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SECURITIES AND EXCHANGE COMMISSION

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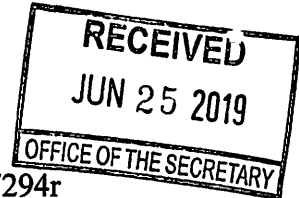
In the Matter of the Application of

DAVID B. TYSK

For Review of Disciplinary Action Taken by

FINRA

Admin. Proc. File No. 3-17294r



OPENING BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

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I. INTRODUCTION

This appeal is from FINRA's second attempt to explain to the SEC why it believes that David Tysk should be sanctioned for engaging in supposedly "unethical conduct" when he accurately supplemented his personal, chronological notes about a customer and later provided those notes (in a report stating the last date on which they had collectively been "edited" and created) to his firm and the customer in an unanticipated arbitration. The only reason this matter arose is that, through no fault of his own, Tysk's personal customer-relationship-management (CRM) software (called "ACT!") was improperly installed, so it did not automatically record the date and time when Tysk edited each of his notes. Yet FINRA did not prove that Tysk knew about the faulty ACT! installation. Therefore, FINRA did not establish that Tysk acted unethically. Had ACT! worked as intended, everyone would have known the exact time and date when Tysk supplemented each entry. These facts first came to light at the hearing in this proceeding. Since then, FINRA has ignored this issue in every pleading and in every decision. FINRA cannot continue to ignore this issue, which goes to the heart of the case against Tysk.

In addition to FINRA's failure to account for the dispositive fact that Tysk's CRM software was malfunctioning, FINRA has ignored other vital facts or misinterpreted the applicable law with respect to both of its specific causes of action, which are premised on "unethical" conduct. For example, FINRA has ignored that Tysk had no need to "bolster his defense" to the customer's complaint letter—because his firm had previously determined multiple times that customer's investments were suitable—and similarly ignored that no one relied on any version of Tysk's notes in assessing the complaint letter or in the subsequent arbitration. FINRA has also ignored multiple statements by Tysk's firm, Ameriprise Financial, Inc., that Tysk had not violated its policies, contrary to FINRA's allegation of such a violation as

a required element of the first cause of action. With regard to the second cause of action related to violations of the Arbitration Code, FINRA has misinterpreted what types of documents Tysk had the ability to produce and is trying to use this case to create new discovery obligations out of whole cloth. And FINRA has misinterpreted and misapplied Tysk's reliance on counsel defense.

Finally, even if the Commission finds Tysk liable for conduct alleged in FINRA's Amended Complaint, the sanctions that FINRA imposed are excessive and should be reduced.

II. STATEMENT OF THE CASE

A. Factual Background

This case arises from Tysk's relationship with a former customer, "GR." After their professional relationship began in 2005, Tysk and GR became very close friends, celebrating birthdays and holidays, and traveling internationally together. In addition, Tysk's children sometimes even spent the night at GR's house. Tysk's relationship with "JZ," GR's girlfriend/fiancée predated this relationship. JZ had helped raise Tysk's children, and for years, she was very close to Tysk and his wife. JZ was a customer of Tysk's prior to GR, and she remained a customer after GR filed his arbitration. (R.2317-20, 2323-24 (Tr.349:11-352:5, 355:20-356:19).)¹

GR had a net worth of \$55 million, and after an initial investment of \$750,000, he ultimately transferred about \$20 million to accounts managed by Tysk. (R.5609 (RX-Tysk-061); R.2320-23 (Tr.352:21-355:19).) By the summer of 2007, those assets were worth over \$29 million. (R.3549 (CX-13A).)

¹ Citations to the certified record are abbreviated as follows: "R.[page]" followed by a parenthetical filing description or exhibit number (e.g., "Tr." for the hearing transcript, "Initial NAC" for the May 16, 2016 decision, "NAC Remand" for the March 11, 2019 decision).

Given GR's interest in tax deferral, Tysk suggested a variable annuity. GR had owned annuities for decades, and he decided in December 2006 to invest \$1 million in an annuity through Tysk. Tysk submitted a preapproval questionnaire to his firm, Ameriprise, which preapproved and subsequently again approved the transaction. In July 2007, GR decided to invest another \$1 million in the same annuity. Although the additional investment did not require similar preapproval, Tysk sought and obtained another preapproval because he "felt comfortable having it done anyway." (R.3545 (CX-8); R.3547 (CX-10); R.2325-26, 2327-29 (Tr. 357:7-358:8, 359:7-361:2).)

GR's additional investment in the annuity triggered an Ameriprise exception report, apparently because of GR's age and the investment size. The firm sent Tysk an email asking for details about the transaction. After its review, Ameriprise concluded in October 2007 that the investment "appear[ed] suitable." (R.4210 (JX-3); R.3549-50 (CX-13A); (R.2273-75, 2594-97 (Tr.305:14-307:9, 626:19-629:6).)

1. Tysk used ACT! software to manage his customer relationships, including his relationship with GR.

Since 1993, Tysk used ACT! to manage his customer relationships. After having ACT! installed by outside professionals, Tysk and his employees used ACT! to schedule meetings, manage personal and professional calendars and contacts, create to-do lists, and keep notes. Tysk used ACT! every day, but he was not involved in its installation or configuration. (R.2055-56, 2303-05, 2308-09, 2423 (Tr.87:24-88:13, 335:18-337:15, 340:23-341:19, 455:3-5).)

Tysk relied on ACT! to maintain a chronology of his customer interactions and follow-up tasks. ACT! allowed him to create and edit entries by the date of the meeting, communication, or transaction (not by the date the information was entered) and organize those entries under categories like notes, history, and activities (collectively "Notes"). (R.4194 (CX-97); R.2250,

2314-15, 2549-52 (Tr.282:10-13, 346:4-347:18, 581:9-14, 582:25-583:5, 583:17-584:4).) Tysk generally used his Notes to describe emails, transactions, meetings, and “just a whole collection of things that one would want to remember, one would want to do.” (R.2314 (Tr.346:10-14).)

ACT! allowed multiple users to collaborate and synchronize their changes to a single database of customer information, and Tysk relied on his employees to record information in his ACT! Notes. Tysk also used a service called Same Day Transcription to dictate notes after customer meetings, and his employees would then copy the transcribed notes into ACT! a few days or a week later. (R.2309-11, 3228-29, 3264-65 (Tr.341:9-343:2, 1258:23-1259:4, 1294:24-1295:9).) Adding notes after a meeting or communication is consistent with industry practice. Brett Storrar, Tysk’s supervisor, testified: “[M]any times there isn’t enough time to complete the notes that you do have and advisors do go back in and add additional notes after the meeting, sometimes they will do it at the end of the week or the following week or even later.” (R.2515 (Tr.547:7-18).) Summaries of meetings or actions were thus never recorded contemporaneously as the meetings took place; all were input at a later time according to the date on which they had occurred.

To avoid the loss of customer information in the event of a power outage or other catastrophe, Tysk’s office staff tried to maintain daily, weekly, and monthly off-site backups of his ACT! database. Those backups, however, were routinely and regularly overwritten—which meant that they could not have recovered any data more than a month old. (R.2063-64, 2306-08, 2423 (Tr.95:19-96:19, 338:4-340:9, 455:12-25).)

ACT! was designed to rely on different database files. Yet according to the undisputed testimony of Mark Lanterman, a forensic expert who examined Tysk’s office computer and ACT! data, two-thirds of the normal database files (including data showing when individual entries or

edits had been made) were missing. Lanterman found no signs that those files had been deleted, and “the only explanation” he could think of was “a bad installation.” If the database files had been present and functioning as intended, ACT! would have automatically recorded the date and time when Tysk edited any of his Notes—regardless of the dates that Tysk input manually to maintain an accurate chronology of his customer relationships. (R.3306-07 (Tr.1336:24-1337:2; *see also* R.3227, 3241-42, 3246-47, 3305-07, 3309-10 (Tr.1257:7-25, 1271:17-1272:6, 1276:25-1277:6, 1335:7-1337:3, 1339:24-1340:22).)

Despite the faulty ACT! installation, Tysk was able to (and did) keep fairly detailed Notes for most of his customers. Because he saw them only once or twice a year, he used ACT! to remember details about their relationships. But given his regular interaction and close relationship with GR—who was by far his biggest and most important client—his Notes for GR were more skeletal. (R.4194 (CX-97); R.2316-17, 2363-64 (Tr.348:17-349:10, 395:23-396:17).) Indeed, Tysk “spent a considerable amount of [his] professional time working with [GR], his business managers, his accountant, his spouse, his children, his fiancé[e] [JZ], and others relating to his accounts.” (R.4194 (CX-97).) GR’s file was usually on Tysk’s or his employees’ desks, and Tysk and GR’s business and personal relationships often blended together such that they discussed personal issues whenever they spoke, which was generally once or twice a month. (R.2131, 2317 (Tr.163:9-13, 349:4-5).)

Regardless of the customer, Tysk maintained Notes for his own purposes, not because they were required or reviewed by his firm. Ameriprise did not require Tysk to use ACT!, did not have access to his ACT! database, did not provide ACT! support, and did not typically review Tysk’s Notes. (R.2303-04 (Tr.335:19-336:12).) As Ameriprise explained,

[ACT!] resides on Mr. Tysk’s local computer; it is not part of a central Ameriprise system, is not offered by Ameriprise, and is not maintained by

Ameriprise and is not automatically reviewed by Ameriprise Home Office other than in its normal supervision over an adviser's documentation. . . . There are no policies, procedures, practices, or instruction specifically regarding ACT! notes beyond the Firm's general policies regarding an adviser's documentation."

(R.3795 (CX-96).)

2. The market declines, and GR sends Ameriprise a letter questioning the annuity's suitability.

GR's investments initially performed well, but they began to decline with the markets in early 2008. In January of that year, GR for the first time indicated to Tysk that he was concerned about performance. GR and his business partner expressed displeasure with performance again in February. Finally, in March, Tysk received an email from the business partner informing Tysk that GR's investments would be transferred to a different firm. (R.2330 (Tr.362:16-21); R.2351 (Tr.383:7-17); R.2351-52 (Tr.383:19-384:9).)

GR had transferred most of his assets from Ameriprise before April 2008, but Tysk remained responsible for the annuity at issue (along with an unrelated annuity that GR had previously exchanged into an Ameriprise product). Then, on April 2, 2008, Ameriprise received a letter signed by GR questioning Tysk's annuity recommendations and asking Ameriprise to waive the surrender charges. The letter also stated that GR "would prefer to work with Ameriprise directly and not involve the NASD, SEC or the Minnesota Attorney General." (R.4207 (JX-2); R.4443 (JX-6 at 574:6-16); R.2175-76, 2351, 2357 (Tr.207:23-208:19, 383:18-21, 389:5-15).)

