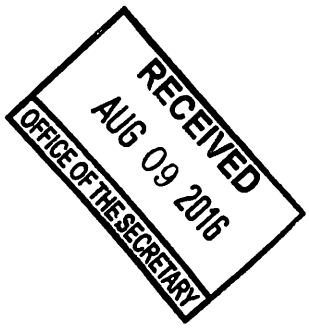
HARD COPY



UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

August 8, 2016

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

OPENING BRIEF OF RESPONDENT

Brian L. Rubin
SUTHERLAND ASBILL & BRENNAN LLP
700 Sixth Street, N.W., Suite 700
Washington, D.C. 20001-3980
Phone: 202-383-0124; Fax: 202-637-3593
brian.rubin@sutherland.com

Lee A. Peifer
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, N.E., Suite 2300
Atlanta, Georgia 30309-3996
Phone: 404-853-8182; Fax: 404-853-8806
lee.peifer@sutherland.com

Attorneys for Respondent David B. Tysk

TABLE OF CONTENTS

TABLE OF AUTHORITIES [corrected Aug. 9, 2016]

Cases

Statutes and Rules

Other Authorities

Miscellaneous

I. INTRODUCTION AND SUMMARY

The primary question in this case is whether the Respondent, David Tysk, acted unethically when he accurately supplemented his personal notes about a customer and later provided the notes (which stated that they had been "edited on" a certain date) to his firm and the customer in an unanticipated arbitration. On the theory that Tysk had "altered" and "backdated" the notes to "bolster his defense to the customer's claim" (R.542, 548 (Am. Compl. ¶¶ 18, 19, 42))—and then failed to "disclose" his supplements during discovery in the arbitration—FINRA charged him with failing to "observe high standards of commercial honor and just and equitable principles of trade" under FINRA Rule 2010 and violating IM-12000 of FINRA's Code of Arbitration Procedure for Customer Disputes (the "Arbitration Code").

The record shows that FINRA was wrong. It is undisputed that the supplements to Tysk's personal notes, which were not firm books and records, were truthful and preserved the chronology of events as they actually occurred. Although the customer at issue wrote a letter complaining about certain annuities in his multi-million-dollar investment portfolio, Tysk supplemented his notes only *after* (1) responding to his firm's inquiries about the customer's letter and (2) being assured by his firm that the letter was meritless (as the firm ultimately concluded it was). This case does not involve a respondent who presented fabricated notes to his firm to defend his recommendations or who relied on fabricated notes when answering an arbitration claim.

The record also contradicts FINRA's allegation that Tysk "violated firm policy" when he supplemented his customer notes. Tysk's firm concluded that he had not violated its policies, which do not on their face apply to the circumstances of this case, and FINRA called no witnesses to dispute the firm's conclusion.

Some of FINRA's findings also exceeded the scope of the allegations in its Amended Complaint, in violation of FINRA's own rules. At a minimum, these findings should be set aside.

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." The two men were introduced at a holiday party in 2004 by "JZ," a Tysk customer and close friend of Tysk and his wife. JZ had helped raise Tysk's children, and Tysk's wife had helped JZ deal with her divorce. JZ was dating GR, and after she introduced him to Tysk, they became friends. They enjoyed birthdays, holidays, and international trips together, and Tysk's children sometimes even spent the night at GR's house. (R.2317-20, 2323-24 (Tr.349:11-352:5, 355:20-356:19).)[1]

1. GR invests $20 million with Tysk, including a $2-million variable annuity.

In early 2005, GR also became one of Tysk's customers. 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).)

Given GR's interest in tax deferral, Tysk suggested that he consider purchasing a growth-focused variable annuity. GR had owned annuities for decades, and he decided in December 2006 to invest $1 million in an annuity that Tysk recommended. Tysk then submitted a

---

[1] Citations to the certified record, which is Bates labeled from FINRA 000001 to FINRA 006340, are abbreviated as follows: "R.[page]," in which the page number omits any leading zeroes. Record citations are further identified by filing name or the exhibit number containing the citation (e.g., "Tr." for the hearing transcript, "NAC" for the NAC decision, etc.).

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 Tysk did not think that the additional investment required similar preapproval, he again sought and obtained preapproval from Ameriprise 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 also triggered an Ameriprise exception report, apparently because of GR's age and the size of the investment. Tysk did not receive a copy of the exception report, but the firm did send him an email asking for more details. After taking yet another look at the transaction, 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).)[2]

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

Since 1993, Tysk has used a software package called ACT! to document and manage his customer relationships. After having the software installed by outside professionals, Tysk and his employees used ACT! for a variety of purposes: to schedule meetings, to manage personal and professional calendars and contacts, to create to-do lists, and to keep notes on all his customers. 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).)

