UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70883 / November 15, 2013

Admin. Proc. File No. 3-15059

In the Matter of the Application of

EDWARD S. BROKAW

c/o Kevin T. Hoffman
Law Offices of Kevin T. Hoffman
151 Railroad Avenue
Greenwich, CT 06830

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDINGS

Conduct Inconsistent with Just and Equitable Principles of Trade

Causing Firm's Books and Records to Be Inaccurate

Former registered representative of member firm of registered securities association engaged in conduct inconsistent with just and equitable principles of trade by engaging in a manipulative scheme. Representative also caused member firm's books and records to be inaccurate. *Held*, FINRA's findings of violation and imposition of sanctions are *sustained*.

APPEARANCES:

Kevin T. Hoffman, for Edward S. Brokaw.

Robert L.D. Colby, Alan Lawhead, and *Jennifer C. Brooks*, for FINRA.

Appeal filed: October 3, 2012
Last brief received: January 17, 2013

I.

Edward S. Brokaw, a former registered representative of FINRA member Deutsche Bank Securities, Inc., appeals a FINRA decision, which found that he violated NASD Rule 2110 by engaging in conduct inconsistent with just and equitable principles of trade when he failed to conduct an adequate inquiry into a customer's trading instructions.[1] FINRA also found that Brokaw violated NASD Rules 2110 and 3110 in causing Deutsche Bank's books and records to be inaccurate by failing to ensure the completion of accurate order tickets.[2] For failing to observe just and equitable principles of trade, FINRA suspended Brokaw for one year and fined him $25,000; for causing his firm's books and records violations, FINRA imposed a concurrent suspension of thirty business days and an additional $5,000 fine.[3]

The charges against Brokaw are based on six unsolicited orders to sell shares of Monogram Biosciences, Inc. common stock that Brokaw facilitated for his client and longtime friend, hedge fund manager Kevin Tang, on three successive trading days in May 2006. During this time, Tang placed orders with Brokaw to sell 50,000 shares at the open of the market and another 50,000 at the close of each day on behalf of his hedge fund, Tang Capital Partners (the "Fund"). Tape-recorded conversations that Brokaw had with his sales assistants and the firm's traders show that Brokaw believed that Tang's orders, placed as they were to coincide with the

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1 On July 26, 2007, the Commission approved a proposed rule change that NASD filed seeking to amend its Certificate of Incorporation to reflect its name change to the Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of its member firm regulatory functions with NYSE Regulation, Inc. *See* Securities Exchange Act Release No. 56148, 2007 SEC LEXIS 1648 (July 26, 2007). Following the consolidation, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See* Exchange Act Release No. 58643 (Sept. 25, 2008), 73 Fed. Reg. 57,174 (Oct. 1, 2008). FINRA's disciplinary action was instituted after the consolidation of NASD and NYSE, but the conduct at issue took place before the consolidated rules took effect. Accordingly, NASD conduct rules apply and this opinion includes references to NASD.

2 NASD Conduct Rule 2110 requires members to observe "high standards of commercial honor and just and equitable principles of trade." NASD Rule 3110 requires member firms to maintain books and records as required by applicable law. NASD Rule 0115(a) makes NASD Rules 2110 and 3110 applicable with equal force to members and their associated persons. Under the Commission's "long-standing and judicially-recognized policy," a violation of another Commission or self-regulatory organization rule or regulation constitutes a violation of the rule prohibiting conduct inconsistent with just and equitable principles of trade. *Stephen G. Gluckman*, Exchange Act Release No. 41628, 54 SEC 175, 1999 SEC LEXIS 1395, at *22 (July 20, 1999); *see also, e.g.*, *Thomas W. Heath III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *12 n.8 (Jan. 9, 2009) (citing and quoting *Gluckman*), *petition denied*, 586 F.3d 122 (2d Cir. 2009).

3 *Dep't of Enforcement v. Edward S. Brokaw*, 2012 FINRA Discip. LEXIS 53 (Sept. 14, 2012).

beginning of a fifteen-day period used to calculate the price of certain derivative securities that both Tang and Brokaw held, were being placed to manipulate the price of those derivatives. The tapes further show that Brokaw then aggressively pressed the firm's traders to execute Tang's orders as directed and, in doing so, evidenced Brokaw's participation in a scheme to manipulate the market in Monogram's stock. Participation in a scheme to manipulate the market price of a security is fundamentally at odds with high standards of commercial honor and just and equitable principles of trade.[4]

Finally, because Brokaw's office prepared misleading booking tickets in connection with Tang's orders, instead of the required order tickets, Brokaw also caused the firm's books and records to be inaccurate. We explain these findings, which are based on an independent review of the record, below.

II.

Brokaw became registered as a general securities representative in 1983 and became associated with Deutsche Bank in 2001. Tang and Brokaw were longtime friends and had been colleagues at other brokerage firms. Tang's hedge fund was one of the largest accounts that Brokaw serviced. At the time relevant here, Tang's hedge fund held approximately 3.3 million shares of Monogram stock and a much larger position—approximately 18 million units—of contingent value rights, or CVRs (which are described in more detail below). Brokaw and his family also owned approximately 215,000 Monogram CVRs. It is Brokaw's handling of Tang's orders to sell Monogram stock (and the potential impact of those sales on the price of the CVRs) that is the subject of this appeal.

A. The contingent value rights that Tang and Brokaw owned would, up to a certain point, increase in value if Monogram's stock price decreased in value.

Monogram's CVRs traded on the open market and entitled a holder to receive a maximum payment of $0.88 depending on the volume weighted average price, or VWAP, of Monogram's stock during a fifteen-trading-day pricing period from May 19, 2006 through June 8, 2006. If the fifteen-day average VWAP for Monogram was $2.90 or higher at the end of the pricing period, Monogram's CVRs would be worth nothing. If the VWAP was below $2.90, however, the payout under the CVRs would increase one penny in value for every penny the VWAP fell below $2.90—but only until the VWAP dropped to $2.02, at which point the CVRs

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[4] *See Peter Martin Toczek*, Exchange Act Release No. 33176, 51 SEC 781, 1993 SEC LEXIS 3080, at *13 (Nov. 9, 1993) (finding that applicant "improperly influenced the prices on the [New York Stock] Exchange, thereby engaging in conduct inconsistent with just and equitable principles of trade").

would pay a maximum of $0.88 each.[5] Any further decrease in the VWAP below $2.02 caused no further increase to the CVRs' payout. Given the Fund's holdings of CVRs, this formula meant that each penny decrease in the VWAP between $2.90 and $2.02 would cause the fund's holdings of CVRs to increase in value by more than $181,000.[6] Tang testified that, if the CVRs were fully valued at $0.88 at the end of the pricing period, his fund would hold CVRs worth more than $16 million.

In the first half of 2006, the daily VWAP of Monogram's stock ranged from $1.37 to $2.27, but by late April and early May 2006, it hovered near the $1.60 mark. On May 8, 2006, eleven calendar days before the CVR pricing period began, Monogram announced that Pfizer, Inc. had agreed to invest $25 million in the company. On that news, the trading volume of Monogram stock more than doubled compared to the previous day, with the share price jumping from a VWAP of $1.65 on Friday, May 5, to $2.27 on Monday, May 8. In the eight trading days between Pfizer's announcement and the start of the pricing period, Monogram's VWAP remained above $2.10, with a VWAP of $2.24 on May 18, 2006, the last day before the CVR pricing period began.

B. Brokaw received orders from Tang on May 19 to sell 50,000 shares of Monogram stock at the open and close of the market.

On May 19, 2006, the first day of the CVR pricing period, Tang called Brokaw before the market opened and placed an order to sell 100,000 Monogram shares, with 50,000 shares to be sold near the open of the market and the remaining 50,000 to be sold near the close.[7] According to Brokaw, Tang informed him that he was not "price sensitive" and told him to sell the shares "quickly and aggressively."[8] These were the first orders to sell Monogram stock that Tang had placed with Deutsche Bank since October 2005, when he had sold 11,500 shares. Brokaw

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5 Monogram was required to pay the first $0.50 per CVR in cash but had the option to pay the balance (*i.e.*, up to another $0.38) in the form of Monogram stock. The company decided to redeem the CVRs entirely for cash, which the company did not announce until May 26, 2006.

6 Brokaw and his family, through their holdings of CVRs, stood to gain or lose approximately $2,150 for every penny decrease in the VWAP between $2.90 and $2.02, with a maximum value of almost $190,000 if the CVRs were fully valued at the end of the pricing period. Brokaw's personal holdings of CVRs represented more than $157,000 of that amount.

7 Tang testified that he had learned from experience that Monogram's stock had the most liquidity at the beginning and end of each day. This view was corroborated by the testimony of Thomas Lombardi, a registered representative at another FINRA member firm who was questioned by FINRA on the record. But there is no evidence that Tang ever provided such a justification or that Brokaw understood this to be true at the time he received Tang's orders.

8 Transcript ("Tr.") at 1376–77.

testified that Tang's order to sell 50,000 shares "was bigger than most" and that Tang had never before sold shares at the open and close.[9] Nor could Brokaw remember any other customer ever placing an order "in the morning and the night . . . simultaneously."[10]

Brokaw nevertheless called in Tang's order to Jennifer Watson, a Deutsche Bank trader, at 9:30 a.m. In doing so, Brokaw told Watson to sell Tang's order "as low as you want" and that, "if . . . you report this thing at one cent, that would be good, okay?"[11] When Watson replied that she could not sell the shares for a penny, Brokaw responded "[a]ll right, just get 50,000 done" and to "[j]ust sell it hard."[12] Watson relayed the order to Chad Messer, an equity trader who made a market in Monogram stock for Deutsche Bank. The firm sold Tang's 50,000 shares in increments over the course of about a minute, during which time the price of Monogram dropped from $2.06 to $1.94.

Brokaw again spoke with Watson later that afternoon and relayed Tang's order to sell a second block of 50,000 shares within five to ten minutes of the market's close. In doing so, Brokaw explained the way the CVRs were valued so that she would know "what the target price is."[13] As Brokaw told Watson during a conversation that was tape-recorded and is not in dispute, Tang's trades were part of a struggle between "good versus evil," in which the CVR holders were attempting to ensure that their investments paid maximum value:

> [Tang] wants [his order to sell executed] close to the close, and you did a great job hammering, and they all just want to hammer it again today to do the wake up call here. So what's happening, so you know what's happening, is there's these rights that are out there which are the [Monogram CVRs]. . . . And they start pricing off of the average over the next 15 days. . . . And he owns a ton of the rights, right. So and the math works that is the closer at 2.02 you get to, uh, the full value of the rights are realized at 2.02 on the stock . . . . Just so you know what the target price is [and] understand the game that's being played . . . .[14]

The firm filled Tang's end-of-the-day order in increments over ten minutes that ended at 3:58, at prices declining from $2.24 to $2.01. The 100,000 shares Tang's fund sold through

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9 *Id.* at 1583.

10 *Id.* at 1631.

11 Joint Exhibit ("JX") at 1.

12 *Id.* at 1–2.

13 *Id.* at 8–12.

14 *Id.*

Deutsche Bank accounted for 5% of the total volume of approximately 2 million shares that day.[15] The VWAP for the day was $2.08, and the Fund's shares sold at an average price of $2.00.

