

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	CFTC Docket No. SD-97-3
ERIC ZUCCARELLI	:	OPINION and ORDER

**SUMMARY**

This case is before the Commission after a remand, which was ordered to allow respondent Eric Zuccarelli (“Zuccarelli”) an opportunity to oppose the Division of Enforcement’s motion for summary disposition. On remand, after a hearing, the Administrative Law Judge (“ALJ”) held that Zuccarelli failed to rebut his presumptive statutory disqualification under Section 8a(3)(M), 7 U.S.C. § 12a(3)(M) of the Commodity Exchange Act (“CEA” or “Act”). Accordingly, the ALJ revoked Zuccarelli’s floor broker registration. Zuccarelli appeals from that decision.

Because the ALJ failed to allow Zuccarelli to present testimony from his expert witnesses or to present new, non-expert witnesses, we vacate the decision below and remand this case for further proceedings.

**BACKGROUND**

In 1997, the Commission filed a Notice of Intent to Revoke, Suspend or Condition Registration (the “Notice”) against Zuccarelli, a floor broker since 1987 at the Commodity Exchange, Inc. (COMEX).<sup>1</sup> The Notice alleged that two exchange disciplinary actions taken by COMEX against Zuccarelli, both of which involved prearranged trading, constituted “other good cause” for revocation under Section 8a(3)(M) of the Act. The first action was

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<sup>1</sup> COMEX is now a unit of the New York Mercantile Exchange (NYMEX).

adjudicated in 1990; the second was settled in 1994.<sup>2</sup>

Zuccarelli filed a response to the Notice, followed by a Summary of Evidence pursuant to Commission Rule 3.60(b)(2)(ii). The Summary of Evidence, which has played a significant role in this case, listed the names of the rehabilitation witnesses Zuccarelli expected to call, and set forth brief summaries of their anticipated testimony. Appended to the Summary were unsworn letters from seven of the listed witnesses. Five were short, conclusory testimonials; one contained a thoughtful discussion of the writer's relationship with Zuccarelli. The last letter, from NYMEX compliance attorneys Nancy M. Minett and Thomas F. LaSala, stated that "Mr. Zuccarelli . . . has not had a trade practice problem since . . . 1993." Zuccarelli included a summary of his own testimony, which he asserted would show that he was a "changed man." He also indicated that he was willing to trade under supervision.

The Division, on October 30, 1997, filed a motion for summary disposition pursuant to Rule 3.60(c). It argued therein that the Summary of Evidence did not raise a genuine issue of material fact requiring a hearing on either the existence of a statutory disqualification or Zuccarelli's rehabilitation from the disqualifying conduct. The day after filing its motion, the Division requested a stay on behalf of "the parties."<sup>3</sup> The ALJ granted the stay "until further order." (Order of Nov. 10, 1997).

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<sup>2</sup>In the earlier action, which involved trades executed between November 1987 and January 1988, Zuccarelli was found to have engaged in prearranged and wash trading by indirectly bucketing customer orders with the assistance of an accommodating trader. He was fined \$30,000, suspended for two weeks, and ordered to cease and desist. The Commission summarily affirmed the COMEX decision on February 5, 1993. *Zuccarelli v. COMEX*, CFTC Docket No. 91-E-4 (CFTC Feb. 5, 1993). In the second action, which involved trades executed from June through September 1993, Zuccarelli accommodated Stephen Briggs in bucketing customer orders. Zuccarelli was fined \$50,000, with half that amount suspended, suspended for four weeks, and ordered to cease and desist.

<sup>3</sup>While the reason for the stay is not stated in the record, the parties presumably requested it to resume previously inconclusive settlement discussions.

In the next development of record, the ALJ, on January 2, 1998, issued an Initial Decision granting the Division’s motion for summary disposition and revoking Zuccarelli’s registration. *In re Zuccarelli*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,221 (CFTC Jan. 2, 1998) (“*Zuccarelli I*”).

