

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 80360 / March 31, 2017

Admin. Proc. File No. 3-17560

In the Matter of the Application of
KIMBERLY SPRINGSTEEN-ABBOTT
For Review of Disciplinary Action Taken by
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY
PROCEEDINGS

Associated person of member firm appeals from FINRA disciplinary action finding that she misused investor funds by improperly allocating personal and other inappropriate expenses to investment funds. *Held*, proceedings are *remanded* for further consideration.

APPEARANCES:

Sandra D. Grannum, of Drinker Biddle & Reath LLP; *Steven M. Felsenstein*, of Greenberg Traurig, LLP; and *Joel E. Davidson* for Kimberly Springsteen-Abbott.

Alan Lawhead and *Lisa Jones Toms* for FINRA.

Appeal filed: September 19, 2016
Last brief received: January 11, 2017

Kimberly Springsteen-Abbott, an associated person of FINRA member firm Commonwealth Capital Securities Corp. (“CCS”), seeks review of a FINRA disciplinary action finding that she violated FINRA Rule 2010 by improperly allocating to investment funds personal and non-related business expenses. FINRA barred her from associating with any FINRA member and imposed disgorgement, fines, and costs. For the reasons explained below, we remand this proceeding to FINRA.

I. Background

Springsteen-Abbott entered the securities industry in 1980. Since 2005, she has served as CCS’s Chair, Chief Executive Officer, and Chief Compliance Officer. CCS is the managing broker-dealer of thirteen investment funds (the “Funds”) sponsored by its parent company, Commonwealth Capital Corp. (“CCC”). Springsteen-Abbott is CCC’s Chair, CEO, CCO, and sole shareholder, as well as the Chair, CEO, and CCO of the Funds’ general partner, Commonwealth Income and Growth Fund, Inc. (“CIG”).

The Funds include both publicly and privately offered funds that invest in equipment leases. Springsteen-Abbott’s husband, Henry “Hank” Abbott, handles the leasing operations for the Funds and is a director of CCS, CCC, and CIG. A number of Abbott and Springsteen-Abbott’s family members are employed by CCS and the other related businesses as well.

The Funds have no employees. Instead, various employees of the other related businesses handle the Funds’ business and either charge related expenses to the Funds or are reimbursed from the Funds. The Funds’ offering documents offer little guidance regarding the types of expenses accrued by CCC and its affiliates that can be charged to or reimbursed from the Funds, other than that they be “necessary to the prudent operation of the [Funds].” The offering documents specify that the expenses of controlling persons—essentially senior and executive management for CIG and its affiliates—cannot be charged to or reimbursed from the Funds.

The expenses at issue in this case were all charged to a single American Express account issued to CCC. Springsteen-Abbott, Henry Abbott, and Lynn Franceschina, the Principal Financial Officer and COO of CCS and CCC, all held credit cards for the account. They used these cards for various expenses, including both business and personal.

Springsteen-Abbott had sole responsibility for determining whether charges on the American Express cards were business expenses that could be allocated to the Funds or other corporate entities or were personal expenses of Springsteen-Abbott or other cardholders that needed to be reimbursed to CCC. She reviewed the credit card statements every month, often in consultation with Abbott or Franceschina; Franceschina processed the allocations, but Springsteen-Abbott had final approval.

A. FINRA brought charges against Springsteen-Abbott for improperly allocating expenses.

In 2011, FINRA received tips concerning allegations of improper expense charges concerning the Commonwealth businesses. FINRA's Department of Enforcement filed a Complaint against Springsteen-Abbott in May 2013, alleging that there were 2,272 misallocated charges totaling \$344,798.79 between December 2008 and February 2012. After Springsteen-Abbott provided explanations for some of the charges, Enforcement filed an Amended Complaint in October 2013.

The Amended Complaint included as an exhibit a spreadsheet showing 1,840 charges totaling \$208,954.44 that Enforcement alleged were inappropriately allocated to the Funds. According to Enforcement, Springsteen-Abbott "direct[ed] the misuse of investor funds to pay for American Express charges that are not related to legitimate fund business." The Amended Complaint alleged that, as a result, Springsteen-Abbott violated FINRA Rule 2010's requirement that members and associated persons "observe high standards of commercial honor and just and equitable principles of trade" in conducting their business.

