**UNITED STATES OF AMERICA**
**before the**
**SECURITIES AND EXCHANGE COMMISSION**

August 6, 2019

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| In the Matter of the Application of<br>DAVID B. TYSK<br>For Review of Disciplinary Action Taken by<br>FINRA | Admin. Proc. File No. 3-17294r |



# REPLY BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

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# I. INTRODUCTION

FINRA's Brief in Opposition ("Opp.") mischaracterizes the record and confirms that FINRA failed to carry its burden of proof. FINRA has spent years trying to sanction David Tysk for *accurately* supplementing his personal "Notes" about his personal and professional relationship with "GR" *after* being assured by his firm that GR's purported suitability concerns were unfounded. FINRA nevertheless tries to paint Tysk's truthful supplements as part of an unethical strategy to "bolter his defense," in "violation" of an Ameriprise policy that the firm repeatedly said hadn't been violated. FINRA further contends that Tysk violated its Arbitration Code by not preemptively explaining the supplemented Notes when his files were later produced in discovery and by not creating new documents that ultimately had to be compiled by a forensic expert. All of FINRA's theories of liability are controverted by the record.

With respect to FINRA's first cause of action, the Commission previously directed FINRA to tie its "bolstering" theory against Tysk to a concrete violation of firm policy, as alleged in the complaint. (R.6496, 6498 (SEC Op. 2, 4).) FINRA has conceded that this cause of action depends on proof of a motive "to bolster his defense *during the firm's investigation.*" (Opp. 1 (emphasis added).) But aside from the fact that Ameriprise did not view its response to GR's letter as a formal "investigation" and repeatedly found and stated that Tysk had not violated its policy, the record shows that nobody at the firm reviewed Tysk's Notes at all—or would have given much weight to the Notes even if they had.

FINRA's "bolstering" theory also ignores the nature of Tysk's supplements, which were nothing more than a chronological "brain dump." (R.2391 (Tr.423:10-15).) Despite FINRA's assertions that Tysk "deceptively" "backdated" his supplemented Notes (*e.g.*, Opp. 26), there is no evidence that Tysk ever lied about his supplements, and FINRA has neither alleged nor

concluded that *any* of the supplements were inaccurate. (*See* R.6592 (NAC Remand 14 n.14).) The vast majority of the alleged "alterations"—more than 90 percent of them—were also indisputably irrelevant to the annuity about which GR had complained. And FINRA has ignored the numerous supplements that would have *hurt*—and not bolstered—a suitability defense.

FINRA's theory that Tysk unethically intended to use his supplemented Notes to "bolster" his defense in a firm investigation therefore makes no sense. Tysk never waved his Notes in front of Ameriprise (or GR) proclaiming his innocence or cited them in response to his firm's questions; Ameriprise never even reviewed the Notes before rejecting GR's complaint letter; and the supplements themselves were both (a) truthful and (b) overwhelmingly irrelevant or even *damaging* to a potential suitability defense. FINRA thus failed to prove the first cause of action.

As for the second cause of action, FINRA relies in part on the theory that Tysk had a duty to disclose and explain that a "Contact Report" produced in arbitration discovery was "misleading" because the chronological Notes that it contained had been (truthfully) supplemented. But as FINRA acknowledges, the Contact Report disclosed on its face that it had been "Edited on 5/27/2008" and "Last edited by David Tysk"—*after* the chronological dates listed for each individual Note entry. (R.4846 (JX-24); Opp. 9.) FINRA failed to prove that Tysk unethically violated the Arbitration Code's rules for producing *documents* by not anticipating and answering questions that could have been asked about the timing and content of those edits at the arbitration hearing.

FINRA also failed to prove that Tysk had unethically violated the Arbitration Code by not creating *new* Contact Reports in response to a follow-up discovery request for "documents showing edits made by Mr. Tysk to the notes in the Contact Report" produced in discovery.

(R.4724 (JX-13).) The Arbitration Code does not require respondents in arbitrations to create new documents or to seek out and then produce documents that are beyond their possession or control. And FINRA's insistence that certain "database files" were "accessible" on Tysk's computer server (Opp. 31, 33) mischaracterizes the evidence and ignores undisputed testimony from the only forensic expert in the case. That expert relied on his expertise and special software to locate hidden files and create new Contact Reports with recovered entries that Tysk "couldn't possibly have printed out in a contact report." (R.3282 (Tr.1312:14-16).) Those new Contact Reports "contain[ed] more information than what the user—what Mr. Tysk would have found if he sat down and did it himself." (R.3285 (Tr.1315:6-8).) The mere existence of incomplete "data" or "database files" did not mean that Tysk could have created (or had a duty to create) the new *documents* that were later generated by the forensic expert. Nor was it unethical for Tysk to respond truthfully that he did not have those documents to produce.

Finally, the arguments in FINRA's Opposition do not support the NAC's excessive "forgery or falsification" sanctions. If those sanctions are not set aside and canceled entirely, they should at least be reduced or remitted.