To evaluate GR's concerns, Ameriprise sent Tysk 12 written questions, to which he responded on April 25, 2008, after "review[ing] my file," "review[ing] the transactions," and "review[ing] all of the information that I had access to." (R.2357-58 (Tr.389:25-390:8); R.3561 (CX-23).) A few days later, Storrar, Tysk's supervisor, sent his delegate, registered principal John

Casement, to meet with Tysk to discuss the annuity. (R.2159-61 (Tr.191:12-193:15) ; R.2527 (Tr.559:6-12).) They discussed Tysk's written responses to the firm's questions, documents "regarding the annuity purchases that [Tysk] and GR discussed in mid 2007," and "reviewed lots of documents" (in a 2,000-page file). (R.2362-63, 2400 (Tr.394:16-395:4; 432:3-12).) But Casement and Tysk did not review the Notes for GR, nor did Casement ask for a copy of them. (R.2163, 2363 (Tr.195:17-22; 395:5-10).) Storrar testified that a representative's notes, if they are even reviewed, are given "[v]ery little" weight during a suitability review because suitability should be based "on applications, contracts, statements and, on any form of correspondence to the client." (R.2636-37 (Tr. 668:20-669:4); R.2556 (Tr. 588:10-18).)

Based on his discussion with Casement, Tysk understood that Ameriprise believed GR's letter was meritless, which was consistent with the firm's numerous suitability reviews of GR's annuity investments in 2006 and 2007. (R.2363 (Tr. 395:18-22); R.2415, (Tr.447:8-13); R.2471 (Tr.503:15-17) ("It was clear to me when John Casement left my office that my process was done, that things were in order."))²

On July 7, 2008, Ameriprise sent GR its response to his letter, concluding, as Casement had indicated, that GR's letter was meritless. (R.3565 (CX-24).) The firm based this conclusion not on Tysk's Notes—which had not been reviewed by the firm—but instead on "the client file," which "contain[ed] extensive documentation as to rationale and disclosure on numerous occasions," such as "copies of applications, financial advice deliverables, forms that were used . . . to 1035 exchange an annuity over [to Ameriprise], [and] any other home office forms or documents [the firm] would have." (R.2540-41 (Tr.572:19-573:11).)³ The firm also based its

² Despite Casement's prominence in this matter, FINRA did not take his investigative testimony or call him as a witness at the hearing.

³ The 1035 exchange is not at issue in this proceeding.

conclusion on an interview with GR and his business partner, who provided answers that “were [at] best limited.” (R.2540 (Tr.572:8-22).)

3. Tysk truthfully supplements his Notes.

After reviewing the documentation regarding his relationship with GR to respond to Ameriprise’s questions, and having been told multiple times by Ameriprise that the annuity was suitable, Tysk decided to supplement his Notes for GR, who at the time was still his client. Tysk did what he called a “brain dump” (R.2391 (Tr.423:10-15)) to ensure that his Notes contained a complete account of his personal and business relationship with GR, as he had always intended, rather than just a skeletal outline:

My notes for [GR] are not like all of my other notes, with the exception of my mother. So I realized it in going through this process [of responding to GR’s letter] and going through the file that I did not have ACT! notes for [GR]. . . . And it bothered me, it bothered me that I had a lot of information and things in my head and pieces of the story that weren’t there and I wanted to add them. . . . I added notes regarding meetings that I had with [GR] to essentially kind of preserve my thoughts and recollections about for whatever reason what I thought was important I can’t say why to this information or why not to that. But at the time I thought it was important to write things down. I think it felt good to review the file, I think it made me feel good, frankly, to just go through things kind of beginning to end.

(R.2364-65 (Tr.396:9-397:5).) Tysk has consistently maintained that he supplemented his Notes for GR because he was upset that they were sparse compared to his other customers’ Notes.

(*See, e.g.*, R.4193-95 (CX-97).)

For that reason, from May 13 until May 27, 2008, Tysk supplemented his Notes, recording meetings and events on the dates when they occurred. Tysk’s supplements were not part of a nefarious plan to protect himself against litigation that, at the time, was an unthinkable prospect. Indeed, as Tysk testified, his supplements were not “written for another reader, they were written for me” (R.2221 (Tr.253:18-19)), and merely reflected his attempt to memorialize

his business and personal relationship with a current client. (R.2289 (Tr.321:9-13) (“I wanted to preserve for my recollection details of a complicated and personal relationship with [GR].”)) Storrar confirmed that ACT! Notes are for the representative’s use, and not the firm’s, to know “in chronological order” what “took place with the client.” (R.2550-51 (Tr.582:25-583:5).)

To preserve his recollection of their relationship, Tysk entered Notes chronologically based on the day of the meeting, communication, or transaction, in what was, to Tysk, the most natural place to do so: ACT!, the computer database in which he maintained information about all of his customer relationships and which “already [contained] a skeleton of [his] meetings” with GR. (R.2371 (Tr.403:2-3)); *see also* R.4194 (CX-97) (“My contact note system, which is organized chronologically and which already had the skeleton of meetings and events, was the logical place for me to keep this history.”)⁴

The Notes demonstrate that Tysk did not supplement them to defend the annuity transactions because most of them did not even concern that product. Only five of the 70 supplements (seven percent) were relevant to the annuity. (R.2409-10 (Tr.441:16-442:9); R.5950 (Tysk Opening NAC Br. Ex. 1).) These five supplements were included because they were part of the chronology of Tysk’s relationship with GR. The remainder of Tysk’s supplements range from the mundane and personal (e.g., about a doctor to whom GR had referred Tysk, motorcycling, and trips to Europe) to entries dealing with other aspects of GR’s finances (e.g., regarding GR’s desire to move money to buy an apartment for JZ in China). (R.3724 (8/14/2006: “another motorcycle trip”); R.3728 (3/6/2007: apartment in China; 4/6/2007: cardiologist) (CX-68).)

⁴ DOE stipulated that ten supplemented Notes “already [had] an entry.” (R.2412 (Tr.444:4-24).) Only two of these supplements (December 14, 2006 and January 11, 2007) were relevant to GR’s letter.

Tysk supplemented his Notes based on the documents in GR's voluminous file, the outline of events that already existed in GR's Notes, his detailed Notes for JZ, and his memory, which he had recently refreshed so that he could respond to Ameriprise's questions. (R.2377-96, 2452-53 (Tr.409:17-428:5; 484:23-485:6).) Where Tysk had no records on which to base his supplements, he so indicated. (See R.3733 (CX-68) (7/25/2006: "No notes.....?").) And when events were already recorded thoroughly elsewhere (for example, in letters sent to GR or in emails), Tysk saw no need to re-record those events in his Notes. (R.2345-46 (Tr.377:18-378:13); R.3727 (CX-68) (2/16/2007: "I saved the emails").)

In addition, some of Tysk's supplements were against his interests, arguably suggesting a failure to "know his customer." And other supplements contained information that could have hurt a suitability defense. For example, GR's letter objected to a ten-year surrender charge, but one of Tysk's supplements says that another company had offered GR an annuity with *no* surrender charges. Further, to ensure that his Notes accurately reflected his relationship with GR, Tysk deleted an entry showing a meeting that had not actually occurred. (R.3727 (CX-68) (2/16/2007 supplement); R.2247-48, 2417-18 (Tr.279:11-280:2; 449:24-450:11).) These supplements certainly could not have "bolstered" Tysk's defense.⁵

Because Tysk based his Notes on pre-existing documents and his regular interactions with GR, the supplements are accurate. Indeed, FINRA has not challenged the accuracy of Tysk's supplements, did not charge him with making false statements, and did not present evidence that the supplements were untruthful. In FINRA's words, "Enforcement did not allege,

⁵ See, e.g., R.3725 (9/20/2006 regarding unknown marital status), 3726 (12/14/2006 regarding uncertainty about GR's current annuity), 3727 ([2/6]/2007 [date partially obscured] regarding unknown source of funds); R.3727 (2/16/2007 regarding competitor's annuity offering higher rate of return with no surrender charges) (CX-68).

nor did the Hearing Panel or NAC conclude, that Tysk's altered notes were false or untrue statements" (R.6588 (NAC Remand 14 n.14).)

4. GR initiates a customer arbitration.

After Ameriprise rejected the suitability concerns in GR's letter, JZ remained a client of Tysk's and "kept in good contact" with him. (R.2413 (Tr.445:15-17).) Nonetheless, in November 2008, six months after Tysk had supplemented his Notes, GR surprised Tysk by initiating an arbitration against him and Ameriprise, alleging that Tysk had sold him an unsuitable annuity and had charged "exorbitant fees for managing his accounts." (R.4631 (JX-9).)⁶ Given his relationships with GR and JZ, Tysk "felt terrible" and "surprised." (R.2413 (Tr.445:11-14, *id.* at 13-14 ("I didn't see that coming.")) Partly because JZ was still Tysk's customer and friend, Tysk "didn't think that [any arbitration] was happening." (R.2413 (Tr.445:17-18).)

After receiving GR's arbitration papers, Ameriprise issued a litigation hold—for the first time—and asked Tysk for documents that would need to be produced in discovery. (R.2161-62, 2414 (Tr.193:20-194:22, 446:4-9).) Tysk then provided Ameriprise with GR's file of more than 2,000 pages, including an ACT! "Contact Report" that contained his Notes. The Contact Report had been created and printed months before by Tysk's employee Michael Kotila, and it disclosed on its face that its contents had been "Edited On 5/27/2008" and "Created 5/27/2008." (R.4846 (JX-24); R.3263-64 (Tr.1293:18-1294:13).)⁷ Tysk did not specifically remember providing Ameriprise with a copy of that Contact Report, but he gave the firm every document that he had concerning GR for the arbitration. Ameriprise and the counsel representing Tysk and the firm

⁶ Although Tysk sold GR one type of annuity at issue in this proceeding, FINRA sometimes refers to "annuities" (plural).

⁷ Kotila is another material witness whom FINRA never interviewed or called at the hearing.

then organized and produced documents—including the Contact Report—to GR. Relying on his counsel at that point, Tysk did not personally participate in any decisions related to this document production. (R.2414 (Tr.446:4-17); R.2419-20 (Tr.451:12-452:6).)