C. Brokaw received orders from Tang on May 22 to again sell 50,000 shares of Monogram stock at the open and close of the market.

The next trading day, May 22, Tang gave Brokaw another order to sell two blocks of 50,000 MGRM shares, again with one block each near the open and close, and again to sell them quickly and aggressively. One of Brokaw's assistants, William Ewing, relayed the order to trader David Zitman (the previous trading day's trader, Watson, had gone on maternity leave). During that telephone conversation, Ewing told Zitman that Tang wanted to sell Monogram's stock "hard" at the opening of the market and then began to explain that Tang "owns the rights . . . They're pricing the rights off the stock . . . ."[16] At that point, Ewing testified, Brokaw, who was listening to the call, signaled for Ewing to "knock it off" by swiping a hand across his throat.[17] Ewing therefore told Zitman, "Sorry, sorry, enough said, I'm not, that's, I'm not supposed to be going into that. Anyways, he's trying to, he wants to sell."[18]

Zitman entered the morning order into the firm's computer system to be executed by the equity trader. Zitman then called Brokaw to confirm the trading instructions. During that conversation, Zitman asked if he should "[t]ake the f[---]ing thing down (inaudible) a dollar?"[19] Brokaw replied, "Yeah, 50 cents, yes."[20] Zitman pressed, "He wants it to be done—and if I take the thing down to $1.50 and it bounces back to $2, he doesn't care?"[21] Brokaw confirmed, "No, right."[22] Tang's order was subsequently executed in increments at prices declining from $1.95 to $1.91.

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15 Tang was also selling Monogram shares for his fund through two other broker-dealers during the pricing period. He sold 200,000 shares through these brokers on May 19. His combined sales therefore accounted for 15% of the total Monogram volume that day.

16 JX at 23–24.

17 Tr. at 192.

18 JX at 23–24. Brokaw testified that he signaled to Ewing to end that line of conversation because he considered it inappropriate for a sales assistant to be discussing a client's strategies, and he wanted the order to be placed promptly.

19 *Id.* at 30.

20 *Id.*

21 *Id.*

22 *Id.*

Later that day, Zitman called Brokaw's office to confirm Tang's second order of the day and spoke to Ewing, who instructed Zitman to sell 50,000 shares of MGRM "as late as you can."[23] The trade, however, was not executed before the close of the market. The firm therefore filled the order by taking shares into inventory at the closing price of $1.89. This was erroneously reported to Brokaw as a trade that was completed in the market. The Fund's sales through Deutsche Bank on May 22 accounted for 4.2% of the total volume for the day.[24] The VWAP for the day was $1.96, and the Fund's shares sold at an average price of $1.91.

D. Brokaw received orders from Tang on May 23 to again sell 50,000 shares of Monogram stock at the open and close of the market.

Just before the market opened on the third day of the pricing period, May 23, Zitman called Brokaw's office to find out if Tang had placed another order to sell Monogram shares. Brokaw, who was already on the phone with Tang when Zitman called, confirmed Tang's order and relayed Tang's instructions to his partner, Mary Meyer, who then relayed them to Zitman: "Same order as yesterday."[25]

Zitman entered the order, which was filled within seconds of the market open at an average price of $1.88. Zitman called Brokaw to confirm the sales, and Brokaw told Zitman to sell another 50,000 at the close. At 3:50 p.m., Brokaw confirmed the order again with Zitman, telling him that Tang wanted him to execute the order "with a minute to go and spread it out a little bit . . . hit the bids . . . ."[26] This raised a concern for Zitman, who began the following exchange:

> Zitman: What, he's trying to mark the close?[27]
> Brokaw: Yeah.
> Zitman: You should, you should—he, he could f[---]ing be going away for a long time doing that.

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23 *Id.* at 32.

24 Together with the 205,900 shares Tang's hedge fund sold at two other brokers, the Fund's combined sales in Monogram stock accounted for 12.8% of the total volume that day.

25 JX at 43.

26 *Id.* at 47–48.

27 "Marking the close" is the manipulative practice of selling or purchasing securities near the end of the day to artificially decrease or increase the closing price of a security. *See SEC v. Masri*, 523 F. Supp. 2d 361, 369–70 (S.D.N.Y. 2007); *see also SEC v. Ficeto*, CV 11-1637-GHK, 2013 U.S. Dist. LEXIS 26223, at *25–26 (Feb. 7, 2013) (observing that marking the close is one of the "quintessential forms of market manipulation"); *Thomas C. Kocherhans*, Exchange Act Release No. 36556, 52 SEC 528, 1995 SEC LEXIS 3308, at *6 (Dec. 6, 1995) (defining "marking the close" as "the practice of attempting to influence the closing price of a stock by executing purchase or sale orders at or near the close of the market").

Brokaw: Really?
Zitman: Yeah. You can't mark the close. It's f[---]ing illegal.
Brokaw: Eh, I didn't think so.
Zitman: Yeah, f[---] it, I, no. I'm not marking the close for him.
Brokaw: No, no, no.
Zitman: I'm not giving up my f[---]ing license.
Brokaw: No, no, no, me neither. No, just sell 50 on the close.[28]

Tang's order was filled by the firm, which took the shares into its inventory at 4:11 p.m. at the day's closing price of $1.84. Monogram's VWAP for the day was $1.91, while the Fund's average selling price was $1.87. The Fund's sales of Monogram stock placed through Deutsche Bank that day accounted for approximately 3.5% of the company's total volume.[29]

E. Deutsche Bank refused to accept any more of Tang's orders to sell Monogram stock after firm personnel become concerned with Tang's orders.

Shortly after the market closed on May 23, Brokaw learned that the firm had executed Tang's orders by taking the shares into inventory rather than in the open market as Tang had requested. Brokaw called Zitman, who incorrectly told Brokaw that Tang had received an execution price of $1.89—better than the posted closing price.[30] Brokaw was not concerned with the price Tang received and stressed that "I need to know whether we were in the VWAP with the 50. That's all I need to know."[31] When Tang learned that Deutsche Bank had not executed his fund's order as he instructed, he complained to the firm, which reversed part of its purchase of Monogram shares.[32]

Concerned that Tang seemed uninterested in his execution price, while being very insistent about his trades being counted in the VWAP, Zitman raised the issue with the equity trader, Messer, who had executed Tang's order. Messer testified that he had a conversation with

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28 JX at 48.

29 Together with the 89,900 shares Tang's hedge fund sold through other brokers that day, the Fund's combined sales of Monogram stock accounted for 8.5% of the company's total volume that day.

30 On appeal, Brokaw attacks Zitman's credibility by, among other things, arguing that Zitman "lied about the execution of Mr. Tang's orders on May 23 being executed near the close when[,] in fact, they were not done until after the close by DBSI in its own inventory." Br. in Supp. of Pet. for Review at 18. But Zitman's credibility is not at issue here, because none of Zitman's testimony discussed in this opinion is disputed (*i.e.*, that he brought Tang's orders to the attention of other Deutsche Bank employees). Our opinion otherwise discusses recordings of Zitman's actual conversations, not his testimony about those conversations. *See, e.g.*, *supra* notes 19–22, 25–28, *infra* notes 37–44, and accompanying text.

31 JX at 58.

32 Because of that reversal, Tang's fund ultimately sold 50,000 shares in the market and 12,600 into Deutsche Bank inventory on May 23.

Brokaw about the trades, during which Brokaw expressed dissatisfaction that Messer had not sold all of Tang's order in the open market. Messer "didn't feel comfortable" about his conversation with Brokaw and therefore elevated the matter to a senior equity trader, William Matthews, who also questioned Brokaw about the rationale for Tang's trades.[33]

Matthews testified that Brokaw "appeared to be very angry about the way [Tang's] trade was executed," and that, "when I had the conversation with [Brokaw], I was trying to decide why it was, if the instructions were that [the trade] was on the closing price, which we did execute, why [Brokaw] would have a problem with us executing whatever way we want if we did what the instructions were."[34] Matthews explained that, after asking Brokaw about the compliance issues surrounding Tang's trades, Brokaw's anger "sort of died down," but that Matthews still "didn't feel comfortable, given the circumstances surrounding the pricing period."[35] Matthews took the matter to a member of the firm's compliance department, who, according to Matthews, "immediately just said, 'We're—It doesn't sound right. We're going to—I don't want you trading or transacting in Monogram with that client going forward.'"[36]

In a phone call the next day, Zitman asked Brokaw about his conversations the night before with Messer and Matthews regarding Tang's trades. According to tape recordings of that conversation, Brokaw responded that "they're a little worried about the way the orders are coming in, and . . . I said . . . I hear you, but you know what? This is the way this guy wants to trade."[37] Zitman expressed concern that the trades could nevertheless "be construed as a little bit suspect," to which Brokaw replied, "[Y]ou know what? It's a free country."[38] Zitman responded, "No, it's not. That's my issue. Someone could walk in here and say, hey, you have a pattern of selling the first minute and selling the last . . . minute."[39] When Brokaw replied, "So what?,"[40] Zitman explained that "there could be a compliance issue."[41] Brokaw then stated that he had told

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33 Tr. at 676.

34 *Id.* at 745.

35 *Id.* at 745–46.

36 *Id.* at 748.

37 JX at 64.

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

Tang to "look into that and make sure that there isn't [a compliance issue]."[42] Contrary to his earlier explanation to Watson that Tang's trades were designed to affect Monogram's VWAP during the pricing period, Brokaw now claimed to Zitman that Tang's trading "doesn't affect the VWAP at all."[43] When Zitman explained that Tang "could be marking the close unintentionally," Brokaw responded that Tang "doesn't want to do anything illegal" and that "this is how he's handling these orders."[44]

At his disciplinary hearing, Brokaw attempted to explain his conversation with Zitman, testifying that there were "enough conversations about marking the close and things like that, you know, [the issue of manipulation] came into my mind," but "[w]hat I was upset about was that . . . I had a 50,000 share trade that got busted . . . so from a commission paying point of view, I wanted the fifty."[45] Brokaw added that he "wasn't really familiar with what the issues were" and that, "[a]s far as I was concerned, taking a market order at the beginning of the day and at the end of the day, I didn't see anything wrong, from my limited knowledge, with that practice."[46] "[I]f there was something wrong," Brokaw continued, "I was hoping that Dave Zitman or, even better, Chad Messer or Billy Matthews called me up and said, Ned, this could be construed . . . as something that could be . . . a problem here, and . . . we're not going to accept the orders."[47] But, Brokaw testified, "I didn't hear any of that."[48] He nevertheless acknowledged that, as a securities professional, he was supposed to be alert to signs that his customers could be engaged in illegal conduct.[49]

By the end of the pricing period, Tang's hedge fund had sold its entire holding of Monogram stock. After the pricing period closed, the CVRs were valued at their maximum possible price of $0.88 per right, with Tang's hedge fund receiving more than $16.3 million from its holdings of CVRs and Brokaw and his family receiving approximately $189,000 from their holdings of CVRs.

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42 *Id.*

43 *Id.*

44 *Id.* at 65.

45 Tr. at 1610–11.

46 *Id.* at 1614.