---

[2] Around the same time that GR made these annuity investments, he also made a 1035 exchange of another annuity. (R.2327 (Tr.359:7-24).). That annuity has not been a focus of these disciplinary proceedings, but the same arguments would apply if FINRA were to raise it here.

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—as in other calendar programs like Microsoft Outlook—and organize those entries under categories including "notes," "history," and "activities." (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 the "notes" category (hereinafter, "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).)

The version of ACT! that Tysk used allowed multiple users to collaborate and synchronize their changes to a single database of customer information, and Tysk regularly relied on his employees to assist him in making additions to his 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).)[3] Summaries of meetings or actions were thus never recorded contemporaneously as the meetings took place; all were input at a later time.

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).)

---

[3] *See also* R.2515 (Tr.547:7-18 (Test. of Brett Storrar, Tysk's supervisor at Ameriprise) ("[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.")).

For most of his customers (with the exception of his mother), Tysk kept fairly detailed Notes. Because he saw most customers only once or twice a year, he needed the Notes 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:

> The ACT! program Mr. Tysk used to keep his contact notes 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).)[4]

---

[4] FINRA has conceded that the Notes are not official books and records. (*See* R.6110 (DOE NAC Br. 27) ("[T]he notes in issue are not subject to SEC and FINRA record-keeping rules.").)

3. The market declines, and GR sends Ameriprise a letter questioning the suitability of the annuities that Tysk had recommended.

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

Before April, GR had transferred most of his assets from Ameriprise, but Tysk remained responsible for the annuities. On April 2, 2008, however, Ameriprise received a letter, signed by GR (but written with his business partner questioning Tysk's annuity recommendations and asking Ameriprise to waive the surrender charges. (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 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); *see also* R.3561 (CX-23).) A few days later, Brett Storrar, the registered principal who supervised Tysk, sent his delegate, registered principal John Casement, to meet with Tysk to discuss the annuities. (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); *see also* R.2556 (Tr. 588:10-18).)

Based on this review with Casement and their discussions, 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); *see also* 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.")).)[5]

On July 7, 2008, Ameriprise sent GR its response to his letter, concluding, as Casement had indicated during his meeting with Tysk, that GR's letter was meritless. (R.3565 (CX-24).) The firm based this conclusion not on Tysk's Notes—which, as discussed above, had not been part of the firm's review—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).) The firm also based its conclusion on an interview with GR and his business partner, who provided answers that "were [at] best limited." (R.2540 (Tr.572:8-22).)

4. Tysk truthfully supplements his Notes about GR.

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 annuities were suitable, Tysk decided to supplement his Notes for GR, who continued to be a client. Tysk

---

[5] Despite Casement's prominence in this matter, FINRA did not interview him during its investigation or call him as a witness at the hearing.

did what he called a "brain dump" (R.2391 (Tr.423:10-15)) to ensure that his notes contained a complete account of his 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.[6]

(R.2364-65 (Tr.396:9-397:5).)

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, as FINRA's Department of Enforcement ("DOE") has portrayed them, 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)),[7] 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].").) To preserve his recollection of their relationship, Tysk entered notes chronologically based on the day of the

---

[6] Tysk has consistently maintained that he supplemented his Notes for GR because he was upset that GR's Notes were sparse compared to his other customers' Notes. (*See, e.g.*, R.4193-95 (CX-97).)

[7] Storrar confirmed that ACT! notes are for the representative's use, and not the firm's. (R.2550-51 (Tr.582:25-583:5 ("The ACT! notes are for the advisor to know again in chronological order what were they doing, when they [did] it, when did they meet with their client, who did they talk to, and a sequence of events that took place with the client.").)

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.").)[8]

The Notes themselves demonstrate that Tysk did not supplement them to defend the annuity transactions. The focus of the Notes was not those products. Only five of the 70 supplements—just seven percent—were relevant to the annuities that GR had questioned. (R.2409-10 (Tr.441:16-442:9); R.5950 (Tysk Opening NAC Br. Ex. 1).) These five supplements were included simply because they were part of the meeting and transaction chronology with GR. The remainder of Tysk's supplements range from the mundane and personal (for example, supplements about a doctor to whom GR had referred Tysk, motorcycling, and trips to Europe) to entries dealing with other aspects of GR's finances (for example, a [redacted].)

