BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Edward S. Brokaw

For Review of Disciplinary Action

Taken by

FINRA

File No. 3-15059

BRIEF OF FINRA IN OPPOSITION TO APPLICATION FOR REVIEW

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January 4, 2013

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I. INTRODUCTION

This case involves Applicant Edward S. Brokaw's ("Brokaw") breach of his ethical duty as a registered representative to investigate suspicious customer trading instructions and of his responsibility to ensure the accuracy of the associated customer order tickets. On three successive trading days, Brokaw placed 50,000 share sell orders of a biotech stock at the open and close of the market for a hedge fund manager named Kevin Tang ("Tang"), one of Brokaw's biggest and most important customers. Brokaw's trading for Tang occurred during the pricing period for a derivative security that both Tang and Brokaw owned. Brokaw clearly understood the valuation process taking place. Brokaw also knew that Tang held a sizable position that he was liquidating rapidly during this period to maximize profits and that Tang's trading during this period deviated from his past practices on several fronts. In the face of these red flags, Brokaw

placed Tang's orders without confirming that they had a legitimate purpose. Brokaw also prepared no order tickets for Tang's sales. As a result, Tang's sales were inaccurately recorded in the records of Brokaw's firm. The National Adjudicatory Council ("NAC") held that Brokaw acted unethically when he failed to inquire diligently into Tang's trading instructions and caused his firm's books and records to be inaccurate.

Consistent with the FINRA Sanction Guidelines ("Guidelines"), the NAC suspended Brokaw for one year from association with any member firm in any capacity and fined him $30,000 for this misconduct. FINRA's sanctions are fully warranted. Brokaw disregarded the obvious red flags that should have sparked a further inquiry on his part. Brokaw chose instead to blindly follow the directions of Tang, a customer who made him "a lot of money." (RP 10684.)[1] Brokaw then evaded a critical component of firm supervision when he neither prepared order tickets for Tang's sales himself nor ensured that his sales assistants prepared them on his behalf. Because the record fully establishes the NAC's findings and supports the sanctions imposed, the Commission should dismiss Brokaw's application for review.

II. FACTUAL BACKGROUND

A. Brokaw and His Relationship with Tang

Brokaw first registered as a general securities representative in 1983. (RP 7797.) Brokaw's misconduct at issue here occurred while he was associated with Deutsche Bank Securities, Inc. ("Deutsche Bank" or the "Firm") in 2006. (RP 7790.) Deutsche Bank terminated Brokaw on June 28, 2006, as a result of his questionable trading for Tang. (RP 7790.) Brokaw has not been associated with a FINRA member firm since June 2010.

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[1] "RP" refers to the page numbers in the certified record of this case filed with the Commission.

As Brokaw acknowledged, Tang was one of his biggest customers at Deutsche Bank and was very important to his business. (RP 7319-20.) Brokaw first met Tang when the two worked together at Alex Brown & Sons, Inc. (RP 7087, 7101, 7468.) At that time, Tang worked as a research analyst focusing on the biotech sector. (RP 7087, 7101, 7137, 7468.) After leaving Alex Brown, Tang formed Tang Capital Partners ("the Fund"), a hedge fund that invested in biotech securities. (RP 6829-30.) Tang used brokers at various firms, in addition to Brokaw and Deutsche Bank, to execute trades for the Fund. (RP 6832-33, 7318.)

B. Monogram Biosciences, Inc. and the Pricing Period

Centrally at issue here is the trading that Brokaw did on Tang's behalf in Monogram Biosciences, Inc. ("MGRM"), on May 19, 2006, through May 23, 2006. MGRM was formed in 2004 when ACLARA BioSciences, Inc. ("ACLARA") and ViroLogic, Inc. merged. (RP 6844, 8681.) Under the terms of the merger, each outstanding share of ACLARA common stock was exchanged for 1.7 shares of MGRM common stock and 1.7 MGRM contingent value rights ("CVR"). (RP 7204, 8708; ViroLogic, Inc. Form 10-K, at 49–50 (Dec. 31, 2004), *available at* http://www.sec.gov/Archives/edgar/data/1094961/000119312505052612/d10k.htm.) Each CVR represented the right to receive a payment up to a maximum of $0.88 per CVR depending on the volume weighted average price ("VWAP") of MGRM common stock traded during a pricing period. (RP 6846, 8723-25, 10786.) The VWAP was determined at the end of each trading day. (RP 8720.)

The pricing period spanned the 15 consecutive trading days immediately preceding June 10, 2006 (May 19, 2006, to June 9, 2006), and the average VWAP was the mean of the VWAP for each day. (RP 8720, 8724, 10786.) If, at the end of the pricing period, MGRM's average VWAP was above $2.90, the CVR holders would receive nothing. (RP 8723-25, 10786.) If the

average VWAP was $2.02 or below, the CVR holders would receive the maximum payout of $0.88 per CVR. (RP 8723-25, 10786.) If the average VWAP was between $2.03 and $2.90, the CVR holders would receive the difference between $2.90 and the VWAP price. (RP 8723-25, 10786.)

At the conclusion of the pricing period, MGRM announced that the average VWAP for the pricing period was $1.85 and therefore CVR holders would receive the maximum payout of $0.88.[2] (RP 10795; MGRM Form 8-K (June 12, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1094961/000119312506128109/d8k.htm.)

C. Brokaw's and Tang's MGRM Holdings

Brokaw and Tang both owned MGRM stock and CVRs. Brokaw owned MGRM stock and CVRs as a result of holding ACLARA stock through the merger with ViroLogic and buying additional CVRs in the open market. (RP 7321, 7326-27.) Brokaw had sold all of his MGRM stock by late 2005, but he and his family continued to hold 215,690 CVRs. (RP 7327-28, 7857.) Brokaw and his family received approximately $190,000 for their CVRs at the conclusion of the pricing period. (RP 7393, 7857.)

Tang was an ACLARA board member, held shares of both ACLARA and ViroLogic before the merger, and was involved in negotiating the terms of the merger, including those related to the CVRs. (RP 6889-91, 7050-51.) Following the merger, the Fund owned more than 7.9 million shares (approximately 6.3%) of MGRM's common stock and received eight million CVRs. (RP 6846, 6849; MGRM Proxy Statement, at 17 (Oct. 2005), *available at*

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[2] The VWAP of MGRM on May 19, 2006, was $2.08, with a trading volume of more than 2 million shares. (RP 9274.) The VWAP of MGRM on May 22, 2006, was $1.96, with nearly 2.4 million shares traded that day. (RP 9274, 9302.) On May 23, 2006, the VWAP of MGRM was $1.91, with a trading volume of 1.8 million shares. (RP 9274, 9302.)

http://www.sec.gov/Archives/edgar/data/1094961/000119312505189780/ddef14a.htm.) In the period between the CVRs' creation in December 2004 and the pricing period, the Fund purchased 10.5 million additional CVRs thereby amassing a total of 18.5 million CVRs. (RP 6849.)

Tang began selling the Fund's MGRM holdings in late 2004. From December 2004 until May 18, 2006, the Fund sold 4,864,400 shares of MGRM common stock (62% of its MGRM stock holdings). (RP 10790.) During the pricing period, Tang sold 2.95 million shares of MGRM common stock through Deutsche Bank and other broker-dealers, resulting in a 300,000 share short position by the pricing period's close. (RP 6978, 8759.) Following the pricing period, the Fund received a payment of more than $16.3 million for its CVRs. (RP 7393, 8759.)

D. Brokaw's Trading for Tang During the Pricing Period

1. May 19, 2006

On the morning of May 19, 2006, the first day of the pricing period, Tang placed a market order with Brokaw to sell 50,000 shares of MGRM at the open and another 50,000 shares at the close. (RP 6866-67, 7347.) Unbeknownst to Deutsche Bank, Tang also was simultaneously selling an additional 200,000 MGRM shares per day through two other broker-dealers in order to ensure that the Fund's three million shares were liquidated during the pricing period. (RP 6865.)

Brokaw called Deutsche Bank sales trader Jennifer Watson ("Watson") to convey Tang's morning sell order. (RP 5599-5601.) Deutsche Bank equity trader Chad Messer ("Messer") executed Tang's order immediately after the open at prices from $2.06 to as low as $1.91. (RP 5649-51, 6283, 9277-79, 10667.)

At 9:33 a.m., Watson called Brokaw's sales assistant, Will Ewing ("Ewing"), to report execution of the sale of 50,000 shares at an average price of $1.9574 per share. (RP 5605, 10668.) Ewing told Watson: "[W]e'll be coming back in at the close." (RP 10668.) Watson asked: "At the close you're coming back with 50? What are you guys up to today?" (RP 5604, 10668.) Ewing responded: "Kevin's [Tang] trying to, you know, they're, anyways, Kevin's doing his thing." (RP 10668-69.) Three minutes later, at 9:36 a.m., Brokaw called Watson to follow up and confirm Tang's 50,000 share order at the close. (RP 10669-70.) Brokaw called Watson again that afternoon to give her additional instructions regarding Tang's order and explain in detail the pricing period and Tang's related selling strategy. (RP 10672-10676.)

Watson conveyed Tang's order to Messer, stating that she had an order to sell 50,000 shares of MGRM in the last two minutes of trading. (RP 5624-25, 5627.) Watson told Messer that she wanted to do what the client asked but "without putting price pressure on . . . the stock." (RP 5627.) In response, Deutsche Bank executed Tang's order over the 11 minutes leading up to the close at prices declining from $2.14 to $2.01 rather than in the minute or so before the close. (RP 5627, 9281-87.)

2. May 22, 2006

Tang placed another order with Brokaw on the following trading day, May 22, 2006, with instructions to aggressively and quickly sell 50,000 shares of MGRM at the open. Tang again told Brokaw he would be back at the close to sell more. (RP 6944-45, 6950-51, 7265, 7366-67.) Tang wanted 50,000 MGRM shares sold within the first five minutes of trading on that day. (RP 6951.) Brokaw directed Ewing to relay the order to the trading desk. (RP 5725, 7265, 7267.) At 9:20 a.m., Ewing called Deutsche Bank sales trader David Zitman ("Zitman") with Tang's order. (RP 10685.)