## II. ARGUMENT

FINRA's Opposition contains numerous inaccuracies and mischaracterizations of the evidence and thus fails to address the substance of the arguments raised in Tysk's Opening Brief. Without reiterating all of the points raised in the Opening Brief, this reply is focused on setting the record straight. Tysk did not act unethically or otherwise in a manner contrary to "high standards of commercial honor and just and equitable principles of trade" under FINRA's Rule 2010 when he truthfully supplemented his Notes and produced the documents that were available to him in discovery.

## A. FINRA Did Not Prove That Tysk Unethically Altered His Notes in Violation of Firm Policy to Bolster His Defense During a Firm Investigation.

FINRA has not proved the specifically pleaded elements of its first cause of action. As the Commission has already observed, "FINRA's first cause of action alleged that Tysk altered his notes before the arbitration filing 'to bolster his defense to the customer's claim, . . . in *violation of his firm's policies.*'" (R.6496 (SEC Op. 2) (quoting R.548 (Am. Compl. ¶ 42) (emphasis added; citation omitted)).) Accordingly, "FINRA predicated its first cause of action on a violation of firm policy" (R.6498 (SEC Op. 4)), specifically the Ameriprise Code of Conduct, which prohibited "alter[ing] in any way documents that are related to any imminent or ongoing investigation." (Opp. 4 (quoting R.5184 (JX-28)).) But the record—when accurately and fairly characterized—plainly shows that FINRA failed to prove that Tysk unethically supplemented his Notes with the intent to bolster his defense in a firm investigation.

### 1. The only direct evidence is that Tysk did not violate Ameriprise policy.

Despite FINRA's attempts to twist the evidence and apply convoluted interpretations to Ameriprise's Code of Conduct, the only direct evidence in the record is that Tysk did not violate it. Ameriprise repeatedly concluded that Tysk had not violated firm policy. (*See* Opening Br. 27-28; R.5222 (JX-34) ("Mr. Tysk's additions to his ACT! notes did not violate any section of the Firm's policies and procedures in effect at the time of the additions. Additionally, the Firm determined the additions Mr. Tysk made to his ACT! notes were truthful."); *id.* ("The Firm did not find that Mr. Tysk violated a specific provision of the Code of Conduct or engaged in any wrongdoing. The Firm also determined that the additions made by Mr. Tysk to his ACT! notes were accurate and fact-based.").)[1] FINRA could have tried to impeach the Ameriprise officials

[1] Despite Ameriprise's conclusions about the interpretation and application of its own policies, FINRA asserts that Tysk "unquestionably" violated firm policy. (Opp. 18, 21 n.17, 25 n.19.) This

who made these findings, or called other witnesses to support its case, but it chose not to. FINRA correctly notes that it has "discretion to present the evidence and select the witnesses to testify in support of its case." (Opp. 21 n.17.) But when FINRA fails to carry its burden of proof by not calling witnesses to support its allegations, it must live with its choices. Tysk did not violate firm policy.

Putting aside Ameriprise's clear findings that Tysk did not violate firm policies, FINRA's first cause of action depends on proof that Tysk supplemented his Notes "to bolster his defense *during the firm's investigation* of the customer's complaint." (Opp. 1 (emphasis added); *accord id.* at 18 n.16; *see also id.* at 14.) FINRA's shifting theories about Tysk's other potential motives, including the impact that the Notes might have had in a subsequent arbitration, are therefore irrelevant. Accordingly, FINRA's arguments related to GR's arbitration—including its reference to the views of GR's counsel on what might have been "important evidence *in a customer arbitration case*," as well as FINRA's unsupported allegations that Tysk "concealed important information *from GR and the arbitration panel*," attempted to "hid[e] the truth *from the arbitration panel*," and "potentially made his defense look stronger" *in the subsequent arbitration* (Opp. 9 n.8 (emphasis added); *id.* at 30 (emphasis added); *id.* at 32 (emphasis added); *id.*)—have no bearing on the elements that FINRA had to prove in its first cause of action regarding a violation of Ameriprise policy *during a firm investigation.*[2]

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assertion is contravened by FINRA's own prior conclusion, in the initial NAC opinion, "that Tysk's actions called into serious question whether he complied with Ameriprise's retention policies." (R.6309 n.12.) As the Commission noted in remanding this matter for an appropriate explanation of FINRA's decision, the NAC's "determination does not appear to constitute a finding that Tysk in fact violated his firm's policies" (R.6498 (SEC Op. 4))—much less that he did so "unquestionably."

[2] Before the Commission's clarifying direction that FINRA needed to tie its bolstering theory to a specific violation of firm policy, FINRA had argued that Tysk's (unproved) intentions with

As Tysk's Opening Brief explained, the firm was not conducting an "investigation" when Tysk truthfully supplemented his Notes, and FINRA did not prove that he intended to influence such an "investigation." (Opening Br. 26-30.) FINRA's arguments to the contrary depend on a series of misleading or false characterizations of the record.