In May 2009, after reviewing Tysk’s document production and seeing the unambiguous “Created” and “Edited On” dates on the Contact Report, GR’s counsel served a follow-up discovery request for “documents showing edits made by Mr. Tysk to the notes in the Contact Report.” (R.4724 (JX-13).) One of Tysk’s lawyers (who jointly represented Ameriprise) emailed Tysk in June about this request, attaching a copy of the Contact Report, with the following accompanying text:

David,

Please see [GR]’s Request No. 4 in the first attachment. The document his attorney is referring to in Request No. 4 is the second attachment. Do you know anything about any edits being made to the contact reports? I assume he picked the date b/c that is the “created date” stamped on the contact report. Do you know why the contact report with [sic] “created” on that date? My assumption was that was simply the date the report was printed off the computer and then probably placed in a hardcopy file.

(R.4198 (CX-122).)⁸

Tysk then searched ACT! for documents showing his supplements and accurately responded, “[t]here are no other documents showing edits per the request.” (R.4197 (CX-122).) After extensive searching, he concluded that he had “enough information” to respond to his attorney’s request. (R.2441 (Tr.473:14-18).) Thus, on July 7, 2009, the lawyers representing both Ameriprise and Tysk informed GR’s counsel that no such documents existed. (R.2820 (Tr.851:15-23).)

⁸ Tysk waived the attorney-client privilege to show “that he acted ethically and did all that he was required to do when relying on counsel to respond to discovery requests.” (R.1492 (Tysk’s Resp. to DOE Mot. to Preclude Reliance upon Counsel Defense).)

A few weeks later, in August, Tysk had his first substantive meeting with his attorneys.⁹ At that meeting, they reviewed and discussed the documents and the Notes for the first time, and Tysk informed his counsel that he had supplemented them. Tysk then relied on advice of counsel, who determined that Tysk's truthful supplements did not need to be more fully explained to GR in discovery. (*See* R.2290-91, 3140 (Tr.322:23-323:5, 1171:12-18).)

In December 2009, two days before the arbitration hearing was scheduled to begin, GR's counsel filed a motion asking the arbitration panel, among other things, to order Respondents "to turnover [sic] all relevant computer files and back-up media so that [GR] may perform a forensic examination and search for all relevant files." (R.3619 (CX-48).) This motion was prompted by Ameriprise's last-minute production of an exception report—and not by Tysk's supplemented Notes—but Tysk was entirely open about his supplements and wanted to ensure that GR had access to everything relevant to his claim. Tysk therefore "volunteered and physically turned over [his] computer to [a] forensic analyst immediately when asked in December, 2009." (R.4194 (CX-97); R.2431 (Tr.463:3, 9-13) ("I told counsel that [the forensic exam] . . . should be done. . . . 'In fact, I recall affirmatively suggesting that my computer be examined when the issue of a forensic analysis first came up at the initial hearing.'"))

Respondents' counsel nevertheless objected to GR's request for a forensic analysis, based on their legal judgment. After several more months of motions and objections, Respondents' counsel produced additional ACT! Contact Reports newly created by the independent forensic analyst, Mark Lanterman. During his forensic examination, Lanterman did not find any saved Contact Reports on the hard drive, or any evidence that Contact Reports had been deleted.

⁹ Tysk had met with his counsel once before in December 2008, shortly after GR initiated the arbitration, but they did not discuss or review his Notes. (R.2427, 3180 (Tr.459:7-14, 1211:11-17).)

(R.3232-33 (Tr.1262:9-1263:13).) He also discovered, as noted above, that several ACT! database files were missing. There were no signs that these database files had been deleted, and Lanterman concluded that the most likely cause was a faulty installation. The result, however, was that Tysk's ACT! system had only a third of the database files that Lanterman expected to find. (R.3227 (Tr.1257:7-25).)

Hence, even though ACT! normally records when individual Notes are modified, Lanterman, even with his forensic expertise and specialized tools, "wasn't able to produce the dates and times of when individual entries were modified" on Tysk's computer. In other words, Tysk's supplements should have indicated when each entry was made, but due to the defective software installation, that data was missing. Lanterman nevertheless managed to create *new* Contact Reports showing certain previous versions of the Notes using his expertise and tools, but only after processing and recovering information from the few database files that did exist. And even then, he could not determine anything about when entries and Notes relating to GR were created or edited—though a comparison of the various new Contact Reports that Lanterman created confirmed that nearly all of the supplements had been made between May 13 and May 27, 2008. (R.3792-93 (CX-96); R.3241-42, 3246-47 (Tr.1271:17-1272:6, 1276:25-1277:6).)¹⁰ Thus, Lanterman confirmed Tysk's statement that ACT! contained no other documents showing edits.

During the arbitration, neither counsel for GR nor counsel for Tysk and Ameriprise relied on the substance of *any* version of the Notes. (See R.2291 (Tr.323:9-20).) After the hearing, the

¹⁰ Tysk's only additions to his Notes for GR after May 27, 2008, were made in the course of ongoing work for GR, who continued to be his customer for another four or five months. (R.2175 (Tr.207:2-22).)

arbitration panel found, without explanation, in favor of GR.¹¹ (*See* R.4820 (JX-23).) The arbitration panel then referred Ameriprise and Tysk to FINRA’s Department of Enforcement (“DOE”). (R.3671 (CX-62).)

5. Ameriprise determines that Tysk did not violate firm policy.

In October 2010, after the arbitration had concluded, Ameriprise began an internal review to determine whether the supplements to Tysk’s Notes had violated any firm policies. (R.3765 (CX-85); R.2568, 2570-71 (Tr.600:6-13, 602:11-603:3).) At the end of this review, in which Storrar participated, Ameriprise issued an Educational Clarification Notice (“ECN”) to Tysk, finding no violation. Although Storrar initially suggested language for the ECN that would have referred to a “failure to follow . . . company policy,” he did not have the authority to make such a determination on his own, and a senior compliance analyst later informed him of the firm’s final approved language, which omitted any such reference. (*Compare* R.3768 (CX-86), *and* R.2579-80 (Tr. 611:13-612:4), *with* R.3771 (CX-87), *and* R.2641 (Tr.673:8-16).) Ameriprise has subsequently and repeatedly stated (as explained in Part III.A.2 below) that it does not believe Tysk violated any of its policies.¹²

B. Procedural History

1. DOE’s investigations and the operative complaint.

After GR filed his arbitration in 2008, FINRA investigated the annuity transactions, but closed the matter without a finding, apparently without a basis to charge Tysk for making an unsuitable recommendation. (R.2436 (Tr.468:5-16).) Subsequently, in May 2010, after the

¹¹ Despite his professed suitability concerns, GR kept the annuity with Ameriprise for nearly two years after the arbitration before exchanging it for a new annuity through a 1035 exchange. (R.2434-36 (Tr.466:17-468:4).)

¹² DOE did not take testimony of or call as a witness the senior compliance analyst, the authors of Ameriprise’s responses, or anyone else with authority to make this determination for the firm.

arbitration panel referred Respondents to FINRA, FINRA began what has now been a nine-year effort to fashion a legal theory under which Tysk could be sanctioned. In February 2012, DOE sent Tysk a Wells Notice alleging that he had “altered” his Notes to make it appear as if entries were contemporaneous. (R.5241 (JX-39) (Tysk’s first Wells response).) FINRA ultimately did not include this charge in the Complaint. In March 2013, DOE filed its initial Complaint against Ameriprise and Tysk. (R.1 (Compl.)) Four months later, having performed no additional discovery, DOE moved to amend the Complaint to correct factual errors and “conform the Complaint to the evidence.” (R.205 (DOE’s Mot. to Amend Compl.)) The Hearing Officer granted this motion over the Respondents’ objections, and DOE filed the operative Amended Complaint. (R.533 (Order Granting DOE’s Mot. to Amend Compl.); R.539 (Am. Compl.))

2. FINRA’s initial decision.

Following a five-day hearing in February 2014, FINRA’s Office of the Hearing Officer (“OHO”) issued a decision, finding violations, suspending Tysk in all capacities for three months, and fining him \$50,000. (R.5755.) Tysk appealed to FINRA’s National Adjudicatory Council (“NAC”), which issued FINRA’s final determination on May 16, 2016. The NAC affirmed the OHO’s findings of violations, but increased the sanctions to a \$50,000 fine and a one-year suspension. (R.6301.)

3. The Commission’s decision remanding for clarification.

Tysk filed an application for review with the Commission (R.6336), which concluded that FINRA had failed to adequately explain its findings and sanctions. The Commission thus remanded this case for further proceedings upon concluding that (1) it was “unclear from the [NAC] opinion under review if FINRA concluded that Tysk violated [his firm’s document retention] policies” and (2) “FINRA did not explain in its decision why Tysk’s conduct during discovery violated just and equitable principles of trade.” (R.6496 (SEC Op. 2).) The

Commission directed FINRA “to clarify its findings” and remanded “for additional explanation of the basis for [the NAC’s] findings of violation.” (*Id.* at 2, 3.)

4. FINRA’s decision on remand.

After further briefing, FINRA issued a replacement decision purporting to explain its findings and imposing the same sanctions. (R.6575.) Although FINRA narrowed the focus of its earlier decision in some respects—by placing less emphasis on its “bolstering” theory and by tying Tysk’s alleged violations primarily to a single Ameriprise policy against altering records during an “investigation”—the decision still purported to hold Tysk liable for making accurate supplements to chronological Notes that no one relied on in assessing GR’s complaint letter or in making substantive arguments in the arbitration. Tysk filed another application for review (R.6619), and this appeal followed.

C. Burden of Proof and Standard of Review

FINRA bears the burden of proving each element of its charges against Tysk by a preponderance of the evidence.¹³ To determine whether FINRA met that burden, the Commission reviews FINRA’s findings and disciplinary sanctions, as represented by the NAC decision on remand, *de novo*.¹⁴

III. EXCEPTIONS AND SUPPORTING ARGUMENT

FINRA erroneously found that Tysk had violated Rule 2010 and the Arbitration Code, first, by accurately supplementing the Notes regarding his personal and business relationship

¹³ See *Dratel Grp., Inc.*, Exchange Act Release No. 77396, 2016 WL 1071560, at *6 (Mar. 17, 2016) (“We base our findings on an independent review of the record and apply the preponderance of the evidence standard for self-regulatory organization disciplinary actions.”); *id.* at *9 (“[T]he burden of proving that Applicants engaged in violative conduct rests with FINRA . . .”).

¹⁴ See *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at *6 n.17 (Nov. 8, 2006).

with GR, and second, by allowing the Contact Report containing those Notes to be produced in arbitration without an accompanying explanation that some of the Notes had been (accurately) supplemented. Despite FINRA's efforts to clarify its earlier decision on remand, Tysk should not be found liable or sanctioned for the actions and omissions alleged in the Amended Complaint.