The Initial Decision held that “Zuccarelli’s acknowledged history of prearranged trading on the floor of the COMEX . . . plainly demonstrates a lack of honesty and an inability to deal fairly with the public. It also illustrates Zuccarelli’s potential disregard of or inability to comply with the requirements of the Act or the Commission’s regulations.” *Zuccarelli I*, ¶ 27,221 at 45,901 (internal quotations omitted).<sup>4</sup> The Initial Decision held that Zuccarelli failed to demonstrate that he could proffer evidence of mitigation or rehabilitation at a hearing to rebut the presumption of unfitness arising from the incidents of prearranged trading. *Id.* at 45,901-04. The decision’s reasons for finding Zuccarelli’s proposed showing inadequate included the absence of expert witnesses. *Id.* at 45,903.

Zuccarelli appealed, arguing that the ALJ erred in not affording him an opportunity to respond to the Division’s motion for summary disposition. The Commission agreed, vacated the decision below and granted Zuccarelli 20 days from its April 15, 1999 order to respond to the Division’s motion. *In re Zuccarelli*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,597 (CFTC Apr. 15, 1999) (*Zuccarelli II*).

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<sup>4</sup>The ALJ stated that “Zuccarelli’s misconduct also demonstrates actual disregard for the Act, since his prearranged trading violates the antifraud provisions of Sections 4b and 4c(a), 7 U.S.C. §§ 6b and 6c(a).” *Zuccarelli I*, ¶ 27,221 at 45,901. We do not view the ALJ’s statements that Zuccarelli’s conduct violated Sections 4b and 4c(a) as findings of violations under the CEA, because those provisions of the CEA were not charged. The incidents of prearranged trading rendered Zuccarelli presumptively disqualified under Section 8a(3)(M)—nothing more. *See In re Riley*, CFTC Docket No. SD 98-4 (CFTC Aug. 9, 2001) (slip op. at 12).

The Commission, observing that Zuccarelli's failure to proffer expert witness testimony had been a factor in the ALJ's decision to grant summary judgment, undertook an extensive discussion of the role of opinion testimony in the context of rehabilitation. The Commission noted that a case decided several months after the Initial Decision was issued, *In re Ashman*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,336 (CFTC Apr. 22, 1998), explained for the first time what kind of background would qualify a witness as a rehabilitation expert. *Zuccarelli II*, ¶ 27,597 at 47,833.<sup>5</sup>

*Zuccarelli* also made clear that the Commission does not reject character witness testimony solely because the witness is not an expert:

Although we have stressed in the past that the opinion testimony of an expert witness is entitled to greater weight than that of a lay witness, the focus of our analysis has been and will continue to be on the basis for the witness's opinion. Lay testimony may establish rehabilitation and is considered along with all other evidence.

*Zuccarelli II*, ¶ 27,597 at 47,834 (footnote omitted). The Commission stated that it would be guided by federal evidentiary standards in evaluating the testimony of lay witnesses. Lay opinion evidence should be ““(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.”” *Id.* at 47,835, *quoting* Fed. R. Evid. 701.

In Zuccarelli's case, the Commission held that the letters and descriptions of lay witness testimony contained in his Summary of Evidence fell short of the evidentiary standard of Fed. R. Evid. 701 and properly were accorded little weight by the ALJ. “If Zuccarelli chooses on remand to file an opposition to the summary disposition motion, greater detail

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<sup>5</sup>*Ashman* emphasized “training and professional experience” to support a witness's claim of specialized knowledge. ¶ 27,336 at 46,549 & n.55. The witnesses recognized as experts in *Ashman* included two academics who had studied recidivism, a forensic psychiatrist and a forensic psychologist.

concerning the bases for the opinions of his lay witnesses might entitle them to greater evidentiary weight,” the Commission said. ¶ 27,597 at 47,835.