Zitman called Brokaw's office at 9:26 a.m. and informed Ewing that he had given Tang's order to Messer with instructions to "trade it like you been trading it last week." (RP 10692.) Zitman then spoke with Brokaw to confirm Tang's instructions:

> Zitman: This guy wants to sell the crap out of, it's a market order.
> Brokaw: Look, it's a market order.
> Zitman: Market order—take the [expletive] thing down (inaudible) a dollar?
> Brokaw: Yeah, 50 cents, yes.
> Zitman: He wants it to be done on the opening?
> Brokaw: Pretty much, yeah, market order.
> Zitman: 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.
> Brokaw: No, right.
> Zitman: He wants me to sell it hard.
> Brokaw: Yeah, just sell market order, yeah. Market order is market order.

(RP 10694.)

The Firm executed Tang's order within two minutes after the open at prices declining from $1.95 to $1.91. (RP 9288-90, 11037-39.)

At 3:22 p.m., Zitman called Brokaw's office to confirm Tang's afternoon order to sell 50,000 additional MGRM shares. (RP 6064, 10695-96.) Ewing told Zitman that the day's second order was "going to be like literally, you know, as late as you can." (RP 10696.) Zitman confirmed "50,000 market on close."[3] (RP 10696.)

3. May 23, 2006

Before the market opened on May 23, 2006, Zitman called Brokaw's office to inquire about another order from Tang and spoke with Brokaw's business partner, Mary Mayer ("Mayer"). (RP 6078, 10706.) At the same time, Tang was on the phone with Brokaw's office. (RP 6940, 6956, 7276-77, 10706-07.) Tang told Brokaw to sell 50,000 shares at the open and

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[3] Deutsche Bank did not execute the trade until five minutes after the close by taking Tang's 50,000 shares into the Firm's inventory at the closing price, $1.89. (RP 6285-86, 11039.) At 4:06 p.m., Zitman confirmed selling the second 50,000-share lot at $1.89. (RP 10698, 10700.)

close like the two previous days. (RP 6954-56.) Mayer conferred with Brokaw and then told Zitman, "Same order as yesterday." (RP 10707.) Zitman confirmed, "He's giving me 50,000 more for sale?" and Mayer responded, "50,000 more for sale. . . . On the open." (RP 6956, 10707.) Deutsche Bank executed Tang's order within the first minute of trading at an average price of $1.87. (RP 7279, 11045-46.) Zitman called Brokaw at 9:31 a.m. and reported the execution. (RP 10708-09.) Brokaw told Zitman that he would have another order from Tang to sell 50,000 at the close. (RP 10710.) Tang told Brokaw to execute the 50,000 share order near the close without a price limit and to make sure it "got done before the close." (RP 6963.)

Brokaw and Zitman spoke that afternoon to confirm Tang's order:

Brokaw: All right. So here's . . . what [Tang] doesn't want on this. He said, look, I don't mind you guys printing me all on one—he said I kind of want it spread out a little bit.
Zitman: Well, then he's got to [expletive] give me until, I mean, you know. The [expletive] guy, he wants his cake and he wants to eat it too?
Brokaw: He wants to eat it too. Well, you know, exactly. So just take it with a minute to go and spread it out a little bit . . . . In other words, hit the, he wants to hit the bids like in a, in a—
Zitman: What, he's trying to mark the close?
Brokaw: Yeah.
Zitman: [H]e could [expletive] be going away for a long time doing that.
Brokaw: Really?
Zitman: Yeah. You can't mark the [expletive] close. It's [expletive] illegal.
Brokaw: Eh, I didn't think so.
Zitman: Yeah, [expletive] it, I no. I'm not marking the close for him.
Brokaw: No, no, no.
Zitman: I'm not giving up my [expletive] license.
Brokaw: No, no, no, me neither. No, just sell 50 on the close.
Zitman: That's a (inaudible) 50,000 market on close.

(RP 10711-12.)

Zitman entered the afternoon order into Deutsche Bank's electronic order system at 3:51 p.m., but the order was not executed until after the close at 4:11 p.m. (RP 11047, 11677.) The Firm filled Tang's order by taking the Fund's 50,000 shares into inventory at $1.84, that day's closing price. (RP 9293, 9303, 11047.) At 4:12 p.m., Zitman called Brokaw's office and

reported the sale. (RP 10715.) A few minutes later, Brokaw called Zitman and sought Zitman's assurance that Tang's trade was in the VWAP because "[t]hat's all [Tang] wants to know" and asked him to have equity trader Messer let him know "whether we were in the VWAP with the 50." (RP 10718-10722.)

Tang became angry after learning that the Firm executed his afternoon order on May 23 by taking his shares into inventory. (RP 6876-77, 10726.) Brokaw spoke with Messer and William Matthews ("Matthews"), a senior trader on the Firm's equity desk, and expressed that taking shares into inventory was not how Tang wanted the order executed. (RP 6287, 6466, 10727.) Messer and Matthews did not understand Tang's complaint when Messer had understood that Tang wanted the stock sold at the close and he executed the order by paying the closing price for the stock. (RP 6288, 6467.) Brokaw further expressed his dissatisfaction with the execution to Zitman expressing that "[a]ll we're trying to do is print as much stock between . . . the last minute and the close. Whether we get the close or not, I don't really care, but what I did care about was that we printed as much stock as we could." (RP 10727.)

Later that day, Zitman spoke with Messer and Matthews about Tang's order and together they concluded that Tang and Brokaw "were trying to potentially affect the VWAP so that the rights would be priced more favorably." (RP 6124-25.) The matter was immediately brought to the attention of Deutsche Bank compliance personnel, who determined that the Firm should stop executing Tang's orders in MGRM. (RP 6468-69.)

E. Inaccurate Order Tickets for Tang's MGRM Orders

Tang's MGRM orders placed with Brokaw during the pricing period were inaccurately reflected in Deutsche Bank's order tickets. The Firm's procedures required Brokaw to create an order ticket "immediately upon receipt" of an order, but Brokaw failed to do this. (RP 5836,

5837-38, 8597.) Rather, Brokaw admittedly played no role in the order ticket preparation process and delegated in totality his responsibility to his sales assistants. (RP 7188-89, 7267-68.)

Due to Brokaw's inaction, no order tickets were prepared for Tang's MGRM orders when his orders were received. (RP 5738-43, 5838, 7196.) Instead, at the end of each of the three trading days at issue here, one of Brokaw's sales assistants, Daniel Aliperti ("Aliperti"), prepared a "booking ticket" for Tang's MGRM orders. (RP 5833, 5835-36, 9310-12.) Rather than correctly reflecting that Tang placed his orders directly with Brokaw, the booking tickets falsely indicated that Tang placed the Fund's orders directly with a Deutsche Bank sales trader and combined Tang's morning and afternoon sales. (RP 9310-12.) Each day's booking ticket inaccurately reflected a single order for the sale of 100,000 shares at a single execution price with a single time stamp. (RP 9310-12.)

III. PROCEDURAL BACKGROUND

FINRA learned that Deutsche Bank had fired Brokaw for cause and opened an investigation to determine whether he had violated FINRA rules. (RP 7790.) FINRA initiated disciplinary proceedings on December 12, 2008, when the Department of Enforcement ("Enforcement") filed a three-cause complaint against Brokaw. (RP 1.) The first cause of the complaint alleged that Brokaw manipulated, or alternatively aided and abetted Tang's manipulation of, the price of MGRM's shares, in violation of Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110. Cause two, an alternative charge to cause one, alleged that Brokaw failed to conduct an adequate inquiry into whether Tang's instructions to sell MGRM stock were for a manipulative purpose, in violation of NASD Rule 2110. The third cause alleged that Brokaw failed to ensure that accurate order

tickets were completed for Tang's sales of MGRM stock, which caused Deutsche Bank's books and records to be inaccurate, in violation of NASD Rules 3110 and 2110.[4] (RP 13-15.)

After a six-day hearing, the Hearing Panel found that Brokaw placed orders to sell MGRM stock on Tang's behalf at the open and close of the market for the purpose of increasing the value of MGRM's CVRs. (RP 11856.) The Hearing Panel concluded that Brokaw therefore manipulated the price of MGRM, in violation of the antifraud provisions as alleged in cause one of the complaint.[5] (RP 11856.) The Hearing Panel further found that Brokaw failed to ensure the accuracy of order tickets as alleged in cause three. (RP 11857-58.) The Hearing Panel barred Brokaw for the manipulation and imposed no sanction for the books and records violation due to the bar. (RP 11859-61.) Brokaw's appeal to the NAC followed. (RP 11863-84.)

In its decision, the NAC dismissed the Hearing Panel's manipulation finding and determined instead that Brokaw acted unethically, and in violation of NASD Rule 2110. (RP 12487-89.) The NAC held that Brokaw failed to inquire diligently into Tang's instructions to

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[4] To illustrate what Brokaw deems his "overzealous prosecution," Brokaw goes to great lengths to discuss what Enforcement alleged in one cause in its Wells Notice: that Brokaw instructed his sales assistants to intentionally falsify the booking tickets. (Br. at 4, 22.) Brokaw contends that Enforcement knew this was not true. (Br. at 4.) What Enforcement alleged in its Wells Notice, however, is irrelevant to these proceedings. The purpose of the Wells process is to give a potential respondent an opportunity to discuss the facts and law and explain why formal charges are not appropriate. *See FINRA Regulatory Notice 09-17*, 2009 FINRA LEXIS 45, at *6 (Mar. 2009). Enforcement's modification of its allegations once it obtained additional evidence, and subsequent to any submission Brokaw may have made, demonstrates that the process worked. Moreover, the Wells process is discretionary for Enforcement and does not bind it to its preliminary determinations. *See id.* at *5; *see also NASD Notice to Members 97-55*, 1997 NASD LEXIS 77, at *14 n.6 (Aug. 1997) ("This process is discretionary with the staff and is not a right or policy.") The Commission should reject Brokaw's fruitless efforts to inject irrelevant information into these proceedings.