In the Amended Complaint, FINRA charged Tysk with failing to "observe high standards of commercial honor and just and equitable principles of trade" under FINRA Rule 2010 (and its identical predecessor, NASD Rule 2110), and that he "violated IM-12000," which provides in part that it may be deemed a violation of Rule 2010 to "fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the [Arbitration] Code." Because FINRA did not charge Tysk with violating any other specific rules, FINRA "must show" that Tysk acted "unethically or in bad faith." *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 WL 4731652, at *14 (Dec. 10, 2009). FINRA did not meet this burden, and its disciplinary findings and sanctions should be set aside.

A. Tysk did not violate FINRA Rule 2010 or NASD Rule 2110 by engaging in the acts and omissions alleged in FINRA's First Cause of Action.

Tysk did not act unethically when he truthfully supplemented his personal Notes or when he provided them to Ameriprise or GR. Tysk kept Notes on all his customers, and when he supplemented the Notes for GR, he did not supplement them to "bolster his defense" to GR's supposed "demand letter" or subsequent arbitration claim (R.6582 (NAC Remand 8)), because *Tysk had already responded* to his firm's inquiries about the letter and had been told by his firm that the letter had no merit. FINRA did not prove that supplementing the Notes to accurately reflect Tysk's relationship with GR was unethical or violated his firm's policies, especially when no arbitration or legal action was pending or threatened at the time and when the firm itself found no violation of its policies.

On remand, FINRA purported to “determine that Tysk’s misconduct violated FINRA’s ethical rule because, by altering his ACT! Notes, Tysk created the false impression that he wrote contemporaneous notes of his conversations with GR.” (*Id.*) But that theory of liability is inconsistent with FINRA’s first cause of action in the Amended Complaint:

42. Tysk altered his customer contact notes after receiving the customer’s Demand Letter *in order to bolster his defense* to the customer’s claim, and continued to make alterations after the arbitration claim was filed, all *in violation of his firm’s policies*.

(R.548 (Am. Compl. ¶ 42) (emphasis added).) FINRA’s complaint did not allege a violation simply because Tysk modified his Notes or because they appeared to be “contemporaneous.” Instead, FINRA bore the burden of proving that Tysk had unethically (1) “altered” his Notes “to bolster his defense,” *and* (2) violated Ameriprise policy by doing so. FINRA did not prove either of those allegations by the requisite preponderance of the evidence.

1. **Tysk did not act to “to bolster his defense” and should not be held liable for making truthful supplements to his chronological Notes.**

As alleged in the Amended Complaint, FINRA’s finding that Tysk violated Rule 2010 is based on the tenuous theory that he supplemented his Notes “to bolster his defense to the customer’s claim.” (R.548 (Am. Compl. ¶ 42).) Despite FINRA’s efforts to explain this theory on remand—and to expand the theory to include alleged alterations to bolster Tysk’s defense in the subsequent arbitration—its reasoning is contrary to the weight of the evidence and ignores critical facts.

The allegations contained in the Amended Complaint demonstrate that FINRA conducted an inadequate investigation prior to bringing the charges. FINRA could not prove the allegations because there is no support for them.

First, because FINRA failed to take the testimony of Casement or understand Ameriprise’s complaint-letter assessment process, FINRA had assumed the firm reviewed and

relied on Tysk's Notes when assessing GR's complaint letter. In fact, Ameriprise did not rely on Tysk's Notes when assessing GR's letter (or even, months later, when its counsel responded to the arbitration). Thus, the theory that Tysk intended "to bolster his defense" in response to GR's letter is belied by the fact that he did not share his supplemented Notes with Ameriprise until *after* the firm had rejected GR's complaint letter (and after GR filed his arbitration claim). No evidence supports FINRA's allegation that Tysk's "additions benefited Tysk and the Firm in connection with the customer's allegations of unsuitable trading." (R.542 (Am. Compl. ¶ 19).) To the contrary, Tysk did not supplement the Notes until after he had responded to Ameriprise's written questions, discussed GR's concerns with a firm representative (who did not review the Notes in any event), and been told GR's allegations were meritless. (R.2163-65, 2362-66, 2396-97 (Tr.195:9-197:19, 394:16-398:14, 428:12-429:20).) Tysk did not provide Ameriprise with *any* documents immediately after receiving GR's letter, and the record establishes that Ameriprise did not receive a copy of any Notes until much later, when Tysk sent his entire customer file for the arbitration. (R.2414, 2497-98 (Tr.446:4-17, 529:13-530:3).)¹⁵

Second, FINRA failed to understand that GR remained one of Tysk's clients for months after the Notes were supplemented, which required Tysk to continue using ACT! after receiving GR's complaint letter. After filing the disciplinary complaint in this matter, FINRA abandoned its argument that Tysk impermissibly had continued to alter his notes after the arbitration was filed. (See R.6302 (Initial NAC 2 n.4 ("In its decision, the Extended Hearing Panel did not

¹⁵ Even if Ameriprise had seen the Notes before rejecting GR's letter, the undisputed evidence is that they would have had "[v]ery little" importance. (R.2636 (Tr.668:15-20)); (R.2636-37 (Tr.668:21-669:4) (Storror Test.) ("ACT! notes are again the advisor's version of events To me suitability information which is what the case was based on is really, should be more public, meaning that it should be on applications, contracts, statements and, any form of correspondence to the client."))

find—and neither do we—evidence establishing that Tysk substantively revised his notes after May 27, 2008.”.) The only additions to Tysk’s Notes for GR after May 27, 2008, were made in the course of ongoing work for GR, who remained a Tysk customer.

Third, due to its inadequate investigation, FINRA failed to consider the implications that Tysk’s truthful supplements have on its theories of liability. FINRA did not find that any of the supplements to Tysk’s Notes were inaccurate. (See R.6588 (NAC Remand 14 n.14 (“[W]e note again that Enforcement did not allege, nor did the Hearing Panel or NAC conclude, that Tysk’s altered notes were false or untrue statements. . . .”).) On this point, FINRA apparently agrees that at least *some* truthful supplements are not actionable. In the initial Complaint, FINRA charged Tysk with deleting a Note showing a meeting that had not actually occurred. (See R.10 (Compl. ¶ 24); R.2247-48, 2417-18 (Tr.279:11-280:2; 449:24-450:11).) When FINRA filed the Amended Complaint, however, it removed the reference to this meeting (see R.535 (DOE Mot. to Amend Compl. 3))—implicitly acknowledging that Tysk did not act in bad faith or unethically “bolster” his defense when he made that particular accurate change. FINRA thus appears to be arguing, without explanation, that only *certain* accurate supplements are actionable. In other words, FINRA is deciding, without relying on any ascertainable standard, and without telling Tysk or anyone else, which types of truthful supplements are actionable and which ones are not.

Because at the Hearing the evidence established that Tysk did not supplement his Notes “to bolster his defense” to GR’s complaint letter, FINRA came up with a new interpretation of the Amended Complaint. Even though the term “customer’s claim” in the Amended Complaint refers only to the antecedent “customer’s Demand Letter” (R.548 (Am. Compl. ¶ 42)), FINRA decided to interpret “customer’s claim” as referring to *either* the “Demand Letter” *or* the arbitration claim, which wasn’t filed until six months later. That interpretation cannot be upheld.

The context surrounding the term “customer’s claim” makes clear that it referred to the Demand Letter—and *not* to the arbitration claim. The Amended Complaint used the term “arbitration claim” to refer to the arbitration, not the term “customer’s claim.” (R.549 (Am. Compl. ¶ 50 (“Tysk altered his own ACT! Notes after he received the customer’s Demand Letter and arbitration claim against him and the firm.”).) If FINRA had wanted to refer to the subsequent arbitration instead of GR’s complaint letter, FINRA could have used the correct words. And the record shows that Tysk had no intention to “bolster” his defense to GR’s then-nonexistent arbitration claim, which was not filed until six months later. Tysk gave uncontradicted testimony that he believed the annuity mentioned in GR’s letter was suitable, based on Ameriprise’s (1) pre-approvals; (2) post-approval suitability review; and (3) assurances through Casement that the firm thought “everything was perfectly in order with the transaction and with [his] file.” (R.2415 (Tr.447:5-13).) Furthermore, given Tysk’s ongoing personal and professional relationship with JZ, and the fact that they had all recently spent Christmas together, Tysk never thought that GR would sue him. (R.2149, 2457-58 (Tr.181:13-18, 489:17-490:5).) Instead of seeing the complaint letter as an implied threat of an arbitration claim, Tysk just saw it as part of an effort led by GR’s business partner to get Ameriprise to waive surrender fees. (R.2458-62 (Tr.490:6-494:14).)

FINRA’s finding that Tysk “intentionally backdated” his Notes “to make it appear that he had written down notes of detailed discussions with GR, when he had not” (R.6583 (NAC Remand 9)) is also erroneous. The Notes were a chronological record of Tysk’s personal notes, history, and activities for each of his customers. As DOE’s counsel stated during on-the-record testimony before the OHO hearing, “the record is pretty clear, based on previous communications and testimony, that Tysk had dates that were utilized and dated from an earlier

time *when the activity apparently occurred*. It *wasn't* he created a note and then *backdated* it.” (R.5688 (RX-Tysk-069, Storrar OTR Test. 116:20-25) (emphasis added).)¹⁶ Tysk was not “backdating” his truthful Notes any more than one “backdates” a calendar (or a calendar entry in Microsoft Outlook) by penciling in something that happened last week or even last year. Indeed, Storrar testified that it was industry practice to add notes after a meeting or communication not on the date the writing was added, but chronologically on the date of the meeting or communication. Nor did FINRA prove that Tysk *knew* that a faulty installation of ACT! was, as Lanterman testified, preventing the system from preserving entry-specific creation and modification dates. If the system had worked properly, it would have recorded the date and time of each supplement, (R.3241-42, 3246-47 (Tr.1271:17-1272:6, 1276:25-1277:6)), and Tysk could not have been found to have acted unethically. FINRA’s suggestion that Tysk should not have summarized a conversation as taking place on the date that the conversation occurred—and FINRA’s finding *for the first time on remand* that doing so somehow constituted a “deceptive business practice” (R.6583 (NAC Remand 9))—demonstrates that FINRA miscomprehends the way that Tysk used ACT! in his day-to-day business, and how representatives use CRM tools.¹⁷

¹⁶ DOE’s revised NAC brief in the appeal from the OHO decision quibbled with this characterization of its counsel’s remarks (R.6050 (DOE’s NAC Br.8 n.29)), but the quotation is accurate and consistent with the fact that Tysk was not fabricating entries about prior events that never occurred or that had occurred on later dates.