Tysk supplemented his Notes based on the documents in GR's voluminous file, the outline of events that already existed in the Notes for GR, JZ's detailed Notes, as well as 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).) Indeed, where Tysk had no records on

[8] Indeed, DOE stipulated that ten dates in Tysk's notes "already [had] an entry" to which Tysk made a supplement. (R.2412 (Tr.444:4-24).) Only two of these supplements—those dated December 14, 2006 and January 11, 2007—were relevant to issues in GR's letter.

which to base his supplements, he so indicated. (*See* R.3733 (CX-68) (7/25/2006 supplement: "No notes.....?").) And when the events of a particular date were already recorded thoroughly elsewhere (for example, in letters that were sent to GR), Tysk at times saw no need to re-record those events in his Notes. (R.2345-46 (Tr.377:18-378:13); *see also* R.3727 (CX-68) (2/16/2007 supplement: "I saved the emails").)

In addition, some of Tysk's supplements were arguably against his interests, suggesting a failure to "know his customer." And other supplements contained information that could have actually 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.[9]

Because Tysk based his notes on pre-existing documents and his regular interactions with GR, the supplements are accurate. During its review of GR's letter, Ameriprise reached the same conclusion. (*See* R.3768 (CX-86).) Likewise, 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. (*See generally* R.539 (Am. Compl.).)

---

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

5. GR initiates a customer arbitration with FINRA.

After Ameriprise rejected GR's letter, JZ, GR's girlfriend, 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 supplemented his notes, and with no prior indication that he would do so, GR surprised Tysk by initiating an arbitration against him and Ameriprise, alleging that Tysk had sold him unsuitable annuities and that he had been charged "exorbitant fees for managing his accounts." (R.4631 (JX-9).) Given his and GR's relationship, Tysk "felt terrible" and "surprised." (R.2413 (Tr.445:11-14); *see also id.* Tr.445:13-14 ("I didn't see that coming.").) Indeed, because GR's girlfriend remained a customer and friend of Tysk's, Tysk "didn't think that [the arbitration] was happening." (R.2413 (Tr.445:17-18).)

After receiving GR's arbitration claim, 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).) In response, Tysk provided Ameriprise with GR's file of more than 2,000 pages, and buried in those documents was a "Contact Report" that contained his Notes, along with information in other categories like "history" and "activities." The Contact Report had been created and printed months before by one of Tysk's employees, 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).)[10] Ameriprise and the counsel representing Tysk and the firm then organized and produced documents—including the Contact Report—to GR. By relying on his counsel, Tysk did not personally participate in any decisions related to this document production. (R.2419-20 (Tr.451:12-452:6).)

---

[10] Kotila is another material witness whom FINRA never interviewed or called at the hearing.

On May 8, 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. One of Tysk's lawyers (who jointly represented Ameriprise) then 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.
>
> Thx,
>
> John

(R.4198 (CX-122).)[11]

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).)[12] 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 counsel representing both Ameriprise and Tysk informed GR's counsel that no such documents existed. (R.2820 (Tr.851:15-23).)

---

[11] Although this communication was protected by the attorney-client privilege, Tysk waived the 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).)

[12] As discussed above, ACT! is a dynamic database that does not maintain prior versions of the Notes, but when properly installed (as explained below), it records the date when each entry was created or edited.

A few weeks later, in August, Tysk had his first substantive meeting with his attorneys. 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 his Notes.[13] 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); *see also* R.2431 (Tr.463:3, 9-13) ("I told counsel [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.'" (quoting CX-97)).)

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—and thus months after Tysk had "affirmatively suggest[ed]" that his computer be examined and turned it over for a forensic exam—Respondents' counsel produced ACT! Contact Reports created by the forensic analyst, Mark Lanterman.

---

[13] Tysk met with his counsel in December 2008, shortly after GR initiated the arbitration (R. 3180 (Tr.1211:11-17)) and again in August 2009. Although their conversations were protected by the attorney-client privilege, Tysk waived the privilege as indicated above.

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. (R.3232-33 (Tr.1262:9-1263:13).) He also discovered 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 stores information about when individual notes are modified, Lanterman, using 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 these deficiencies, that data was missing. Lanterman managed to create new Contact Reports showing certain previous versions of Tysk's Notes for GR 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).)[14]

During the arbitration, neither GR's counsel nor Respondents' counsel relied on the substance of any version of the Notes. (*See* R.2291 (Tr.323:9-20).) Following the hearing, the

[14] 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 a customer for another four or five months. R.2175 (Tr.207:2-22).)

arbitration panel found, without explanation, in favor of GR.[15] (*See* R.4820 (JX-23).) The arbitration panel then referred Ameriprise and Tysk to DOE. (R.3671 (CX-62).)