[5] Because the Hearing Panel found that Brokaw directly violated the antifraud provisions, it dismissed the aiding and abetting allegations asserted in cause one of the complaint and the related, alternative allegations of violations of NASD Rule 2110 under cause two. (RP 11837 n.1, 11852 n.27.)

sell tens of thousands of MRGM shares repeatedly at the open and close of the market to ensure that they were not for a manipulative purpose. (RP 12488-89.) The NAC determined that Brokaw overlooked a confluence of factors that provided him with notice that further inquiry on his part was called for. (RP 12488-89.) Brokaw personally owned CVRs and, as a result, was well-familiar with the pricing period. (RP 12488.) He knew Tang held sizable MGRM stock and CVR positions and wanted to liquidate all his stock by the pricing period's close. (RP 12488.) Tang also deviated in several ways from his usual trading practices with Brokaw. (RP 12488-89.) The NAC found that Brokaw, in the face of these red flags, impermissibly ceded all responsibility for inquiring into Tang's orders to the Firm's traders and violated NASD Rule 2110. (RP 12488-89.) The NAC affirmed the Hearing Panel's findings that Brokaw caused the inaccuracy of his Firm's books and records, and violated NASD Rules 3110 and 2110, when he failed to ensure the accurate completion of customer order tickets. (RP 12490-91.)

In dismissing the Hearing Panel's finding that Brokaw intended to manipulate MGRM shares, the NAC concluded that Enforcement failed to prove the allegation by a preponderance of the evidence. (RP 12484-87.) The NAC specifically determined that Enforcement failed to prove that Brokaw, in trading for Tang, acted with the requisite scienter. (RP 12484-87.)

The NAC sanctioned Brokaw by suspending him for one year in all capacities and fining him $25,000 for his failure to conduct an adequate inquiry into Tang's trading instructions. (RP 12492.) The NAC also fined Brokaw an additional $5,000 and concurrently suspended him for 30 business days for causing his Firm's books and records to be inaccurate.[6] (RP 12493-94.)

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[6] In accordance with FINRA rules, the NAC submitted its draft decision to the FINRA Board of Governors. *See* FINRA Rule 9349(c). The Board of Governors called this matter for review pursuant to FINRA Rule 9351 and remanded the case to the NAC. (RP 12225, 12447.)

[Footnote continued on next page]

On October 3, 2012, Brokaw filed this appeal with the Commission.[7] (RP 12505-07.)

IV. ARGUMENT

The NAC's findings are fully supported by the record. Brokaw's failure to question Tang's sizeable MGRM trades at the open and close of the market during a critical pricing period violated NASD Rule 2110. In contravention of just and equitable principles of trade, Brokaw ignored his unequivocal duty as a securities professional to act as an unconflicted gatekeeper when he was faced with suspicious market activity. The Commission has long held that a securities professional's unethical conduct can violate Rule 2110. Establishing scienter is not required, and a showing of unethical conduct, even if not in bad faith, is sufficient to establish liability under the Rule.

As demonstrated below, the NAC carefully weighed the evidence against Brokaw and arrived at a reasoned conclusion that Brokaw failed to make a diligent inquiry when confronted with myriad red flags in connection with Tang's sizable MGRM orders at the open and close of the market during the pricing period. Brokaw possessed the discretion to refuse to execute the trades that were suspicious or, at a minimum, to highlight the orders and what he knew about them for others in a supervisory or compliance capacity before placing the trades. The NAC

[cont'd]

After a remand to the NAC, the Board of Governors did not call this matter for further review, and the NAC issued its final decision. (RP 12495.)

[7] Brokaw has requested oral argument before the Commission. (Br. at 1.) Brokaw has not shown that an oral presentation of the facts and arguments would aid the Commission's decisional process. *See* SEC Rule of Practice 451(a), 17 C.F.R. § 201.451. The issues raised in this appeal are readily reviewable based upon the parties' briefs.

applied the correct legal standard, and a preponderance of the evidence supports its findings that Brokaw violated Rule 2110.[8]

The record also fully supports the NAC's finding that Brokaw failed to ensure the accurate completion of order tickets reflecting Tang's six, 50,000 share MGRM sell orders. Brokaw's failure directly resulted in his Firm's inaccurate books and records. Brokaw's complete disregard of his recordkeeping responsibilities when viewed in conjunction with his involvement in Tang's trading demonstrates his inattention to regulatory requirements and warrants the sanctions that the NAC imposed.

As to sanctions, Brokaw provides no relevant or material basis upon which the Commission should modify his sanctions, which are consistent with the FINRA Guidelines. The NAC correctly found that Brokaw's violation of Rule 2110 warranted the appropriately remedial one-year suspension and $25,000 fine. Brokaw's failure to recognize the ample warning signs that Tang's trades could have been for an illicit purpose, along with his failure to appreciate his ethical obligations as a long-standing registered representative, necessitate the imposition of a reasonably weighty sanction. The 30-business day suspension and additional $5,000 fine that the NAC imposed for Brokaw's failure to comply with the recordkeeping requirements is also wholly justified.

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[8] Brokaw in his appellate brief oddly points to numerous Hearing Panel findings to which he takes exception. (Br. at 6-9.) For example, he states that the Hearing Panel "ignored the testimony of Thomas Lombardi," another registered representative at another FINRA member firm who took Tang's MGRM orders during the pricing period. (Br. at 9.) The NAC acknowledged Lombardi's testimony as reflected in its decision. (RP 12485-86.) The NAC's decision is the final action of FINRA; thus, the Commission reviews the NAC's decision—not the Hearing Panel's. *See* 15 U.S.C. § 78s(e); FINRA Rules 9351(e), 9370(a). Any findings of the Hearing Panel that are contrary to the NAC's findings are irrelevant. *See Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 3176, at *21 n.17 (Nov. 8, 2006).

The Commission should affirm FINRA's findings and sanctions and dismiss Brokaw's application for review.[9]

A. Brokaw's Failure to Inquire into Tang's Suspicious Orders Violated Just and Equitable Principles of Trade.

1. Rule 2110 Encompasses Broad Ethical Principles.

NASD Rule 2110 states that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[10] Rule 2110 is "not limited to rules of legal conduct but rather . . . it states a broad ethical principle which implements the requirements of Section 15A(b)" of the Securities Exchange Act of 1934 ("Exchange Act").[11] *Benjamin Werner*, 44 S.E.C. 622, 625 n.9 (1971). In *Werner*, the Commission explained that "the NASD through its disciplinary powers can and should play an important role in improving the ethical standards of its members." *Id.*; *see also William F. Rembert*, 51 S.E.C. 825 (1993) ("We have long recognized that [NASD Rule 2110] states broad ethical principles . . . . Section 15A(b)(6) of the Exchange Act empowers self-regulatory

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[9] The standards articulated in Section 19(e) of the Securities Exchange Act of 1934 ("Exchange Act") provide that the Commission must dismiss Brokaw's application for review if it finds that Brokaw engaged in conduct that violated FINRA rules, FINRA applied its rules in a manner consistent with the purposes of the Exchange Act, and FINRA imposed sanctions that are neither excessive nor oppressive and that do not impose an unnecessary or inappropriate burden on competition. 15 U.S.C. § 78s(e). Brokaw does not contend that FINRA applied its rules in a manner inconsistent with the Exchange Act or that FINRA's sanctions impose an undue burden on competition.

[10] NASD Rule 2110 is applicable to associated persons pursuant to NASD Rule 0115(a), which provides that "[t]hese 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."

[11] Congress required SROs, in Section 15A(b)(6) of the Exchange Act, to adopt rules "designed . . . to promote just and equitable principles of trade." 15 U.S.C. § 78o-3(b)(6).

organizations, such as the NASD, to discipline their members for unethical behavior, as well as violations of law.").

The Commission has recognized that securities industry participants have a duty to the marketplace that is necessary to instill integrity and confidence in the markets. *See, e.g.*, *Daniel Joseph Alderman*, 52 S.E.C. 366, 369 (1995) (explaining that precursor to NASD Rule 2110 set "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"), *aff'd*, 104 F.3d 285 (9th Cir. 1997). The courts have likewise recognized what the alternative would be if a duty to the marketplace were not insisted upon: "Nor, in our view, could any purported function of the scheme be considered protected given Congress' stated concern for the perception of fairness and integrity in the securities markets and the potential costs of forsaking such legislated concerns, including fewer market participants and greater reliance on fraud as a means of competing in the market." *United States v. Carpenter*, 791 F.2d 1024, 1030 (2d Cir. 1986) (*citing* H.R. 9323, 73d Cong., 2d Sess. Rep. No. 1383, at 7865-66), *aff'd by an equally divided court*, 484 U.S. 19 (1987). The Commission and the courts accordingly have insisted on the highest possible professional and ethical standards on the part of those who desire to participate in the securities industry. In light of Brokaw's familiarity with the MGRM stock and CVRs, the pricing period, and Tang's general trading strategy related to MGRM, his failure to recognize red flags of potential manipulation is inconsistent with this standard.