¹⁷ While Tysk did not “backdate” his Notes here, FINRA appears to believe that it can backdate without repercussions. In this case, for example, the OHO issued a revised decision on October 16, 2014, but backdated it with the date of October 13, which was the date the OHO had initially issued the decision. Yet that version does not indicate that it had been altered after October 13. The certified record contains only the “backdated” October 16 version (R.5755), while the original October 13 version is available online. See <https://www.israelsneuman.com/wp-content/uploads/2014/10/Tysk-FINRA-AWC.pdf> (October 13 version incorrectly stating that Tysk’s counsel was from Topeka, Kansas).

DOE also backdated its NAC brief. DOE properly filed its original brief on the due date, March 20, 2015, but after discovering more than a dozen errors, DOE filed a revised version on

FINRA's new finding that Tysk "deliberately created misleading evidence" (*id.*) is also incorrect. If Tysk had intended to bolster his defense with "misleading evidence," surely he would have provided it to Casement and cited the supplemented Notes when he responded to Ameriprise's questions about GR's letter. (If "bolstering" referred to the arbitration filed six months later, he would have discussed his Notes with his lawyers before they filed an answer, cited them in his arbitration answer, and used them in the arbitration.) Yet Tysk did not share his Notes with Ameriprise before the firm responded to GR's letter or to GR's arbitration claim, nor did his counsel rely on their substance during the arbitration. (*See* R.2291 (Tr.323:9-20).) Similarly, despite FINRA's citation to testimony from GR's counsel "that Tysk's ACT! Notes were important evidence in the arbitration" (R.6580 (NAC Remand 6)), GR's counsel did not rely on "evidence" related to *any* version of the Notes (pre- or post-supplementation) either. (*See* R.2291 (Tr.323:9-20).) Moreover, Storrar, an industry professional (as opposed to a lawyer) testified that such notes have "[v]ery little" importance in suitability determination. (R.2636 (Tr.668:15-20).)

FINRA has also ignored that only a small fraction of the supplemented Notes concerned GR's annuity, and many parts of Tysk's "brain dump" were personal, unrelated to the business,

March 24. (*Compare* R.5957, *with* R.6035.) Rather than date the revised version March 24, when it was actually submitted, DOE backdated it to March 20 and did not sign the similarly backdated certificate of service. (*See* R.6038, R.6074-75.)

Regardless of whether these instances of backdating were unethical, the Commission may nevertheless find that FINRA improperly altered documents and violated its own rules. The Commission has previously sanctioned FINRA and NASD for altering documents and for failing to follow their own rules. *See, e.g., FINRA*, Exchange Act Release No. 65643, 2011 WL 5097714 (Oct. 27, 2011), <https://www.sec.gov/litigation/admin/2011/34-65643.pdf>; *NASD*, Exchange Act Release No. 37538, 1996 WL 447193, at *3 (Aug. 8, 1996). FINRA should not be permitted to sanction Tysk for allegedly "backdating" personal records when FINRA itself has backdated its official records and pleadings.

or otherwise irrelevant.¹⁸ Other supplemented entries even could have *hurt* Tysk's defense in a suitability case by suggesting that he did not "know his customer" (as required to recommend an investment) or should have recommended a different product. (See discussion *supra* Part II.A.3.)

If Tysk supplemented his Notes for multiple purposes (e.g., for personal and business reasons) or "altered" only *some* of the Notes "to bolster his defense" (R.548 (Am. Compl. ¶ 42)), then FINRA has not proved its first cause of action as pleaded in the Amended Complaint. This cause of action is analogous to the charge in *IFG Network Securities, Inc.*, Release No. 273, 2005 WL 328278, at *2 (ALJ Feb. 10, 2005), *reversed in part*, Exchange Act Release No. 54127, 2006 WL 1976001 (July 11, 2006). In that case, the Order Instituting Proceedings ("OIP") alleged that certain registered representatives had violated antifraud rules by not disclosing to customers investing at least \$250,000 that "Class A shares of the mutual funds that they were purchasing would have produced materially higher returns than Class B shares of the same mutual funds," *id.*, but did not explicitly allege that Class A shares would *always* outperform Class B shares (simply that A shares "would" produce higher returns). Here, by analogy, FINRA did not explicitly allege that Tysk altered his Notes so that *all* of the altered Notes would bolster his defense; FINRA simply alleged that he altered his Notes to bolster his defense. In *IFG*, the ALJ found that "an investment of \$250,000 in Class A shares will not outperform an investment in Class B shares *in all circumstances.*" *Id.*, 2005 WL 328278, at *24 (emphasis added.) Therefore, the ALJ found that the Commission's Division of Enforcement had not proved its case. The ALJ further explained, "Had the Commission intended to adopt an OIP alleging that

¹⁸ FINRA erroneously cited a January 9, 2006 Note for the proposition that Tysk created "new entries that supported his investment recommendations at issue." (R.6579 (NAC Remand 5).) In fact, the funds described in that note (American Century, Putnam, and Fidelity) have nothing to do with the annuity at issue in the arbitration.

Class A shares at the \$250,000 level would ‘likely’ outperform Class B shares, the OIP would have articulated it forthrightly.” *Id.* Similarly, here, to the extent that certain “alterations” did not “bolster [Tysk’s] defense” (such as alterations about motorcycling, a cardiologist, a meeting that did not take place, or statements against interest), then FINRA has not proved its case. If FINRA had intended to allege that Tysk altered “*certain* customer notes” or that Tysk’s Notes dated X, Y, and Z were altered “to bolster his defense,” FINRA could (and should) have stated its cause of action using those words.

Given that Tysk never relied on the Notes to bolster his defense by waving them in front of Ameriprise or his counsel, and that many supplements were irrelevant or harmful to a suitability defense, the record does not support FINRA’s finding that Tysk unethically supplemented his Notes with that intent.

2. Tysk’s supplements to the Notes did not “violat[e] his firm’s policies.”

In response to the Commission’s instruction to “explain whether Tysk violated his firm’s policies by altering his notes and, if so, which policies were violated” (R.6498 (SEC Op. 4)), FINRA appears to have narrowed its focus to the following excerpt from the Ameriprise Code of Conduct dated “2005/2006”:

(2) “You may not shred, destroy or alter in any way documents that are related to any imminent or ongoing investigation, lawsuit, audit, examination, or are required to be maintained for regulatory purposes.”

(R.544 (Am. Compl. ¶ 25), *quoted in* R.6582-83 (NAC Remand 8-9).)¹⁹ But FINRA has not proved that Tysk actually violated this specific policy.

¹⁹ Tysk could not have violated the other Ameriprise policy quoted in the Amended Complaint, on “Lawsuit and Arbitration Claims.” (*See* R.544 (Am. Compl. ¶ 25); R.3763 (CX-83); R.2091-93 (Tr.123:11-125:17).) That policy would not have prevented him from supplementing his Notes in May 2008, which was six months *before* GR filed his arbitration claim in November 2008. This allegation once again shows that FINRA’s investigation was flawed.

As an initial matter, any finding that Tysk violated firm policy is precluded by Ameriprise's own, un rebutted conclusion that *there was no such violation*. Indeed, Ameriprise has stated repeatedly that Tysk did not violate its policies:

- “The Firm does not perceive the addition of notes to Mr. Tysk’s ACT! records as misconduct.” (R.3795 (CX-96).)
- “The Firm did not report its discovery of Tysk’s additions to his ACT! notes to FINRA because it found no misconduct by Mr. Tysk.” (R.3797 (CX-96).)
- “[T]he Firm had no reason to believe, and still has no reason to believe[,] that Mr. Tysk had done anything wrong or had tried to mislead the Firm in any way by making additions to his notes.” (R.5227 (JX-35).)

FINRA’s insistence that it knows better than Ameriprise on this point is mere *ipse dixit* unsupported by the record. Regardless of Storrar’s initial suggestions for Tysk’s ECN, Storrar had neither the ability nor the authority to determine policy violations on behalf of Ameriprise—which found that Tysk had not violated any policies. (*Compare* R.3768 (CX-86), *and* R.2579-80 (Tr.611:13-612:4), *with* R.3771 (CX-87), *and* (R.2641 (Tr.673:8-16).) FINRA did not call (1) the Ameriprise employees who approved the final ECN, (2) the authors of the firm’s multiple submissions stating that Tysk did not violate firm policy, or (3) anyone else with authority to contradict Ameriprise’s final interpretation of its own policies. FINRA bears the burden of proof, and the firm’s own conclusions about its policies should be dispositive. *Cf. DOE v. Niekras*, No. 2013037401001, 2018 WL 4961493, at *1 (FINRA NAC Oct. 8, 2018) (“We, like the Hearing Panel, find that the absence of witnesses . . . impacts our assessment of the evidence in this case. Based on this record, and the lack of evidence about the surrounding circumstances

with respect to the alleged misrepresentations, we find that Enforcement failed to prove its case. Accordingly, we affirm the Hearing Panel’s findings and dismiss the underlying complaint.”²⁰

At any rate, FINRA presented no evidence that the Ameriprise Code of Conduct dated “2005/2006” (*see* R.5155, 5184 (JX-28)) was still in effect when Tysk supplemented his Notes years later. The only witnesses who testified about that exhibit at the hearing in this matter were Tysk and Storrar—neither of whom established that it was in effect when Tysk supplemented his Notes in 2008. (*See* R.2075-77, 2082-84 (Tr.107:19-109:7, 114:5-116:5) (Tysk Test.); R.2508-10, 2511-14 (Tr.540:24-542:8, 543:24-546:2) (Storrar Test.).)

Furthermore, the policy at issue governed “[c]ompany documents,” which “must be kept” in a certain way. (R.5184 (JX-28).) But ACT! Notes are not “company documents.” They were Tysk’s personal notes. Ameriprise explained that Tysk’s ACT! software “is not part of a central Ameriprise system, is not offered by Ameriprise, and is not maintained by Ameriprise and is not automatically reviewed by Ameriprise Home Office.” (R.3795 (CX-96).) For the first time, FINRA has asserted on remand that Tysk’s Notes “constituted a firm record” (R.6583 (NAC Remand 9)). That assertion is unsupported and is contradicted by Ameriprise’s statements.

The specific provision of the Code of Conduct applies only to “documents that are related to any imminent or ongoing investigation, lawsuit, audit, [or] examination,” or are required to be maintained for regulatory purposes. (*Id.*) With respect to the second half of that policy, there is no allegation that Tysk’s Notes were “required to be maintained for regulatory purposes.”