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

In October 2010, Ameriprise began an internal review to determine whether the supplements to Tysk's Notes had violated any firm policies. (*See* 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 that it "does not perceive the addition of notes to Mr. Tysk's ACT! records as misconduct." (R.3795 (CX-96); *see also* R.5227 (JX-35) ("[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.").)[16]

B. Procedural History

After the arbitration panel referred Respondents to FINRA in May 2010, DOE began what has now been a six-year effort to fashion a legal theory under which Tysk could be

---

[15] Despite his supposed suitability concerns, GR kept the annuities with Ameriprise for nearly two years after the arbitration award before exchanging them for new annuities through a 1035 exchange. (R.2434-36 (Tr.466:17-468:4).)

[16] DOE did not interview 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.

sanctioned.[17] 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. (*See* R.5241 (JX-39) (Tysk's first Wells response).) FINRA ultimately decided not to pursue this charge and did not include it in the Complaint. In July 2012, Tysk received a second Wells Notice, this one alleging that Tysk had violated Rule 2010 and IM-12000. With regard to the First Cause of Action in the Amended Complaint, DOE failed to provide a Wells Notice, thus violating the spirit of FINRA Regulatory Notice 09-17.[18]

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.).)

Following a five-day hearing in February, 2014, FINRA's Office of the Hearing Officer ("OHO") issued a decision concluding that Tysk had violated FINRA Rule 2010, NASD Rule

---

[17] This investigation into Tysk's conduct is FINRA's second. After GR filed his arbitration in 2008, FINRA investigated Tysk and closed the matter without a finding. (*See* R.2436 (Tr.468:5-16).)

[18] Regulatory Notice 09-17 explains, "While the Wells process is used in virtually every case, the process is discretionary and there may be instances where senior Enforcement staff determines that it must move forward without providing this opportunity, such as when customer funds are at risk." *Id.* at 3. Here, no good cause, such as customer funds being at risk, existed for not providing a Wells Notice, particularly when the events at issue had occurred several years in the past and the complaint was not filed until 8 months later, in March 2013. If the Commission does not dismiss on this ground, it should order FINRA to revise Regulatory Notice 09-17 to accurately reflect FINRA's policy on the Wells process. (The Notice should also be amended to accurately reflect that John A. Wells was not, as the Notice states, a Senator. *See id.* at 5.)

2110, and IM-12000 and that he should be suspended in all capacities for three months and fined $50,000. The OHO also censured Ameriprise and fined the firm $100,000.[19] (R.5755.)

Tysk—but not Ameriprise—timely appealed to FINRA's National Adjudicatory Council ("NAC"), which issued FINRA's final determination and disciplinary sanctions in a decision dated May 16, 2016. The NAC affirmed the OHO finding that Tysk had violated FINRA Rule 2010, NASD Rule 2110, and IM-12000, but it increased FINRA's sanctions to a $50,000 fine and a one-year suspension. (R.6301.)

Tysk then filed a timely Application for Review with the Commission (R.6336), which issued a briefing schedule on July 8, 2016.

C. Standard of Review

FINRA bore the burden of proving each element of its charges against Tysk by a preponderance of the evidence.[20] To determine whether FINRA met that burden, the Commission reviews FINRA's findings and disciplinary sanctions, as represented by the NAC decision, de novo.[21] Hence, unless the Commission independently finds that Tysk's "acts or practices, or omissions to act, [were] in violation of . . . [FINRA's] rules" and "that such provisions are, and were applied in a manner, consistent with the purposes of [the Exchange Act]," 15 U.S.C. § 78s(e)(1)(A), the Commission "*shall*, by order, set aside the sanction imposed

---

[19] The OHO sanctioned Ameriprise in part for what the OHO found to be the untimely production of the exception report that GR's July 2007 annuity investment triggered. Tysk had not seen or played any role in producing this exception report, and the issue is not relevant to this appeal.

[20] *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 . . . .").

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

by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings," *id.* § 78s(e)(1)(B) (emphasis added).[22]

Similarly, if the Commission "finds . . . that a sanction imposed by [FINRA] upon [Tysk] imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the [Commission] may cancel, reduce, or require the remission of such sanction." 15 U.S.C. § 78s(e)(2). "As part of this review, [the Commission] consider[s] any aggravating or mitigating factors presented and whether the sanctions that FINRA imposed are remedial and not punitive." *Dratel Grp.*, 2016 WL 1071560, at *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 with GR, and second, by allowing the Contact Report containing those notes and other information to be produced in the arbitration without an accompanying explanation that certain of the notes had been supplemented. Tysk should not be found liable or sanctioned for the actions and omissions alleged in the Amended Complaint.

A. FINRA Erred by Finding That Tysk Violated Its Rules Through the Actions and Omissions Alleged in the Amended Complaint.