The Commission has long held that to impose liability for violating Rule 2110, or other rules requiring just and equitable principles of trade, it is sufficient to find "bad faith or unethical conduct." *See Thomas W. Heath III*, Exchange Act Rel. No. 59223, 2009 SEC LEXIS 14, at *13 (Jan. 9, 2009), *aff'd*, 586 F.3d 122 (2d Cir. 2009); *Chris Dinh Hartley*, 57 S.E.C. 767, 773 n.13

(2004); *Calvin David Fox*, 56 S.E.C. 1371, 1376-77 (2003). Brokaw does not disagree that this is the controlling standard. (Br. at 13, 21.) The principal consideration is whether the misconduct reflects on an associated person's ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public. *See James A. Goetz*, 53 S.E.C. 472, 477 (1998). A broad array of conduct can violate the rule, including when a broker breaches his duty to the marketplace, as occurred here.[12] *See, e.g.*, *Shultz v. SEC*, 614 F.2d 561, 570 n.20 (7th Cir. 1980) (finding market maker violated the Chicago Board Options Exchange's J&E Rule when he engaged in transactions "without legitimate economic purpose"); *Robert J. Prager*, 58 S.E.C. 634, 654 (2005) (affirming Rule 2110 violation for aiding and abetting manipulative scheme furthered by broker's failure to conduct inquiry into suspicious trading).[13]

Brokaw owed a duty to the investing public commensurate with professional responsibilities and privileges growing out of his position as a registered person. *See Piper, Jaffray & Hopwood, Inc. v. Ladin*, 399 F. Supp. 292, 298-299 (S.D. Iowa 1975). FINRA's rules

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[12] Brokaw contends that he is unclear as to whether the NAC found that he violated a duty to Tang or the Firm. (Br. at 13.) Brokaw's ethical obligations in this case were to the other participants in the marketplace. *See Heath*, 2009 SEC LEXIS 14, at *15 ("Promulgated to discipline a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace, the J&E Rule focuses on the securities professional's conduct rather than on a subjective inquiry into the professional's intent or state of mind." (internal quotations and citations omitted)).

[13] Brokaw goes to great lengths to distinguish his misconduct from that in the cases the NAC cited in its decision. (Br. at 13-17 (discussing *DiFrancesco*, *Prager*, *Toczek*, and *Alessandrini*).) As the NAC decision illustrates, however, the NAC did not rely on these cases for the application of their specific facts. Rather, the NAC applied the legal constructs contained therein. For example, the NAC quoted from *DiFrancesco* and *Alessandrini* to explain the contours of Rule 2110 and the general duty of diligence expected from brokers to prevent fraud. (RP 12487-89.) Brokaw cannot escape the broad sweep of Rule 2110 by asserting that his actions do not match exactly those of other violators.

require absolute honesty and integrity. And indeed, the standard of ethical conduct required by Rule 2110 goes beyond what may be imposed by formal legal duties, *see Peter Martin Toczek*, 51 S.E.C. 781, 788 n.14 (1993), and may even in some instances require the employee of a member organization to act in a way that is potentially detrimental to his career. *Dep't of Mkt. Regulation v. Proudian*, Complaint No. CMS040165, 2008 FINRA Discip. LEXIS 21, at *37-38 (FINRA NAC Aug. 7, 2008); *cf. Voss v. SEC*, 222 F.3d 994, 1004 (D.C. Cir. 2000) ("A registered representative can always refuse to execute a trade she knows may constitute a securities violation."). When a broker fails to satisfy such professional and ethical standards, liability under Rule 2110 follows. Under no analysis of the facts in this record can it be said that Brokaw met such high standards. Brokaw's unabated trading for Tang in the face of myriad red flags was in violation of the duty to the public and the marketplace that he undertook as a securities professional.

Applying these principles, the NAC properly held that Brokaw's trading for Tang violated the ethical precepts embodied in Rule 2110.

2. Brokaw Blindly Followed Tang's Suspicious Trading Instructions in Violation of NASD Rule 2110.

Although a broker is generally required to place orders for a client, it cannot be done with a blind eye to the circumstances surrounding the orders. *See Voss*, 222 F.3d at 1004; *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 108 (2d Cir. 1998). Brokaw did just that with respect to Tang's MGRM trades. As the Commission has stated, "The importance of a broker-dealer's responsibility to use diligence where there are any unusual factors is highlighted by the fact that violations of the anti-fraud and other provisions of the securities laws frequently depend for their consummation . . . on the activities of broker-dealers who fail to make diligent inquiry to obtain sufficient information to justify their activity in the security." *Alessandrini & Co.*, 45 S.E.C.

399, 406 (1973); *see also Hanly v. SEC*, 415 F.2d 589, 595 (2d Cir. 1969) (explaining that registered representatives are under a duty to investigate); *Frederick H. Joseph*, 51 S.E.C. 431, 438 (1993) (explaining that "[r]ed flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review"). Because Brokaw failed to inquire diligently into Tang's orders, his actions undoubtedly violated Rule 2110.

a. The NAC Found Ample Indicia of Potential Manipulation.

The NAC found that Brokaw ignored numerous red flags that he was potentially involved in a manipulative scheme to mark the open or close or otherwise improperly influence MGRM's price. (RP 12488-89.) Courts and the Commission have recognized that marking the close, for example, is a vehicle for manipulative activity. *See SEC v. Masri*, 523 F. Supp. 2d 361, 370-72 (S.D.N.Y. 2007); *Thomas C. Kocherhans*, 52 S.E.C. 528, 530 (1995). Marking the close involves the placing and execution of orders at or shortly before the close of trading on any given day to artificially affect the closing price of a security. *Masri*, 523 F. Supp. 2d at 369-70; *Kocherhans*, 52 S.E.C. at 530.

The evidence abundantly demonstrates that Brokaw was on notice to investigate Tang's suspicious trading, and Brokaw's claims to the contrary are unpersuasive in light of the recordings and other probative evidence. (Br. at 11, 12, 19, 20, 21.) The NAC found that because Brokaw personally owned thousands of CVRs, he was familiar with the pricing period and the associated price targets. (RP 7321, 7326-28, 7857, 12488.) In fact, his expertise surrounding the intricacies of the pricing period was reflected in his conversation with Firm trader Watson on the first day of the pricing period. (RP 10675-76.) When Brokaw called Watson at 9:36 a.m., on May 19 to place Tang's afternoon order, Brokaw told her that "you got another 50 to sell at the end of the day." (RP 10669.) He added: "[T]hey're all set up on these

CVRs. Do you realize what's going on here?" Watson indicated that she had to get off the call, and Brokaw told her to call back and that he would explain it. (RP 10670.)

At 2:09 p.m., Brokaw again called Watson and gave her further instructions regarding Tang's afternoon order. Brokaw stressed that Tang wanted to sell very near to the close of trading:

> Brokaw: [Tang] wants it close to the close, and you did a great job hammering, and they all just want to hammer it again today to do the wakeup call here. So what's happening, so you know what's happening, is there's these rights that are out there which are the MGRMRs . . . . And they start pricing off of the average over the next 15 days. Do you follow me?
> Watson: Uh, I think so.
> Brokaw: Okay. So the trader ought to be aware of this.
> Watson: Well we've had somebody else selling for a few days now.
>
> * * * *
>
> Brokaw: I can tell you [Tang] wants at the end of the day, he wants to be net short this stock which he will end up doing.
> Watson: So he's going to sell more than he owns because of the rights.
>
> * * * *
>
> Brokaw Just so you know what the target price is, and I'm sure Chad [Messer] knows that, but if he doesn't and he wants me to go through it with him, I'll explain it to him so he understands.
> Watson: You're a good person.
> Brokaw: So, yeah, understand the game that's being played for the next 15 days. It's good versus evil . . . the company versus us because, see, the company issued these things thinking they would never . . . typical, um, [expletive], you know, optimistic company, and um you know that the point here is that they do this and then they turn around and . . . never succeed on anything that they promised everyone . . . .

(RP 10672-10675.)

Brokaw's own words show that he knew that Tang wanted to be "net short" the stock, Tang was going to sell more stock than he owned because of the CVRs, Tang "owns a ton of the rights," and "what the target price" was and how it was derived. In light of Brokaw's deep knowledge of MGRM, Tang's holdings, and salient portions of his trading strategy, the NAC determined that

the curious timing and large size of Tang's orders was a red flag that Brokaw should have recognized as indicia of potential manipulation. (RP 12488.) The courts have recognized that selling large numbers of securities when timed to correspond with a material event, such as the market's close or a settlement period, is relevant to a potential manipulation. *See In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 535 (S.D.N.Y. 2008); *Masri*, 523 F. Supp. 2d at 370.

There are additional circumstances that, when combined with Brokaw's other knowledge, strongly indicate that Brokaw should have been aware that Tang's trading was potentially improper. The NAC found that Tang departed from his past practices with Brokaw on several fronts. First, prior to the pricing period, Tang had not placed an MGRM order with Brokaw for six months. (RP 7013, 7347, 9258.) Yet, Brokaw saw nothing curious when he received orders to sell 50,000 MGRM shares at the open and end-of-day on consecutive trading days after not having received an MGRM order from Tang since October 2005 when Tang sold a mere 11,500 shares.[14] (RP 7013, 7347, 9258, 9554-55.) Second, beginning on the morning of the first day of the pricing period, Tang previewed his afternoon MGRM orders for Brokaw. (RP 6950-51, 6955, 7265, 7348, 7366-67, 9554.) Never before had Tang revealed prematurely his future orders to Brokaw. (RP 7348, 9554.) Brokaw contends in his brief that Tang only did this on one occasion, on May 19, because Tang was traveling that day, but the evidence proves otherwise. (Br. at 10.) Tang continued this unusual practice each of the next two mornings when Tang gave Brokaw his morning order. (RP 6944-45, 6956-57, 7265, 7366-67, 7369.) Brokaw testified that on May 22, he received the morning order from Tang and he recalled that Tang "at that point in

[14] From December 28, 2004, to May 18, 2006, Tang sold 5.4 million MGRM shares and bought 468,000 for net sales of approximately 4.9 million prior to the pricing period. (RP 6935, 10790.)

time he indicated to sell some at the end of the day as well." (RP 7265.) Brokaw testified similarly with respect to Tang's trades on May 23. (RP 7369.) Brokaw confirmed that Tang, when placing his morning order with Brokaw, said he would be "coming back with 50 more at the close again." (RP 7369.) Third, Brokaw testified that Tang's 50,000 share orders were significantly larger than the orders that Tang usually placed with Brokaw.[15] (RP 7517.) Fourth, Tang had never before sold shares at the open and close through Brokaw. (RP 7564-65.) Brokaw's own testimony again supports this finding. Brokaw testified that *never* during his entire lengthy career, had a customer "come in in the morning and the night . . . simultaneously," until he received Tang's orders. (RP 7564-65.) Even in the face of these facts, Brokaw failed to question Tang's trading on the third consecutive day of receiving his curious orders to sell—a fact which the NAC found particularly glaring and led to its conclusions. (RP 12489.)

