or liquidity concerns about SLARS, it made sense for TWP to try to earn more interest in the Medicis/Dermavest and Hot Topic accounts during the period that they were waiting for regularly scheduled auctions to occur. The January 29, 2008 cross trades provided the Medicis/Dermavest and Hot Topic accounts with a few additional weeks of enhanced return rates before the anticipated final auction dates, which were eight to 22 days away. The evidence supports Brinck's position. FINRA's examiner, Joshua Doolittle ("Doolittle"), testified that the yields on the SLARS that Medicis/Dermavest and Hot Topic purchased on January 29, 2008, were approximately 130 basis points higher than other SLARS that TWP sold from their accounts in regularly scheduled auctions on that day.

Additionally, none of the auction dates scheduled on the SLARS that Medicis/Dermavest and Hot Topic purchased extended beyond the dates when TWP and the customers expected TWP to have completed divesting the Medicis/Dermavest and Hot Topic accounts of SLARS.¹² The January 29, 2008 cross trades therefore did not interfere with or extend the completion date of TWP's planned divestiture from SLARS. In Brinck's view, the cross trades were consistent with the slow and orderly divestiture that TWP recommended, provided Medicis/Dermavest and Hot Topic with enhanced returns, and were consistent with the manner in which TWP routinely provided liquidity to all of its corporate cash customers.

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report, a report that sorted investments into different categories, a report that outlined the accounts' cash flows, and a summary that tied all of the information together.

¹¹ Brinck was no longer associated with TWP at the time of the buy back.

¹² Based on the regularly scheduled auction dates for the SLARS that Medicis/Dermavest and Hot Topic held in their accounts, TWP expected to fully divest the Medicis/Dermavest accounts of SLARS by February 27, 2008, and the Hot Topic account by March 3, 2008.

b. Brinck Was Not Forced to Execute Cross Trades to Obtain Cash for TWP Bonuses

Brinck also contended that TWPG did not pressure him to sell SLARS to generate cash for bonuses and that the sales were consistent with TWP's long-standing method of generating cash for all corporate cash clients on an "as needed" basis. The evidence supports this contention.

In 2007 and 2008, cross transactions were a standard method employed by the Desk to provide corporate cash clients with liquidity. Brinck testified that, when corporate cash clients requested liquidity between auctions, which was a somewhat regular occurrence, the Desk would first approach remarketing broker-dealers to determine if they would buy the SLARS. Brinck testified that it was rare for remarketing broker-dealers to readily agree to repurchase SLARS between auction dates. The second course of action was to sell the SLARS to other corporate clients that held sufficient cash in their accounts and for whom the SLARS at issue made financial sense as an investment. Employees on the Desk concurred with Brinck's assessment and testified that TWP followed its long-standing standard practice for providing corporate cash clients with liquidity when it executed the January 29, 2008 cross trades.

FINRA examiner Doolittle also testified that the Firm had a consistent history of executing cross trades between corporate cash accounts to provide inter-auction liquidity. Between December 2006 and February 2009, Doolittle found that TWP executed many such cross trades to provide liquidity for various corporate cash clients and that TWPG often was the purchaser in the crosses. In fact, Doolittle noted that, on January 14, 2008, two weeks prior to the cross trades at issue, TWPG's account purchased from Hot Topic for \$500,000 the very same SLARS that it sold back to Hot Topic in the cross trades on January 29, 2008 and that are the subject of this complaint. TWPG's January 14, 2008 purchases provided Hot Topic with the liquidity that it needed at that time. Indeed, MY testified that Hot Topic made many requests for cash from its TWP account and that it generally provided TWP with only a few days' notice. MY stated that TWP was never unable to liquidate SLARS to provide Hot Topic with cash when requested.