First, GR's complaint letter to Ameriprise did not "*threaten*[] that . . . he might seek to involve 'the NASD, SEC or Minnesota Attorney General.'" (Opp. 5-6 (emphasis added) (quoting R.4207 (JX-2).) Instead, GR asked to "work with Ameriprise directly and *not* involve the NASD, SEC or the Minnesota Attorney General." (R.4207 (JX-2) (emphasis added).) Nor did Tysk "testif[y] that when he received GR's letter, he believed *the firm* was going to fire him." (Opp. 6 (emphasis added).) Rather, Tysk acknowledged that GR no longer wanted to do business with him, which meant only that he had been "fired" ("[e]ffectively") *by GR*. (R.2177 (Tr.209:3-20).) But Tysk unequivocally testified that he "did not think [GR] would sue me," that he "didn't read [GR's letter] as an implied threat," and that the letter did not make him "more nervous that [he] might get sued." (R.2149 (Tr.181:18); R.2459 (Tr.491:23-24); R.2462-63 (Tr.494:17-495:10); *cf.* R.2162 (Tr.194:18-22) (Tysk Test.) ("Q. And did anybody, lawyers, non-lawyers ever say to you around 4/21[/2008] that they thought that this demand letter from [GR] dated April 2, 2008 might lead to litigation? A No.").)[3]

Second, FINRA mischaracterizes the nature of the Ameriprise response to GR's complaint letter as an "investigation" covered by the firm's policy against altering documents.

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respect to a potential arbitration were probative of his alleged intent to bolster his defense. (*See, e.g.*, R.6444 & n.16).)

[3] FINRA's suggestion that these arguments are part of a new "attempt to downplay GR's complaint, on appeal" (Opp. 6 n.6), is incorrect. Tysk gave this testimony at the hearing, and these arguments have been raised in his prior briefing before FINRA and the Commission. (*See, e.g.*, R.6536; R.6390, 6394.)

The only testimony from an Ameriprise representative in the record is from Brett Storrar, Tysk's supervisor.[4] Although Storrar at one point mistakenly agreed that GR's letter had "led to a formal investigation" (R.2523 (Tr.555:4-6)), FINRA selectively omits Storrar's correction of that mistake only a few minutes later at the hearing:

> Q [FINRA's counsel]. And again, this was a formal investigation at the time?
>
> ***
>
> A. It, *it wasn't a formal investigation*, it was, it was, we were collecting data for a client complaint.

(R.2531 (Tr.563:15-21) (emphasis added)); *see also* R.2513-14 (Tr.545:23-546:2) (Storrar Test. that Ameriprise policy against altering documents during "ongoing investigations, lawsuits, audits and exams . . . didn't pertain to [the] specific situation [Tysk] was involved in.").)

FINRA also selectively relies on documents that do not rebut Storrar's corrected testimony. The fact that an email sent by Lisa Zapko (an Ameriprise employee whom FINRA did not call to testify) once referred to "the complaint case" that Ameriprise had opened in response to GR's letter as "this investigation" (R.3551 (CX-18); R.3555 (CX-19), *cited in* Opp. 6, 20) cannot outweigh Storrar's sworn testimony at the hearing. Nor do Zapko's emails rebut Ameriprise's repeated conclusions that Tysk had not violated firm policy. And FINRA's misleading references to a joint privilege log (R.3600 (CX-46), *cited in* Opp. 6, 20), which was prepared in 2009 to preserve work-product protections in GR's arbitration after litigation was already underway, do not prove that Ameriprise had undertaken a formal "investigation" under the firm's Code of Conduct in May 2008.[5]

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[4] FINRA decided not to call any other Amerprise representatives to testify at the hearing.

[5] FINRA's assertion that "Ameriprise investigated GR's complaint 'in anticipation of litigation and for evaluation of whether settlement is warranted'" (Opp. 6 (quoting R.3600 (CX-46))) is

Third, FINRA failed to prove that Tysk *knew* that a firm "investigation" was ongoing when he supplemented his Notes. Although Tysk was aware that Ameriprise had opened a "complaint file," he testified that he didn't know who Zapko was and had never seen her emails.. (R.2134 (Tr.166:3-5); R.2133 (Tr.165:14-18); R.2159 (Tr.10-11).) Similarly, the privilege log that counsel created in 2009 (and which Tysk had not seen before the arbitration hearing[6]) has no bearing on Tysk's mindset and intent when he supplemented his Notes in May 2008.[7]

Regardless of how FINRA characterizes Ameriprise's review of GR's concerns behind the scenes, the selective evidence that FINRA cites cannot not show that Tysk *intentionally* and *unethically* violated a firm policy when he had no reason to believe that a formal "investigation" covered by that policy was in progress. As explained in Tysk's Opening Brief, he supplemented his Notes only after responding to Ameriprise's questions about GR's letter and after being assured by Ameriprise—in keeping with the firm's several previous approvals of that investment—that the letter was meritless. (Opening Br. 7, 20.)