Finally, the NAC noted an additional reason for Brokaw to have seriously questioned Tang's instructions. The NAC noted that Brokaw failed to comprehend the trepidations of Firm trader Zitman on the morning of May 22. (RP 10694, 12489 n.35.) Zitman, after speaking with Ewing, called Brokaw to confirm Tang's instructions. (RP 10694.) Zitman testified that he wanted Brokaw to understand that Tang's 50,000 share market order executed at the open could cause MGRM's share price to move drastically. (RP 6060-61.) Now in response, Brokaw

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[15] Irrespective of his own testimony, Brokaw endeavors to show that this order size was not unusual for Tang based on Tang's earlier trading in another security. (Br. at 15.) Brokaw's example is hardly exculpatory. Most importantly, there is no evidence that Brokaw owned the same security and was privy to the same knowledge that he held with respect to MGRM. There is also no evidence that this security was in the midst of a critical pricing period like MGRM. (RP 8811-8839; Br. at 15.) Brokaw's admission that Tang's MGRM orders were unusually large is highly significant here.

attempts to impugn Zitman's credibility.[16] (Br. at 18.) Brokaw contends that Zitman lied and was not a credible witness. (Br. at 18.) The Hearing Panel, however, made no such finding. It had the opportunity to assess Zitman's demeanor when he testified and made no findings that he was not credible. The Hearing Panel did, nevertheless, determine that *Brokaw* was not credible and that *he* attempted to evade responsibility by blaming others, determinations that the NAC accepted. (RP 11856, 11858 & n.35. 11860, 12478-79 n.13; 12494.)

Brokaw ignored the suspicious activities of Tang. He never questioned the number of MGRM shares that Tang had to sell during the pricing period or the pace at which he planned to sell those shares. He never asked Tang whether he was contemporaneously selling MGRM shares through other broker-dealers, despite knowing that Tang previously used other firms frequently. (RP 7318.) He never confronted Tang regarding his departure from his usual trading patterns, including selling at the open and close simultaneously.[17] In failing to question Tang on these issues, Brokaw ignored red flags of suspicious trading. Brokaw therefore acted inconsistently with high standards of commercial honor and just and equitable principles of trade when he traded MGRM shares for Tang without determining whether Tang's trading instructions

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[16] To support his point, Brokaw questions the fact that Zitman called Brokaw's office at 9:27 on the morning of May 23, inquiring if Tang had an order. (Br. at 18.) Zitman testified that he called that morning, three minutes before the market's open, to follow up on the trading from the prior day. He was "being extra diligent" on the account that he was covering for Watson. (RP 6078-79, 6147.) Although Zitman testified that he was unfamiliar with MGRM when Brokaw was trading for Tang, RP 6149, that does not diminish Zitman's concern that trading 50,000 shares of a stock at the open could move the price. The NAC's reliance on Zitman's warning should be upheld.

[17] Contrary to Brokaw's assertion, Br. at 24, there is no evidence in the record that Brokaw was aware of Tang's belief that MGRM's volume was greatest at the open and close.

were for a manipulative purpose. At a minimum, Tang's trading pattern should have alerted Brokaw to inquire of others in a supervisory or compliance capacity before proceeding.

b. Brokaw's Defenses Are Meritless.

Brokaw argues that because the NAC found that he did not engage in a manipulation of MGRM in violation of the antifraud provisions of the securities laws, the NAC's finding that he violated NASD Rule 2110 is inconsistent and creates a new obligation for registered representatives. (Br. at 3, 15.) Brokaw misunderstands the NAC's findings and his interpretation of Rule 2110 is impermissibly narrow. The NAC dismissed the manipulation allegations against Brokaw because it determined that Enforcement failed to prove that Brokaw acted with the requisite scienter. (RP 12487-88.) In other words, Enforcement did not prove that Brokaw knew or was reckless in not knowing that following Tang's directions was manipulative. (RP 12487.) Such a finding, however, does not foreclose Brokaw's liability under Rule 2110. As Brokaw acknowledges, Br. at 13, "[s]cienter is not an element of [a J&E] violation," *Louis Feldman*, 52 S.E.C. 19, 21 (1994), nor is it necessary to "ascertain [a broker's] motive in order to find that he [violated the rule]," *Keith Springer*, 55 S.E.C. 632, 646 (2002). *See Heath*, 586 F.3d at 139 ("[T]he SEC has made clear that no scienter is required and mere unethical conduct is sufficient . . . ."). While the NAC found that Enforcement failed to prove that Brokaw knowingly lent himself to a manipulative scheme, Brokaw, nevertheless, ignored clear warning signals and failed to fulfill his investigatory obligations as a registered representative. (RP 12487-89.) Conduct such as his fits squarely within the four corners of what Rule 2110 aims to prohibit.

Throughout his brief, Brokaw overstates the NAC findings in an effort to escape liability under Rule 2110. Brokaw repeatedly contends that the NAC found that Tang "did not engage in

a manipulation scheme" and found that Tang's trades were "legitimate" and, as a result, any additional burden of inquiry on Brokaw is untoward. (Br. at 2, 3, 10, 15, 19.) Brokaw overweighs the NAC's dismissal of the fraud findings. The NAC did not declare Tang's trades to be legitimate. As the language on the tapes suggests, a manipulative scheme may very well have been in motion, but Enforcement did not prove a necessary element. The NAC's collateral finding of liability under Rule 2110, where proving intent is not required, is consistent with the record evidence.

In an effort to diffuse his liability, Brokaw casts himself as merely "an individual who passed along some of Tang's trades to his sales-trader," essentially an order taker without any discretion. (Br. at 9, 10, 11, 12, 13, 19.) Brokaw's defense is based on his claims that he relied on the traders, Watson and Zitman, as the "true gatekeepers of the firm" for guidance and to tell him if trades were improper. (Br. at 21.) Indeed, Brokaw points to his conversation with Watson as an example of how he went "further" to explain to her the selling pressure on MGRM during the pricing period.[18] (Br. at 11, 13-14.) Brokaw cannot use the Firm's traders' execution of Tang's trades as a substitute for his own duty to investigate Tang's trading instructions. *Cf. Sharon M. Graham*, 53 S.E.C. 1072, 1084-85 (1998) (finding that a salesperson aided and

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[18] Brokaw's attempt to show his efforts to inform the Firm traders is undercut by the fact that he only informed one trader, Watson, of certain facts that he know about MGRM and Tang. Watson's last day at the Firm was May 19, when she left on maternity leave. (RP 5592, 5620, 10670-71.) Brokaw cannot show that he similarly informed Zitman, who took over the trading desk in Watson's absence. (RP 5620, 6032-33.) In fact, the recordings show that on May 22, 2006, Ewing started to explain some of Tang's strategy to Zitman but Brokaw cut him off. At 9:20 a.m., Ewing called Zitman with Tang's daily order. (RP 10685.) Ewing told Zitman, "We got 50,000 this morning and 50,000 this afternoon . . . and he wants to sell 50,000 on the, uh, opening and sell it hard." Ewing continued, "[H]e's trying to—he, he owns the rights and—[t]hey're pricing the rights off the stock." (RP 5725-26, 10686-88.) Brokaw then signaled to Ewing to "knock it off." (RP 5726-28.)

abetted antifraud violations notwithstanding a compliance officer's assurances that the trades were "fine"), *aff'd*, 222 F.3d 994.

Brokaw contends that the facts in *Peter Martin Toczek*, 51 S.E.C. 781 (1993), somehow support his position that he should *not* be found in violation of Rule 2110. (Br. at 17, 19.) In that case, the Commission held that by a broker entering orders at or near the close of trading on consecutive days, the broker influenced prices and engaged in conduct inconsistent with just and equitable principles of trade. 51 S.E.C. at 788. The Commission noted that the broker was an experienced securities trader and his trading at the end of the day was more likely to affect price—a fact that should have been apparent to him. *See id.* at 787 & n.12. Brokaw, like Toczek, played a crucial role in Tang's trading. Brokaw spoke with Tang and accepted his orders.[19] (RP 6861-62, 6944-45, 6985, 7265, 7347-48, 7366-67, 10710.) He relayed Tang's instructions for a barrage of trades at the open and close. (RP 5599-5601, 5725, 6963, 7265, 7267, 10670, 10672-10676, 10694, 10710, 10711-12.) He contacted the trading desk to ensure the orders were carried out. (RP 10670, 10672-10676, 10694, 10708-09, 10711-12, 10718-10722.) And Brokaw's words in the recordings reiterate his knowledge of the circumstances surrounding MGRM and Tang's holdings at the time. (RP 10670, 10672-76, 10694, 10708-12.) As the person most often in contact with Tang, Brokaw was the person at Deutsche Bank who

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[19] Brokaw contends that the evidence contradicts the finding that Tang placed his orders directly with Brokaw. (Br. at 10, 18.) The testimony in the record is uncontroverted that Tang, on each of the three days at issue, gave Brokaw, and only Brokaw, his orders. (RP 6861-62, 6944-45, 6985, 7265, 7347-48, 7366-67, 10710.) Brokaw, when asked specifically by Enforcement, "But on May 19, May 22, May 23, [Tang] placed these trades directly with you?" Brokaw answered, "Right." (RP 7348.) Enforcement reiterated this in a follow-up question, "But to make sure we are clear, on May 19, 22, and 23, all of those trades were placed with you?" Brokaw unequivocally responded, "Correct." (RP 7348.) Thus, only Brokaw knew of Tang's instructions until Brokaw communicated them to others.

was in the best position to know the nature and extent of his activities. Any rational observer knowing what Brokaw knew should have been highly suspicious under these circumstances and questioned what may have been taking place.[20] Brokaw's claim that he bears no responsibility for investigating Tang's trades should be rejected.