Before the Hearing Panel,¹ Enforcement set out to prove "a pattern of misuse of funds." A FINRA examiner testified that, in putting together the exhibit attached to the Amended Complaint, she had focused on purchasing patterns, including charges made during vacations and other family events, as well as charges of meals and car rentals in the towns in which Springsteen-Abbott and her husband lived. Enforcement entered into evidence a series of spreadsheets that supported the examiner's testimony.

Springsteen-Abbott countered that, apart from some charges allocated in error, these were all legitimate business expenses that reflected the fact that the Funds' business often occurred outside of regular working hours or on the road, and included employees who were also family members. She also pointed out that, in some instances, she had gone back and reallocated charges with which FINRA had taken issue away from the Funds, including charges that should not have been allocated because of her position as a controlling person. Springsteen-Abbott offered a spreadsheet that noted adjustments of approximately \$35,000 worth of charges listed in the Amended Complaint, though she maintained that many of the charges were legitimate.

While Enforcement had sought restitution and/or disgorgement in the Amended Complaint, it focused only on restitution in both its prehearing briefs and at the hearing. Enforcement sought \$174,321.73, explaining that this was the amount originally misallocated to the Funds minus the reallocations from the list Springsteen-Abbott provided. Enforcement noted that it had no supporting documentation to confirm that the reallocations were actually made, but did not challenge Springsteen-Abbott's claim that this occurred.

¹ Proceedings were held before an Extended Hearing Panel pursuant to FINRA Rule 9231(c), which allows such panels "[u]pon consideration of the complexity of the issues involved, the probable length of the hearing, or other factors that the Chief Hearing Officer deems material." We refer to the Extended Hearing Panel as the Hearing Panel.

B. The Hearing Panel found a pattern and practice of misconduct.

The Hearing Panel’s decision found that Springsteen-Abbott violated FINRA Rule 2010 by misallocating Fund monies over at least three years, and that her practice of doing so personally benefitted her and damaged the Funds. The Hearing Panel devoted almost 30 pages to making specific findings regarding dozens of charges it deemed improperly allocated personal expenses. It performed this exercise “to convey the day-in, day-out nature of Springsteen-Abbott’s misconduct,” and stated that while not every improperly allocated expense proven at the hearing was included, “these expenses are sufficient to show Springsteen-Abbott’s pattern and practice over the three years from 2009 through 2011.”

The Hearing Panel’s discussion of specific improperly allocated personal expenses included vacation expenses, restaurant meals at which Springsteen-Abbott’s young grandchildren were present, and expenses associated with various family celebrations. Springsteen-Abbott provided business justifications for many of the expenses discussed, but the Hearing Panel made specific determinations that Springsteen-Abbott and Abbott lacked credibility in offering these justifications and that some were “demonstrably false.”

The Hearing Panel permanently barred Springsteen-Abbott from associating with any FINRA firm in any capacity, ordered \$208,953.75 in disgorgement (plus prejudgment interest), fined her \$100,000, and assessed costs against her. In so doing, the Hearing Panel offered several reasons for why disgorgement was more appropriate than restitution. The chief reason was that restitution is premised on a quantifiable loss, and the record made it impossible to calculate how much restitution would need to be awarded to any specific Fund; in contrast, disgorgement prevents unjust enrichment, and courts have held that it need only be “a reasonable approximation of gains that are causally connected to a violation.”²

The \$208,953.75 disgorgement amount was based on a schedule attached to the decision (the “Expense Schedule”), which totaled all 1,840 charges listed on the Amended Complaint exhibit with some *de minimis* corrections of errors.³ The Hearing Panel found that, while not every charge had been individually proven to be improperly allocated at the hearing, Enforcement had successfully proven “a purposeful pattern and practice of improperly allocating