Fourth, FINRA's assertion that "Tysk provide[d] no supporting evidence that, before he altered his notes, Ameriprise assured him that GR's complaint had no merit" (Opp. 25 n.19) is simply wrong. Tysk gave unrebutted testimony that after meeting to discuss GR's letter with

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based solely on a privilege-log entry—which was created after GR had initiated his customer arbitration and for purposes of asserting attorney-client and work-product privileges in litigation. (*Cf.* Opp. 20 (citing the same privilege log for the misleading assertion that that "the firm opened a case file to conduct—in its own words—an "*investigation* of [the] complaint" (brackets in original).)

[6] *See* R.2166 (Tr.198:5-18) (objections to admission of privilege log into evidence on grounds that "Tysk never saw that document before" and "[t]his is not a document that was prepared by the witness and it is the words of others").

[7] FINRA's argument that "proof of motive or scienter is not required to show that Tysk violated the firm's policies" (Opp. 22) misses the point. FINRA had the burden to prove Tysk intended to bolster his defense *during a firm investigation.* Proof of Tysk's intent is an essential element of FINRA's first cause of action, and it cannot prove that Tysk acted unethically without proving that he supplemented his Notes with the improper motive alleged in the complaint.

Ameriprise representative John Casement—whom FINRA chose not to call as a witness—he "understood that everything was perfectly in order with the transaction and with my file and the applications and the preapproval and everything that I had that would essentially go to suitability with the annuity, and I thought it was over." (R.2415 (Tr.447:5-13); *see also* 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.").)

Fifth, FINRA ignores the fact that Tysk did not wave his Notes in front of Ameriprise to substantiate suitability, and the firm did not review the Notes in considering and then denying GR's complaint letter. (*See* R.2163 (Tr.195:17-22); R.2363 (395:5-10).)[8] This critical fact—the fact that neither Tysk nor Ameriprise emphasized or even consulted the Notes during the firm's alleged "investigation"—is fundamentally inconsistent with FINRA's allegation that Tysk altered his Notes to bolster his defense during such an investigation. Indeed, Storrar's unrebutted testimony on this point was clear—even if Ameriprise *had* considered Tysk's Notes, they would have been largely (it not entirely) irrelevant to the firm's suitability determination:

> Q. . . . The ACT! notes, just as a regular course, how important are, are contact notes, whether they're on the ACT! system or some other system, to you as a registered principal in evaluating suitability?
>
> A. Very little.

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[8] FINRA's assertion that Storrar and Casement reviewed Tysk's Notes "*before* the firm determined that GR's suitability claim had no merit" (Opp. 25 n.19) is contradicted by the same testimony that FINRA cites. (*See* R.2541 (Tr.573:4-6) (Storrar Test.) ("Q. And so when you say file notes [that Ameriprise reviewed], you don't mean ACT! notes? A. I do not."); R.2542 (Tr.574:2-9) (Storrar Test.) ("[Q.] So is your answer no, that the client file which is referred to here with extensive documentation, so on and so forth, in your mind did not include the ACT! notes? THE WITNESS: The way I'm reading that and how I would think of it is it would not. I'm thinking of it as what's in the file, what was the content or physical content in the file."); *cf.* R.2561 (Tr.593:23-25) (Storrar Test.) ("I don't recall looking at those [ACT!] notes and making my specific [suitability] recommendation based off of those notes.").)

Q. Well, why do you say that?

A. I think I believe I testified to the fact that ACT! notes are again the advisor's version of events that took place and what took place on that event. 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, and any form of correspondence to the client.

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Q. So if you're looking at a file and what would you consider to be more important, the documents that the client actually sees or the advisor's notes?

A. What I stated earlier is that the information that the client receives or signs is more important in terms of suitability and, and understanding of the specific investment.

(R.2636-37 (Tr.668:15-669:21).)[9]

FINRA thus failed to prove that Tysk had any specific intent to bolster his defense *during a firm investigation*, and its first cause of action fails for that reason alone.

**2. The supplements to Tysk's Notes themselves show that he did not make them to bolster a suitability defense.**

FINRA's bolstering theory also depends on an exaggerated mischaracterization of the supplements that Tysk actually made. As explained in Tysk's Opening Brief, he truthfully supplemented his Notes to reflect his best recollection of events over the course of his relationship with GR as—and on the dates when—those events had actually occurred. (Opening Br. 8-11, 19-26.) FINRA's description of those supplements as a "staggering" collection of "67

[9] FINRA's emphasis on the (uncertain) timing of the transmittal of Tysk's Notes to Ameriprise (Opp. 7) is a distraction. Tysk did not supplement his Notes until after he had already responded to Ameriprise's written questions and had met in person with Casement. At any rate, no one relied on the Notes during Ameriprise's review of GR's letter, and the supplements to the Notes themselves would not have bolstered Tysk's suitability defense even if he had tried to use them for that purpose.

substantive modifications" with "significant details" (Opp. 7, 17) is belied by the supplements themselves.