Brokaw also argues that he had no training at the Firm on identifying marking the open or close and thus relied on the sales traders to "ensure that client orders were executed . . . properly." (Br. at 25.) The Commission should give this no weight. Brokaw had been a general securities representative since the early 1980s, and these concepts are well-established in the securities industry.[21] *See, e.g.*, *Kocherhans*, 52 S.E.C. at 530-31. His purported unfamiliarity with these devices is not plausible and even more unbelievable when viewed in light of his decades of experience in the securities industry, which was comprised of mostly business for institutional and high-net worth customers. (RP 7172-75); *see, e.g.*, *Keyes*, 2006 SEC LEXIS 2631, at *21 (noting that a registered representative's lengthy experience undercuts a claim of ignorance of the rules of conduct). Furthermore, as a participant in the securities industry,

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[20] For the purpose of deflecting his duty to investigate, Brokaw distinguishes the facts here to those in *Kane v. SEC*, 842 F.2d 194 (8th Cir. 1988), which involved a willful violation of §5 of the Securities Act of 1933. (Br. at 20.) The NAC cited this case in its sanctions discussion, but signaled that its application was comparative only. (RP 12492.) Relying on *Kane*, and with the benefit of hindsight and after hearing all of the evidence in this case, Brokaw argues that he had no obligation to conduct a searching inquiry because MGRM was not a thinly traded security, Tang's orders were a fraction of the total volume, and Tang was a well-known seller. The NAC, however, found that Brokaw's duty derived from what he knew at the time when Tang placed his orders with him: Tang placed successive large orders to sell at the open and close during the pricing period for a derivative that both men owned.

[21] Brokaw was also obligated to adhere to the high standards of ethics and the good business practices demanded of him by his Firm. (RP 8527.) Indeed, Brokaw had actual notice of the prohibition from engaging in any manipulative or deceptive device as set forth in the Deutsche Bank Policy and Procedure Manual, and testified that he agreed that a broker had a duty to be "diligent and vigilant on activities that are suspicious." (RP 7549, 8673.)

Brokaw is required to take personal responsibility for compliance with regulatory requirements, including the duty of inquiry in the face of red flags, and cannot be excused for a lack of understanding or appreciation of these requirements. *See Kocherhans*, at 531; *Jay Frederick Keeton*, 50 S.E.C. 1128, 1130 (1992).

Brokaw further contends that he had "no discretion" with respect to the handling of Tang's orders and is unclear what he was supposed to do. (Br. at 11-12, 19.) Brokaw seems to suggest that, because these were market orders, he did not have any responsibility to question them. (Br. at 10, 11-12, 16.) But Brokaw did have such an obligation. As the courts have held, Brokaw could have refused to execute Tang's trades and elevated any concerns to supervisory or compliance staff at the Firm. *Cf. Voss*, 222 F.3d at 1004 (rejecting argument that registered representative did not substantially assist a manipulation, since the execution of the manipulator's trades was a "ministerial" act); *Wonsover v. SEC*, 205 F.3d 408, 411, 415 (D.C. Cir. 2000) (holding, in light of several red flags, that broker's reliance on approval by firm and its lawyers did not negate finding that he acted willfully).

Notwithstanding what is plainly shown by the telephone recordings and other evidence, Brokaw asserts that his sales of MGRM for Tang gave him no cause for suspicion and that the actions of Tang were not questionable.[22] (Br. at 15.) Brokaw's effort to distance himself from his duty of inquiry is unreasonable. Brokaw was not simply a broker who should have known

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[22] Brokaw erroneously contends that "a stockbroker is not liable for their [sic] customer's misdeeds." (Br. at 19.) A broker, however, "can be primarily liable under Section 10(b) for following a [principal's] directions to execute stock trades that [he] knew, or was reckless in not knowing, were manipulative, even if [he] did not share the [principal's] specific overall purpose to manipulate the market for that stock." *U.S. Envtl., Inc.*, 155 F.3d at 108. Relying on a faulty premise, Brokaw contends that because the NAC found no wrongdoing by Tang, he had no reason to question Tang's selling strategy. (Br. at 19-20.) As discussed *supra* in Part IV.A.2, Brokaw had ample reason to question Tang.

better. Brokaw was the only broker who spoke with Tang with respect to these orders. Brokaw was aware of Tang's deep financial ties to MGRM and ownership of "a ton of the rights"; aware that a critical pricing period was underway; and aware that Tang was trading in an uncustomary and unusual manner; yet Brokaw assisted him nonetheless, no questions asked. Brokaw also had "skin in the game." He and his family held more than two hundred thousand CVRs. Brokaw's knowledge of all these circumstances should have caused him to be highly suspicious.

Despite having never received successive orders at the open and close in his twenty years in the securities business, Brokaw made no effort to determine whether Tang's instructions to trade tens of thousands of shares at the open and close repeatedly were justified by a legitimate investment purpose. Instead, he simply continued to execute all of Tang's orders. Under these circumstances, Brokaw abdicated his responsibility to investigate Tang's trading and completely ignored the possibility that Tang was potentially engaging in manipulative activity that would deceive investors in the marketplace. The NAC properly concluded that Brokaw's actions were squarely in contravention to the ethical standard contained in Rule 2110. The Commission should affirm the NAC's findings of violation.

B. Brokaw's Failure to Ensure the Preparation of Accurate Order Tickets Violated NASD Rules 3110 and 2110.

The Commission also should affirm the NAC's findings that Brokaw failed to ensure the preparation of order tickets accurately reflecting Tang's MGRM sales. In so doing, Brokaw violated NASD Rules 3110 and 2110.

NASD Rule 3110(a) requires that member firms keep books and records as prescribed in Exchange Act Rule 17a-3.[23] FINRA member firms therefore must create and keep memoranda of all brokerage orders and any instructions given or received for the purchase or sale of securities. *See* 17 C.F.R. § 240.17a-3(a)(6)(i).

The evidence unquestionably demonstrates that the Firm's records related to Tang's MGRM orders did not comply with recordkeeping requirements. First, no order tickets were prepared when Tang placed his six MGRM orders with Brokaw. Second, the booking tickets that Brokaw's sales assistant Aliperti prepared at the end of each trading day did not reflect the separate orders of 50,000 shares each that Tang placed with Brokaw at the open and close of each of the three trading days. (RP 9310-12.) Instead, the booking tickets combined Tang's morning and afternoon orders and inaccurately indicated that Tang placed his orders directly with sales traders Watson and Zitman rather than through Brokaw. (RP 9310-12.) Each bears only one time stamp instead of one time stamp upon receipt of the order and a second upon execution. (RP 9310-12.) Brokaw failed to meet his duty to ensure that accurate order records of Tang's trading were created.

Brokaw below admitted that order tickets "should have been generated" and did not contest that certain of the Firm's records were inaccurate.[24] (RP 7196, 7511-12, 11819.) In an

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[23] Exchange Act Rule 17a-3 specifies 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." 17 C.F.R. § 240.17a-3(a)(6).

[24] Brokaw reverses course and now contends, in his brief, that the Firm's records were accurate. (Br. at 23.) Brokaw overstates the accuracy of the Firm's records with respect to Tang's MGRM orders when in fact no order tickets were prepared. The NAC in its decision

[Footnote continued on next page]

effort to evade his recordkeeping obligations, however, Brokaw contends that it was his sales assistants' job to complete and review order tickets. The Commission should give Brokaw's contention no weight. As the NAC correctly found, Brokaw was the person assigned by the Firm's procedures as responsible for ensuring that an order ticket be prepared contemporaneously with Tang's orders.[25] (RP 12490-91.) Brokaw asserts that he was complying with Firm practice by not getting involved in order ticket preparation. (Br. at 23.) The Firm's procedures, however, required that the representative accepting a customer order initiate an order ticket "immediately upon receipt of an order." (RP 8412, 8597-98.) Once Brokaw accepted Tang's orders, he agreed to serve as the person accountable for Tang's account. (RP 6572-74, 6700-01.) While it was permissible for Brokaw to delegate certain responsibilities to his sales assistants, it remained Brokaw's responsibility for carrying out the duties and obligations as assigned and described by the Firm's procedures. (RP 6572-74, 6715, 8597-98.)

The Firm's branch manager during May 2006, James Knight ("Knight"), agreed that order tickets were ultimately the broker's responsibility even if he delegated the task to a sales assistant—contrary to Brokaw's representations, Br. at 22. (RP 6572-73.) Knight further explained that if a broker received a telephone order from a customer and relayed the order to a sales trader, the broker needed to complete the order ticket. (RP 6574.) Brokaw therefore was not relieved of his obligation to ensure that his subordinates accurately prepared records on his behalf. *See North Woodward Fin. Corp.*, Exchange Act Rel. No. 60505, 2009 SEC LEXIS 2796,

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[cont'd]

acknowledged that some information related to Tang's trades was accurately reflected in the Firm's transaction history report. (RP 11026-49, 12493.) This fact, however, does not excuse Brokaw's responsibility to complete order tickets when he received Tang's orders.

[25] The Firm's procedures were applicable to all Firm employees. (RP 8407, 8513.)

at *23 (Aug. 19, 2009) (explaining that individuals may violate NASD Rules 3110 and 2110 when they fail to comply with Exchange Act Rules 17a-3 or 17a-4, or are otherwise responsible for creating inaccurate books and records); *cf. John F. Lebens*, 52 S.E.C. 606, 608 (1996) ("It is important that broker-dealers conduct their business operations with regularity and that their records accurately reflect those operations."). If Brokaw was unwilling to accept this responsibility, then he was not free to remain the representative at the Firm assigned to Tang's account. (RP 6572-74, 6700-01, 6715.) The Firm's procedures make clear that it was Brokaw who was primarily responsible for completing the order tickets after he received the orders from Tang. (RP 12490-91); *cf. Steven P. Sanders*, 53 S.E.C. 889, 904 (1998) ("[E]ven where supervisory responsibility is shared between firm executives, each can be held liable for supervisory failure.").