² See *SEC v. Capital Sols. Monthly Income Fund, L.P.*, 28 F. Supp. 3d 887, 897 (D. Minn. 2014); see also *Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *22-23 (May 2, 2014) (stating that “unlike restitution, the primary purpose of disgorgement is not to compensate investors by the amount they lost, but to force a defendant to give up the amount by which he was unjustly enriched,” that as a result “the measure of disgorgement need not be tied to the losses suffered by defrauded investors,” and that because “separating legal from illegal profits exactly may at times be a near-impossible task . . . disgorgement need only be a reasonable approximation of profits causally connected to the violation”) (internal quotation marks, brackets, and citations omitted); *Kenneth L. Lucas*, Exchange Act Release No. 33922, 1994 WL 148473, at *3-4 (Apr. 19, 1994) (confirming NASD’s authority to order disgorgement in this manner).

³ The total amounts differed by less than a dollar.

expenses to the Funds” and that assertions made “by Springsteen-Abbott and her husband regarding the purported business purposes for various charges were proven untrustworthy.” The Hearing Panel also noted that there was “reason to distrust” some of Springsteen-Abbott’s explanations that led Enforcement to drop the some 400 items from the original Complaint, which had decreased the charges against Springsteen-Abbott by over \$135,000. Therefore, the Hearing Panel found that the total amount in the Amended Complaint was a “fair and reasonable estimate” of Springsteen-Abbott’s unjust enrichment.

The Hearing Panel reasoned that any risk of uncertainty in the accuracy of the disgorgement amount should fall on Springsteen-Abbott. Springsteen-Abbott, the Hearing Panel found, was responsible for much of the lack of transparency surrounding the validity of individual charges. The Hearing Panel further noted that while Springsteen-Abbott “admitted that some expenses had been mistakenly charged to the Funds,” she “refused to specify which expenses were covered by this admission.” Once Enforcement had presented a reasonable approximation of the amount of unjust enrichment, the Hearing Panel determined that the burden shifted to Springsteen-Abbott to prove that the amount was not reasonable. The Hearing Panel found that Springsteen-Abbott had failed to carry that burden.

The Hearing Panel offered two additional reasons for ordering disgorgement of the entire amount in the Expense Schedule. First, the Hearing Panel stated that even if some of the charges were legitimate business expenses many related to CCS, not the Funds. Therefore, they were not Fund expenses and should not have been allocated to them. Second, the Hearing Panel found that Springsteen-Abbott and her husband were controlling persons during the relevant period, and the Funds’ offering documents precluded controlling person expenses from being reimbursed by the Funds. Therefore, to the extent that the Expense Schedule included legitimate Fund business expenses, most of these were controlling person expenses and thus also misallocated.

The Hearing Panel declined to decrease its disgorgement figure by the \$35,000 in reallocations, as Enforcement had for its restitution figure. It stated that the full amount of improperly allocated charges should be disgorged as “more appropriately remedial.”

C. The National Adjudicatory Council found that Springsteen-Abbott violated Rule 2010.

Springsteen-Abbott appealed to FINRA’s National Adjudicatory Council (the “NAC”). The NAC adopted as its own the facts presented in the Hearing Panel’s decision. The NAC then “affirm[ed] the Extended Hearing Panel’s findings of violation against Springsteen-Abbott to include all of the 1,840 improperly allocated charges identified in the *Expense Schedule*.”

The NAC rejected Springsteen-Abbott’s argument that Enforcement had improperly shifted the burden to her to disprove the allegations it brought against her. The NAC stated:

Enforcement has the burden of proving a prima facie case based on a preponderance of the evidence that Springsteen-Abbott committed the alleged violation. The entire itemized list of the 1,840 charges at issue was presented and accepted into evidence. We are unpersuaded by Springsteen-Abbott’s argument

in view of the full record. We find that, based on the evidence presented, Enforcement established its prima facie case of her alleged violation. An explanation detailing each of the 1,840 itemized charges was not required. Upon establishing a prima facie case, the burden shifted to Springsteen-Abbott to either discredit or rebut the evidence presented, which she failed to successfully do.