It bears repeating that almost all of Tysk's supplements were immaterial to GR's letter and that only a handful of them concerned GR's annuity. (*See* Opening Br. 9.) This fact directly contradicts FINRA's assertion that "[*m*]*any* altered notes *directly* addressed Tysk's investment recommendations that were the subject of GR's complaint" and that he altered his Notes "to generally support his defense." (Opp. 19, 25 (emphasis added).) Indeed, the vast majority (65 of 70 entries) had nothing to with the annuity or his potential defense. For instance, 20 of them reflected only the fact and dates of Tysk's trips with GR to Europe. (*See* R.3731 ("Trip to Germany with [JZ] and [GR]"; "David in Germany"), 3736 ("Germany with [GR]"), 3738 ("David in Germany") (CX-68 (comparing 5/27/2008 Contact Report (R.4846-63 (JX-24)) with forensically generated 5/13/2008 Contact Report (R.4869-85 (JX-27))).) These supplements were more akin to updated calendar entries than the "new, detailed notes" described by FINRA. (Opp. 17.) Many other supplements referred to GR's personal matters, generic meetings, or other investments—all totally unrelated to the annuity referenced in GR's letter.

The "example" supplements that FINRA selected for emphasis in its Opposition Brief are either irrelevant or among the few supplements that even arguably had *anything* to do with the issues raised in GR's letter. The January 9, 2006 Note that FINRA cites "[f]or example" (Opp. 8 (citing R.3723 (CX-68))) concerns investments *other* than the annuity at issue almost a full year *before* Tysk recommended it to GR. Similarly, the Note that FINRA cites from May 15, 2006 (observing that GR had been "very happy" with his investments and the associated risks at the time (*id.*)) had nothing to do with the annuity either. Tysk was managing between $20 and $30 million of GR's assets during the relevant time period (*see* Opening Br. 2), and supplements

about GR's other investments cannot be used to show that Tysk was trying to bolster his defense to suitability questions about a separate $2-million annuity.[10]

Even the third supposedly "helpful" supplement that FINRA cites, from December 14, 2006 (Opp. 8, 19 (citing R.3726 (CX-68))), is counterbalanced by several of Tysk's other supplements to the Notes—supplements that would have *undermined* (not bolstered) a suitability defense. (*See generally* Opening Brief 10.) In those other supplements, Tysk acknowledged within a few months of GR's annuity purchases that Tysk was still learning new information about GR's marital status and that he lacked details about the sources of GR's funds available for investment. (R.3725 (9/20/2006 supplement), R.3727 ([2/6]/2007 supplement [date partially obscured]) (CX-68).) Even the December 14, 2006 supplement that FINRA cites acknowledged that Tysk "did not have detail on" GR's existing annuity investments—evidence that could have been used to suggest that Tysk had recommended an additional annuity without fully understanding GR's current exposure to similar risks. (R.3726 (CX-68).) And in a supplement dated February 16, 2007—between the dates of GR's annuity purchases—Tysk acknowledged that another agent had offered GR an annuity investment at "a higher rate of return" with "no surrender charges." (R.3727 (CX-68).) None of these potentially damaging admissions in Tysk's supplements would have "bolstered" his defense in a firm investigation.

FINRA's hyperbolic "backdating" arguments likewise misconstrue the record. Tysk explained that he "thought it was rational and prudent . . . to preserve facts and details" of his relationship with GR "in a chronological order." (R.4193 (CX-97); *see also* R.4194 (CX-97) ("My only thought and purpose was to preserve for myself and my file the details of my personal

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[10] *Cf.* R.2376 (Tr.408:16-19) (Tysk Test.) ("[T]he annuities were only a small part of my interaction with [GR]. I didn't, I wasn't selective with, I wasn't selective with adding information, I just added information to ACT!").)

and business relationship with [GR] as I recalled those details at the time. 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.").) Regardless of whether Tysk had to manually type in the dates for some of his supplements,[11] neither he nor Ameriprise considered that practice to involve deceptive "backdating." (R.2455 (Tr.487:15-23).) To the contrary, Storrar testified that ACT! Notes like Tysk's "would have documented *the chronological order* of, of their phone calls, personal visits and, and meetings that they held with, with the client or any of his professionals." (R.2549 (Tr.581:9-14) (emphasis added)); *see also* R. 2550-51 (Tr.582:25-583:5) (Storrar Test.) ("The ACT! notes are for the advisor to know again *in chronological order* what were they doing, when did they do it, when did they meet with their client, who did they talk to, and a *sequence of events* that took place with the client." (emphasis added)).)[12] Even FINRA's trial counsel agreed, during on-the-record testimony, that "the record is pretty clear, based on previous communications and testimony, that Mr. 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).)