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When Zuccarelli’s case resumed before the ALJ, he submitted a document styled “Initial Amended and Supplemental Summary of Evidence” pursuant to Rule 3.60(b)(2)(ii). He *amended* his earlier filing with a more detailed statement from proposed witness John H. Hanemann and an affidavit over Zuccarelli’s own signature regarding the anticipated testimony of proposed witness Nancy Minett.

Zuccarelli *supplemented* his earlier filing by adding the names of four new witnesses: three members of the futures industry and the social worker from whom he had received counseling. Detailed statements were submitted describing the proposed testimony of these witnesses. A day later, Zuccarelli further supplemented his Summary of Evidence with a report from a forensic psychologist who had examined him and whom he apparently intended to call as a witness. He also submitted another affidavit of his own, which elaborated further on the extent to which he believed he had changed.

The ALJ accepted the filing as responsive to the Commission’s remand order. On May 24, 1999, the ALJ reinstated his earlier order of summary disposition as to the existence of a statutory disqualification and the absence of mitigating evidence. *Order Granting in Part and Denying in Part Motion for Summary Disposition and Setting Matter for Oral Hearing*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,651 at 48,106, 48,107-08 (CFTC May 24, 1999) (“*Summary Disposition Order on Remand*”). He ordered a hearing on the issue of Zuccarelli’s rehabilitation.

The ALJ refused Zuccarelli’s request to call additional witnesses, ruling that this relief

lay outside the scope of the Commission's remand order and that Zuccarelli had no reason not to include them in his original filing. *Id.* at 48,105-06, n.10. The ALJ determined that the remand order allowed Zuccarelli to expand the proposed showing of the witnesses already named, not to add new ones. He later denied Zuccarelli's petition for reconsideration, along with the suggestion to call a smaller group of rehabilitation witnesses drawn from Zuccarelli's original list and new list.

Prior to the hearing, Zuccarelli apprised the ALJ that two of his industry witnesses had declined to testify for him. Zuccarelli said both had agreed to testify immediately after the remand, but changed their minds soon afterward. The ALJ refused to allow Zuccarelli to present substitutes in their places.

A two-day hearing was convened on July 7, 1999. Zuccarelli, the lead witness, acknowledged that he has a history of cheating customers and thinking little of it. He said he was influenced by the example and morals of his father, who was also his business partner. He said he began a long, slow process of reform in 1992, when his father retired, a point at which Zuccarelli was on his own, for the first time in his adult life. *Tr.* at 28. He said he began to address a serious weight problem, joining a weight loss program in 1993 and exercising regularly. *Id.* at 28-32, 50-52. He had become a father and felt the responsibilities of that role. *Id.* at 47.

During this period Zuccarelli said he continued to cheat customers, even as he strove to reinvent his personal life. "I was reaching out for help at that time, but still doing the things I had done up until that point wrong. I didn't know any other way to live at that point, and I was trying to do something about it, but it just still, it wasn't working at that time . . . ." *Id.* at 31.

He said things came to a head in the fall of 1993, when COMEX began investigating a series of prearranged trades in July and August of that year in which Zuccarelli had participated. "When I received the trading card request, it was the other shoe in my mind that finally dropped. The biggest fear that I always was waiting for, just one more time getting caught, and at that point I knew that I had to do something substantial go and make some better strides of what I was trying to attempt to do." *Id.*

Zuccarelli received counseling from family therapist Charles McBrearty during 1993 and 1994. He confronted his general high level of anger and volatile temper, and his lack of professional integrity. This occurred as the COMEX case unfolded and ultimately settled. Zuccarelli was able to reach a settlement on terms acceptable to him in part by agreeing to testify against co-respondent Stephen Briggs. *Id.* at 32-36, 49.

He said that since 1994, he has settled down, trades according to the rules, and controls his temper. *Id.* at 52-53. He said that he literally moved away from his position near Briggs in the ring to avoid his bad influence. *Id.* at 45, 53.