FINRA has 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

---

[22] *Accord Dratel Grp.*, 2016 WL 1071560, at *6.

FINRA did not charge Tysk with violating any other specific rules,[23] 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).[24] FINRA did not meet this burden, and its disciplinary findings and sanctions should be set aside.

1. 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 violate FINRA Rule 2010 or NASD Rule 2110 when he 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 had already responded to his firm's inquiries about GR's 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.

FINRA's First Cause of Action rests on the following allegations:

> 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.
>
> 43. Tysk failed to 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.

---

[23] As discussed further below, despite the Amended Complaint's references to Rules 12505 and 12506 of the Arbitration Code, FINRA did not allege that he had violated those rules.

[24] *See generally Kirlin*, 2009 WL 4731652, at *14 ("[I]n the absence of a violation of another securities rule or law, conduct may violate Rule 2110 if it is 'unethical' or committed in 'bad faith.' In order to prove that Kirincic violated the rule, *FINRA therefore must show* that he not only signed his parents' signatures to the documents at issue, but also *that he did so unethically or in bad faith.*" (emphasis added) (footnotes omitted)).

(R.548 (Am. Compl. ¶¶ 42, 43).) FINRA is not simply alleging a violation because Tysk modified his Notes. FINRA bore the burden of proving that Tysk had unethically (1) "altered" his Notes "to bolster his defense," (2) continued to "alter" his notes after the arbitration was filed, and (3) violated Ameriprise policy by engaging in one of those two actions. FINRA did not prove any of those allegations by the requisite preponderance of the evidence, nor did it prove that Tysk breached a duty to "notify the claimant, or his firm" of the supplemented Notes during discovery.

(a) Tysk did not make any changes or additions to his Notes "after the arbitration claim was filed."

Both the OHO and the NAC found that Tysk did not alter his Notes after GR initiated the arbitration in November 2008. (*See* R.6302 (NAC 2 n.4 ("In its decision, the Extended Hearing Panel did not find—and neither do we—evidence establishing that Tysk substantively revised his notes after May 27, 2008.")); R.5794 (OHO 40).) In fact, the evidence showed unequivocally that Tysk did not supplement or otherwise edit his previous Notes for GR at any time after May 27, 2008. (R.2260-61, 2289-90 (Tr.292:15-293:15, 321:24-322:9).)[25] The Commission should therefore reject any arguments for liability premised on alterations of Tysk's Notes after the arbitration was filed.

(b) Tysk did not "alter" his Notes "to bolster his defense" and should not be held liable for truthful supplements to his personal customer notes.

FINRA's finding that Tysk violated Rule 2010 is based on a tenuous "bolstering" theory that "[r]egardless of his motives for doing so, Tysk acted, at the least, unethically," because he "altered his notes after receiving GR's complaint," "backdated new entries and revised

---

[25] As noted above, 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 until October or November of that year. (R.2175-76 (Tr.207:2-208:19).)

significant portions of his notes that directly addressed GR's concerns" and "fail[ed] to disclose that he altered his notes." (R.6309 (NAC 9).) This reasoning is contrary to the weight of the evidence and ignores critical facts.

First, FINRA did not find that any of the supplements to Tysk's Notes were inaccurate. (*See* R.6312 (NAC 12 n.18 ("[W]e note that the Extended Hearing Panel did not make a finding, nor did Enforcement allege, 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 un-held 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 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.

The theory that Tysk intended to "bolster his defense" in response to GR's letter is further belied by the fact that he did not share his supplemented Notes with Ameriprise until *after* the firm had rejected GR's suitability letter. 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).)[26]

With respect to the arbitration itself, the record similarly 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 annuities mentioned in GR's letter were suitable, based on Ameriprise's pre- and post-approvals, as well as implicit or explicit assurances (through Casement) that Ameriprise 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 GR's girlfriend, 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, 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 deceptively "backdated" his Notes is also erroneous. The Notes were a chronological record of Tysk's 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

---

[26] Even if Ameriprise had seen the ACT! 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)); *see also* (R.2636-37 (Tr.668:21-669:4) (Storrar 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.").)

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).)[27] 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. 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. (*See* R.3241-42, 3246-47 (Tr.1271:17-1272:6, 1276:25-1277:6).) FINRA's suggestion that Tysk should not have summarized a conversation as taking place on the date that the conversation occurred demonstrates that FINRA miscomprehends the way that he used ACT! in his day-to-day business.[28]

---

[27] DOE's revised NAC brief 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.