Brokaw claims that NASD Rule 3110 imposes no duty upon him for the recordkeeping requirements.[26] The Commission previously has sustained FINRA's finding of substantive liability on registered persons who were directly involved in the conduct that lead to a firm's violation of FINRA rules. *See, e.g., Robert E. Strong*, Exchange Act Rel. No. 57426, 2008 SEC LEXIS 467, at *36 (Mar. 4, 2008) (finding that compliance officer failed to employ "reasonable diligence" to review research reports and to verify the accuracy of the disclosures and therefore directly violated NASD Rule 2711); *Michael A. Rooms*, 58 S.E.C. 220, 223 (2005) (affirming NASD's finding that principal was liable for causing firm to violate penny stock rules), *aff'd*,

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[26] NASD Rule 0115 makes all NASD rules, including NASD 3110, applicable to both FINRA members and all persons associated with FINRA members. *See supra* n.10. A violation of NASD Rule 3110 constitutes conduct inconsistent with just and equitable principles of trade and violates NASD Rule 2110. *North Woodward*, 2009 SEC LEXIS 2796, at *2 n.4; *see also Fox & Co. Inv., Inc.*, 58 S.E.C. 873, 884 n.19 (2005) (explaining that violations of the recordkeeping rules are "inconsistent with the just and equitable principles of trade provisions of NASD Conduct Rule 2110").

444 F.3d 1208 (10th Cir. 2006). In the case of *Fox & Co.*, the Commission determined that the firm, acting through its financial and operations principal, James Moldermaker, failed to provide an accurate statement of the firm's trial balances and net capital computations. 58 S.E.C. at 892. Thus, the Commission held that Moldermaker violated NASD Rules 3110 and 2110 when he caused the firm to maintain materially inaccurate books and records. *Id.* at 892-93.

It was Brokaw's responsibility, and his alone, to ensure the accurate preparation of order tickets for Tang's orders—orders that Brokaw himself received directly from Tang. Brokaw cannot blame others for his misconduct. *See Scott Epstein*, Exchange Act Rel. No. 59328, 2009 SEC LEXIS 217, at *73-74 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *Justine Susan Fischer*, 53 S.E.C. 734, 741 n.4 (1998); *see also Patrick G. Keel*, 51 S.E.C. 282, 287 (1993) (finding that respondent did not take responsibility for his own misconduct but blamed his supervisor and customers instead).

The Commission should sustain the NAC's finding that Brokaw was responsible for the Firm's inaccurate books and records, in violation of NASD Rules 3110 and 2110.

C. The Sanctions that the NAC Imposed on Brokaw Are Consistent with the Guidelines and Neither Excessive nor Oppressive.

The sanctions that the NAC crafted in this case are appropriate, reflect the gravity of Brokaw's conduct, and are neither excessive nor oppressive. Exchange Act Section 19(e)(2) provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. 15 U.S.C. § 78s(e)(2). In conducting its examination, the Commission considers any mitigating factors that an applicant raises and gives due regard to the "public interest and the protection of investors." *See PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007); *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005).

The NAC carefully weighed the relevant factors contained in FINRA's Guidelines, as detailed in the NAC's decision in this matter. The Commission should affirm the NAC's sanctions imposed upon Brokaw, as they are neither excessive nor oppressive and are consistent with the Guidelines.

1. A One Year Suspension and $25,000 Fine Are Appropriate for Brokaw's Unethical Conduct.

The NAC suspended Brokaw for one year in all capacities and fined him $25,000 for his failure to conduct an adequate inquiry into Tang's trading instructions, in violation of Rule 2110. The Commission should affirm these sanctions.

FINRA's Guidelines contain no specific guideline applicable to Brokaw's unethical trading on Tang's behalf. Nevertheless, the Guidelines provide general principles and principal considerations to guide the formulation of all sanctions.[27] *See FINRA Sanction Guidelines* 2-7 (2011), *available at* http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf (hereinafter "*Guidelines*"); *see also Dante J. DiFrancesco*, Exchange Act Rel. No. 66113, 2012 SEC LEXIS 54, at *33-34 (Jan. 6, 2012). The suspension and fine are appropriate here because the NAC consulted these provisions of the Guidelines and found a number of aggravating factors. The NAC found that Brokaw ignored many key factors that illustrated that Tang's trades could have been manipulative.[28] *See Guidelines*, at 7

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[27] Brokaw quibbles with the fact the NAC relied on the Guidelines' general principles and principal considerations in the absence of a violation-specific Guideline. (Br. at 23-24.) The Commission has consistently upheld this approach to the NAC's sanctions determinations. *See Prager*, 58 S.E.C. at 665.

[28] Brokaw misquotes the NAC Decision in his brief, stating that the NAC concluded that Brokaw was "indifferent to every sign" that Tang's trades were for possible illicit purpose. (Br. at 24.) In fact, the NAC concluded that Brokaw "was indifferent to the ample warning signs"

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(Principal Consideration No. 13); *supra* Part IV.A; (RP 12492). Brokaw was also motivated to appease Tang who was his most important customer and who made him "a lot of money." (RP 10684.) Moreover, Brokaw played a central role in Tang's trades circumventing Firm supervision. (RP 12490-91.) Brokaw's trading for Tang was also self-serving. Brokaw not only earned commissions on Tang's trades, but he also profited indirectly by receiving full value for the CVRs that he and his family held. *See Guidelines*, at 7 (Principal Consideration No. 17). Brokaw received $190,000 in CVR payouts and $725 in commissions.[29] (RP 7216-17, 7393, 7857.) The NAC found that Brokaw's potential receipt of handsome profits from the CVRs clouded his judgment and precluded the discerning inquiry necessary when presented with Tang's trading pattern. (RP 12492.) Brokaw argues that he was selling CVRs before the pricing period; thus, his financial motivation was diminished. (Br. at 25.) Brokaw's assertion that he had sold some of his MGRM holdings before the pricing period in no way undercuts the NAC's findings that he and his family continued to hold more than 200,000 CVRs going into the pricing period. (RP 12474.) Brokaw maximized his profits by holding his remaining CVRs until they were fully valued at the pricing period's conclusion. (RP 7327-28, 7393, 7857.) The NAC further found aggravating that Brokaw repeatedly sold hundreds of thousands of MGRM shares at Tang's direction. *See Guidelines*, at 7 (Principal Consideration No. 18); (RP 12492). Absent

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that Tang's trades could have been for an illicit purpose, (RP 12492), based on what Brokaw knew when he transmitted Tang's orders. (RP 12488-89, 12492.)

[29] Brokaw tries to discount the commissions that he received by contending his stake was less after sharing these with his sales team and insubstantial when juxtaposed with his more than $831,000 in commissions for the year. (Br. at 24-25.) This is irrelevant. The Guidelines advise adjudicators to consider a respondent's *potential* for monetary or other gain, which the NAC correctly did here. *Guidelines*, at 7; (RP 12492).

the Firm's intervention, Brokaw admittedly would have continued with his unfettered trading for Tang. (RP 7565.)

Brokaw understood the "game" that was being played and, through his disregard, he and Tang won financially. Ignoring myriad indicia of manipulation in order to process large orders for an important customer, and in the furtherance of personal profit, is the type of unethical conduct that warrants the one-year suspension and $25,000 fine imposed upon Brokaw. Under the circumstances, the sanctions imposed are sufficient to protect the investing public and to deter Brokaw from engaging in a similar ethical breach in the future. Brokaw's arguments seeking a modification of the sanctions are without merit.

2. The Commission Should Affirm Brokaw's 30-Business-Day Suspension and $5,000 Fine for Causing Inaccurate Books and Records.

The NAC suspended Brokaw for 30 business days and fined him an additional $5,000 for causing the Firm's inaccurate books and records related to Tang's MGRM orders. (RP 12493-94.) The Commission should affirm these sanctions.

The NAC appropriately found that Brokaw's delinquency in ensuring that order tickets were created when he received Tang's orders undermined the accuracy of the Firm's records. The Commission has emphasized the importance of accurate books and records by describing the recordkeeping rules as the "keystone of the surveillance of broker dealers." *Edward J. Mawod & Co.*, 46 S.E.C. 865, 873 n.39 (1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979). Because Rule 3110 plays a critical role in FINRA's self-regulatory efforts in this regard, the Guidelines recognize the importance of enforcing Rule 3110 and requiring that firms maintain accurate required records. Indeed, the Guidelines for a violation of Rule 3110 direct adjudicators to impose strong sanctions for such violations particularly when the nature of the inaccurate or missing

information is especially material. *Guidelines*, at 29. That is exactly what occurred in this case. The NAC found that order tickets are "essential documents" because they permit firms and regulators to review market activity in order to protect investors. (RP 12493.) The Commission has also emphasized that "[o]rder tickets play an important role in the recording and settlement of a brokerage firm's transactions." *Richard G. Strauss*, 50 S.E.C. 1316, 1317 n.5 (1992). Consistent with that view, the Firm's branch administrative manager and compliance officer Zbynek Kozelsky ("Kozelsky") testified that the Firm utilized order tickets in its surveillance functions and to facilitate correct billing and posting of orders to a customer's account. (RP 6531.)

The NAC acknowledged that some relevant information related to Tang's MGRM orders was accurately reflected in Deutsche Bank's transaction history report. (RP 11026-49, 12493.) Nevertheless, the NAC determined it crucial to its sanctions calculus that Brokaw prepared no order tickets at the time of Tang's orders. (RP 12493.) In addition, the booking tickets that were prepared after-the-fact misrepresented to Firm supervisory staff that Tang placed his MGRM orders with a trader rather than Brokaw. (RP 12493.) This effectively circumvented Firm surveillance of Brokaw's involvement with Tang. (RP 5736-42, 5836-38, 6530-53, 9310-12.) The NAC also correctly found aggravating that this was not an isolated occurrence. *See Guidelines*, at 7 (Principal Consideration in Determining Sanctions, No 18). On six instances over the course of three days, Brokaw sidestepped an important Firm surveillance tool by failing to complete order tickets. As the NAC appropriately found, the fact that Brokaw profited in the form of commissions on these trades further supports the sanctions imposed. *See id.* (Principal Consideration in Determining Sanctions, No 17).