²⁰ The only case that FINRA cites to support the idea that FINRA can ignore Ameriprise’s conclusions about its own policies is *DOE v. McGee*, No. 2012034389202, at 22 n.28 (FINRA NAC July 18, 2016), <http://disciplinaryactions.finra.org/Search/ViewDocument/66380>—which involved alleged violations of the Commission’s and FINRA’s antifraud rules. *McGee* stands for the unsurprising proposition that FINRA can enforce its own rules; it does not give FINRA the final word on whether associated persons have broken policies established by their firms.

Indeed, FINRA's DOE conceded that "the notes in issue are not subject to SEC and FINRA record-keeping rules." (R.6110 (DOE NAC Br. 27).) In addition, the Commission has already observed, "FINRA did not allege that Tysk violated books and records requirements applicable to broker-dealers under the Securities Exchange Act of 1934." (R.6496 (SEC Op. 2 n.2).)

Moreover, when Tysk supplemented his Notes in May 2008, no investigation or lawsuit was "imminent or ongoing." Tysk did not think that any lawsuit was "imminent" because he believed that GR would never sue him and because he still had a close personal and professional relationship with JZ, GR's girlfriend/fiancée. And the only testimony elicited by FINRA about whether Ameriprise was conducting an "investigation" was from Storrar, who stated unequivocally that when Tysk supplemented his Notes, there "wasn't a formal investigation[;] . . . we were collecting data for a client complaint." (R.2531 (Tr.563:15-21); *see also* R.2513-14 (Tr.545:23-546:2) (Storrar Test.) ("[A]s I read [the policy] here, it's dealing with ongoing investigations, lawsuits, audits and exams. And maybe I'm looking at the words, but that didn't pertain to [Tysk's] specific situation he was involved in.").)

Despite this unrebutted witness testimony, FINRA's decision on remand doubled down on its unsupported assertion that Tysk had altered his Notes during an Ameriprise "investigation." (R.6583 (NAC Remand 9).) But this assertion, based largely on a casual reference from an internal Ameriprise email to Storrar, ignores his testimony that "complaints and investigation" are "two separate areas of, of review." (R.2649-50 (Tr.681:17-682:22).) Both FINRA and the Commission similarly distinguish between formal "investigations" and other inquiries like examinations. *Compare* FINRA, Oversight, <http://www.finra.org/industry/oversight> ("Member Regulation *examines* all firms for compliance with FINRA, MSRB and SEC rules, and federal securities laws." (emphasis added)), *and*

FINRA, Enforcement, <http://www.finra.org/industry/enforcement> (“Enforcement Department is tasked with *investigating* potential securities violations and, when warranted, bringing formal disciplinary actions against firms and their associated persons.” (emphasis added)), *with* SEC, Office of Compliance Inspections and Examinations (OCIE), <https://www.sec.gov/ocie> (“The results of the OCIE’s *examinations* are used by the SEC to inform rule-making initiatives, identify and monitor risks, improve industry practices and pursue misconduct.” (emphasis added)), *and* SEC, Division of Enforcement, <https://www.sec.gov/page/enforcement-section-landing> (“The Commission’s enforcement staff conducts investigations into possible violations of the federal securities laws . . .”). *See generally* FINRA Rule 8210 (discussing FINRA’s authority in “an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules”). Regardless of GR’s complaint letter, FINRA did not prove that Ameriprise was investigating Tysk when he supplemented his Notes—rather, Ameriprise had already assured Tysk that GR’s allegations were meritless. And in the absence of an “investigation,” Tysk could not have violated the 2005/2006 Code of Conduct.

3. FINRA did not prove that Tysk’s alleged violations of firm policy were unethical.

Regardless of whether FINRA could prove a technical violation of firm policy (though it did not), the record cannot support a finding that Tysk *unethically* violated firm policy because FINRA did not prove that he “*knowingly or intentionally* attempted to evade the Firm’s policies” or acted with “reckless indifference to his responsibilities.” *DOE v. [Redacted]*, No. 2007011915401, at 15 (FINRA OHO Oct. 11, 2011) (emphasis added), http://www.finra.org/sites/default/files/OHODecision/p125275_0.pdf; *see also id.* at 12, 15 (finding no violation of NASD Rule 2110 because it was “not obvious to the Hearing Panel that

the Firm’s own policies prohibited” the conduct at issue, and the respondent, though “mistaken,” had “attempted, in good faith,” to “comply[] with the Firm’s policies”).

FINRA failed to prove that Tysk knew that ACT! was not properly recording the dates and times when he supplemented his Notes. Without that proof, FINRA cannot prove that Tysk acted unethically. Had ACT! worked properly, everyone would have been on notice of the dates of the supplements, and there would be no case. Moreover, the record shows that both Tysk and Ameriprise *believed* that supplementing the Notes in May 2008—while no arbitration, lawsuit, or investigation was pending—did not violate firm policy. Put another way, “it was not obvious” or “clear” that “the Firm’s own policies”—which did not require or address the use of ACT! at all—“prohibited” Tysk from supplementing his personal Notes. *DOE v. [Redacted]*, No. 2007011915401, at 12. Tysk “reasonably believed” that he was not violating firm policy—even if he “may have been mistaken”—and DOE “failed to prove that [he] knowingly or intentionally attempted to evade [his] Firm’s policies.” *Id.* at 15. Because DOE’s first cause of action depends on proving an *unethical* violation of firm policy, that cause of action should have been dismissed. *See id.*

B. Tysk did not violate FINRA Rule 2010 or IM-12000 by failing to act as alleged in FINRA’s Second Cause of Action.

FINRA also erroneously found that Tysk had violated IM-12000 of the Arbitration Code, which as relevant here provided that “[i]t *may* be deemed conduct inconsistent with” Rule 2010 to “fail . . . to produce any document in his possession or control as directed pursuant to provisions of the Code.” FINRA IM-12000, IM-12000(c) (emphasis added). Tysk thus cannot be held liable solely for “violating” IM-12000, which is an interpretive material and not a freestanding rule. To establish a violation under Rule 2010, FINRA must prove that any failure to comply with IM-12000 was *unethical*. Indeed, FINRA’s counsel agreed that the second cause

of action does not depend on a mere failure to produce documents under IM-12000.²¹ More importantly, the Arbitration Code did not require Tysk to produce documents that he did not have (and that did not even exist), nor did it require him to explain the history and circumstances surrounding every supplement to his Notes before the arbitration hearing.

FINRA's Second Cause of Action rests specifically on the following allegation:

50. Tysk altered his own ACT! Notes after he received the customer's Demand Letter and arbitration claim against him and the firm. Then, Tysk did not notify the claimant, or his firm, of these edits when Tysk responded to discovery requests for his notes and when he responded to subsequent requests for edits to his notes.

(R.549 (Am. Compl. ¶ 50).) But FINRA's DOE acknowledged before the NAC that the second cause of action is (to put it mildly) not "clearcut."²² Nevertheless, FINRA's final decision on remand concluded that Tysk had "violated the arbitration rules when he produced his altered ACT! Notes during discovery and did not disclose that he had manually backdated" them "after GR complained." (R.6585 (NAC Remand 11).) As discussed below, that is the very issue for which Tysk relied on counsel.

Neither IM-12000 nor any other provision of the Arbitration Code requires parties to give their adversaries (or co-respondents) an affirmative explanation of each discovery document at the time of production. Quite the contrary: Parties must exchange documents and information "in good faith," but "narrative answers" are "not require[d]," and "[s]tandard interrogatories are generally not permitted." FINRA Rule 12507(b)(2), (a)(1). "Depositions are [also] strongly

²¹ R.6227-28 (Tr. of DOE oral argument to NAC 35:23-36:2) ("The case consists of two claims alleging violations of Rule 2010. That's it. It's a standalone Rule 2010 case. As the other side points out, it's not predicated on a violation of some other rule.").

²² R.6242 (NAC Oral Argument Tr.50:14-18); *see also id.* ("Was the violation that he didn't produce the document or was it that he didn't disclose the information? The violation, in essence, if I had to characterize it in a few words, was that he misled the other side."). IM-12000(c) itself says nothing about "misleading" the other side in arbitration.

discouraged” under FINRA Rule 12510, and parties who have questions about a discovery document are not typically entitled to answers until the arbitration hearing.²³ Tysk gave truthful answers about supplementing his Notes when asked at the arbitration, and nothing in the Arbitration Code required him to anticipate or answer those questions beforehand in discovery.

1. Tysk complied with IM-12000 and Rule 2010 by turning over every responsive “document in his possession or control.”

As noted above, the part of IM-12000 cited in the Amended Complaint refers solely to the production of documents within a party’s “possession or control.” FINRA IM-12000(c) (cited in R.548 (Am. Compl ¶ 46)). And when Ameriprise sought Tysk’s file for purposes of GR’s arbitration, Tysk turned over “thousands of pages of documents and *everything* that [he] had.” (R.2414 (Tr.446:4-14) (emphasis added).) Although Tysk did not specifically remember producing his Notes (or remember thinking about them at the time), the Contact Report that his employee Kotila had created and printed out several months earlier was produced to GR by the arbitration Respondents’ joint counsel. Tysk did not create or modify any documents during this process, and Lanterman (the forensic expert) found no evidence that any other Contact Reports existed or had been deleted from the hard drive that he examined. (R.2414-15, 3232-33 (Tr.446:15-447:22, 1262:9-1263:13).)

Accordingly, FINRA’s primary criticism against Tysk does not describe an unethical violation of the Arbitration Code. FINRA alleged that “[a]lthough GR requested Tysk’s edits to his ACT! Notes during discovery, Tysk did not produce them when asked” (R.6586 (NAC Remand 12)). However, the Arbitration Code, including IM-12000, does not require the parties

²³ Cf. FINRA Office of Dispute Resolution, Arbitrator’s Guide 33 (2018) (“For example, a question asked of a witness such as, ‘What is your understanding of this document?’ should generally be left for the hearing.”), <http://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.

to create documents that are not already in their possession, custody, or control.²⁴ By providing the documents that he *did* possess to Ameriprise and his arbitration counsel, Tysk fully complied with his obligations under IM-12000, the ground for FINRA’s second cause of action. Until Lanterman had reconstructed new Contact Reports from hidden ACT! database files, there existed no “documents showing edits” for Tysk to produce. Even his “best efforts” under FINRA Rule 12506 (*id.*)²⁵ could not have led him to produce documents that simply did not exist.