[28] While Tysk did not "backdate" his notes here, people and entities that backdate documents in other contexts can presumably do so without acting unethically. In this case, for example, the OHO backdated its decision, which was first emailed to the parties and dated October 13, 2014. (*See* R.5751 (Notice of OHO Decision).) After Tysk's counsel pointed out a factual error, the OHO altered its decision and emailed a revised version to the parties on October 16, with changes on page two. The date on the revised decision, however, remained October 13, rather than October 16, and nothing in the revised decision indicates that it was changed after October 13. The certified record contains only the "backdated" October 16 version, but both versions are available online. *Compare* http://www.israelsneuman.com/wp-content/uploads/ 2014/10/Tysk-FINRA-AWC.pdf (original October 13 version, incorrectly stating that Tysk's counsel was from Topeka, Kansas), *with* http://www.finra.org/sites/default/files/OHO%20Web%20Decision %20Proceeding%20Number%202010022977801_0.pdf (October 16 version dated October 13) (R.5755).

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 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. Moreover, DOE did not sign the backdated brief or the backdated Certificate of Service. (*See* R.6074-75.)

Regardless of whether these instances of backdating were unethical, the Commission may

More broadly, if Tysk had intended to bolster his defense, surely he would have cited the Notes when he responded to Ameriprise's questions about GR's letter or in the subsequent arbitration. Yet as noted above, Tysk did not share his Notes with Ameriprise before the firm responded to GR's letter, and his counsel did not rely on their substance during the arbitration itself. (*See* R.2291 (Tr.323:9-20).) Only a small fraction of the supplemented Notes concerned GR's annuities at all, and many parts of Tysk's "brain dump" (R.2391 (Tr.423:10-15)) were personal, unrelated to the business, or otherwise irrelevant.[29] Other entries could have even *hurt* Tysk's defense in a suitability case by suggesting that he did not initially "know his customer," which is required to make a recommendation, or should have recommended a different product. (*See* discussion *supra* Part II.A.4.) Given that Tysk never relied on the Notes to bolster his defense by waiving it in front of Ameriprise or counsel, and that many supplements were irrelevant or unhelpful to a suitability defense, the record does not support FINRA's finding that Tysk unethically supplemented his Notes with that intent.

(c) Tysk's supplements to the Notes did not "violat[e] his firm's policies."

FINRA addressed this element of the First Cause of Action in a footnote: "Contrary to Tysk's argument on appeal that his alterations did not violate firm policies and procedures, we support the Extended Hearing Panel's finding that Tysk's actions called into *serious question* whether he complied with Ameriprise's retention policies." (R.6309 (NAC 9 n.12) (emphasis

---

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 its 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).

[29] FINRA erroneously cited an ACT! note dated January 9, 2006, for the proposition that Tysk created "new entries that supported his investment recommendations at issue." (R.6305 (NAC 5 & n.7).) In fact, the funds described in that note (Am Cent Ultra, Putnam Vista, and Fidelity New Heights) have nothing to do with the annuities at issue in the arbitration.

added).) FINRA thus did not find that Tysk had *actually violated* any Ameriprise policies. For this reason alone, the Commission should set aside any liability based on the allegation that Tysk acted unethically by violating firm policy.

More fundamentally, any finding that Tysk violated firm policy is precluded by Ameriprise's *own* conclusion that there was *no such violation*. Ameriprise has stated repeatedly that it "does not perceive the addition of notes to Mr. Tysk's ACT! records as misconduct." (R.3795 (CX-96).)[30] 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 the Ameriprise employees who approved the final ECN, the authors of the firm's multiple submissions stating that Tysk did not violate firm policy, or anyone else with authority to contradict Ameriprise's final interpretation of its own policies. The firm's own conclusions about its policies should therefore be dispositive.

Nor did Tysk violate either specific policy identified in the Amended Complaint. The Amended Complaint specifically accused Tysk of violating only the following firm policies:

> (1) once a lawsuit or demand for arbitration about a firm client is received, 'You must retain copies of all documents and notes about the client. Do not destroy, revise or alter these documents in any way; keep the entire client file.' [quoting Ameriprise policy on "Lawsuit and Arbitration Claims"], and
>
> (2) 'You may not shred, destroy or alter in any way documents that are related to any imminent or ongoing investigation, lawsuit, audit,

---

[30] *See also* R.5227 (JX-35) ("For reasons described in prior responses, the Firm had no reason to believe, and still has no reason to believe[,] that Tysk had done anything wrong or had tried to mislead the Firm in any way by making additions to his notes.").

> examination, or are required to be maintained for regulatory purposes.' [quoting Ameriprise Code of Conduct dated "2005/2006"]

(R.544 (Am. Compl. ¶ 25).) Yet neither of these policies applied to the circumstances in which Tysk supplemented his Notes.