Over time, according to Zuccarelli, his rehabilitation became complete. Previously, when "I executed paper or executed brokerage or did business for myself, I just took it as a course of action to help myself with the orders that I executed. . . . [I]f I could get out of a trade for a little bit of an extra profit if I used a customer order and asked somebody to accommodate me with that, I would do it." *Id.* at 55. Zuccarelli testified that after a struggle, honesty has now become a habit:

I don't know, like, a specific light shone or anything, but I noticed that over time, when I get an order, I do an order. I didn't think about it, I didn't think about how I could use it, and that's how it is now. If I get an order, I execute an order. I don't feel tempted by that order any more. I don't feel as if I can use this order to my advantage.

Tr. at 65.

During cross-examination, the Division's attorney elicited from Zuccarelli testimony that when it began investigating him in 1996, he never said anything about his father's influence on his behavior, or his various emotional problems and his attempts to address them. Tr. at 78-80. The Division suggested that Zuccarelli "will say or do whatever is necessary" to remain in the futures industry. *Id.* at 80. The Division obtained concessions that Zuccarelli had lied on numerous occasions in the past and sought to establish that because he always had earned his adult livelihood in the commodities business, he had a motive to be less than candid in order to stay in the business. *Id.* at 81-85.

The ALJ questioned Zuccarelli, at one point asking: "is your level of integrity so high that you wouldn't shade the truth if you felt shading the truth would enhance your chances of remaining registered?" *Id.* at 93. Zuccarelli, after being pressed, answered no. The ALJ also asked if there were any circumstances "in any context" where Zuccarelli would not tell the truth. After some verbal fumbling, he answered, hypothetically, that if he were viewing adult material on the internet he wouldn't admit it to his wife. *See generally* Tr. at 94-97. The ALJ also asked what he would do if his registration were revoked. Zuccarelli, whose recent taxable income has ranged from \$140,000 to \$300,000 a year, and typically averages \$225,000, said he supposed he would try trading off the floor for his own account. He said he presumed he could make this shift without a substantial loss of income after "a learning curve," but would prefer to remain on the floor. Tr. at 83-86.

Zuccarelli presented the testimony of three other witnesses in support of his fitness for continued registration: two business associates, John H. Hanemann and David E. Klein, and NYMEX compliance counsel Nancy Minett.

Hanemann is a former COMEX chairman and at the time of the hearing was president

of the Commodity Floor Brokers and Traders Association. He gave a good opinion of Zuccarelli's character, stating, "Eric . . . is an asset to the Exchange . . . and he can be a pain in the neck sometimes, but his honesty and integrity to me, what I see now is unquestionable." *Id.* at 128. *See also* Tr. at 130-31. He added later during cross-examination, "I see Eric every day five days a week. I know the strain he's been under the past couple of years with his marital problems, I see him struggling there every day and trying to better himself there. That's all I see." *Id.* at 143. Asked by the ALJ what he meant by "better himself," Hanemann explained, "What he's been going through in private, personally in his personal life, would drive almost any man crazy, and he sits there, and he focuses on the market, he talks to the customers, even though his boss can be a real pain in the neck and constantly, Eric is there." *Id.* at 144.

During cross-examination, the Division sought to establish that Hanemann knew Zuccarelli only superficially. Hanemann said he saw Zuccarelli at the exchange and that they commuted on the same ferry, but that he did not know him intimately otherwise. Tr. at 142. He also said he had no detailed knowledge of Zuccarelli's violations. *Id.* The Division sought to impeach Hanemann by asking him about his own disciplinary history. Asked if he recalled that charges settled in 1987 involved trading against his customers, Hanemann replied: "I don't know how to answer it. I don't have an attorney. I have no idea and this is exactly why I didn't want to come here today." *Id.* at 148.