47 *Id.*

48 *Id.*

49 *Id.* at 1615 ("I agree with the statement that we're supposed to, you know, be diligent and vigilant on activities that are suspicious.").

F. Tang's trades were inaccurately recorded on booking tickets instead of order tickets.

Exchange Act Rule 17a-3 requires, among other things, that brokers record the time an order was received from a customer.[50] That requirement includes the requirement that the records be accurate,[51] which applies "regardless of whether the information itself is mandated."[52] For trades such as the ones at issue here, where an order was placed with Brokaw rather than directly with the trading desk, Deutsche Bank's procedures required Brokaw to ensure that an order ticket was created to track the details of the trade. As one of the firm's branch managers, Kbynek Kozelsky, explained, such a ticket should have reflected the time Brokaw received the order from Tang, the time the order was forwarded to the trading desk, and the time the order was executed. Instead, Brokaw's assistant, Daniel Aliperti, prepared a single, so-called "booking ticket" for each day's trades. As Brokaw's other assistant, William Ewing, testified, a booking ticket is used when a client order is placed directly with the trading desk and "was kind of seen as a dummy ticket just to make sure that everything matched up."[53] By preparing such booking tickets for Tang's orders, Brokaw's office failed to record the times when Tang placed his orders or the time his orders were executed, inaccurately aggregated each day's transactions as a single sale of 100,000 shares, and inaccurately stated that Tang placed his orders directly with the trading desk.

Brokaw acknowledged at the hearing that there was "[n]o doubt in my mind that an order ticket should have been generated" for Tang's trades, but claimed that was not his job.[54] "My

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50 17 C.F.R. § 240.17a-3(a)(6) (specifying that the memorandum of each brokerage order shall show, among other requirements, "the time the order was received; the time of entry; the price at which executed; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer or, if a customer entered the order on an electronic system, a notation of that entry; and, to the extent feasible, the time of execution or cancellation").

51 *See Anthony A. Adonnino*, Exchange Act Release No. 48618, 56 SEC 1273, 2003 SEC LEXIS 2411, at *25 (Oct. 9, 2003) (stating that "[t]he requirement that records be kept [under Rule 17a-3] embodies the requirement that those records be true and accurate"), *aff'd*, 111 F. App'x 46 (2d Cir. 2004); *accord Fox & Co. Invs., Inc.*, Exchange Act Release No. 52697, 58 SEC 873, 2005 SEC LEXIS 2822, at *32 (Oct. 28, 2005) (finding that applicant "maintained materially inaccurate books and records in violation of Exchange Act Rule 17a-3 and NASD Conduct Rules 3110 and 2110").

52 *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Exchange Act Release No. 33367, 51 SEC 892, 1993 SEC LEXIS 3516, at *20 (Dec. 22, 1993) (citing *Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971) ("Although the Commission's rules did not specifically require that the executing brokers' names be put on the order tickets, that information was obviously material and important, and, even assuming no legal obligation to furnish the names, there was an obligation, upon voluntarily supplying that information, to be truthful.")).

53 Tr. at 201.

54 *Id.* at 1332.

job," Brokaw explained, "was not to look at order tickets and review order tickets. That was the function of my sales assistants."[55] Regarding the trade on May 19, for example, Brokaw testified, "I don't remember telling [my sales assistants] the particulars of the order, but we sit within [close] proximity of one another. And part of their function is to really look out after what I am doing and making sure those things are followed up on."[56] Brokaw also acknowledged that the booking tickets, as written, falsely stated that Tang had placed his orders directly with a trader, but again blamed his sales assistants, contending that it "was the sales practice in the office" to list orders as being placed directly with a trader, whether or not they actually had been.[57]

G. Deutsche Bank terminated Brokaw, and FINRA charged Brokaw with, among other things, market manipulation and books and records violations.

After conducting an investigation into the circumstances surrounding Tang's orders, Deutsche Bank terminated Brokaw for what it described as "questionable trading of one stock in [a] client's account."[58] When Brokaw met with his branch supervisors after being fired, Brokaw conceded that "[w]hat [he] did was stupid" and that "the tapes were bad."[59] But Brokaw did not offer an explanation for Tang's trading strategy or attempt to explain the taped conversations. Brokaw's assistant, Aliperti, had a conversation with Brokaw following Brokaw's termination, after which, Aliperti testified, he understood Brokaw to have told him that Tang's trades had been placed at the open and close of the market, during the pricing period, "to have an effect on the stock price."[60]

FINRA subsequently opened an investigation into Brokaw's conduct and eventually filed a three-cause complaint against him, charging Brokaw with (i) manipulating the price of Monogram on behalf of Tang or aiding and abetting Tang's manipulation in violation of federal antifraud provisions, Exchange Act Section 10(b) and Exchange Act Rule 10b-5, and NASD Rules 2120[61] and 2110; (ii) in the alternative to cause one, failing to make an adequate inquiry

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55 *Id.* at 1327.

56 *Id.* at 1331.

57 *Id.* at 1649.

58 Report, Edward S. Brokaw, CRD No. 1162997, at *17 (generated Oct. 15, 2013) (describing allegation related to termination from Deutsche Bank), *available at* http://www.finra.org/brokercheck.

59 Tr. at 846.

60 *Id.* at 307 ("Q: Did you understand [Brokaw] to be saying that the—that the intent was to drive the price somewhere? A: Yes.").

61 NASD Rule 2120 prohibits registered representatives from "effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

into Tang's trading in violation of NASD Rule 2110; and (iii) failing to ensure the accuracy of the order tickets associated with the trades at issue in violation of NASD Rules 3110 and 2110.

After a six-day hearing, a FINRA hearing panel found that Brokaw engaged in market manipulation by placing sell orders of Monogram stock at the open and close of the market for the purpose of increasing the value of Monogram's CVRs. The hearing panel found that "the tape recorded conversations [between Brokaw and traders] provided overwhelming evidence of [Brokaw's] intent to manipulate the market for MGRM shares."[62] Because the hearing panel found that Brokaw was primarily liable for violating the antifraud provisions, it dismissed the aiding and abetting allegations asserted in cause one of the complaint and the alternative failure to make an adequate inquiry asserted under cause two. The panel further found that Brokaw failed to ensure the accuracy of order tickets. The panel barred Brokaw for these violations.

Brokaw appealed that decision to the National Adjudicatory Council, which reversed the hearing panel's finding that Brokaw engaged in manipulation. Unlike the hearing panel, which did not find credible Tang's testimony about his reasons for the seemingly manipulative trades, the NAC credited Tang's testimony about his trades.[63] The NAC thus found that FINRA staff had "set forth insufficient evidence proving that [Tang's] transactions were manipulative."[64] The NAC further found that there was "no direct evidence" that Tang ordered Brokaw to drive down the price of Monogram's shares, that Brokaw had no discretion over Tang's orders, and that Brokaw did not know what Tang's orders would be until the day of the order.[65] Because of this, the NAC concluded, FINRA staff "did not prove by a preponderance of the evidence that Brokaw intended to manipulate [Monogram's] shares."[66]

The NAC nevertheless found that, because of Brokaw's familiarity with the CVRs, the timing and size of Tang's orders were "sufficiently suspicious to put Brokaw on notice that he might be participating in a market manipulation scheme."[67] The NAC concluded that Brokaw

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62 *Dep't of Enforcement v. Edward S. Brokaw*, 2010 FINRA Discip. LEXIS 34, at *34 (June 11, 2010).

63 Tang testified that he was bearish on Monogram's stock and sold his fund's approximately three million remaining shares by the end of the fifteen-day pricing period. As noted above, Tang further testified that he placed his trades at the open and close of the market because, in his experience, Monogram had the most liquidity at those times. *See supra* note 7.

64 *Brokaw*, 2012 FINRA Discip. LEXIS 53, at *44.

65 *Id.* at *41.

66 *Id.* at *45.

67 *Id.* at *48.

violated his ethical duty under Rule 2110 by failing to conduct an adequate inquiry into Tang's orders. The NAC also upheld the hearing panel's finding that Brokaw failed to ensure the accuracy of order tickets in violation of NASD Rules 3110 and 2110. The NAC imposed a one-year suspension and $25,000 fine for Brokaw's failure to inquire into Tang's orders and imposed a 30-day suspension and a $5,000 fine for causing his firm's books and records to be inaccurate.[68] This appeal followed.

III.

A. Brokaw violated Rule 2110's requirement to observe just and equitable principles of trade by engaging in a scheme to manipulate the market.

NASD Rule 2110 requires associated persons to adhere to "high standards of commercial honor and just and equitable principles of trade." This requirement "sets forth a standard intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace."[69] An associated person may be found liable under this rule for either engaging in unethical conduct or acting in bad faith.[70] Unethical conduct is defined as conduct that is "[n]ot in conformity with moral norms or standards of professional conduct."[71] "Bad faith" has been defined as "[d]ishonesty of belief or purpose."[72] Willful participation in a scheme to manipulate the price of a security is the type of unethical conduct the rule is aimed to address.

We agree with the NAC's conclusion that Brokaw violated Rule 2110. However, Brokaw's violations do not solely arise out of his purported "failure to inquire" about Tang's

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68 The NAC also affirmed the hearing panel's order of $13,207.85 in hearing costs.

69 *Daniel Joseph Alderman*, Exchange Act Release No. 35997, 52 SEC 366, 1995 SEC LEXIS 1823, at *7 (July 20, 1995); *see also Heath*, 2009 SEC LEXIS 14, at *13 (noting that Rule 2110 establishes broad ethical principles that focus on the "ethical implications of the [a]pplicant's conduct" (quoting *Timothy L. Burkes*, Exchange Act Release No. 32142, 51 SEC 356, 1993 SEC LEXIS 949, at *10 (Apr. 14, 1993), *petition denied*, 29 F.3d 630 (9th Cir. 1994) (Table))).

70 *Heath*, 2009 SEC LEXIS 14, at *13 (noting that "we have long applied a disjunctive 'bad faith or unethical conduct' standard to disciplinary action under the [just and equitable principles of trade] Rule"); *accord Robert E. Kauffman*, Exchange Act Release No. 33219, 51 SEC 838, 1993 SEC LEXIS 3163, at *4 n.5 (Nov. 18, 1993) (stating that, to find a violation of the just and equitable principles of trade, "[t]he most that is required is a finding of bad faith or unethical conduct").

71 *Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS.

72 *Id.*; *see also* BLACK'S LAW DICTIONARY 668 (6th ed. 1990) (defining bad faith as "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity").

trades. Rather, Brokaw's liability stems from his deliberate unethical acts in furtherance of his scheme to manipulate the Monogram stock price.