In the context of a system designed to record customer interactions in chronological order, FINRA's assertion that "Tysk deceptively fabricated his record of events and investment discussions" or "falsely created the appearance that he made contemporaneous notes" (Opp. 26) is absurd. Even if anyone at Ameriprise had reviewed Tysk's supplemented Notes, Storrar

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[11] Some of the supplements were to existing Notes, so Tysk did not type a new date to preserve the chronology of events for those supplements. (*See* R.2374-75 (Tr.406:9-407:10).)

[12] The only backdating in this case was committed by the OHO and FINRA's Department of Enforcement. (*See* Opening Br. 23 n.17.) Ironically, the protections touted by FINRA ("openly not[ing] what the correction was, and issu[ing] a revised decision (making both versions of the decisions available))" (Opp. 26) were not followed by the OHO, and FINRA has failed to defend Enforcement's conduct.

understood that the Notes were supposed to represent a chronological history. And the Contact Report from Tysk's files disclosed on its face that it had been last "Edited on 5/27/2008" (R.4846 (JX-24))—*after* the date of GR's letter.[13] This case is far removed from the circumstances described in the various "backdating" cases that FINRA cites,[14] and the record shows that FINRA failed to prove that Tysk unethically supplemented his Notes to bolster his defense in an Ameriprise "investigation" (or otherwise).

### B. FINRA Did Not Prove That Tysk Unethically Violated the Arbitration Discovery Code by Producing an Accurate Copy of His Supplemented Notes Without a Narrative Explanation or by Not Producing a Nonexistent Copy of Past "Edits."

FINRA's arguments in support of its second cause of action are fatally flawed. (*See* Opening Br. 31-39.) FINRA's discovery rules do not require arbitration respondents to anticipate and "disclose" or explain the answers to questions that the claimant's counsel might ask at the hearing. Acknowledging this basic feature of streamlined arbitration discovery—in which "interrogatories are generally not permitted" and "narrative answers" are "not require[d]," FINRA Rule 12507(a)(1)—is not an "exceedingly technical point" (Opp. 32).[15] FINRA's IM-12000 itself provides that "[i]t may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010" to "(c) fail . . . to produce any *document* in his

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[13] FINRA's arguments about Tysk's malfunctioning ACT! software (Opp. 27) are addressed below.

[14] *Cf., e.g., Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *5, 14 (May 27, 2015) (involving backdating of firm books and records *while a FINRA examiner was waiting in his office* and later denial under oath) (*cited in* Opp. 19, 25, 37).

[15] FINRA cites its Regulatory Notice 14-40 (which concerned confidentiality agreements), 2014 WL 5107133 (Oct. 9, 2014), for the proposition that the discovery process is designed to allow parties to obtain "relevant facts and information" (Opp. 32), but it is improper to rely on that notice from 2014 in a discussion about Tysk's alleged conduct in 2008.

*possession or control*" (emphasis added).[16] Tysk had no further obligation to figure out which narrative disclosures might have been necessary to confirm the "hunch" of GR's counsel that Tysk had edited his Notes as recently as "5/27/2008"—as plainly stated on the face of the original Contact Report produced in discovery. (Opp. 30; R.4846 (JX-24).) And no general duty of "good faith" requires the parties in arbitration to create *new* documents to satisfy another party's discovery requests.[17] FINRA's arguments that Tysk failed to use his "best efforts" or acted in "bad faith . . . when he failed to produce the edits to his altered notes after repeated discovery requests to do so" (Opp. 28), are therefore unavailing.

Instead of directly confronting the legal arguments that support Tysk's defenses to the second cause of action, FINRA continues to misconstrue the record. For example, FINRA insists that the original Contact Report produced in discovery was somehow "misleading" because Tysk "failed to disclose that the notes he produced were altered." (Opp. 28.) But in fact, the Contact Report *itself* explicitly disclosed that it had been edited by Tysk in May 2008, *after* the date of GR's letter:

| | |
|---|---|
| *Last edited by* | David Tysk |
| *Edited On* | 5/27/2008 |

(R.4846 (JX-24).) To suggest that Tysk "may well have hidden the truth from the arbitration panel" if his supplements had not been disclosed in discovery (Opp. 32)—instead of through the ordinary process of questioning at the arbitration hearing—is contravened by the Contact

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[16] FINRA's argument that IM-12000 "is legally binding" (Opp. 29 n.20) is beside the point. FINRA would still bear the burden of proving that Tysk actually engaged in conduct in "violation of Rule 2010," as required by IM-12000.

[17] FINRA's new arguments about a duty to produce documents showing prior edits are also inconsistent with the observation by FINRA's OHO 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) (emphasis added).)

Report's showing that "the edited date on the ACT! Notes version that Tysk produced came after GR's complaint to Ameriprise," as GR's counsel easily saw (*id.* at 9). FINRA's allegation that the Contact Report was misleading in that respect is unsustainable.