In this regard, FINRA’s assertion that Lanterman “found multiple versions of Tysk’s ACT! Notes concerning GR in database files on Tysk’s computer” (R.6581 (NAC Remand 7)) ignores important distinctions between the Notes that Tysk maintained, the incomplete database files that forensic-expert Lanterman found, and the *new* Contact Reports that Lanterman created through a technical, multistep process for the arbitration. The ACT! software could be used to prepare “Contact Reports,” in which a user could print out specific information pulled from those ACT! database files that existed. The supplemented Notes at issue here, for example, were contained in a Contact Report that Kotila created, printed on May 27, 2008, and placed in GR’s paper file. But FINRA’s assertions that “Tysk made no reasonable attempts to search the saved ACT! database files on his computer” and that he “knowingly withheld providing his edits to his ACT! Notes in response to GR’s discovery request” (R.6586 (NAC Remand 12)) have no factual support.

Regardless of any additional “ACT! database files” that existed on “Tysk’s computer” (R.6588 (NAC Remand 14 n.12)), those files were not reasonably accessible to Tysk for

²⁴ *Accord* FINRA Discovery Guide 5 (2013) (“Parties are not required to create documents in response to items on the Lists that are not already in the parties’ possession, custody, or control.”), <https://www.finra.org/sites/default/files/ArbMed/p394527.pdf>.

²⁵ Despite the Amended Complaint’s references to Rule 12506 of the Arbitration Code (R.549 (Am. Compl. ¶ 47)), FINRA did not specifically allege that he had violated that rule.

production in arbitration discovery. Lanterman had to use his expertise and special “forensic software” to locate those files (R.3230 (Tr.1260:16)), including *hidden* files that Tysk would not have been able to find. Lanterman described the files as follows:

[T]hese are not documents, these are database files. A user, who spent a lot of time, because they are not all in the same place, they would need to go out and find these, because they are kind of scattered around into different folders, a user would see some of these files, but not all of these files. There’s one file that came from a recycle bin that was hidden to Mr. Tysk’s user account.

(R.3274 (Tr.1304:16-24) (emphasis added); *see also* R.3228-30 (Tr.1258:14-1260:25).)

Lanterman used these files to create brand new Contact Reports, which included “even entries that the user couldn’t possibly have printed out in a contact report.” (R.3282 (Tr.1312:14-16); *see also* R.3280-81 (Tr.1310:6-1311:24).) Lanterman “wasn’t able to produce the dates and times of when individual entries were modified” because that data did not exist, but he “relied on the data contained inside of the [database] files that [he] did locate” to “generate contact reports related to [GR].” (R.3242 (Tr.1272:5-16).) These new Contact Reports were then compared with the one that Kotila had placed in Tysk’s paper file to show (roughly) which Notes had been supplemented between May 13 and 27, 2008. FINRA’s assertion that “Tysk indeed had possession of previous versions of the ACT! Notes and was required by the arbitration rules to produce them, or explain why he could not” (R.6588 (NAC Remand 14)), is thus flatly contradicted by the record.

FINRA distorts these facts about the Contact Reports by relying on a passing reference to irrelevant and misleading testimony from Christopher Leigh (R.6587 (NAC Remand 13)), a FINRA employee with “self taught” “database experience” (R.2731 (Tr.762:5-6)), who made a convoluted effort to demonstrate the ACT! software at the disciplinary hearing. Leigh used a

different version of ACT! than Tysk had used,²⁶ and he made no effort to recreate the unique conditions of the “bad installation” that Lanterman said had limited the software’s functionality on Tysk’s computer.²⁷ Leigh also admitted that he was “not intimately familiar with the distinction[s] between” the various kinds of ACT! database files. And neither the OHO nor the NAC relied on Leigh’s purported “demonstration” until *after* the Commission’s order remanding the case. (R.2705-06, 2736, 2743, 3004-09 (Tr.736:9-737:15, 767:18-24, 774:8-9, 1035:12-1040:2).)

The only authority that the NAC cited to support FINRA’s findings on remand under IM-12000 of the Arbitration Code was *DOE v. Westrock Advisors, Inc.*, No. 2006005696601, 2010 WL 4163739 (FINRA NAC Oct. 21, 2010). (R.6586 (NAC Remand 12).) But that case (concerning IM-12000’s predecessor, NASD Rule IM-10100) involved a party who outright failed to produce documents that were indisputably within its possession or control. *Westrock*, at *7 (noting that the respondent “had in its possession and control many of the order tickets and blotters . . . that it was directed to produce in the arbitration, but it did not produce them”). Here, Tysk did nothing of the sort. He turned over all the documents that he had (to Ameriprise), and when his counsel forwarded GR’s follow-up discovery request, he responded truthfully—as later verified by Lanterman—that “no other *documents*” showing edits to the Contact Report existed. (R.4197 (CX-122) (emphasis added).) The Contact Reports that Lanterman created using his forensic tools and expertise were not within Tysk’s possession or control when his counsel

²⁶ Leigh admitted that he “would have no way of knowing what version [Tysk] used” (R.3007 (Tr.1038:8-9)), and Lanterman’s testimony showed that Leigh had, in fact, bought a different version from the one used by Tysk (*see* R.3228-29 (Tr.1258:23-1259:13)).

²⁷ Leigh’s testimony suggested that his *properly* installed copy of ACT! recorded the “create” and “edit” dates of each Note. (R.2721-22, 2724-25, 2725-26 (Tr.752:16-753:6, 755:20-756:2, 756:24-757:5).)

responded to GR's discovery requests. Tysk cannot be held liable under IM-12000(c) for failing to produce documents that he did not have, and that did not exist, and FINRA erred by concluding that his allegedly "intentional withholding of discoverable information was conduct inconsistent with just and equitable principles of trade." (R.6586 (NAC Remand 12).)

2. IM-12000 and Rule 2010 did not require Tysk to "notify GR or his firm of his alterations when he responded to discovery requests." (R.6584 (NAC Remand 10).)

In an effort to expand the scope of Rule 2010 and IM-12000, FINRA improperly held Tysk liable for violating the Arbitration Code "when he produced his altered ACT! Notes during discovery and did not disclose that he had manually backdated . . . and supplemented" them. (R.6585 (NAC Remand 11).)²⁸ But the answer to the Commission's specific question whether Tysk violated Rule 12506(b) (R.6499 (SEC Op. 5))—which directs the parties to "act in good faith" by using their "best efforts" to produce "documents in their possession or control that are described in Production Lists 1 and 2"—is a resounding *no*.

FINRA's OHO correctly noted that "the Amended Complaint does not charge Tysk with any misconduct related to whether he made good faith efforts to respond to discovery requests for prior versions of the notes." (R.5773 (OHO 19 n.100).) To the extent the NAC nevertheless found that Tysk had "failed to meet the requirements of FINRA Rule 12506(b)(2)" (R.6586 (NAC Remand 12)), FINRA's findings are erroneous and unsupported by the record.

FINRA also departed from the plain meaning of IM-12000 and Rule 12506(b) when it found that Tysk "was deliberately concealing important information from GR and the arbitration

²⁸ The discovery rules, of course, govern the exchange of information with other parties, not the disclosure of information to one's own firm. But at most, Tysk waited only a couple of months after receiving GR's follow-up discovery request in June 2009 to explain the Note supplements to his counsel, at their first substantive meeting in August 2009.

panel.” (R.6587 (NAC Remand 13).) Aside from the lack of evidence that Tysk deliberately concealed anything—his Notes were accurate, and the Contact Report disclosed on its face that it had been “edited” and “created” after the date of GR’s complaint letter—this finding wrongly suggests that a party can be held liable for failing to “*produce* documents” simply because he does not simultaneously *explain* those documents to the other parties.

Forcing parties in arbitration to affirmatively explain their documents—and to anticipate questions about the documents’ history—would be fundamentally inconsistent with FINRA’s Arbitration Code. As written, the discovery rules do not permit standard interrogatories and strongly discourage depositions, *see* FINRA Rules 12507, 12510, so parties are expected to ask most of their questions about documents at the hearing.²⁹ Upending that principle by imposing a one-sided ethical duty to “explain” documents would back arbitration respondents (but not complaining customers) into an unfair and inefficient corner: predict and answer the opposing party’s questions about your document production in advance—unless you want to risk a fine, a suspension, or worse.

If FINRA believes that arbitration participants should have a pre-hearing duty to explain the documents that they produce, it should seek the SEC’s approval and amend the Arbitration Code to allow standard interrogatories and to remove the qualification that requests for documents and information should “not require narrative answers.” FINRA Rule 12507(a)(1). Such a dramatic expansion of discovery obligations under the Arbitration Code should occur only through a regular rulemaking process—not in an ad hoc disciplinary proceeding.

²⁹ These express limitations on arbitration discovery contravene FINRA’s assertion that “[t]he essential goal of the discovery process . . . is to ensure that the parties to an arbitration obtain *all* relevant facts and information to prepare for the hearing.” (R.6587 (NAC Remand 13) (emphasis added).)

The record therefore does not support a finding that Tysk unethically violated Rule 12506(b)—or, by extension, IM-12000. Neither the underlying rule nor its associated interpretive material requires parties to volunteer explanations or anticipate questions about the provenance and history of documents produced in discovery, and any “documents showing edits” to Tysk’s Notes were not within his possession or control *because they did not exist*. Rule 12506(b) required Tysk to produce the documents that he already had—not to hire an expert to create new ones or to provide the sort of “narrative answers” that are expressly discouraged by Rule 12507(a)(1).³⁰ Nothing that Tysk did in discovery “threatened the integrity of the arbitration process” as contemplated by the express provisions of the Arbitration Code (R.6587 (NAC Remand 13)), and he should not be held liable for producing the responsive (and accurate) documents within his possession or control.

C. FINRA’s Sanctions Should Be Canceled, Reduced, or Remitted.

Finally, the sanctions that FINRA imposed—which exceed those recommended by the OHO—are excessive and oppressive. Even if Tysk could be held liable on the charges here, these sanctions should be canceled, reduced, or remitted under 15 U.S.C. § 78s(e)(2).