As we have noted previously, "[m]anipulation strikes at the heart of the pricing process on which all investors rely" and "attacks the very foundation and integrity of the free market system."[73] By telling Deutsche Bank traders to, among other things, hammer Tang's orders "as low as you want," including for as little as $0.01, as a way to maximize the CVRs' payout, and then responding "So what?" when a trader questioned those orders, Brokaw plainly failed to conform to either moral norms or standards of professional conduct.[74]

While such unethical conduct is all that is required to find a violation of Rule 2110, the tape-recorded conversations and circumstances surrounding Tang's orders show that Brokaw also acted in bad faith. Specifically, the taped conversations make clear that Brokaw was actively engaged in a scheme to manipulate Monogram's stock price, thus displaying a dishonesty of both belief and purpose.[75] For example, when instructing one of the firm's traders to sell Tang's

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[73] *Pagel, Inc.*, Exchange Act Release No. 22280, 48 SEC 223, 1985 SEC LEXIS 988, at *21 (Aug. 1, 1985) (finding that respondents manipulated the market for a security); *cf. Michael J. Markowski*, Exchange Act Release No. 43259, 54 SEC 830, 2000 SEC LEXIS 1860, at *17 (Sept. 7, 2000) (finding that respondents manipulated the price of a stock, while observing that "[m]anipulation strikes at the heart of the pricing process on which all investors rely. It attacks the very foundation and integrity of the free market system. Thus it runs counter to the basic objectives of the securities laws."), *aff'd*, 274 F.3d 525 (D.C. Cir. 2001).

[74] *Cf. Kirlin, Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *66–68 (Dec. 10, 2009) (finding that an applicant acted unethically, and thus inconsistently with just and equitable principles of trade in violation of Rule 2110, by facilitating manipulative transactions); *Robert J. Prager*, Exchange Act Release No. 51974, 2005 SEC LEXIS 1558, at *33–34 (July 6, 2005) (finding that, by making no inquiries into "an abundance of warning signs that should have aroused his suspicions," registered representative aided and abetted a market manipulation and thus violated just and equitable principles of trade); *John Montelbano*, Exchange Act Release No. 47227, 2003 SEC LEXIS 153, at *21 (Jan. 22, 2003) (finding that applicants "played important roles in carrying out [a] manipulative scheme," and thus violated Rule 2110 and the antifraud provisions, where applicants "energized the sales force [of their firm] to sell speculative [securities] at inflated price levels"); *Randolph K. Pace*, Exchange Act Release No. 32153, 51 SEC 361, 1993 SEC LEXIS 960, at *22–23 (Apr. 15, 1993) (finding that, by arranging for his firm to profit from a manipulative scheme, applicant violated just and equitable principles of trade).

We also note that our cases do not require, as Brokaw asserts, a finding that he breached a duty to either a client or his firm as a predicate for finding a violation of Rule 2110. *Cf. Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (per curiam) (affirming Commission's finding that registered person violated the just and equitable principles of trade by misappropriating a club's funds and misrepresenting to the club's treasurer the location of those funds); *James A. Goetz*, Exchange Act Release No. 39796, 53 SEC 472, 1998 SEC LEXIS 499, at *11 n.9 (Mar. 25, 1998) (concluding that it was not "an injudicious exercise of NASD's discretion" to find that petitioner engaged in unethical conduct, and thus violated the just and equitable principles of trade, despite the fact that "no customer was involved and no customer's funds were jeopardized or misappropriated").

[75] *Cf. Peter W. Schellenbach*, Exchange Act Release No. 30030, 50 SEC 798, 1991 SEC LEXIS 2718, at *7 (Dec. 4, 1991) (finding that a deliberate intent to conceal his firm's net capital position from regulators established bad faith and thus violated the just and equitable principles of trade), *aff'd*, 989 F.2d 907 (7th Cir. 1993).

Monogram shares "as low as you want"[76] and "to hammer it,"[77] Brokaw explained that there was a "target price" for maximizing the value of Tang's CVR holdings and how that price was derived.[78] As Brokaw described it, "the game that's being played for the next 15 days [is] good versus evil," with the good being the CVR holders (who had an interest in dropping the price of the stock to $2.02 or below to maximize their payout under the CVRs) and the evil being Monogram (which had an interest in raising the price of its stock above $2.90 to avoid paying out the CVRs).[79] Brokaw's assistant Aliperti also testified that, after speaking with Brokaw about why Tang's trades were being placed at the open and close, Aliperti understood Brokaw as saying that "the intent [of Tang's trades] was to drive the price."[80]

Brokaw argues against liability by noting that the NAC credited Tang's testimony regarding his trading strategy and concluded that enforcement staff had failed to provide sufficient evidence to find that Tang's trades were manipulative. But those findings are in no way inconsistent with our finding that Brokaw believed that Tang was seeking to manipulate Monogram's stock price and that, by aggressively pushing Tang's orders, the stock price would drop, to the benefit of Tang and Brokaw. The record contains no evidence that Tang conveyed his purportedly legitimate motives for his suspicious trading activity to Brokaw or that Brokaw was otherwise aware of those reasons. To the contrary, the taped conversations, as noted above, make clear that Brokaw *believed* Tang was engaged in a scheme to manipulate the market and, more importantly, that Brokaw himself participated in such a scheme by taking steps to manipulate the price of Monogram's stock.[81]

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76 JX at 1.

77 *Id.* at 8.

78 *Id.* at 10.

79 *Id.* at 10–11.

80 Tr. at 307. Brokaw tries to explain away his incriminating statements by essentially arguing that he did not mean what he said. Brokaw testified, for example, that he was simply "being very glib" when he told Watson to place Tang's orders to sell for $0.01 and that he said "a lot of stupid things on these taped lines [that] obviously I am paying for." Tr. at 1379, 1397–98. On appeal, Brokaw concedes that some of his language "was colorful, and even colloquial at times," but argues that "the evidence is clear that the sales-traders understood all of the Tang orders to be market orders and no false information was ever injected into the marketplace." Br. in Supp. of Pet. for Review at 21. None of these attempted explanations alters our conclusion that the tape-recorded conversations and circumstances surrounding Tang's orders show that Brokaw, at the time of Tang's orders, was engaged in a manipulative scheme to maximize the CVRs' payout.

81 The NAC's decision to credit Tang's testimony is not entitled to any deference, because, unlike a credibility finding by an initial fact finder, the NAC did not base its decision on a first-hand observation of Tang's demeanor. *Cf. Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *7 (July 1, 2008) (noting that "the credibility determination of the initial decisionmaker is entitled to considerable weight and deference, since it is

Brokaw claims he had no motive to engage in a manipulation because he had sold some of his CVRs before the pricing period began (which he claims he would not have done had he been seeking to maximize any illicit profits). He similarly argues that the value of his CVR holdings could have increased by only another $48,321.90 given their value at the start of the pricing period and that his commission on Tang's orders was only $500.[82] But Brokaw had ample other motivation to participate in a scheme to drive down Monogram's stock price. Tang was Brokaw's friend and one of his largest and most important clients. Brokaw thus derived an obvious personal benefit from keeping Tang satisfied and retaining his business by increasing the value of Tang's CVRs.[83] The more than $48,000 in additional gain that Brokaw could earn from his holdings of CVRs (and the more than $10,000 his family additionally stood to earn) after the start of the pricing period was also not insignificant, regardless of the commissions Brokaw received from Tang's orders. And there was no guarantee that the value of Brokaw's CVRs would not decrease during the pricing period. Depending on how Monogram's stock price performed, Brokaw's personal holdings of CVRs could have been worth anywhere between $0 and approximately $157,000—not an insignificant difference. Nor did it even matter whether Brokaw ultimately profited from these trades, as we have held that "the absence of profit from manipulative conduct does not negate that conduct."[84]

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based on hearing the witnesses' testimony and observing their demeanor" (quoting *John R. Butzen*, Exchange Act Release No. 36512, 52 SEC 512, 1995 SEC LEXIS 3228, at *5 n.7 (Nov. 27, 1995))). We also note that, as the hearing panel recognized, Tang's claim that he was simply trying to unload Monogram shares is belied by his insistence that Deutsche Bank reverse the May 23 sale that the firm took into its own inventory, rather than sold into the market, because the transaction would not have affected the stock's VWAP. *See Brokaw*, 2010 FINRA Discip. LEXIS 34, at *32.

82 Reply Br. in Supp. of Pet. for Review at 7 (noting that Brokaw earned $500 in commissions on Tang's trades, compared to more than $931,446 in gross commissions Brokaw earned that year). The approximately $48,000 Brokaw argues he stood to gain from the CVRs is the maximum net gain he could have earned if his personal holdings of CVRs became fully valued at $0.88, using the CVRs' $0.61 value at the start of the pricing period as the comparison point. As noted earlier, Brokaw and his family's combined holdings of CVRs, if fully valued, would be worth almost $190,000 (of which more than $157,000 represented Brokaw's personal holdings).

83 *Cf. Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *56 (Feb. 1, 2010) (noting that registered representative "derived a personal benefit by keeping [her] clients . . . happy and retaining their business").

84 *Howard R. Perles*, Exchange Act Release No. 45691, 55 SEC 686, 707 n.31 (Apr. 4, 2002) (rejecting applicants' claim that they "lacked economic or other motivation to participate or assist in a manipulative scheme"); *accord R.B. Webster Inv., Inc.*, Exchange Act Release No. 34659, 1994 SEC LEXIS 2868, at *13 (Sept. 13, 1994) (concluding that applicants intended to manipulate despite applicants' claim that they lost money on the transactions at issue—and thus acted inconsistently with just and equitable principles of trade—by observing that the Commission "d[id] not believe that a financial loss demonstrates that Applicants had no intent to manipulate").

Nor is proof of motive required where there is direct evidence of manipulative intent. It is only where direct evidence of scienter is lacking that circumstantial evidence of intent, such as motive, becomes critical. *See, e.g.*, *Renovitch v. Kaufman*, 905 F.2d 1040, 1046 (7th Cir. 1990) (noting that where there is no "direct evidence of

We are also not persuaded by Brokaw's contention that he and Tang had no reason to manipulate Monogram's stock price because the CVRs, according to Brokaw, were likely to be fully valued at the end of the pricing period regardless of whether manipulation took place. In particular, Brokaw notes that Monogram's VWAP was at or below $2.02 (the price at which the CVRs' payout would reach its maximum value) on seventy-two out of ninety-five days in 2006 leading up to the pricing period and that Monogram's stock price had fallen to a low of $1.90 on the first day of the pricing period. But, as noted above, Monogram's VWAP had been above $2.10 all eight trading days immediately preceding the start of the pricing period (*i.e.*, after Pfizer's announcement about investing in Monogram), thus giving Tang and Brokaw an obvious incentive to put downward pressure on Monogram's stock price at the start of the pricing period.