David E. Klein, chairman and president of Klein & Co. Futures Inc., which at the time was a futures commission merchant and clearing member of COMEX, also testified. Klein knew Zuccarelli as a customer; Zuccarelli began clearing through Klein in April 1997. He was aware of Zuccarelli's "serious disciplinary history," and had been reluctant to accept him

as a client on that account, but had developed a favorable view of him and was willing to sign a Supplemental Sponsor Certification Statement on his behalf. Klein testified:

I didn't know him then [during his time of troubles]. I don't even think I spoke to him during that period. I knew who he was, I knew he had a brother, I knew who his father was then. So if he's different from then, I don't know that, and I don't know that he's made a change.

The way that he spoke to me, the way he has been frank about his past and about his challenges in the present, he appears to be an honest man, he appears to realize that he's pushed this to the brink, and he's done some bad things to him and other people, and he can't do it anymore. I think he's, whether he's been read the riot act or understands it, he's not going to do it anymore and he realizes he doesn't have to. He can trade honestly and make money, he can trade honestly and lose money and that's what he wants to do.

Tr. at 185-86. Klein also testified that Zuccarelli had developed a good reputation generally in the trading community. *Id.* at 180-81.

Exchange compliance counsel Nancy Minett testified that her office had detected no prearranged trading or other misconduct by Zuccarelli since it began investigating the trading that led to the issuance of its June 1994 complaint against him. She also testified that Zuccarelli had complied with the terms of his settlement requiring his cooperation in the case against Stephen Briggs. *See generally* Tr. at 106-15.

In his Initial Decision on Remand, the ALJ held that Zuccarelli had not established rehabilitation and again revoked his registration. *In re Zuccarelli*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,784 (CFTC Oct. 1, 1999) (“*Zuccarelli III*”). The ALJ assessed Zuccarelli’s testimony harshly, stating, “the reliability of Zuccarelli's self-appraisal is inherently suspect. If the record reveals it to contain *any hint* of contrivance, it deserves no weight at all.” *Zuccarelli III*, ¶ 27,784 at 48,739 (emphasis supplied, footnote omitted). The ALJ found Zuccarelli to be “less than candid” based on the questions the ALJ had asked him:

For example, he sought to conceal circumstantial evidence of bias. Zuccarelli testified that, over the last five years as a floor broker, he has earned an average annual taxable income of approximately \$225,000. Nonetheless, he sought to minimize the stake that he has in the outcome of this proceeding, by suggesting that his continued registration had little economic value to him. This testimony rings as less than truthful . . . . For these reasons, and having observed Zuccarelli's demeanor, the Court accords no weight to Zuccarelli's expectably favorable self-assessment . . . .

*Id.* at 48,740 (footnotes omitted). The ALJ also focused on his interchange with Zuccarelli relating to whether there were any circumstances in which Zuccarelli would lie, as further evidence of his lack of credibility. *Id.* at 48,739-40.<sup>6</sup>

The ALJ gave little weight to the testimony of Hanemann and Klein, chiefly on the ground that they lacked intimate knowledge of Zuccarelli before his misconduct and thus could not testify reliably that he had changed for the better. *Id.* at 48,743-46. He also held that Minett's testimony regarding Zuccarelli's clean record since the 1993 incident failed to "substantially advanc[e] Zuccarelli's claim of fitness." *Id.* at 48,747.

## DISCUSSION

Zuccarelli raises four arguments on appeal: (1) he should have been allowed to present additional witnesses; (2) in any event the evidence he presented was sufficient to prove his rehabilitation; (3) the ALJ committed various "errors of logic" in his analysis; and (4) the ALJ was biased. The Division seeks affirmance.