The NAC also affirmed the sanctions that the Hearing Panel imposed, and added the costs of the appeal to the costs assessed against Springsteen-Abbott. It rejected Springsteen-Abbott's argument that the Hearing Panel's imposition of disgorgement in excess of the restitution amount Enforcement recommended was improper. It offered similar reasons to the Hearing Panel for why disgorgement was more appropriate than restitution. It further noted, in upholding disgorgement of the full \$208,953.75, that "[i]t was Springsteen-Abbott's burden to accurately identify with supporting documentation the misallocated charges that she purportedly reversed and fully reimbursed to the Funds, but she failed to do so." Therefore, disgorgement in the full amount was appropriate. This appeal followed.

II. Analysis

We consider applications for review of self-regulatory organization disciplinary actions under Section 19(e)(1) of the Securities Exchange Act of 1934.⁴ We must determine whether the respondent engaged in the conduct found by the SRO, whether such conduct violates the SRO's rules at issue, and whether those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.⁵ We base our findings on an independent review of the record, and "it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of FINRA which is subject to Commission Review."⁶

With respect to our review of whether a respondent engaged in the conduct found by the SRO, Section 15A(h)(1) of the Exchange Act provides that a registered securities association's determination to impose a disciplinary sanction must be supported by a statement setting forth "any act or practice in which [the respondent] has been found to have engaged[.]"⁷ This requirement ensures that applicants are not "impaired in their ability to defend themselves before

⁴ 15 U.S.C. § 78s(e)(1).

⁵ *Id.*; see also *Stephen Grivas*, Exchange Act Release No. 77470, 2016 WL 1238263, at *3 (Mar. 29, 2016) (detailing Commission review of SRO actions).

⁶ *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *17 n.89 (Feb. 13, 2015) (internal quotation marks, brackets, and citation omitted).

⁷ 15 U.S.C. § 78o-3(h)(1).

us.”⁸ Moreover, “it is important that a self-regulatory organization clearly explain the bases for its conclusions. If it fails to do so, we cannot discharge properly our review function.”⁹

In this case, we are unable to discharge our review function because the NAC’s decision is unclear regarding what conduct it found to violate FINRA Rule 2010. Although the NAC stated that it was affirming the Hearing Panel’s findings of violation, it misstated those findings. The NAC stated that the entire itemized list of the 1,840 charges at issue was presented and accepted into evidence and that it was affirming the Hearing Panel’s “findings of violation against Springsteen-Abbott to include all of the 1,840 improperly allocated charges identified in the *Expense Schedule*.” The Hearing Panel, however, based its finding of violation on the specific expenses it discussed that showed a “pattern and practice” of misconduct over the span of three years. It did not find that all 1,840 charges identified in the Expense Schedule were improperly allocated, that the Expense Schedule itself established a pattern or practice of misconduct, or that no evidence other than the Expense Schedule needed to be considered. A remand is therefore necessary so that the NAC can clarify the basis on which it is upholding liability and explain how its findings of violation inform the sanctions imposed.¹⁰

On remand, the NAC may determine that the evidence warrants affirming the Hearing Panel’s finding that a specific subset of expenses in the Amended Complaint established a pattern and practice of misconduct in violation of Rule 2010. The Hearing Panel recognized that “[a]lthough Enforcement did not individually prove at the hearing that every single one of [the 1,840] expenses was improperly allocated to the Funds, it did prove that Springsteen-Abbott engaged in a purposeful pattern and practice of improperly allocating expenses to the Funds,” and detailed specific expenses in that pattern and explained why they were improper. The NAC may also choose to premise a finding of a pattern or practice of misconduct on other expenses, so long as it states specific reasons and supporting evidence as to why those expenses are violative.¹¹ The NAC may also find that all 1,840 expenses were improperly allocated in violation of Rule 2010 as long as it offers “clarification and further explanation” as to how that

⁸ *Donald R. Gates*, Exchange Act Release No. 36109, 1995 WL 497444, at *2 (Aug. 16, 1995).

⁹ *Jonathan Feins*, Exchange Act Release No. 37091, 1996 WL 169441, at *2 (Apr. 10, 1996).