Brokaw asserts that Tang also had no reason to drive the price of Monogram's stock below $2.02 per share because of his fund's underlying holdings. At that price, Brokaw argues, the CVRs' payout would have reached its maximum value—while the Fund's underlying holding of stock would continue to lose approximately $29,500 for each additional $0.01 drop in price. As it turned out, though, Tang liquidated his fund's entire holdings of Monogram stock by the end of the pricing period (as he testified he intended to do), which meant that Tang did not have, or intend to have, a long-term exposure to a depressed stock price.[85] Brokaw similarly argues that Tang would not have wanted to drive the price of Monogram's stock below $2.02 because Monogram had a contractual right to satisfy some of its CVR payout obligations by issuing stock. The exercise of that right, Brokaw explains, would have increased the Fund's holdings of Monogram stock, "thus increasing its potential exposure to a depressed and falling stock price."[86] But according to the CVR agreement, any shares issued by the company under the agreement were to be valued, for purposes of calculating the number of shares issued, using the same 15-day VWAP as used for valuing the underlying CVR payments. Consequently, the more that Tang and Brokaw could artificially suppress Monogram's stock price during the pricing period, the

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scienter, the court should examine whether there is indirect evidence of scienter" including examining whether there was motive to commit fraud); *Stumpf v. Garvey*, No. 03-CV-1352-PB, 02-MDL-1335-PB, 2005 U.S. Dist. LEXIS 19154, at *35 (D.N.H. Sept. 2, 2005) ("[S]cienter can be established through direct evidence" or by "'combin[ing] various facts and circumstances indicating fraudulent intent—including those demonstrating motive and opportunity.'" (quoting *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir. 2002))); *Kas v. Caterpillar, Inc.*, 815 F. Supp. 1158, 1163 (C.D. Ill. 1992) ("If the plaintiff fails to produce direct evidence, the court should examine whether there is indirect evidence of scienter by considering whether the fraud was in the interest of the defendants or whether the defendants had a motive to defraud."). Ample such evidence of scienter exists here, including taped statements by Brokaw evidencing his intent to influence Monogram's stock price.

85 Even though the VWAP remained below $2.02 throughout the pricing period, Tang agreed with a hearing panelist's observation that the Monogram transactions were still "economically successful." Tr. at 1277.

86 Br. in Supp. of Pet. for Review at 9.

more shares that Tang and Brokaw would receive if the company decided to exercise its right to issue such shares, thus increasing the chances that Tang and Brokaw would realize a profit from any subsequent increase in the stock's price.[87]

Brokaw nonetheless claims that the facts here are "starkly different" than those in other cases in which we have found violations of Rule 2110 for conduct related to market manipulation.[88] Brokaw contends that, unlike in other cases, the trades at issue here were "done at prevailing market prices with minimal impact on the stock's price."[89] This argument misstates our case law regarding just and equitable principles of trade and manipulation. Although successfully impacting a stock's price may be evidence of manipulation, we have observed that "whether a respondent has adequate market power to successfully manipulate a market is not dispositive of whether the respondent engaged in a manipulative scheme."[90] Instead, where one engages in conduct designed to influence a stock's price (as Brokaw engaged in here), we have recognized that an applicant's "scienter renders his interference with the market illegal."[91] In

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87 Brokaw also did not share Tang's disincentive to sell below $2.02, as Brokaw held only CVRs during the pricing period. Because of this, it is possible that, rather than seeking to further a manipulative scheme by Tang, Brokaw was furthering his own manipulative scheme by taking advantage of his client's desire to sell Monogram stock (*i.e.*, Brokaw could have been relaying Tang's orders even more aggressively than Tang intended, with the sole aim to increase the value of Brokaw's own CVR holdings).

88 Reply Br. in Supp. of Pet. for Review at 17.

89 *Id.* at 18. For example, Brokaw contends that the timing of the trades (at the open and close of the market) did not affect the CVRs' value because that value was based on a fifteen-day average of Monogram's stock price (*i.e.*, the VWAP) and thus did not depend on the stock price at any particular time of day. He similarly argues that the volume of shares sold in each trade was insufficient to affect the stock's price. But we note that Brokaw pushed traders to aggressively sell stock at the open and close of the market over several trading days, which could cause a long-term, aggregate impact on Monogram's VWAP. *Cf. Kocherhans*, 1995 SEC LEXIS 3308, at *7 (finding that placing orders at the end of the trading day with the purpose of influencing a stock's reported price constitutes a manipulative practice because the placing of such orders "convey[s] false information to the market as to the stock's price level and therefore as to the demand for the stock free of manipulative influences").

90 *Amr Elgindy*, Exchange Act Release No. 49389, 2004 SEC LEXIS 555, at * (Mar. 10, 2004) (finding that the record contained insufficient evidence of a manipulative scheme in that instance, but nevertheless agreeing with the NASD that "[s]uccess is not a prerequisite for a finding of manipulation "); *see also Kuehnert v. Texstar Corp.*, 412 F.2d 700, 704 (5th Cir. 1969) (observing that the definition of a manipulative device is "broad enough to encompass conduct irrespective of its outcome"); *SEC v. Marsi*, 523 F. Supp. 2d 361, 372 n.17 (S.D.N.Y. 2007) (noting that "a transaction entered with manipulative intent distorts the functioning of the market and sends a false message to its participants" and rejecting "defendant's proposed *per se* rule that open-market activity cannot be considered manipulative based solely on manipulative intent"); *SEC v. Mandaci*, No. 00-Civ-6635, 2004 U.S. Dist. LEXIS 19143, at *33 (S.D.N.Y. Sept. 27, 2004) (stating that "it is not necessary for the SEC to establish that he successfully manipulated the stock prices in order for it to succeed on its claims"); *SEC v. Martino*, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003) (observing that "[a]n attempted manipulation is as actionable as a successful one"), *aff'd*, 94 F. App'x 871 (2d Cir. 2004).

91 *Kirlin*, 2009 SEC LEXIS 4168, at *57; *see also Markowski v. SEC*, 274 F.3d 525, 528–29 (D.C. Cir. 2001) (rejecting the argument that manipulation required fictitious transactions and concluding that the Commission's

other words, if someone intends to manipulate the market for a security and engages in action that furthers that intent (even if the manipulation ultimately is unsuccessful), that person has engaged in illegal market manipulation.

Nor does Brokaw accurately characterize our previous cases as involving greater involvement by the registered person in a manipulative scheme. Brokaw claims that, unlike in other cases, "there was no evidence that [Brokaw] ever caused any false information to be injected into the marketplace regarding MGRM"[92] and he "was merely communicating a client's market orders to his firm's sales-traders . . . to execute the orders at the market and to act expeditiously in accordance with Mr. Tang's instructions."[93] To find him liable under such circumstances, Brokaw argues, would effectively make him a "gatekeeper . . . judg[ing] the legitimacy of [Tang's] orders"[94] and thus "create new obligations for registered representatives well beyond what is legally required."[95] These arguments misrepresent Brokaw's obligations and conduct.

Although Brokaw may have had an obligation to make "every reasonable effort" to execute Tang's orders "promptly and fully" when he accepted them, he was under no obligation to accept his customer's order in the first place—particularly where he believed those orders to be part of a manipulative scheme.[96] Moreover, Brokaw did more than simply communicate a customer's market orders. He instead pushed the firm's traders to "hammer" the stock for as little as one penny. Brokaw even explained to a trader the motivation for doing so: by lowering Monogram's stock price, the trades would increase the value of Monogram's CVRs—going so far as to describe the trades as a battle of "good versus evil." Brokaw then expressed concern when Deutsche Bank took some of Tang's sell order into inventory (rather than selling it into the market), meaning that the transaction would not affect the stock's VWAP, despite the fact that he had been told (albeit incorrectly) that those orders had received a better execution price than the posted closing price. Brokaw also attempted to conceal the true nature of the orders by indicating

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interpretation of Exchange Act Section 10(b) was reasonable in light of "Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose").

92 Reply Br. in Supp. of Pet. for Review at 21.

93 *Id.* at 14.

94 *Id.* at 24.

95 *Id.* at 3.

96 *Cf. Bateman Eichler*, Exchange Act Release No. 18401, 47 SEC 692, 1982 SEC LEXIS 2485, at *5 (Jan. 8, 1982) ("A dealer, of course, is under no obligation to accept market orders for customers. However, when it does, it must make every reasonable effort to execute them promptly and fully.").

to one of his assistants to stop talking when the assistant began to explain the manipulative intent behind the trades and by failing to ensure that the firm completed accurate order tickets. Intentionally putting in orders to impact a stock price, while also obscuring the nature of those orders, to further a manipulative scheme can in no way be construed as consistent with just and equitable principles of trade.[97] Nor, as we previously held, does our finding that Brokaw's conduct was inconsistent with just and equitable principles of trade require an accompanying finding that his conduct also amounted to a specific antifraud violation.[98]

Finally, Brokaw argues that he discharged his ethical obligations here, by "highlight[ing] the situation and educat[ing] the sales-trader, Jenner Watson, who was responsible for getting Mr. Tang's orders executed, about the pricing period involving MGRM and the CVRs as well as the likely selling pressure."[99] But nothing in Brokaw's taped conversations with Watson, nor anything else in the record, suggests any effort to question or otherwise raise a concern about Tang's orders. To the contrary, Brokaw made clear that he had no interest in questioning them. Brokaw praised Watson for "hammering" Monogram's stock and pushed her to continue doing so. On the second day of the pricing period, when a new trader replaced Watson and the pattern of Tang's orders was becoming more suspicious, Brokaw told his sales assistant to "knock it off" when the assistant began explaining the CVRs to the trading desk.[100] And when part of Tang's trade was reversed on the third day of trading and Brokaw was finally confronted with the prospect that Tang's trades "could be construed as a little bit suspect," Brokaw responded: "It's a free country"[101] and "So what?"[102] Only when told directly that "there could be a compliance issue" did Brokaw claim that he had taken some action, asserting that he had "told [Tang] to look into that and make sure that there isn't."[103] Even then, Brokaw testified, "[w]hat [he] was upset about" was that he would no longer receive a full commission.[104]

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97 *See supra* notes 74–80 and accompanying text.

98 *Toczek*, 1993 SEC LEXIS 3080, at *13 n.14 (finding that applicant violated just and equitable principles of trade by improperly influencing the price of securities despite the Commission's setting aside a finding that the same conduct also violated the antifraud provisions of the Exchange Act and rejecting applicant's argument that "to find that he engaged in conduct inconsistent with just and equitable principles of trade we must find that he also violated a specific statutory provision or regulation").

99 Reply Br. in Supp. of Pet. for Review at 4.

100 Tr. at 192.

101 JX at 64.

102 *Id.*

103 *Id.* On appeal, Brokaw does not mention this claim of having told Tang to look into whether there was a compliance issue, and, regardless, such a vague, unsupported claim of having asked Tang to make sure he is not

It is telling that, in stark contrast to Brokaw's aggressive efforts to unquestioningly facilitate Tang's orders, Deutsche Bank almost immediately put a hold on any further trades by Tang in Monogram stock when the firm's compliance department learned about the circumstances surrounding those trades. Despite acknowledging that, as a securities professional, he was obligated to be alert to signs that his customers could be engaged in illegal conduct, Brokaw intentionally ignored this obligation in order to further a manipulative scheme. As the NAC found, this indifference to his obligation to question Tang's trading was, in its own right, inconsistent with just and equitable principles of trade.[105]

Brokaw thus cannot avoid liability by blaming his colleagues for his misconduct. Brokaw testified that "if there was something wrong" with Tang's orders, he simply hoped that someone else at the firm would have "called [him] up and said, Ned, this could be construed . . . as something that could be . . . a problem here, and . . . we're not going to accept the orders."[106] Because he "didn't hear any of that," he continued to make sure that the firm was fulfilling Tang's

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doing anything improper does not negate the finding that Brokaw believed that Tang's orders were manipulative when he placed them; nor would such an action constitute an adequate inquiry into the circumstance surrounding Tang's suspicious orders.

[104] Tr. at 1610–11.