*The Precluded Witnesses.* In determining whether Zuccarelli should have been permitted to present expert witnesses, and new lay witnesses, we look first to the scope of the remand. An inferior tribunal's latitude in accepting additional evidence and legal theories on

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<sup>6</sup>The ALJ himself recognized the difficulty of answering the question, noting: "[a]pparently sensing that a 'yes' answer to this question might be regarded as directly incriminating, while a 'no' answer might be viewed as not credible, Zuccarelli tried to evade answering." *Zuccarelli III*, ¶ 27,784 at 48,739.

remand is determined by the scope of the remand order.<sup>7</sup> In remanding, the Commission vacated the entire Initial Decision, leaving all issues undecided. It did not state specifically that Zuccarelli should proffer the testimony of any particular witness, or type of witness, or number of witnesses.<sup>8</sup> The Commission's order noted, however, that "the lack of proposed expert testimony was a factor in Zuccarelli's failure to demonstrate the need for a hearing in the present case" and that "the law has evolved" since the Initial Decision. *Zuccarelli II*, ¶ 27,597 at 47,833.

The ALJ ruled that Zuccarelli could amend his showing under Rule 3.60(b)(2)(ii), but could not supplement it, relying on the Commission's statement, "[i]f Zuccarelli chooses on remand to file an opposition to the summary disposition motion, *greater detail concerning the bases for the opinions of his lay witnesses* might entitle them to greater evidentiary weight." *Id.* at 47,835 (emphasis added). The ALJ, reading that statement literally, held on remand that Zuccarelli was limited to attempting to improve the showing he already had made. Thus, the

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<sup>7</sup>See *Heno v. Spring/United Management Co.*, 208 F.3d 847, 855 (10<sup>th</sup> Cir. 2000) (citation to supporting case omitted) (a reviewing court has considerable leeway to fashion the scope of a remand). "An 'inferior court has no power or authority to deviate from the mandate issued by an appellate court.'" *In re Wella A.G.*, 858 F.2d 725, 728 (Fed. Cir. 1988), quoting *Briggs v. Pennsylvania RR*, 334 U.S. 304, 306 (1948) (parallel citations and citation to additional authority omitted). "The rule is equally applicable to the duty of an administrative agency . . . to comply with the mandate issued by a reviewing court," *id.*

<sup>8</sup>Guidance offered by the Commission addressed Zuccarelli's showing under Rule 3.60(b)(2)(ii), in which he identified his witnesses, summarized their anticipated testimony, and gave a first-person affidavit attesting to his rehabilitation. The Commission said that the document failed to set forth the case for rehabilitation with sufficient specificity and detail. It held in part:

Neither the summary of their proposed testimony nor the letters that they submitted provided the sort of detailed, personal observations or recollections of concrete events from which one could reasonably conclude that Zuccarelli has undergone a change in direction since the time of his misconduct. . . . If Zuccarelli chooses on remand to file an opposition to the summary disposition motion, *greater detail concerning the bases for the opinions of his lay witnesses* might entitle them to greater evidentiary weight.

*Zuccarelli II*, ¶ 27,597 at 47,835.

ALJ refused to let Zuccarelli add experts or new lay witnesses.

The remand instruction could have been clearer: its essential intent to restart the prehearing process is not plain on the face of its decision. The ALJ's restrictive interpretation therefore was not clearly incompatible with the Commission's language. In the circumstances of this case, however, especially the developments in the law of rehabilitation, the ALJ's interpretation was too narrow. A broader and better reading of the Commission's instruction would be that Zuccarelli should have been permitted to file a new Rule 3.60(b)(2)(ii) statement.

Thus, without committing error, the ALJ nevertheless abused his discretion by hurrying the case to completion at the expense of allowing Zuccarelli to develop the record. *See In re Abrams*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,684 at 40,255 (CFTC May 4, 1993). The goal of decisional efficiency did not justify denying Zuccarelli a full, fair opportunity to make his case, especially since the Division would have suffered no prejudice had Zuccarelli been allowed to present new witnesses. The principle that expedition should be moderated by a fair opportunity to be heard has particular relevance here. The expert testimony Zuccarelli offered bore materially on his rehabilitation showing and may have been the key to his ability to meet his burden of persuasion.