FINRA inappropriately relied on its Sanction Guideline for “Forgery [and/or] Falsification of Records” despite the lack of any allegation or finding that Tysk’s supplemented Notes were false. Indeed, FINRA did not charge (or prove) that Tysk had made a single false

³⁰ FINRA denied Tysk’s motion to introduce expert testimony on standards for arbitration discovery, including “standards and practices for discovery and the production of documents” in FINRA arbitrations, “discovery motion practice,” and “obligations, or lack therefore, to perform forensic examinations.” (R.720 (Resp’ts’ Mot. to Allow Expert Test. 2).) That expert, a former director of the Investor Rights Clinic at Pace University, would have explained the common understanding that the Arbitration Code does not require respondents to conduct routine forensic examinations or to anticipate and answer their adversaries’ questions during discovery. (R.1113 (Order Den. Resp’ts’ Mot. to Allow Expert Test. 3).)

statement in his Notes, and sanctioning him as if he had forged or falsified records was inappropriate. The severity of the sanctions that FINRA imposed—especially in light of Tysk’s otherwise-clean disciplinary history and high customer-satisfaction ratings (R.3489 (CX-1); R.2298-99, 3421-22 (Tr.330:5-331:7, 1451:15-1452:9)), as well as his reliance on counsel in arbitration discovery—strongly suggests that the sanctions are more punitive than remedial.

1. FINRA erred by relying on its Sanction Guideline for falsification or forgery of documents.

The Commission should reject FINRA’s reliance on the guideline for forgery or falsification, which has no reasonable application to Tysk’s conduct. Unlike other cases in which FINRA has applied the forgery or falsification guideline, Tysk did not cause *any* of his personal Notes for GR to be inaccurate. *Cf., e.g., Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780 (May 27, 2015) (respondent signed and backdated documents to cover up his failure to supervise annuity transactions, undermining the accuracy of his firm’s records); *John F. Noonan*, Exchange Act Release No. 35731, 1995 WL 315521 (May 18, 1995) (respondent used fabricated notes to defend his conduct in an arbitration proceeding) (underlying NASD decision cited in R.6589 (NAC Remand 15)). And the Contact Report that Kotila created and printed accurately showed that its contents had been created and edited in May 2008. FINRA has not alleged or proved that the Notes were false in any respect, and its speculative assertion that the Contact Report as produced (if “undetected”) “would have undermined the arbitrator’s ability to find the truth” (R.6589 (NAC Remand 15)) is utterly inconsistent with the reality that *none* of the parties to the arbitration relied on the substance of the Notes at all, and that such notes, according

to Storrar, have little relevance to suitability. The Commission should therefore reject FINRA's application of this guideline in determining any sanctions to be imposed.³¹

2. FINRA erroneously rejected Tysk's defense that he relied on his counsel's advice in arbitration discovery.

FINRA rejected Tysk's advice-of-counsel defense "because Tysk altered his ACT! Notes without consulting an attorney" (R.6590 (NAC Remand 16)), but the Commission has correctly observed that Tysk's advice-of-counsel defense does not concern his decision to supplement his Notes in May 2008 but is instead a defense to "the second cause of action based on alleged discovery violations during the arbitration proceeding" (R.6499 (SEC Op. 5)). Even FINRA's DOE acknowledged during closing arguments at the hearing in this case that although "Ameriprise does not have an advice of counsel defense[,] *Mr. Tysk does after August of 2009.*" (R.3352 (Tr.1382:17-19) (emphasis added)).³² Indeed, FINRA's final decision on remand concluded that Tysk had "violated the arbitration rules when he . . . did not disclose that he had manually backdated" them "after GR complained." (R.6585 (NAC Remand 11).) Tysk consulted with counsel on this very issue a couple of months after GR raised the question, and counsel told Tysk that he did not have to disclose information about the supplements.

Specifically, after delivering the 2,000 pages of relevant documents within his possession or control to Ameriprise and their joint arbitration counsel, Tysk eventually had his first substantive meeting with counsel to review documents and start working on the case in August 2009. Tysk had previously told his counsel in June 2009—accurately—that he had no

³¹ The OHO did "not find the Guidelines for Forgery and/or Falsification of records to be helpful in this case." (R.5801 (OHO 47).)

³² See also R.1983 (Tr.15:8-12) (DOE's opening argument at the hearing: "Mr. Tysk says he cannot be blamed if his attorneys did not tell the customer in the arbitration that the notes were backdated. *That may be true for after August 21, 2009*, the date he told the attorneys of his edits." (emphasis added)).

“documents showing edits” to his Notes (because no responsive *documents* existed). But at the meeting in August 2009, Tysk further explained the history of the supplemented Notes.

Then he handed over the reins to his lawyers: “My attorneys made the decisions with what you call production or discovery and what to disclose, [and] I wasn’t involved in that process.” (R.2290-91 (Tr.322:19-323:5).) Thereafter, Tysk “relied on [his] attorneys to make decisions about documents and information to produce in discovery, and decisions about strategy in the arbitration.” (R.4195 (CX-97).) And Tysk’s lead arbitration counsel corroborated the fact that Tysk was relying on counsel to “handle discovery issues” and “make decisions about documents and information to produce in discovery,” as well as “decisions about strategy.” (R.3144-45 (Tr.1175:7-1176:6).)

The evidence also shows that Tysk had told his counsel that he was willing to have such an examination performed as soon as GR’s counsel requested one—and then gave his office computer to a forensic expert for that purpose in December 2009. (R.4194 (CX-97); R.2430-31 (Tr.462:22-463:13).) Indeed, a March 25, 2010 email from Tysk’s counsel shows that his counsel had made a strategic decision to resist a forensic analysis for months, regardless of Tysk’s personal willingness to cooperate. (R.4203 (CX-122) (March 25, 2010 email to Mr. Tysk from his arbitration counsel: “There is also no indication at this point that we have to do a forensic analysis of any computers, although [GR’s] attorneys are threatening to do more to try to get one. So that is all good.”).)³³

Tysk’s reliance on the advice of his arbitration counsel is thus a complete defense to all allegations of supposedly “unethical” or “obstructionist” discovery tactics after August 2009—a

³³ As noted above, Tysk waived the attorney-client privilege to show his reliance on counsel in discovery.

time that was *not* “too late in the process” (R. 6590 (NAC Remand 16)) to have a meaningful impact on the course of discovery. It is also a mitigating defense to any allegedly unethical discovery conduct before that date: Although FINRA examined Tysk’s arbitration counsel at the Hearing, FINRA did not prove that counsel would have provided different legal or strategic advice if Tysk had given them more detail sooner about the supplemented Notes. Tysk reasonably relied on his counsel’s professional judgment after discussing the supplements with them, and he should not be held liable for any allegedly unethical discovery tactics that his counsel chose to pursue (or would have presumably pursued) while he was ready and willing to cooperate with GR’s request for a forensic examination.

3. FINRA’s sanctions are excessive and oppressive.

As discussed above, FINRA has not established that that Tysk violated FINRA Rule 2010, NASD Rule 2110, or IM-12000. If the Commission disagrees, however, it should limit any sanction to a 20-day suspension (at most) and a \$7,500 fine, in keeping with the sanctions imposed for somewhat similar (but more serious) conduct in *DOE v. Decker*, AWC No. 2011025434002 (May 22, 2014),

https://www.finra.org/sites/default/files/fda_documents/2011025434002_FDA_KC7483.pdf.³⁴

The respondent in *Decker* was a chief compliance officer who had violated FINRA Rule 2010 and NASD Rule 3110(a) when he produced documents during a FINRA exam on which he had “plac[ed] his initials near a backdated notation,” which stated “Compliance Review

³⁴ FINRA’s assertion that “a comparison to a settled FINRA case” like *Decker* “has minimal to no probative value” because it settled (R.6592 (NAC Remand 18 n.21)) is incorrect. The Commission has “recognized that it may be appropriate for an SRO to review settled precedent as one of many guideposts to determine the appropriate sanction.” *Schon-Ex, LLC*, Exchange Act Release No. 57857, 2008 WL 2167941, at *6 (May 23, 2008) (internal quotation marks omitted).

[DATE].” *Id.* at 2. The respondent stated that “the date approximated the date on which he had reviewed” the documents and that he “knew that the spreadsheets he marked would be provided to FINRA staff.” *Id.* For this violation of the applicable rules, the respondent was suspended in a principal capacity for 20 days and fined \$7,500. *Id.*

The facts of *Decker* and the facts of this case are similar because both respondents supplemented their records to reflect past events. Furthermore, in neither case did FINRA allege that Tysk or Decker had been untruthful. But *Decker* differs in one important respect: The respondent there, as his firm’s chief compliance officer, specifically knew that the documents he had changed would be produced to (and relied upon) by FINRA.

Unlike the respondent in *Decker*, Tysk supplemented his own personal customer Notes—not records intended for review by FINRA or anyone else—and he did not anticipate that his Notes would be produced during a subsequent arbitration. Tysk supplemented his Notes for his own personal use, only after determining that both he and Ameriprise believed the suitability concerns in GR’s letter were meritless, and without any indication that GR would file an arbitration claim. Thus, should the NAC determine that sanctions are appropriate, it should impose sanctions that are similar to or less severe than those imposed in *Decker*.

Imposing a lengthy suspension or other harsh sanctions would not protect the investing public and would serve solely to punish Tysk and his customers for an isolated incident involving accurate supplements to his personal Notes.


IV. CONCLUSION

FINRA’s disciplinary findings are flawed and its sanctions are unsupported by the record. Tysk therefore asks the Commission to review and set aside the sanctions imposed by FINRA, under Section 19(e)(1) of the Exchange Act, 15 U.S.C. § 78s(e)(1), and to reject FINRA’s

findings of liability. At a minimum, the sanctions imposed should be canceled, reduced, or remitted under Section 19(e)(2), 15 U.S.C. § 78s(e)(2).

Filed: June 21, 2019

Respectfully submitted,

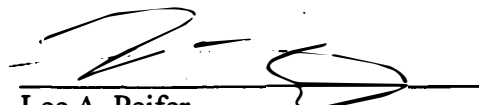
A handwritten signature in black ink, appearing to read "Brian L. Rubin", is written over a horizontal line.

Brian L. Rubin
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Attorneys for David B. Tysk

CERTIFICATE OF COMPLIANCE

In accordance with SEC Rule of Practice 450(d), I certify that the foregoing Opening Brief in Support of Application for Review complies with the length limitation set forth in Rule of Practice 450(c), and that this brief (exclusive of pages containing the table of contents, table of authorities, this Certificate of Compliance, and the attached Certificate of Service) contains 13,985 words, according to the word count of the word-processing system used to prepare the brief.



Lee A. Peifer

CERTIFICATE OF SERVICE

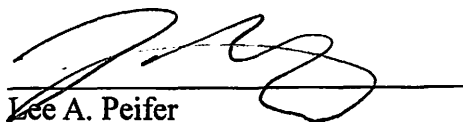
I certify that on June 21, 2019, I caused a copy of the foregoing Opening Brief in Support of Application for Review to be served upon the other parties to this action as follows:

Original and three copies via overnight delivery and fax to:

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