[105] Given the suspicious circumstances surrounding Tang's orders, we believe that the NAC was justified in concluding that Brokaw's failure to investigate Tang's suspicious trades was itself sufficient to support a finding that he violated Rule 2110. *See Prager*, 2005 SEC LEXIS 1558, at *33 (finding registered representative violated Rule 2110 by continuing to execute trades despite being "confronted with an abundance of warning signs that should have aroused his suspicions and caused him to question [his customer's] trading"); *cf. Piper, Jaffray & Hopwood Inc. v. Ladin*, 399 F. Supp. 292, 298–99 (D. Iowa 1975) (stating that "[b]rokers are required to meet relatively strict requirements in entering their profession and they thereby gain the advantage and exclusive privilege of trading in the national securities market on behalf of a wide range of investors"). While Brokaw contends that Tang's orders represented only a small percentage of the overall market, Tang's orders were not insignificant, were larger than most orders he placed with Brokaw, and were unusually timed at the open and close of the market. Those factors, combined with Brokaw's knowledge that someone like Tang, who held CVRs, could be motivated to manipulate Monogram's stock price, plainly were sufficient to put Brokaw on notice that such an effort could be taking place. *Cf. In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 533–35 & n.133 (S.D.N.Y. 2008) (observing that manipulation can be signaled by "anything that distinguishes a transaction made for legitimate economic purposes from an attempted manipulation" and that "marking the close" by purchasing or selling shares near the close of the market is one such sign of a manipulative practice); *SEC v. Schiffer*, 97-CIV-5853, 1998 U.S. Dist. LEXIS 8579, at *30 (S.D.N.Y. June 11, 1998) (finding that the Commission had established a *prima facie* case that Schiffer violated the antifraud provisions of the securities laws by marking the close); *Richard D. Chema*, Exchange Act Release No. 40719, 53 SEC 1049, 1998 SEC LEXIS 2592, at *13–14 (Nov. 30, 1998) (finding that respondent engaged in "patently manipulative" conduct in violation of the securities laws by "artificially influencing JML's price level at the end of the day" by purchasing shares in the last ten minutes of the trading day and thus "intentionally distort[ing] the stock's market price, conveying false information to investors and the market"). We thus find that Brokaw's failure to investigate the presence of "red flags" of possible misconduct provides an alternate basis for liability under Rule 2110.

[106] Tr. at 1614.

orders.[107] Yet, as we have long held, a registered person "has responsibility for his own or her own actions and cannot blame others for [his or her] own failings."[108] The record also contains evidence that Brokaw attempted to conceal the true nature of Tang's orders (and thus frustrate his colleagues' ability to monitor his compliance with appropriate laws and regulations) by telling one of his assistants to stop explaining the reasons behind the trades and by failing to ensure that the firm completed accurate order tickets describing those orders. Brokaw cannot pass the blame to others for his own unethical behavior.[109]

*** * * ***

Brokaw also presents several more generalized arguments about why we should reverse FINRA's findings. He complains, for instance, that FINRA engaged in overzealous prosecution when informing him (through what is known as a Wells Notice) that it had made a preliminary determination to recommend bringing a disciplinary action against him. Brokaw contends that FINRA accused him of instructing one of his sales assistants to fill out trade tickets incorrectly despite the fact that his sales assistant had testified on the record that this was not the case. FINRA's Wells process, however, is discretionary and gives potential respondents an opportunity to discuss the facts and law and to explain why formal charges are not appropriate.[110] Given that FINRA subsequently modified its allegations before filing its complaint against Brokaw, FINRA's procedures in this matter seem to have worked as intended, and we find no evidence of improper conduct by FINRA.

Brokaw similarly argues that, throughout these proceedings, FINRA "acted as if it was 'a given' that Mr. Tang had been attempting to manipulate the price of MGRM to maximize his profit on the MGRM CVRs."[111] Because of this, Brokaw argues, FINRA failed to credit Tang's

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107 *Id.*

108 *Philip L. Spartis*, Exchange Act Release No. 64489, 2011 SEC LEXIS 1693, at *34 (May 13, 2011) (quoting *Justine Susan Fischer*, Exchange Act Release No. 40335, 53 SEC 734, 1998 SEC LEXIS 1763, at *14 n.4 (Aug. 19, 1998)).

109 We are likewise not persuaded by Brokaw's argument that other brokers, at other firms, handled similar orders for Tang or that other fund managers set up hedged positions involving both Monogram common stock and Monogram CVRs. Such activities by other people neither explains nor excuses Brokaw's aggressive furthering of a manipulative scheme. Nor does a regulator's decision not to prosecute others mean that misconduct has not taken place. *Cf. infra* note 147 (noting that an agency's decision not to prosecute is a decision "generally committed to an agency's absolute discretion").

110 *See FINRA Regulatory Notice 09-17*, 2009 FINRA LEXIS 45, at *5–6 (Mar. 2009) (explaining FINRA's Wells process); *NASD Notice to Members 97-55*, 1997 NASD LEXIS 77, at *14 n.6 (Aug. 1997) (stating that the Wells process "is discretionary with the staff and is not a right or policy").

111 Br. in Supp. of Pet. for Review at 5.

"extensive testimony" about "his legitimate trading strategy based on a legitimate economic purpose."[112] But we have found no evidence that Brokaw knew of Tang's purportedly legitimate reasons for his suspicious trading activity, and, in any event, Tang's trading strategy is not relevant to our finding that Brokaw took his own steps, with his own motivations, to further a manipulative scheme.[113] Nor do we find evidence that FINRA's decision was somehow biased or unfair, and "our *de novo* review of the evidence cures whatever bias, if any, that may have existed."[114]

B. Brokaw violated Rule 3110 by causing the firm's books and records to be incomplete and inaccurate.

NASD Conduct Rule 3110 requires that FINRA member firms keep books and records as prescribed by Exchange Act Rule 17a-3.[115] As noted above, Rule 17a-3 requires, among other things, that broker-dealers record the time that an order was received from a customer.[116] This obligation to maintain certain records also includes the requirement that such records be accurate.[117] As we have explained, access to "basic source documents and transaction records"[118] is "a keystone of the surveillance of brokers and dealers by [Commission] staff and by the securities industry's self-regulatory bodies."[119] The recordkeeping requirements of the securities

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112 *Id.*

113 *See, e.g., supra* text accompanying note 81.

114 *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *75–76 (May 27, 2011). Brokaw also takes several exceptions to findings in the hearing panel decision, but "it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action . . . which is subject to Commission review." *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *21 n.17 (Nov. 8, 2006). Brokaw's exceptions to the panel's decision are therefore moot.

115 *See supra* note 50 (citing requirements of Exchange Act Rule 17a-3).

116 *See supra* note 50 and accompanying text.

117 *See supra* notes 51–52 and accompanying text.

118 *Statement Regarding the Maintenance of Current Books and Records by Brokers and Dealers*, Exchange Act Release No. 10756, 1974 SEC LEXIS 3290, at *3 (Apr. 26, 1974).

119 *Edward J. Mawod & Co.*, Exchange Act Release No. 13512, 46 SEC 865, 1977 SEC LEXIS 1811, at *16 n.39 (May 6, 1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979); *see also Comm'n Guidance to Broker-Dealers on the Use of Electronic Storage Media Under the Electronic Signatures in Global and Nat'l Commerce Act of 2000 with Respect to Rule 17a-4(f)*, Exchange Act Release No. 44238, 2001 SEC LEXIS 2761, at *7 (May 1, 2001) (noting that "preserved records are the primary means of monitoring compliance with applicable securities laws, including antifraud provisions and financial responsibility standards").

laws are therefore "fundamental requirements imposed on those who wish to engage in the securities business."[120]

Brokaw incorrectly argues that NASD Rule 3110 imposes no duty on him, as an associated person, for his firm's compliance with recordkeeping requirements. As noted above, the requirements of NASD Rule 3110, as well as all other NASD rules, are applicable to both FINRA members and all persons associated with FINRA members by virtue of NASD Rule 0115, which provides that "these Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules."[121] Because of this, FINRA member firms and their associated persons must create and keep memoranda of all brokerage orders and any instructions given or received for the purchase or sale of securities. Indeed, Deutsche Bank's own internal manual also required client advisors (such as Brokaw) to "fully and accurately complete all applicable sections of each order ticket immediately upon receipt of an order."[122]

It is largely undisputed that Brokaw failed to fulfill these obligations. Brokaw does not dispute that, by failing to complete an order ticket as should have been done, his office created a record that failed to record the times when Tang placed his orders or the times his orders were executed, inaccurately aggregated each day's morning and afternoon orders into a single order, and inaccurately indicated that Tang placed his orders directly with the traders. Brokaw instead argues that FINRA failed to give proper weight to his long-standing practice of delegating the creation of order tickets to his assistants and that Deutsche Bank "had accepted this practice throughout his entire career there."[123] As Brokaw's branch manager testified, however, the responsibility for the accuracy of order tickets remained with the broker even if he delegated the task to his assistant.[124] That some information related to Tang's trades was reflected elsewhere in

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120 *Mark James Hankoff*, Exchange Act Release No. 24390, 48 SEC 705, 1987 SEC LEXIS 1964, at *9 (Apr. 24, 1987).

121 *See supra* note 2; *see also North Woodward Fin. Corp.*, Exchange Act Release No. 60505, 2009 SEC LEXIS 2796, at *23 & n.30 (Aug. 19, 2009) (finding applicant, who was firm's principal and financial and operations principal, liable for violating NASD Rule 3110 even though applicant, as an individual, could not be found liable for violating Exchange Act Rule 17a-3, which by its terms applies only to broker-dealers).

122 FINRA Exhibit 25B at 85; *see also supra* note 52 (noting that the requirement to keep accurate records applies regardless of whether the information entered is itself mandated).

123 Br. in Supp. of Pet. for Review at 23.

124 *Cf. Marc N. Geman*, Exchange Act Release No. 43963, 54 SEC 1226, 2001 SEC LEXIS 282, at *65–67 (Feb. 14, 2001) (rejecting officer's claim that he could not be responsible for firm's failure to memorialize the times of certain trades on order tickets because he had delegated responsibility for those tickets to someone else), *aff'd*, 334 F.3d 1183, 1195 (11th Cir. 2003).

Deutsche Bank's recordkeeping system does not alter the fact that the order tickets, for which Brokaw was responsible, were not completed as required and that the booking tickets, which were created instead, were misleading.[125]

Brokaw repeatedly testified that he did essentially nothing to ensure that the tickets were prepared correctly, and we have long held that "conduct that reflects negatively on an applicant's ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade."[126] As discussed above, Brokaw also effectively obscured the true nature of the manipulative scheme by failing to ensure that tickets were prepared correctly. We accordingly find that Brokaw violated NASD Rules 3110 and 2110.[127]

IV.