¹⁰ *See Gates*, 1995 WL 497444, at *2 (remanding to NASD’s National Committee where it was unclear whether National Committee’s findings were “a correct interpretation of the District Committee’s opinion or the National Committee’s independent evaluation of the evidence”).

¹¹ *See Investment Planning, Inc.*, Exchange Act Release No. 32490, 1993 WL 226044, at *2 (June 18, 1993) (holding that Enforcement need not prove every item listed in complaint to prove overall violation but must provide sufficient identification of transactions that are basis of pattern as well as explanation as to why they are violative).

finding is established by the evidence.¹² Of course, the NAC may also determine that the evidence does not support any finding of liability.

Regardless of what the NAC does on remand, if it finds violations it will have to consider how those findings affect, among other sanctions, the appropriate amount of disgorgement. Here, having found that the Hearing Panel determined all 1,840 charges to be violative, the NAC found that Springsteen-Abbott's unjust enrichment was the total amount of the 1,840 violative charges. The NAC thus did not specifically address the Hearing Panel's finding that it was "fair and reasonable to view all of the alleged improper charges as unjust enrichment" based on "the improper expense allocations individually proven, the categories of improper charges that also were proven, the pattern of misuse, and other circumstances indicating Springsteen-Abbott's lack of candor and fundamental failure to comply with her ethical obligations." In other words, the Hearing Panel appears to have found that the total dollar amount of the 1,840 allegedly improper charges was a reasonable approximation of Springsteen-Abbott's unjust enrichment because it found that the total dollar amount was causally connected to her pattern and practice of misallocating expenses in violation of Rule 2010, and Springsteen-Abbott had not rebutted any portions of that showing.

On remand, the NAC should explain the relationship between any violations found and any disgorgement ordered and whether such disgorgement is a reasonable approximation of unjust enrichment.¹³ "[D]isgorgement primarily serves to prevent unjust enrichment[.]"¹⁴ The amount of disgorgement must be a "reasonable approximation of profits causally connected to the violation."¹⁵ The disgorgement calculation does not need to be exact, but only after the NAC finds that Enforcement has satisfied its burden of approximating unjust enrichment from the specific misconduct proven does the burden shift to the respondent to rebut the calculation of

¹² See *Calvin David Fox*, Exchange Act Release No. 48731, 2003 WL 22467374, at *3 (Oct. 21, 2003) (remanding case to New York Stock Exchange brought under equivalent of FINRA Rule 2010 because of its lack of findings); see also *Warren E. Turk*, Exchange Act Release No. 55942, 2007 WL 1800481, at *2 (June 22, 2007) (remanding to NYSE because of our inability "to make all of the findings required to sustain the NYSE's action"); *Eagle Supply Grp., Inc.*, Exchange Act Release No. 39800, 1998 WL 133847, at *4 (Mar. 25, 1998) (remanding under Section 19(f) of the Exchange Act so that NASD could "provide a sufficient basis for its decision to enable us to make the requisite determination").

¹³ See generally *Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at *3-4 (Aug. 21, 2014) (remanding where record did not contain sufficient evidence for Commission's meaningful review of disgorgement figure's reasonableness).

¹⁴ *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989).

¹⁵ *SEC v. Whittemore*, 659 F.3d 1, 7 (D.C. Cir. 2011) (internal quotation marks and citation omitted); *First City*, 890 F.2d at 1231.

disgorgement.¹⁶ Once a reasonable approximation has been established, any risk of uncertainty in the amount of disgorgement should be borne by the wrongdoer.¹⁷

To the extent the NAC finds violations, it will also need to clarify the significance of other factors mentioned by the Hearing Panel in its unjust enrichment analysis. For instance, the Hearing Panel justified its decision to disgorge all 1,840 charges from the Amended Complaint, despite the fact that not all had been proven violative, in part because they included controlling person expenses and because there was “reason to distrust” some of Springsteen-Abbott’s explanations that led Enforcement to drop some 400 expenses from the original Complaint. While disgorgement need only be a reasonable approximation of unjust enrichment, it must be related to misconduct that was actually charged and found to be violative.¹⁸