The NAC also found troubling, and supportive of its sanctions, Brokaw's lack of candor during these proceedings in an effort to minimize his own responsibility. *See, e.g.*, *Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971, at *17-18 (May 9, 2007). The Commission has previously held that an applicant's failure to acknowledge responsibility for his misconduct is an aggravating factor. *See James B. Chase*, 56 S.E.C. 149, 162 (2003); *Michael F. Flannigan*, 56 S.E.C. 8, 23 (2003).

Indeed, throughout these proceedings, Brokaw persists in blaming Deutsche Bank staff and his sales assistants for a situation that was created by his own negligence. (RP 7188-89, 7191, 11819, 11984; Br. at 4, 22-23.) Brokaw has made clear that he never completed order tickets. (RP 7188-89, 7191; Br. at 22-23.) "My job was not to look at order tickets and review order tickets. That was the function of my sales assistants." (RP 7191.) Even if the use of inaccurate post-transaction booking tickets was a condoned practice within Deutsche Bank, Brokaw may not shift to others, such as his sales assistants, the responsibility for *his* misconduct. *See Charles E. Kautz*, 52 S.E.C. 730, 736 (1996) ("He argues that his conduct was an accepted practice at his Firm and approved by his supervisor, as if that should excuse his actions."); *Michael G. Keselica*, 52 S.E.C. 33, 37 (1994) (rejecting blame-shifting arguments). Brokaw's statements during the course of this disciplinary action indicate that he fails to appreciate his responsibility for his predicament and calls into question the high standards demanded of registered persons. *See Raghavan Sathianathan*, Exchange Act Rel. 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 Fed. App'x 883 (D.C. Cir. 2008); *Clyde Bruff*, 53 S.E.C. 880, 887 (1998) (finding continued attempts to shift blame to be "additional indicia of [applicant's] failure to take responsibility for his actions").

Moreover, the sanctions imposed fall well within the recommended ranges set forth in the Guidelines. For violations of NASD Rules 3110 and 2110, the Guidelines recommend imposing a fine of $1,000 to $10,000 and suspending the responsible individual for up to 30 business days. *See Guidelines*, at 29. As the NAC appropriately found, not only did Brokaw fail to ensure that accurate records were kept of Tang's trading, the records had the effect of camouflaging the true characteristics of Tang's trading. Brokaw's repeated failure to document Tang's MGRM orders in Firm records warrants the 30-business-day suspension and $5,000 fine, and the Commission should affirm these sanctions.

3. Brokaw Fails to Demonstrate Mitigating Factors.

Brokaw makes a variety of other unpersuasive arguments that there were mitigating factors. Brokaw's mitigation arguments, however, have no merit and amount to nothing more than a request for credit for a lack of additional aggravating factors. *See Michael Frederick Siegel*, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459, at *43 (Oct. 6, 2008) (explaining that presence of factor could constitute aggravating circumstances and justify increase in sanctions, but absence of that factor is not mitigating), *aff'd in relevant part*, 592 F.3d 147 (D.C. Cir. 2010).

Brokaw argues in favor of lesser sanctions that he "provided full cooperation to all regulatory agencies." (Br. at 25.) Brokaw misconstrues FINRA's Guidelines. The Guidelines provide that an associated person's substantial assistance to FINRA during an investigation is generally mitigating. *Guidelines*, at 7 (Principal Consideration No. 12). The record illustrates,

however, that Brokaw did not provide substantial assistance to FINRA, but rather cooperated as he was obligated to do.[30]

Brokaw's contention that his misconduct resulted in no customer harm, and therefore is less serious is unavailing. (Br. at 25.) "The absence of monetary gain or customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally." *Howard Braff*, Exchange Act Rel. No. 66467, 2012 SEC LEXIS 620, at *26 & n.25 (Feb. 24, 2012) (internal quotations omitted). Brokaw's misconduct is no less serious because of the lack of evidence of customer harm.

Brokaw also contends that he has endured financial hardship, including loss of employment and related compensation and "unreimbursed" legal expenses as a result of this disciplinary action. (Br. at 25.) The Commission should reject his argument outright. Brokaw's actions reflect a lack of appreciation for the requirements that he was subject to as an associated person of a FINRA member firm. The Commission does "not consider mitigating the economic disadvantages [respondent] alleges he suffered because they are a result of his misconduct." *See Jason A. Craig*, Exchange Act Rel. No. 59137, 2008 SEC LEXIS 2844, at *27 (Dec. 22, 2008).

Brokaw argues that he has an "unblemished career" with no prior disciplinary history. (Br. at 25.) His assertion is of no moment. As the federal courts and the Commission have stressed, the lack of a disciplinary record is not a mitigating factor. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006); *John B. Busacca III*, Exchange Act Rel. No. 63312, 2010 SEC LEXIS 3787, at *64-65 n.77 (Nov. 12, 2010), *aff'd*, 449 Fed. App'x 886 (11th Cir. 2011). Brokaw should not be rewarded because he previously may have acted appropriately as a

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[30] The record does not substantiate Brokaw's purported cooperation with "all" other regulators.

registered representative. *See Keyes*, 2006 SEC LEXIS 2631, at *23. Brokaw's failure to accept responsibility for his actions and his continued blame of others, however, directly supports the sanction imposed by the NAC. *Patrick G. Keel,* 51 S.E.C. at 287; *see also Kautz, 52* S.E.C. at 736 ("[H]e fails to recognize the seriousness of this violation.").

In furtherance of reduced sanctions, Brokaw argues that Enforcement did not prosecute another representative at another firm, Thomas Lombardi, who also traded MGRM for Tang during the pricing period. (Br. at 24.) Brokaw's objection is groundless. "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." *See Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997), *pet. for review denied*, 168 F.3d 478 (3d Cir. 1998). Moreover, FINRA's investigation of Brokaw and the filing of disciplinary charges represent legitimate regulatory exercises in furtherance of investor protection. *See* 15 U.S.C. § 78o-3; *see also Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) ("NASD disciplinary proceedings are treated as an exercise of prosecutorial discretion."). The record is clear that these proceedings derived from Deutsche Bank's discharge of Brokaw for cause.[31] (RP 7790.)

Next, Brokaw contends that Enforcement did not prove intentional misconduct; therefore, the Commission should reduce sanctions. (Br. at 25.) The NAC, however, did not base its sanctions on Brokaw's intentional wrongdoing. (RP 12492-94.) Instead, the NAC considered that Brokaw was indifferent to his regulatory responsibilities and sanctioned him accordingly.

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[31] The Firm stated that it terminated Brokaw for "questionable trading of one stock in [a] client's account." (RP 7790.) Brokaw objects to language related to his termination in the NAC's opinion. Specifically, Brokaw takes issue with the NAC's description of his misconduct leading to his termination as "executing trades" for Tang. (Br. at 10; RP 12471.) Regardless of semantics, Brokaw's involvement in Tang's trading is clear. *See supra* Part IV.A.

(RP 12492-94.) Brokaw's cavalier attitude permeates the record and indicates that he fails to appreciate that his actions call into question the high standards of commercial honor demanded of registered persons. *See Robert Tretiak*, 56 S.E.C. 209, 234 (2003) ("Tretiak's suggestions . . . indicate to us that he fails to appreciate the seriousness of his misconduct and his own responsibility . . . ."). Brokaw's arguments of purported mitigation have no bearing on the assessment of sanctions in this case.

* * *

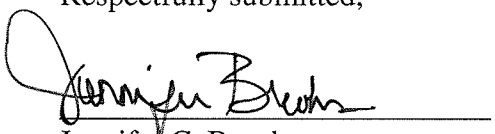
Brokaw has maintained throughout this disciplinary action that he is the victim of certain unsubstantiated conspiracies by Enforcement and "overzealous" regulators. (RP 11983, 12033, 12145-46, 12194 12247; Br. at 4, 5, 9, 22.) Brokaw's failures are his alone. He does not understand his professional obligations as a registered representative. Armed with a wealth of knowledge of MGRM, Brokaw failed to question a series of trades that could not have been more suspicious and permitted these trades to escape timely supervisory scrutiny when order tickets were not completed. When taking into account the facts and circumstances of this case, the sanctions are entirely appropriate for Brokaw's dereliction of his most basic obligations as a securities professional.

V. CONCLUSION

Brokaw placed his own self-interest ahead of the interests of the overall integrity of the securities markets. He ignored ample indications that Tang could potentially be manipulating the market for MGRM stock. When faced with a plethora of questionable circumstances that suggested that Tang was attempting to manipulate the market, Brokaw chose instead to ignore the obvious and blindly proceed on the course of conduct that offered him the greatest financial benefit. The record evidence demonstrates that Brokaw dismissed indicia of a possible

manipulation and disregarded his obligation to ensure accurate books and records through the completion of precise customer order tickets. Brokaw's ethical breach and disregard of FINRA's rules and his continued misunderstanding of the seriousness of the violations warrant the sanctions imposed by the NAC in this case. The Commission should affirm the NAC's decision in all respects.

Respectfully submitted,



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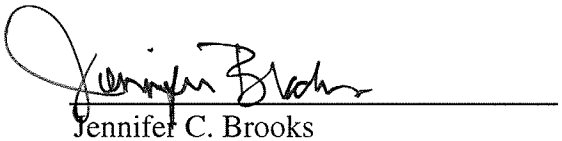
January 4, 2013

CERTIFICATE OF COMPLIANCE

I, Jennifer Brooks, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition not to exceed 14,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,858 words.



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