Tysk could not have violated the policy on "Lawsuit and Arbitration Claims" dated April 14, 2008. (*See* R.3763 (CX-83); R.2091-93 (Tr.123:11-125:17).) First, FINRA presented no evidence that Tysk had ever received notice of this policy before he supplemented his Notes. Second, even if he had received notice, the 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.

FINRA presented no evidence that the Ameriprise Code of Conduct dated "2005/2006" (*see* R.5155, 5184 (JX-28)) was still in effect years later when Tysk supplemented his Notes. Furthermore, the policy is very limited, applying only to "documents that are related to any imminent or ongoing investigation, lawsuit, audit, examination, or are required to be maintained for regulatory purposes." (*Id.*) There is no allegation that Tysk's Notes were "required to be maintained for regulatory purposes,"[31] and when he supplemented the notes in May 2008, no formal 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 GR's girlfriend, JZ. And the only testimony elicited by FINRA about whether Ameriprise was conducting an "investigation" was from

[31] FINRA has stated that "the notes in issue are not subject to SEC and FINRA record-keeping rules." (R.6110 (DOE NAC Br. 27).)

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).)[32]

Nor can FINRA prove that Tysk *unethically* violated an Ameriprise policy without proving 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), https://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"). Because both Tysk *and Ameriprise* reasonably believed that supplementing the Notes in May 2008 did not violate any firm policy—and because FINRA cannot prove that Tysk "knowingly or intentionally attempted to evade" any policies without also proving that he had received them and that they remained in effect—FINRA's finding that Tysk unethically violated Ameriprise policy should be set aside.

(d) Tysk did not breach any duty to "notify" Ameriprise or GR of the supplements to his Notes.

FINRA's finding that Tysk violated Rule 2010 when he "fail[ed] to disclose that he altered his notes" (R.6309 (NAC 9)) rests entirely on an unacceptably vague duty that bears no relation to the applicable rules or existing precedent. Tysk should not be held liable for violating FINRA's new discovery standard that no rule or previous case has imposed on the production of

---

[32] *See also* R.2649-50 (Tr.681:17-682:22) (Storrar's testimony that "complaints and investigation" are "two separate areas of, of review"). FINRA's rules likewise treat "investigations" differently from other inquiries and proceedings. See FINRA Rule 8210 (discussing FINRA's authority in "an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules").

truthful information in a customer arbitration. If the Commission finds otherwise, it will be establishing a "Tysk Rule," which will have implications far beyond this one case.

As noted above, FINRA has not found that the supplements to Tysk's Notes were inaccurate. Tysk fully disclosed and explained the supplements to his counsel, who represented him and Ameriprise—and thus notified Ameriprise—at their first substantive meeting in August 2009. (*See* R.2990-91 (Tr.322:23-323:2 ("The very first meeting with my attorneys when we reviewed documents and when we started working on the case, I disclosed to my attorneys and we discussed this in detail."); *see also* (R.3140 (Tr.1171:12-18).) Because Tysk was relying on his counsel to make decisions about discovery and hearing strategy, he let them decide how to proceed with further disclosures to GR.

FINRA's finding that "Tysk's misconduct occurred well before he sought legal advice," (R.6313 (NAC 13)), demonstrates the breadth of the disclosure obligation that FINRA would presumably impose in every customer arbitration. Even though the Notes were accurate, were not official books and records, and were not subject to any litigation hold, FINRA concluded that Rule 2010 imposed a duty to refrain from making truthful supplements to his own personal customer notes. If GR's letter alone was enough to trigger this duty, what did Tysk have to do to satisfy these never-before-articulated standards? The Contact Report contained an obvious 5/27/2008 "Created" and "Edited On" date, but FINRA apparently believes that this information did not sufficiently disclose that the Notes might have been "created" or "edited" on that date. Does FINRA also believe that Rule 2010 required Tysk to create a detailed index of his supplements just in case they later needed to be provided to his firm or any potential adversaries in an (unanticipated) arbitration? Moreover, the premise behind FINRA's argument fails

because it did not prove that Tysk knew that ACT! wasn't working properly and therefore was not recording the date and time of each supplement.

What is more, FINRA has decided that certain truthful modifications are permissible but others are not. As noted above, FINRA's first Complaint charged Tysk with deleting an entry for a meeting that did not occur, but the Amended Complaint removed the reference to this un-held meeting and omitted any allegation that the deletion was unethical. Tysk is, however, being charged for truthful supplements that are purely personal, having nothing to do with the business as such,[33] and nothing to do with GR's letter—such as supplements that included the name of a doctor or review of a restaurant. (R.3728 (4/6/2007 supplement concerning doctor); R.3735 (6/6/2007 supplement concerning dinner at Canyon Grill) (both in CX-68).) Finally, Tysk is being charged for making truthful statements against his own interest, such as admitting that he didn't "know his customer" and might have been able to recommend a better product.[34] A respondent cannot be sanctioned under such a standard, where only FINRA appears to know the parameters.