Pursuant to Exchange Act Section 19(e)(2), we will sustain FINRA's sanction unless we find, having due regard for the public interest and the protection of investors, that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition.[128] FINRA suspended Brokaw from associating with any FINRA member firm in all capacities for one year and imposed on him a $25,000 fine for the violation of just and equitable principles of trade and concurrently suspended him for thirty business days and fined him an additional $5,000 for the books and records violations. We sustain these sanctions because, as explained

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125 *Cf. Eugene N. Owns*, Exchange Act Release No. 7370, 42 SEC 149, 1964 SEC LEXIS 540, at *4 (July 16, 1964) (finding violations of books and records requirement by observing that "[t]he fact that certain of the data required in such records might have been derived from other records maintained by registrant did not obviate the need for full compliance with [books and records] requirements"); *Associated Sec. Corp.*, Exchange Act Release No. 6315, 40 SEC 10, 1960 SEC LEXIS 337, at *20–21 (July 12, 1960) (finding violation of books and records requirements where "basic data could be derived from other records maintained by registrant" by noting that "[t]he efficacy of [the books and records requirements] would be materially diminished if persons in charge of the records could take it upon themselves to decide . . . that compliance with some of those requirements is not necessary"), *aff'd*, 293 F.2d 738 (10th Cir. 1961).

126 *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22 (Aug. 22, 2008). Brokaw's violation of Rule 3110 also caused him to violate Rule 2110. *See supra* note 2.

127 *See Fox & Co.*, 2005 SEC LEXIS 2822, at *32 (finding that entering incorrect information in documents constituted a violation of NASD Rules 3110 and 2110); *John F. Lebens*, Exchange Act Release No. 36691, 52 SEC 606, 1996 SEC LEXIS 91, at *5 (Jan. 5, 1996) (finding that broker violated just and equitable principles of trade rule by improperly allocating losing personal trades to proprietary accounts of his firm, which had lax internal controls, and noting that "[i]t is important that broker-dealers conduct their business operations with regularity and that their records accurately reflect those operations; it is unethical conduct for their employees to take advantage of loose internal controls to prevent achievement of these principles").

128 15 U.S.C. § 78s(e)(2). Exchange Act § 19(e)(2) permits us to cancel, reduce, or remit a FINRA sanction, but does not authorize us to increase the sanction. *Id.*; *see also Gregory W. Gray*, Exchange Act Release No. 60361, 2009 SEC LEXIS 2554, at *39 n.41 (July 22, 2009) (noting that the Exchange Act does not authorize the Commission to increase an SRO disciplinary sanction).

below, we believe that they are neither excessive nor oppressive in light of Brokaw's violative conduct and that they will serve the public interest and protect investors.[129]

A. FINRA's imposition of a one-year suspension and $25,000 fine for Brokaw's violation of just and equitable principles of trade is not excessive or oppressive.

FINRA's decision to suspend and fine Brokaw for his Rule 2110 violation is consistent with FINRA's Sanction Guidelines.[130] Because the Guidelines contain no specific guideline applicable to Brokaw's violation of just and equitable principles of trade, FINRA appropriately relied on, and gave proper weight to, the Guidelines' Principal Considerations in Determining Sanctions, which are applicable to all violations.[131] In doing so, FINRA reasonably found several factors to be aggravating. FINRA found, for example, that Tang's six orders were "significant in size and notably larger than the orders [Tang] usually placed with Brokaw."[132] FINRA also noted that Brokaw not only earned commissions on Tang's trades but also profited indirectly from the value of the CVRs that he and his family held, which the NAC reasonably concluded "clouded his ability to conduct a discerning inquiry into [Tang's] trades."[133] Brokaw disputes that he was motivated by any profit, arguing that he earned less than $500 in commissions on Tang's trades (out of more than $931,446 in gross commissions Brokaw earned that year); that he and his family had held the CVRs for a long time; and that he had sold some of his and his family's CVRs before the pricing period began. Brokaw testified at the hearing, however, that he was concerned about his commission and was upset when the firm unwound Tang's trade because he would not get his full commission. And regardless of whether Brokaw sold any CVRs before the pricing period, he and his family also still owned other CVRs during the pricing period. The

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129 Brokaw does not claim, and the record does not show, that FINRA's action imposes an unnecessary or inappropriate burden on competition.

130 FINRA promulgated the Sanction Guidelines to achieve greater consistency, uniformity, and fairness in its sanctions. Although the Guidelines do not bind our consideration of the sanctions, they serve as a benchmark for our review under Exchange Act Section 19(e)(2). *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *18 n.27 (Dec. 22, 2008).

131 *See* FINRA Sanction Guidelines ("Guidelines"), at 2–7 (setting forth a non-exhaustive list of factors that should be considered), available at http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf; *see also Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *33 (Jan. 6, 2012) (finding that, where "[t]he Guidelines contain no specific recommendation for the conduct at issue[,] . . . FINRA properly considered the Guidelines' Principal Considerations in Determining Sanctions applicable to all violations").

132 *Brokaw*, 2012 FINRA Discip. LEXIS 53, at *58 (citing Guidelines, at 7 (Principal Consideration No. 18) (directing adjudicators to consider "[t]he number, size and character of the transactions at issue")).

133 *Id.* (citing Guidelines, at 7 (Principal Consideration No. 17) (directing adjudicators to consider "[w]hether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain")).

length of time that he and his family had held those CVRs did not alter the fact that those holdings became worth approximately $189,000 because of what occurred during the pricing period.

Perhaps the most aggravating factor is the nature of Brokaw's misconduct. Manipulation, we have repeatedly noted, is one of the most serious securities offenses,[134] and contrary to Brokaw's claim that there was no proof of intentional wrongdoing, the record plainly shows that Brokaw intentionally facilitated orders in an effort to manipulate the market. This intentional misconduct raises serious questions about Brokaw's commitment to the high ethical standards required of associated persons.[135] While Brokaw asserts that there was no injury to the investing public, manipulation is an offense that is "perpetrated not merely on particular customers but on the entire market."[136] And his willingness to participate in a manipulative scheme reflects a disturbing disregard for the integrity of the market in which he was effecting transactions. Moreover, "[t]he absence of . . . customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally."[137]

Nor do we find Brokaw's misconduct to be mitigated by his claim that he "provided full cooperation to all regulatory agencies."[138] Such cooperation was required of Brokaw as an associated person.[139] And, although the Guidelines provide that an associated person's

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134 *Kirlin*, 2009 SEC LEXIS 4168, at *85 (quoting *Montelbano*, 2003 SEC LEXIS 153, at *49 (noting that "there are few, if any, more serious offenses than manipulation")); *Markowski*, 2000 SEC LEXIS 1860, at *17 (holding that deliberate manipulation of the market is "serious" misconduct that "strikes at the heart of the pricing process on which all investors rely" and "runs counter to the basic objectives of the securities laws").

135 *Cf. Conrad P. Seghers*, Investment Advisers Act Release No. 2656, 2007 SEC LEXIS 2238, at *28 (Sept. 26, 2007) (noting that the securities industry "presents continual opportunities for dishonesty and abuse"), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008); Guidelines, at 7 (Principal Consideration No. 13) (directing adjudicators to consider "[w]hether the respondent's misconduct was the result of an intentional act, recklessness or negligence").

136 *Montelbano*, 2003 SEC LEXIS 153, at *49 (affirming bars and fines of up to $50,000 for applicants' roles in a manipulative scheme); *see also Michael B. Jawitz*, Exchange Act Release No. 44357, 55 SEC 188, 2001 SEC LEXIS 1042, at *26 (May 29, 2001) (noting that "[m]arket participants, in making investment decisions, rely on the market as an independent pricing mechanism").

137 *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *26 & n.25 (Feb. 24, 2012) (internal quotations omitted); *accord PAZ Sec. Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *17 (Apr. 11, 2008) (holding that applicants' failures to comply with NASD rule "are not mitigated because those failures did not, in themselves, produce a monetary benefit to Applicants or result in injury to the investing public"), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *Coastline Fin., Inc.*, Exchange Act Release No. 41989, 54 SEC 388, 1999 SEC LEXIS 2124, at *15–16 (Oct. 7, 1999) (rejecting absence of customer harm as a mitigating factor for sanctions). Here, as noted above, Brokaw and his family both profited from the CVRs.

138 Br. in Supp. of Pet. for Review at 25.

139 *Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *28–29 n.25 (Nov. 4, 2009) (finding that associated person's cooperation with an NASD investigation "was consistent with the

"substantial assistance to FINRA" during an investigation is generally mitigating,[140] the record contains no evidence suggesting that Brokaw's cooperation rose to this level. We also do not find mitigating Brokaw's claims that he advised Watson of the CVR pricing period "to ensure both the sales traders and the equity traders were fully informed."[141] Brokaw's conversation with Watson indicates that Brokaw not only believed that Tang may have been trying to manipulate the market, but that Brokaw himself was engaged in such a scheme.

Brokaw also asks the Commission to consider what he claims have been "tremendous personal losses" that he has suffered by losing his employment in the securities industry (thus losing deferred compensation from the firm), not being able to have worked in the securities industry for more than two years, and incurring "significant legal expenses that have been unreimbursed to date."[142] We recognize that Brokaw has endured some hardships, but they are all a direct result of his deliberate misconduct.[143] Brokaw's continued effort to blame others for his regulatory failures also indicates that, despite any hardships he has suffered, including his termination from Deutsche Bank, he still does not appreciate his responsibilities as a registered person. Given the seriousness of Brokaw's misconduct, we thus find that FINRA's imposition of a one-year suspension and $25,000 fine was entirely reasonable despite his claimed hardships.

Brokaw contends that he suffered further hardship by "enduring [FINRA's] false charge that he instructed his sales assistants to put false information on the order tickets from the Wells Notice for over one year."[144] As noted above, however, a FINRA Wells Notice is a step in a discretionary process that gives potential respondents an opportunity to explain why formal charges are not appropriate—a process that appears to have worked here since FINRA subsequently dropped the allegation at issue before filing its complaint against Brokaw. We do not find Brokaw's vague assertion that he has had to respond to state regulators "as a result" of

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responsibility he agreed to fulfill when he became an associated person and does not constitute substantial assistance"); *Keyes*, 2006 SEC LEXIS 2631, at *23 (rejecting argument that lesser sanction was justified because applicant cooperated with NASD in its investigation by noting that "when Keyes registered with NASD he agreed to abide by its rules, which are unequivocal with respect to the obligation to cooperate with NASD, and compliance with this obligation is not a mitigating factor").

140 Guidelines, at 7 (Principal Consideration No. 12).

141 Br. in Supp. of Pet. for Review at 25.

142 *Id.*

143 *Cf. Craig*, 2008 SEC LEXIS 2844, at *27 ("We also do not consider mitigating the economic disadvantages Craig alleges he suffered because they are a result of his misconduct."); *Hans N. Beerbaum*, Exchange Act Release No. 55731, 2007 SEC LEXIS 971, at *20 (May 9, 2007) (finding that applicant's claims of "great economic hardship" as a result of sanctions were not mitigating).