The ALJ's abuse of discretion embraced his refusal to allow new lay witnesses as well as his rejection of the proposed expert witnesses. Sixteen months elapsed between the issuance of the Initial Decision and the remand order. Some realignment of the character witness list was not unreasonable, as relationships flourished or cooled, or witnesses' circumstances changed. Finally, the ALJ acted unreasonably in refusing to allow Zuccarelli to offer substitute witnesses when two of his original witnesses became unavailable shortly

before the hearing.

*Weighing the evidence.* As noted above, Zuccarelli argues that the evidence he presented was sufficient to prove his rehabilitation, and that the ALJ committed various “errors of logic” in his analysis. These two arguments are the same—variants of a request to the Commission to reweigh the evidence in Zuccarelli’s favor. “The CFTC is empowered by the APA and its own regulations to vacate an ALJ’s findings and conduct an independent review of the factual record.” *Lehoczky v. CFTC*, 125 F.3d 844 (2d. Cir. 1997), 1997 WL 606863 (citing authority).

Zuccarelli cannot prevail under Commission precedents on the showing he has made thus far. The record, however, has not been developed to the extent to which Zuccarelli was entitled, a circumstance necessitating a second remand.

On remand, we direct the ALJ not to discount wholly the weight accorded to the testimony of Hanemann and Klein on account of the fact that neither knew Zuccarelli except in passing before 1993, the year of his most recent disciplinary action for prearranged trading, and therefore could not address whether he had changed. Commission decisions in statutory disqualification cases should not be read to require such a bright-line rule for weighing witness testimony. The same principle shall apply to any new witness whom Zuccarelli may call. The ALJ shall consider the totality of the rehabilitation evidence in the record and determine whether, cumulatively, it demonstrates a change in direction on the part of Zuccarelli.<sup>9</sup>

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<sup>9</sup>In addition, in weighing the evidence on remand, the ALJ shall bear in mind the Commission’s recent holding that a character witness’s business or personal relationship with a respondent will not thereby render the witness’s evidence unreliable. *See In re Laken*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,458 at 51,494 n.41 (CFTC Feb. 2, 2001).

## CONCLUSION

The record establishes, and accordingly we hold, that Zuccarelli is subject to a statutory disqualification under Section 8a(3)(M) and is presumptively unfit to be registered. This case is remanded for a further hearing consistent with this opinion, which shall be limited to the issue of Zuccarelli's rehabilitation.<sup>10</sup>

Preparatory to the hearing, Zuccarelli may submit a new Rule 3.60(b)(2)(ii) statement naming a reasonable number of expert and non-expert witnesses. If Zuccarelli testifies a second time, his testimony may be limited to the period after the first hearing in this matter. The same rule applies to any other witness called by Zuccarelli who testified at the first hearing. The testimony of any witness who testifies a second time shall be weighed cumulatively with prior testimony. New witnesses are not subject to this restriction and may address any relevant period of Zuccarelli's conduct. The time period for measuring Zuccarelli's rehabilitation claim shall run from 1993, the time of the second prearranged trade, through the second hearing.

IT IS SO ORDERED.

By the Commission (Acting Chairman NEWSOME and Commissioners HOLUM, SPEARS, and ERICKSON).

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Catherine D. Dixon  
Assistant Secretary of the Commission  
Commodity Futures Trading Commission

Dated: September 7, 2001

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<sup>10</sup> Zuccarelli argues that the ALJ was biased against him, but has given no indication that the alleged bias stemmed from an extrajudicial source or that the ALJ demonstrated such a high degree of antagonism as to make fair judgment impossible. Accordingly, this argument fails. *Liteky v. U.S.*, 510 U.S. 540, 551-55 (1994); *Ferriola v. Kearsse-McNeill*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,172 (CFTC June 30, 2000); *Olson v. Ulmer*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,987 (CFTC Jan. 23, 1991).