Similarly, the evidence does not establish that TWPG pressured Brinck to sell SLARS from its account to generate cash. Rather, TWPG's request appeared not to be out of the ordinary course of business and similar to many requests that the Desk had received previously from TWPG and other corporate cash customers. On January 22, 2008, Brinck received an email from Ryan Stroub ("Stroub"), corporate controller and director of finance for TWPG, indicating that TWPG would need \$25 million in cash at the end of January. Brinck and other Desk employees testified that corporate cash clients routinely requested liquidations for cash and generally provided just a few days' notice. Brinck responded that TWP would be ready, and he alerted Clark.¹³ Clark testified that he immediately checked auction dates for SLARS held in

¹³ Stroub and David Baylor ("Baylor"), chief operating and chief financial officer of TWPG, testified that TWPG needed money to fund its retention bonus program and to increase TWP's excess net capital before an upcoming FOCUS filing. Although Brinck knew that TWPG needed cash for these purposes, he testified that he did not feel pressured to produce the funds. The evidence supports Brinck's contention. Although many employees on the Desk would

TWPG's account and determined that TWPG did not have \$25 million in SLARS up for scheduled auctions before the end of January, so the Firm followed its standard practice for providing liquidity in the TWPG account.¹⁴

The factual basis underlying Enforcement's theory of fraud is not proven by the evidence. The preponderance of the evidence does not prove that the January 29, 2008 cross trades were contrary to Medicis/Dermavest's and Hot Topic's explicit instructions and that TWP's sole basis for executing the trades was to generate funds for TWP's bonuses.

3. *The Evidence Does Not Establish that TWP Subsequently Made False and Misleading Statements to Medicis/Dermavest to Induce the Customer to Forfeit Its Rights of Redress against TWP*

We also do not find evidence to support Enforcement's allegation, as part of its theory of fraud, that TWP subsequently made false and misleading statements (during a December 8, 2008 meeting and in a February 9, 2009 letter) to Medicis/Dermavest about the January 29, 2008 transactions in an effort to induce Medicis/Dermavest to forfeit its rights of redress against TWP for the sales.¹⁵

On December 8, 2008, BB, vice president of finance and operations at Medicis/Dermavest, and other Medicis/Dermavest representatives met with TWP representatives

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receive bonuses, Brinck was ineligible to receive one. Desk employees other than Brinck testified that they were unaware of TWPG's intended use for the money. Stroub and Baylor testified that, if necessary, TWPG could have secured the funds from other avenues and that the Firm could have counted certain securities towards its excess net capital. Stroub and Baylor did not believe that they pressured Brinck, and neither Baylor nor Stroub held any supervisory authority over Brinck or Handy.

¹⁴ TWP successfully sold approximately \$9 million of TWPG's SLARS to remarketing agents. Clark and others on the Desk attempted to sell more to remarketers, but were unsuccessful. Rueb testified that she did not support the decision to execute cross trades to provide TWPG with cash because she found cross trades to be administratively cumbersome and complicated, and she generally did not support using them. She also testified that it seemed inconsistent to her to purchase SLARS in the accounts of customers for whom the Firm generally was selling SLARS, but that she did not believe that the trades were wrong or fraudulent.

¹⁵ Brinck was no longer associated with TWP during the time that, Enforcement alleged, TWP made false and misleading statements in furtherance of the alleged fraud. Enforcement also alleged, as an independent cause of action (cause two), that TWP violated Rule 2110 by falsely misrepresenting and omitting material information at a December 8, 2008 meeting and in a February 9, 2009 letter. We discuss these allegations in part III.B (The Preponderance of the Evidence Does Not Prove that TWP Made False and Misleading Statements to Medicis/Dermavest in Correspondence and During a Meeting).

at TWP's request. SS did not attend this meeting. BB testified that he could not recall who represented TWP at the meeting and that his overall recollection was hazy. He recalled that TWP requested retroactive approval of the January 29, 2008 cross trades and represented that the Firm had erred in not getting prior permissions from Medicis/Dermavest to execute the trades because TWP sold the securities to Medicis/Dermavest from TWPG's account and, under the Investment Advisers Act, TWP should have sought prior approval. BB recalled that TWP representatives stated that the mistake was discovered in some type of a review. BB could not recall whether TWP representatives disclosed FINRA's investigation, but stated that they may have mentioned it. No other meeting attendee testified at the Hearing Panel hearing.