If the NAC chooses to order disgorgement, it should also address the \$35,000 in charges that Springsteen-Abbott claimed to have reallocated. Springsteen-Abbott did not produce evidence substantiating this claim at the hearing apparently because Enforcement’s calculation of restitution did not include the amounts she claimed to have reallocated.¹⁹ Because the amount of disgorgement that may be ordered is limited to a reasonable approximation of unjust enrichment at the time of the order, a reasonable approximation of disgorgement necessarily accounts for evidence of amounts already returned.²⁰ “[T]o the extent [the defendant] pays or has paid

¹⁶ *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004); *First City*, 890 F.2d at 1231-32.

¹⁷ *See Calvo*, 378 F.3d at 1217; *Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *20 (Dec. 11, 2009), *aff’d*, 627 F.3d 1230 (D.C. Cir. 2010).

¹⁸ *See* 15 U.S.C. § 78o-3(h)(1); FINRA Rule 9212(a)(1) (requiring that complaint include reasonable detail of specificity of conduct alleged); *Riordan*, 2009 WL 4731397, at *20 (decreasing disgorgement because it included transactions that “were not a subject of the Order Instituting Proceedings, and thus should not have been included in the disgorgement calculation”); *James W. Browne*, Exchange Act Release No. 58916, 2008 WL 4826020, at *10-11 (Nov. 7, 2008) (dismissing finding of liability premised on evidence not reached by complaint); *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 WL 2597567, at *4 (July 1, 2008) (setting aside violation findings under NASD Rule 2110 because they were based on allegations not included in complaint); *Charles F. Kirby*, Exchange Act Release No. 47149, 2003 WL 71681, at *11 n.74 (Jan. 9, 2003) (recalculating disgorgement because it erroneously included transactions not at issue in case and so not found violative).

¹⁹ *Cf. Nicholas J. Nickolaou*, Exchange Act Release No. 16210, 1979 WL 170308, at *4 (Sept. 18, 1979) (finding CBOE appeals board’s increase of sanctions inappropriate where respondent was not given notice of possibility that sanctions could be increased and had no opportunity to present related evidence or argument to appeals board).

²⁰ *See, e.g., Larry C. Grossman*, Exchange Act Release No. 79009, 2016 WL 5571616, at *22 (Sept. 30, 2016) (“Although a respondent’s settlement of private litigation will not always affect disgorgement, ‘[a] settlement payment may . . . be taken into account . . . in calculating the amount to be disgorged.’”) (quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996)); *Charles Trento*, Exchange Act Release No. 49296, 2004 WL 329040, at *2 n.11 (Feb. 23, 2004) (allowing modification of disgorgement request to account for duplication with

restitution . . . such payments will offset his disgorgement obligation.”²¹ Otherwise, disgorgement would be improperly punitive.²²

Accordingly, we remand this matter to FINRA. In so doing, we do not intend to suggest any view as to a particular outcome.²³ An appropriate order will issue.²⁴

By the Commission (Acting Chairman PIWOWAR and Commissioner STEIN).

Brent J. Fields
Secretary

another order); *Lucas*, 1994 WL 148473, at *4 (remanding to NASD where it was unclear whether ordered disgorgement amount was duplicative).

²¹ *SEC v. Palmisano*, 135 F.3d 860, 863-64 (2d Cir. 1998).

²² *First City*, 890 F.2d at 1231.

²³ Springsteen-Abbott requested oral argument in this appeal. In light of our decision to remand, that request is denied. See Rule of Practice 451(a), 17 C.F.R. § 201.451(a). We also do not reach Springsteen-Abbott’s motion to submit additional evidence to supplement the record.

²⁴ We have considered all of the parties’ contentions and have rejected or sustained them to the extent they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
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KIMBERLY SPRINGSTEEN-ABBOTT
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FINRA

ORDER REMANDING PROCEEDING TO FINRA

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

ORDERED that the proceedings with respect to Kimberly Springsteen-Abbott be, and they hereby are, remanded to FINRA for further consideration consistent with this opinion.

By the Commission.

Brent J. Fields
Secretary