More importantly, FINRA ignores indisputable evidence that (1) Tysk's malfunctioning ACT! software did not record the edit dates for each of his supplements and (2) only a forensic expert was able to generate the new Contact Reports that allowed comparisons showing Tysk's prior edits.

**1. The installed ACT! software *should* have recorded the dates of his supplements but did not—through no fault of Tysk's.**

FINRA incorrectly argues that Tysk "waived" arguments that his malfunctioning ACT! software was the reason that his Contact Report did not show entry-specific dates for each of his supplements. (Opp. 27.) But these issues were raised through the testimony of the forensic expert, Mark Lanterman, as well as in closing arguments at the hearing. (*See* R.3399 (Tr.1429:18-23) ("Mr. Lanterman testified that he pulled all data that was available out of ACT!. All these databases. All the various databases. If there was information relating to when those database were created, he would have it. But he said it wasn't available."); R.3400 (Tr.1430:9-13) ("Mr. Lanterman did not find any evidence that any of these files were deleted intentionally or that they ever existed. He thinks it's a problem with the way that the software was installed. So no data, no create date.").) Tysk also raised these issues before the NAC and briefed them extensively in his prior appeal to this Commission. (*See, e.g.*, R.6129, 6257, 6382, 6391, 3482-86.) FINRA's contention that these arguments were "waived" is baseless.

FINRA also misinterprets Tysk's argument based on the faulty ACT! installation. Tysk is not arguing that he supplemented his Notes "through no fault of his own." (Opp. 27.) Instead, Tysk argues that FINRA failed to address the evidentiary problems that the faulty installation

posed for FINRA's second cause of action. Even if FINRA's legal theories about a duty to explain documents produced before an arbitration hearing were accepted—though they should be rejected[18]—FINRA would still have to prove that Tysk had intentionally and unethically produced a misleading document in discovery. Yet there is no evidence that Tysk knew about the faulty ACT! installation, knew that the Contact Report created and printed by Michael Kotila (not called by FINRA to testify) was missing individual edit dates for each supplement, or even remembered providing that specific document to his counsel for production in discovery. As explained in Tysk's Opening Brief, if the ACT! system had worked properly, it would have recorded the date and time of each supplement to his Notes (R.3241-42 (Tr.1271:17-1272:6); R.3246-47 (Tr.1276:25-1277:6)), and Tysk could not have been found to have acted unethically.

**2. Tysk could not have produced "documents showing edits" to his Notes because doing so required the tools and analysis of a forensic expert.**

FINRA also ignores Lanterman's undisputed testimony that Tysk *could not have created* the "documents showing edits" (R.4724 (JX-13)) that Lanterman was able to generate using his forensic expertise and special software. FINRA's assertions that that the database files necessary to create those new Contact Reports were "viewable" or "accessible" by Tysk (Opp. 11, 31, 33 n.23) are misleading. Lanterman described the problems with those assumptions in detail:

> Q. You testified about this, but you found 11 databases in the hard drive that you were analyzing; is that correct?
>
> A. Well, I found six databases, and then five additional databases inside of non-database files. So think of it—I found database inside of a different container. But, yeah, your total is correct.

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[18] The OHO improperly excluded evidence from an arbitration expert who would have testified that the Arbitration Code does not typically require explanations or forensic examinations in discovery. (*See* R.720, 726 (Resp'ts' Mot. to Allow Expert Test. 2, 8); (R.1117 (Order Denying 3).)

(R.3267 (Tr.1297:6-12).)

> Q. Okay. Were these documents that you found viewable when you worked in [Tysk's] virtual environment?
>
> ***
>
> THE WITNESS: It depends. And *these 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.3273-74 (Tr.1303:21-22, 1304:16-24) (emphasis added).)

> Q. You testified that *you generated the contact reports* that we see here, correct?
>
> A. That's correct.
>
> Q. And you testified that *you did not find a PDF of these contact reports* in the database files; is that correct?
>
> A. That's correct.
>
> Q. *Could anyone who had access to the computer have generated those contact reports?*
>
> A. *Not in the way that I produce them.*
>
> Q. Can you explain that?
>
> A. Sure. When I generated the reports, those reports are based on after I recovered everything out of those database files that I could. And then I generated the reports. *If a user were to have—if they sat down at Mr. Tysk's system, opened ACT! and then printed out a contact report, it would have fewer entries. It wouldn't reflect the entries that I recovered out of the database.*

(R.3280 (Tr.1310:6-24) (emphasis added).)