In a February 9, 2009 letter from TWP to Medicis/Dermavest that Handy signed, TWP represented that, at the end of January 2008, the Firm recommended selling enhanced SLARS from corporate cash accounts. The letter stated that the SLARS that Medicis/Dermavest's accounts purchased on January 29, 2008 were natural, not enhanced, SLARS that were consistent with Medicis/Dermavest's investment policies and provided high yields. The Firm represented in the letter that Brinck or someone from his group had explained the differences between natural and enhanced SLARS to someone at Medicis/Dermavest. Finally, TWP represented that it could not reasonably have anticipated the market failures that occurred on February 12, 2008 in the SLARS auction market and that, prior to the widespread auction failures on February 12, 2008, it had received numerous reassurances from SLARS underwriters that the SLARS market remained liquid and stable. Handy did not testify before the Hearing Panel.

We do not find that TWP made false and misleading statements to Medicis/Dermavest after the trades. First, the only meeting attendee who testified (BB) was unable to recall specific discussions from the meeting and who exactly attended. His testimony does not prove misrepresentations as alleged. Second, we have credited Brinck's explanation of the events surrounding the January 29 cross trades, which is consistent with the explanation contained in the February 2009 letter. Handy was not called to testify regarding the contents of the letter, and we find no evidence of misrepresentations. We therefore do not find that the evidence regarding TWP's post-January 29, 2008 communications with Medicis/Dermavest support Enforcement's theory of fraud and demonstrate that TWP made false and misleading statements to Medicis/Dermavest. This finding alone would not necessarily defeat the fraud allegation. Taken with the other gaps in the evidence, however, it supports our determination to dismiss cause one.

4. Other Evidence Militates Against a Finding of Fraud

Other evidence, or the lack thereof, also militates against Enforcement's allegation of fraud. For example, missing from the evidence is any effort on Brinck's part to conceal his conduct. Medicis/Dermavest and Hot Topic received confirmations of the cross trades, and the trades were reflected on account statements. Brinck was openly and actively engaged with the customers during the relevant period and also openly discussed the cross trades with others on the Desk and made no attempt to conceal the trades from his supervisors. Additionally, Brinck, Stroub, and Baylor testified that TWPG did not place undue pressure on Brinck to generate cash in TWPG's account by selling SLARS. Stroub and Baylor testified that TWPG did not need to liquidate SLARS positions to pay bonuses because TWP already had \$50 to \$60 million in liquid cash that it could use to pay bonuses, and Westwind Partners, an entity that TWPG had recently acquired, had more than \$20 million in cash that could have been used. The evidence also

indicates that while Brinck sold the SLARS at issue in this case, he left many other SLARS, including enhanced SLARS, in TWPG's account.

At the time of the transactions at issue, Brinck had just earned a graduate degree, and he was actively searching for a new job. Brinck left TWP voluntarily in August 2008.¹⁶ He had no incentive to act contrary to his customers' best interests simply to benefit TWPG or TWP, the firm that Brinck intended to leave. He also knew that he was not eligible to be paid a bonus, so personal gain (in the form of a bonus paid from the proceeds of the January 29, 2008 cross sales) was not an incentive. Furthermore, TWP and Brinck personally earned no commissions on any of the trading activity in the corporate cash accounts. In short, the evidence presents no support for finding that Brinck was motivated to commit fraud.

We also note that Brinck's execution of cross trades on January 29, 2008 without first contacting Medicis/Dermavest and Hot Topic was consistent with his conduct as to every other transaction that he executed in the Medicis/Dermavest and Hot Topic accounts, over which TWP exercised discretionary authority, and with other transactions involving the TWPG account. We agree that Brinck and TWP violated the Investment Advisers Act by not obtaining prior approval from Medicis/Dermavest and Hot Topic to sell SLARS from TWPG's account to Medicis/Dermavest's and Hot Topic's accounts. TWP erroneously treated the TWPG account as it treated all corporate cash accounts and failed to identify it as a proprietary account before Brinck joined TWP. This corroborates Brinck's explanation of why, in the normal course of business, it did not occur to him that he needed to get Medicis/Dermavest's and Hot Topic's permission for the January 29, 2008 cross trades. Although by doing so Brinck and the Firm acted negligently, this does not prove fraud as alleged by Enforcement.¹⁷