144 Br. in Supp. of Pet. for Review at 25.

FINRA's allegation to be mitigating. FINRA's underlying investigation was a direct result of his deliberate misconduct. Given the circumstances surrounding Tang's trades, and Brokaw's role in them, it was also entirely foreseeable and reasonable that various regulators might want to investigate, and cooperating with regulatory investigations is part of the responsibility he agreed to fulfill as an associated person.[145]

Also unavailing are Brokaw's assertions that the sanctions are unfair because FINRA did not prosecute another representative at another firm, who also traded Monogram shares for Tang during the pricing period. It is well recognized "that the appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding."[146] Nor are we persuaded by Brokaw's assertion that FINRA's sanctions are inconsistent with either the NAC's finding that Tang's trades were legitimate or with our decision not to pursue an enforcement action against Tang. As noted above, the NAC never concluded that Tang's trades were legitimate; it found only that FINRA enforcement staff failed to introduce sufficient evidence to support an allegation that Tang engaged in market manipulation. And our decision not to bring an enforcement action cannot be construed as a determination that Tang's trades were legal.[147] Moreover, whether Tang was engaged in manipulation is not determinative as to whether—at the time of the trades—Brokaw himself was furthering a scheme to manipulate Monogram's stock price.[148]

We are also not persuaded by Brokaw's attempts to deflect blame for his own actions. Brokaw argues that Deutsche Bank offered no training for brokers on "marking the open" or "marking the close"; that "he justifiably relied upon sales traders to ensure that client orders were executed by the equity traders properly"; and that he advised trader Watson of the CVR pricing period "to ensure both the sales traders and the equity traders were fully informed."[149] He further

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145 *See supra* notes 138–140 and accompanying text (discussing obligation to cooperate with investigations).

146 *Christopher J. Benz*, Exchange Act Release No. 38440, 52 SEC 1280, 1997 SEC LEXIS 672, at *14 (Mar. 26, 1997), *petition denied*, 168 F.3d 478 (3d Cir. 1998); *see also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) (stating that "employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases").

147 *Cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (stating that an agency's decision "not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"); *Chicago Bd. of Trade v. SEC*, 883 F.2d 525, 530–31 (7th Cir. 1989) (noting that a "[r]efusal to prosecute is a classic illustration of a decision committed to agency discretion" and that "decisions about the best use of the staff's time are for the prosecutor's judgment" (citations omitted)).

148 *See, e.g., supra* text accompanying note 81.

149 Br. in Supp. of Pet. for Review at 25.

contends that Deutsche Bank's sales-traders were the "true gatekeepers of the firm"[150] and that he expected them to inform him if something was inappropriate. None of these arguments is mitigating here. Brokaw, like all securities industry professionals, "must take responsibility for compliance" with regulatory responsibilities and "cannot be excused for lack of knowledge, understanding or appreciation of" those requirements.[151] If anything, Brokaw's repeated attempts to blame others for these deliberate failures calls into question whether he appreciates the seriousness of his misconduct and his responsibility as a registered person to comply with high standards of commercial honor.[152] Moreover, by telling one of his assistants to stop explaining the true nature of Tang's orders and by failing to ensure that accurate order tickets describing those orders were completed, Brokaw frustrated the firm's ability to monitor his regulatory compliance.[153] All of this weighs against imposition of a lesser sanction.

We further find that Brokaw's lack of prior disciplinary history does not weigh in favor of a lesser sanction. As we have repeatedly stated, a "lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional."[154] Although the NAC reasonably

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150 *Id.* at 21.

151 *Guang Lu*, Exchange Act Release No. 51047, 58 SEC 43, 2005 SEC LEXIS 117, at *22 (Jan. 14, 2005) (rejecting applicant's defense that firm's president advised against complying with disclosure requirements), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006); *see also John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *54 (Feb. 10, 2012) (rejecting applicant's attempt to "lay part of the blame for her lack of disclosure on what she believes is the branch's lax review of correspondence" by "reiterate[ing] that applicants cannot shift to others the responsibility for their own compliance with applicable rules"); *Craig*, 2008 SEC LEXIS 2844, at *15 (noting that a representative "cannot shift his responsibility to comply with NASD rules to his firm").

152 *Cf. Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *64 (Nov. 9, 2012) (finding that applicant's "persistent attempts to deflect blame onto others . . . suggests that he is likely to engage in similar misconduct in the future"), *appeal filed*, No. 13-31 (2d Cir. Jan. 8, 2013); *Craig*, 2008 SEC LEXIS 2844, at *22 (finding that applicant's "failure to take responsibility for his conduct makes recurrence more likely"); *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at *44 (Nov. 8, 2006) (finding aggravating for purposes of sanctions that applicant repeatedly blamed others for his violative conduct), *aff'd*, 304 F. App'x 883 (D.C. Cir. 2008); *Robert Tretiak*, Exchange Act Release No. 47534, 56 SEC 209, 2003 SEC LEXIS 653, at *43–44 (Mar. 19, 2003) (finding that applicant's argument that his misconduct was excusable "indicate[s] to us that he fails to appreciate the seriousness of his misconduct and his own responsibility, as a securities principal and industry participant, for his compliance with essential regulatory requirements that serve to protect public investors"); *Clyde J. Bruff*, Exchange Act Release No. 40583, 53 SEC 880, 1998 SEC LEXIS 2266, at *17 (Oct. 21, 1998) (finding respondent's "attempts to shift blame are additional indicia of his failure to take responsibility for his actions").

153 Guidelines, at 6 (Principal Considerations in Determining Sanctions, No. 10) (directing adjudicators to consider "[w]hether the respondent attempted to conceal his or her misconduct or to lull inactivity, mislead, deceive or intimidate a customer . . . or . . . the member firm with which he or she is/was associated").

154 *Keyes*, 2006 SEC LEXIS 2631, at *23; *see also, e.g.*, *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (stating that a "[l]ack of a disciplinary history is not a mitigating factor" because, as a registered person, appellant

concluded that "Brokaw's actions in this case were not otherwise reflective of his unblemished 23-year career in the securities industry," we agree with the NAC that, on balance, the factors surrounding Brokaw's misconduct strongly support imposition of a one-year suspension and a $25,000 fine.

Therefore, contrary to Brokaw's claims that the sanctions imposed are unduly harsh and severe, we find, for the reasons above, that the sanctions imposed are well within the appropriate range, will serve to impress upon Brokaw the importance of his responsibilities as a registered person, and will deter him and others within the securities profession from engaging in such misconduct.

B. FINRA's imposition of a thirty-business-day suspension and $5,000 fine for Brokaw's failure to comply with the books and records requirements is not excessive or oppressive.

FINRA's imposition of a thirty-day suspension and $5,000 fine falls squarely within the recommended ranges set forth in the Sanction Guidelines for books and records violations.[155] The order tickets that Brokaw and his office failed to create were "essential documents," which permitted Deutsche Bank and regulators to review market activity in order to protect investors.[156] As the firm's branch administrative manager and compliance officer testified, Deutsche Bank utilized order tickets in its surveillance functions and to facilitate correct billing and posting of orders to a customer's account. Without order tickets for Tang's trades, Deutsche Bank was less able to fulfill these functions. And although some information related to Tang's orders was accurately reflected in Deutsche Bank's transaction history report, the NAC correctly concluded that those records did not lessen Brokaw's responsibility to ensure that an order ticket was completed at the time of Tang's orders.[157] By failing to ensure that order tickets were created

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"was required to comply with the NASD's high standards of conduct at all times"); *John B. Busacca III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *64–65 n.77 (Nov. 12, 2010) (finding that lack of disciplinary history was not a mitigating factor), *aff'd*, 449 F. App'x 886 (11th Cir. 2011).

155 *See* FINRA Sanction Guidelines, at 29 (recommending a fine of $1,000 to $10,000 and suspension of an individual for up to thirty business days and, in egregious cases, a fine of $10,000 to $100,000 and a suspension of up to a two years or a bar).

156 *Brokaw*, 2012 FINRA Discip. LEXIS 53, at *60; *see also Richard G. Strauss*, Exchange Act Release No. 31222, 50 SEC 1316, 1992 SEC LEXIS 2402, at *4 n.5 (Sept. 22, 1992) (noting that "[o]rder tickets play an important role in the recording and settlement of a brokerage firm's transactions"); *Mawod*, 1977 SEC LEXIS 1811, at *16 n.39 (observing that accurate books and records are the "keystone of the surveillance of broker dealers").

157 *See supra* note 125 and accompanying text (noting that the fact that some information related to Tang's trades was reflected correctly elsewhere in Deutsche Bank's recordkeeping system does not excuse Brokaw's failure to ensure the creation of accurate order tickets).

when he received Tang's orders, Brokaw thus undermined the accuracy of Deutsche Bank's records.

Compounding the seriousness of Brokaw's books and records failures was the fact that the booking tickets that Brokaw's office prepared in lieu of the order tickets further obfuscated the true nature of Tang's trades by misleadingly aggregating each day's morning and afternoon orders into a single order. These booking tickets also inaccurately reflected that Tang placed his orders directly with the traders and failed to record the times when Tang placed his orders or the time his orders were executed. As the NAC correctly found, this happened for every one of Tang's six orders and "serves to aggravate sanctions [by showing] that Brokaw's failure was not an isolated incident."[158] And, by earning commissions on these trades, Brokaw profited from his underlying books and records failures.[159]

Also aggravating is Brokaw's consistent attempt to blame others, including Deutsche Bank staff and his sales assistants, for his own books and records failures. Brokaw testified that it was not his job "to look at order tickets and review order tickets. That was the function of my sales assistants."[160] Brokaw further claims that it was Deutsche Bank's established practice to allow sales assistants or sales traders to complete order tickets. Regardless of whether the firm allowed this practice, it did not relieve Brokaw of his responsibility for ensuring that his sales assistants or sales traders were completing order tickets accurately.[161] Nor does the firm's acceptance of sales assistants' entering order tickets explain why Brokaw's assistants instead completed misleading booking tickets. Brokaw's attempt to blame others during the course of

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158 *Brokaw*, 2012 FINRA Discip. LEXIS 53, at *61; *see* Guidelines, at 7 (Principal Consideration No. 8) (directing adjudicators to consider "[w]hether the respondent engaged in numerous acts and/or a pattern of misconduct").

159 *See* Guidelines, at 7 (Principal Consideration No. 17) (directing adjudicators to consider "[w]hether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain").

160 Tr. at 1327.

161 *See Charles E. Kautz*, Exchange Act Release No. 37072, 52 SEC 730, 1996 SEC LEXIS 994, at *16 (Apr. 5, 1996) (rejecting argument that respondent's "was an accepted practice at his Firm and approved by his supervisor"); *Michael G. Keselica*, Exchange Act Release No. 34929, 52 SEC 33, 1994 SEC LEXIS 4242, at *11 (Nov. 3, 1994) (stating that "attempts to blame others for his misconduct . . . demonstrate that [respondent] fails to understand the seriousness of . . . violations").

this disciplinary action is further evidence that he fails to appreciate his responsibilities and the high standards required of registered persons.[162] We therefore find that Brokaw's repeated failure to document Tang's orders in firm records and continued failure to take responsibility for that failure strongly supports FINRA's imposition of a thirty-business-day suspension and $5,000 fine.

An appropriate order will issue.[163]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN and PIWOWAR).

Elizabeth M. Murphy
Secretary

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162 *See supra* note 152 (citing cases).

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70883 / November 15, 2013

Admin. Proc. File No. 3-15059

In the Matter of the Application of

EDWARD S. BROKAW

c/o Kevin T. Hoffman
Law Offices of Kevin T. Hoffman
151 Railroad Avenue
Greenwich, CT 06830

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by FINRA against Edward S. Brokaw is sustained.

By the Commission.

Elizabeth M. Murphy
Secretary