Lanterman's testimony shows that "documents showing edits made by Mr. Tysk to the notes in the Contact Report" (R.4724 (JX-13)) were clearly beyond Tysk's possession or control. FINRA cites testimony from Christopher Leigh, a "self taught" FINRA examiner (*not* an outside

forensic expert).[19] (R.2731 (Tr.762:5-6).) But Leigh's use of a different, properly installed version of ACT! at the hearing does nothing to undermine Lanterman's explanation of Tysk's faulty ACT! environment. And FINRA's assertion that "Tysk made no reasonable attempt to search ACT! and determine whether back-ups of his notes existed" (Opp. 31) is similarly belied by the record:

> Mr. Tysk actively and thoroughly searched his ACT! system for any prior edits to his notes or any way to show modifications made to his notes in any form. Mr. Tysk found that ACT! does not have a function that allows a user to access or view past versions of notes, nor does it create redline versions or otherwise identify changes made to notes. Nor did Mr. Tysk have any prior hard-copy version of his notes. Mr. Tysk was unaware of any data on his server that could show the prior versions of notes. Outside counsel made a similar inquiry in August after the Firm learned of additions to the notes, and reached the same conclusion.

(R.5227 (JX-35); *see also* R.2264 (Tr.296:9-11) (Tysk Test.) ("Q. And how many times did you search your ACT! system for prior versions? A. More than twice.").) Contrary to FINRA's assertions, the record in fact shows that "a reasonable search on [Tysk's] computer would" *not* "have produced the discovery requested" (Opp. 34) for documents showing edits to Tysk's Notes.

FINRA concedes that "the discovery rules did not require Tysk to create new data" (Opp. 33), but the Arbitration Code did not require him to create new documents from a corrupted software environment either. Lanterman's ability to generate new Contact Reports (that were still missing data)[20] does not mean that *Tysk* could (or should) have created those documents himself

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[19] The Hearing Officer himself stated during Leigh's demonstration of a hypothetically functioning ACT! system, "I don't think this is in the realm of expertise." (R.2717 (Tr.748:7-20).)

[20] Lanterman testified that he looked for metadata showing when Tysk had made each of his supplements to the Notes, without success. (R.3241-42 (Tr.1271:20-1272:6) ("Typically with ACT!—ACT! is actually a pretty good application in that, you know, think of it almost like a Quicken. If you're working on your financial records, it tells you when you're paying a check or

for purposes of arbitration discovery. FINRA's second cause of action, to the extent based on the theory that the Arbitration Code required Tysk to create or produce Contact Reports or other documents that did not exist, necessarily fails.

### C. FINRA's Sanctions Were Inappropriate.

As set forth in Tysk's Opening Brief, FINRA's sanctions were excessive—even if Tysk is found liable on one or both causes of action. (*See* Opening Br. 39-45.) The sanctions imposed should be set aside, or at least reduced.

Among other things, FINRA erred by relying on its sanction guideline for "forgery" or "falsification" of evidence. When confronted with "Tysk's repeated reminders that there is no proof his altered notes contained false statements," for example, FINRA's only response is that the truth of Tysk's supplements "is not relevant to this disciplinary proceeding." (Opp. 26.) But unlike the respondents in the other falsification cases that FINRA cites (*see id.* at 36-37), Tysk truthfully supplemented his Notes and produced a document that disclosed on its face the "last" date on which it had been "edited." Tysk did not falsify his supplemented Notes by ensuring that they retained an accurate chronology of his relationship with GR, and he did not engage in any conduct even approaching a forgery.

FINRA's assertion that Tysk "caused the parties to make more discovery motions, forced a delay in the hearing, and thereby increased costs" (Opp. 37), is similarly misplaced. To the extent that alleged discovery abuses triggered a delay in the hearing, even FINRA acknowledges that those delays were prompted by Ameriprise's failure to produce a "smoking gun" exception report until "the eve of the hearing." (*Id.* at 10.) Tysk should not be held responsible for the

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deleting things. What I expected was I should have had information pertaining to when individual records were modified. I expected to find that. And I didn't find that. I thought that was unusual. And at the time, I chalked it up to these missing data files. I wasn't able to produce the dates and times of when individual entries were modified.").)

conduct in discovery of another party (even if the parties were jointly represented by the same counsel).

Finally, Tysk fully addressed FINRA's advice-of-counsel arguments in his Opening Brief. (*See* Opening Br. 41-43.) Tysk encouraged his counsel to procure a forensic examination of his computer server as soon as GR's counsel requested one (R.4194 (CX-97); R.2431 (Tr.463:3, 9-13) (Tysk Test.)), and any strategic discovery decisions made after he discussed his supplemented Notes with counsel in August 2009 (*before* Ameriprise produced the late exception report) should be attributed to the judgment of his arbitration counsel, not to Tysk.

## III. CONCLUSION

FINRA's findings and sanctions are unsupported by the record. The Commission should therefore reject those findings and set aside or reduce FINRA's sanctions in accordance with the Exchange Act.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

In accordance with SEC Rule of Practice 450(d), I certify that the foregoing Reply 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 6,819 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 August 6, 2019, a copy of the foregoing Reply Brief in Support of Application for Review is being served as follows:

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