We have considered the direct and circumstantial evidence in the record. We find that many of the indicia of scienter that we often see in fraud cases are absent. *Cf. Pagel, Inc.*, 48 S.E.C. 223, 226 (1985) ("Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail. Findings must be gleaned from patterns of behavior, from apparent irregularities, and from trading data. When all of these are considered together, they can emerge as ingredients in a manipulative scheme designed to tamper with free market forces."), *aff'd*, 803 F.2d 942 (8th Cir. 1986). While we do not conclude that every case must include the same variety of evidence to prove fraud, we find that much of the evidence in this case contradicts Enforcement's theory that Brinck and TWP acted with scienter and fraudulently.

* * * *

¹⁶ Brinck testified that, as part of his job search, he planned to refer potential employers to his clients for feedback on the level of service that he provided to them, so he had an interest in maintaining a positive relationship with Medicis/Dermavest and Hot Topic.

¹⁷ We note also that, while not a determinative factor and not a required element of proof, TWP's customers Medicis/Dermavest and Hot Topic did not lose money. During the period when Medicis/Dermavest and Hot Topic held these SLARS positions, they continued to pay interest. After the February 2008 widespread auction failures, they still paid interest. On July 13, 2009, TWP repurchased at par the \$13.2 million of crossed SLARS that remained in the Medicis/Dermavest and Hot Topic accounts, and the clients were made whole.

We have considered all of the evidence together, and we conclude with certainty that the preponderance of the evidence does not support a finding of fraud as alleged in cause one of the complaint. We therefore affirm the Hearing Panel's dismissal of cause one.

B. The Preponderance of the Evidence Does Not Prove that TWP Made False and Misleading Statements to Medicis/Dermavest in Correspondence and During a Meeting

We conclude that the preponderance of the evidence does not support a finding that TWP made false and misleading statements to Medicis/Dermavest in a February 9, 2009 letter from TWP to Medicis/Dermavest and during a December 8, 2008 meeting between representatives of Medicis/Dermavest and TWP, in violation of NASD Rule 2110 and FINRA Rule 1010. As such, we affirm the Hearing Panel's dismissal of cause two.

As we discuss above in part III.A.3 (The Evidence Does Not Establish that TWP Subsequently Made False and Misleading Statements to Medicis/Dermavest to Induce the Customer to Forfeit Its Rights of Redress Against TWP), we do not find that the evidence regarding TWP's December 8, 2008 meeting with Medicis/Dermavest representatives and February 9, 2009 letter to Medicis/Dermavest proves that TWP made false and misleading statements to Medicis/Dermavest. With respect to the December 8, 2008 meeting, the only attendee that Enforcement called to testify was BB. BB was unable to recall who attended the meeting and his recollection of the details of the conversation was hazy at best. Enforcement failed to demonstrate that TWP made false and misleading representations at this meeting. The February 9, 2009 letter represented that, at the end of January 2008, the Desk recommended to its corporate cash clients that they sell enhanced SLARS. The explanation of the events surrounding this recommendation that are contained in the letter are consistent with Brinck's explanation, which we credit, of the events related to SLARS trading at TWP in late January and early February 2008. Neither BB's testimony regarding the December 2008 meeting nor the contents of the February 2009 letter supports the finding that TWP materially misrepresented the events leading up to and on January 29, 2008, and the state of the SLARS market at that time.¹⁸

We affirm the Hearing Panel's dismissal of cause two.

C. The Preponderance of the Evidence Failed to Prove that TWP Falsely Responded to FINRA Requests for Information

We do not find that the preponderance of the evidence supports a finding that TWP falsely responded to FINRA requests for information.

¹⁸ We note that the only attendee from the February 2009 meeting to testify was BB. His recollection was incomplete, and he did not contradict the recitation of events provided by Brinck and other Desk employees. Handy signed the February 9, 2009 letter on behalf of TWP, but he did not testify before the Hearing Panel. We find that, on its face, the letter does not contradict the testimony provided by Brinck and other Desk employees.

NASD Rule 8210 requires member firms to provide information orally, in writing, or electronically in response to a FINRA request and to testify under oath. The information provided to FINRA in response to a request pursuant to Rule 8210 must be truthful in order to comply with the rule. *See Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *25 (Aug. 22, 2008) (finding that supplying false information to FINRA during an investigation violates Rule 8210).

The complaint specifically alleged that TWP made two false statements. First, Enforcement alleged the falsity of TWP's statement that the January 29, 2008 sales of SLARS from TWPG to Medicis/Dermavest and Hot Topic were consistent with the Desk's strategy for corporate cash accounts. As we discuss above in parts III.A.1 (The Evidence Does Not Establish that Brinck Began Selling SLARS in Hot Topic's and Medicis/Dermavest's Accounts and the Accounts of All Corporate Cash Customers Because of Concerns about SLARS) and III.A.2 (The Evidence Does Not Establish that the January 29 Cross Trades Were Contrary to Medicis/Dermavest's and Hot Topic's Explicit Instructions to Sell and that Brinck Executed the Cross Trades to Obtain Cash for TWPG's Corporate Bonuses), we do not find that the January 29 cross sales were inconsistent with the Desk's strategy.¹⁹ We therefore do not find this statement false.

Second, the complaint alleged to be false the statement that the Desk had not decided to sell or begun to sell all SLARS from corporate cash accounts at the time of the January 29 cross sales. As we discuss above in parts III.A.1 and 2, the evidence is unclear as to when Brinck made the second decision to sell all (as opposed to just enhanced) SLARS. Although Brinck stated that he may have made the second decision as early as January 25, neither he nor anyone else who worked on the Desk could state with certainty when he made the second decision. We therefore also do not find this statement to have been false at the time that it was made.

Moreover, we do not in this instance believe that it is appropriate to view TWP's November 21, 2008 letter in a vacuum. The evidence demonstrates that TWP cooperated with Enforcement's investigation and reasonably endeavored to gather a complete understanding of the events of January 2008. When Enforcement commenced its investigation, TWP hired outside counsel from a multi-national law firm that specializes in regulatory practice and financial services. TWP's attorney, WA, signed the November 21, 2008 letter, which responded to one of FINRA's numerous requests for information and documents. In the letter, WA stated that, in addition to providing FINRA with the information and documentation requested, the

¹⁹ In support of Enforcement's argument that the Desk's emails expressed concern about the SLARS market and that Brinck recommended selling all SLARS because of that concern, Enforcement quoted from Brinck's emails to corporate cash customers. For example, on appeal Enforcement cites to January 25, 2008, February 1, 2008, and February 19, 2008 emails from TWP to corporate cash customers other than Medicis/Dermavest and Hot Topic to demonstrate Brinck's level of concern over the SLARS market. Enforcement fails, however, to acknowledge that in each of these emails, Brinck also states "we believe there is no risk of any principal loss if you continue to hold the securities," "there is no credit risk," and "there have been no liquidity problems and we do not expect any." We find that considering only selected passages from these emails may result in their being read out of context, and we are not persuaded by Enforcement's citations.

Firm wished to explain its current understanding of the relevant events preceding the January 29, 2008 cross trades that are the subject of this case. By way of providing background, WA explained that TWPG expressed its need for \$25 million on January 22, 2008, and TWP's Desk determined that there were no auctions scheduled for the securities that TWPG held between January 23 and 30. TWP's Desk then followed the ordinary course of business by contacting auction agents to attempt to sell back some of the securities that TWPG held in its account (which it did for \$9 million), then the Desk determined which of TWPG's securities would be appropriate investments for other corporate cash customers. WA also represented that the Desk's recommendation to sell SLARS on January 23 and 24, 2008 was not inconsistent with the January 29, 2008 cross trades because the Desk's sales strategy was to sell enhanced SLARS, and the SLARS that Medicis/Dermavest and Hot Topic bought on January 29, 2008 were natural SLARS. WA did not, however, indicate in the letter that Brinck subsequently made a second decision to sell all SLARS, natural and enhanced, from corporate cash accounts.

WA testified before the Hearing Panel that, when he prepared the November 2008 letter, he and TWP made every effort to provide FINRA with all of the documents requested and a full and complete explanation of the Desk's activities. WA stated that, when he sent the letter, he and the Firm were unaware that Brinck (who already left TWP) had followed his first decision to sell enhanced SLARS with a second decision to sell all SLARS. WA's point of contact at TWP was the Firm's general counsel, Mark Fisher, and between them, they endeavored to coordinate with a large group of current and former TWP employees.²⁰ WA spoke to the individuals that the Firm understood at the time to be involved in the underlying events and sent them documents to refresh their memories. WA provided a copy of his draft response to Stroub, Clark, Bender, Handy, McCabe, and Mahon for their approval. Mahon read portions of the letter to Brinck, who no longer was associated with TWP, but did not send him a copy of the full document or send Brinck copies of trading records or other documents to refresh his recollection. Brinck could not specifically recall which portions of the letter Mahon read to him. WA admitted that it was his idea to include in the letter the explanatory introductory section (which is the section alleged to contain false information) before producing the requested documents to help the Firm to be as clear, cooperative, and transparent as possible. He indicated that the information provided was based on TWP's best efforts to determine the facts at the time. Fisher agreed that TWP fully intended to cooperate with FINRA and never sought to hide Brinck's second decision to sell all SLARS from corporate cash accounts. When WA sent this letter to FINRA, Fisher contended, he and WA simply had not yet learned of the second decision.

WA also attended FINRA's three-day on-site examination of TWP. Although Brinck was no longer employed by TWP at the time of the examination, he returned to TWP's offices to answer FINRA's questions. TWP continued to respond to FINRA requests for information

²⁰ To prepare TWP's November 21, 2008 response, WA and Fisher worked with Don Mahon ("Mahon"), a compliance officer at TWP, Mardi Finegan, another TWP compliance officer, Mel Fisher, a sales supervisor on TWP's trading desk, Clark, Bender, Handy, and Stroub. During the period in 2008 when WA was preparing TWP's response, Clark's memory was somewhat unreliable because of injuries that he sustained in an April 2008 auto accident for which he was on medical leave from April through August 2008. Brinck no longer worked at TWP, although WA spoke with him. Rueb was not asked to review the response letter.

through early 2010 and turned over all documents requested, including emails which demonstrated that, at some time, Brinck recommended selling all SLARS (not just enhanced) in the accounts of TWP's corporate cash customers, contradicting any suggestion that TWP tried to conceal this fact. FINRA also took on-the-record testimony from 20 TWP employees, including Brinck on three occasions. Brinck fully disclosed his two-part decision to sell SLARS in corporate cash accounts. WA testified that FINRA gave TWP only a matter of weeks to compile the November 21, 2008 response and, given that TWP was freely providing documents to FINRA and employees were testifying before FINRA, it defied logic for TWP to be less than forthcoming in the November 21, 2008 letter.

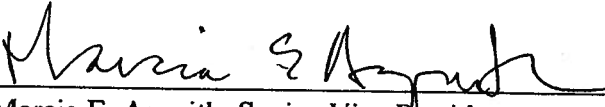
We do not find that the preponderance of the evidence demonstrates that TWP falsely responded to a FINRA information request. In light of the foregoing, we affirm the Hearing Panel's dismissal of cause three.

IV. Conclusion

We affirm the Hearing Panel's dismissal of causes one, two, and three of the complaint.

Thus, this matter is dismissed as to Brinck and causes one, two, and three are dismissed as to TWP.²¹

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith, Senior Vice President
and Corporate Secretary

²¹ We also have considered and reject without discussion all other arguments advanced by respondent.