FINRA also erroneously found that that Tysk had violated a duty to disclose "by intentionally producing an indiscernible copy of the ACT! Notes contact report to GR's counsel" and then "deflecting his [own] attorney's questions about it." (R.6310 (NAC 10).) FINRA did not explain how the Contact Report was "indiscernible" when it did disclose that it had been edited in May 2008. FINRA also failed to prove that Tysk was liable given that Tysk did not even remember *seeing* the Contact Report, much less providing Ameriprise with a copy, nor did he participate in his counsel's decision to produce the Contact Report in the arbitration. After all, Kotila (not Tysk) had created the Contact Report, printed it, and presumably filed it away.

---

[33] *Cf.* SEC Rule 17a-4(b)(4).

[34] *See* discussion *supra* Parts II.A.4, III.A.1(b).

And with respect to the June 2009 email inquiry from Tysk's counsel about "edits being made to the [attached] *contact reports*," his counsel's question did not recognize the distinction between the discrete Contact Report that Kotila had created and printed—a document that Tysk had not created and did not specifically remember—and the individual Notes that Tysk had supplemented over a year before, in May 2008. (R.4198 (CX-122) (emphasis added).) But only two months later, during his first substantive meeting with counsel August 2009, Tysk truthfully explained the specific supplements without hesitation. (R.2290-91, 2441-42 (Tr.322:23-323:2; 473:9-474:25).)

Whatever FINRA thinks the Tysk Rule should mean, the Commission should not allow FINRA to impose this new duty without giving appropriate notice and going through an appropriate rule-making process. The only cases that FINRA cited to support this rule are readily distinguishable,[35] and Tysk should not be held accountable for violating a rule that he could not have known existed. As discussed further below, 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.

---

[35] FINRA relied on *John F. Noonan*, Exchange Act Release No. 35731, 1995 WL 315521 (May 18, 1995), which is of no precedential value because Noonan conceded liability. Moreover, Noonan "admittedly fabricated" evidence "as a means of defeating [a customer's arbitration] action." *Id.* at *1. Here, by contrast, Tysk supplemented his Notes with truthful statements after Ameriprise had reviewed GR's letter and told him that it was meritless, six months before the arbitration was filed. This case is also distinguishable from *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266 (Jan. 9, 2015), *aff'd sub nom. West v. SEC*, 641 Fed. App'x 27 (2d Cir. 2016), in which the SEC found bad faith because the respondent had concealed misuse of customer funds and made affirmative misrepresentations to the customer.

2. 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. FINRA must prove that any failure to comply with IM-12000 was *unethical* to prove a sanctionable violation under Rule 2010. Indeed, FINRA's counsel agreed that the Second Cause of Action does not depend on a mere failure to produce documents under IM-12000.[36]

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 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 discouraged" under FINRA Rule 12510, and parties who have questions about a discovery

---

[36] *See* 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.").

document are not typically entitled to answers until the arbitration hearing.[37] 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.[38]

(a) 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 Kotila had created and printed 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).)

---

[37] *Cf.* FINRA Office of Dispute Resolution, Arbitrator's Guide 31 (2016) ("For example, a question asked of a witness such as, 'What is your understanding of this document?' should generally be left for the hearing. Limiting the scope of requests for documents and information to the facts of a case keeps the discovery process moving."), https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf.

[38] Given DOE's novel legal theories alleging liability based on discovery conduct and reliance on advice from counsel, Tysk moved to introduce expert testimony on standards for discovery in FINRA arbitrations from a former director of the Investor Rights Clinic at Pace University, who would have testified about, among other things, "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).) This expert would have explained the common understanding that the Arbitration Code does not require respondents to anticipate or answer their adversaries' questions during discovery (or to conduct routine forensic examinations), but the OHO denied Tysk's motion. (R.1113 (Order Den. Resp'ts' Mot. to Allow Expert Test. 3).)

The Arbitration Code, including IM-12000, does not require the parties to create documents that are not already in their possession, custody, or control.[39] 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.

A search of the relevant caselaw revealed only two contested disciplinary proceedings in which a respondent has been sanctioned under IM-12000 (or its predecessor, NASD Rule IM-10100)—and both are consistent with the straightforward understanding of the rule articulated above. In *DOE v. Josephthal & Co.*, No. CAF000015, 2002 WL 939504, at *5 (NASD NAC May 6, 2002), NASD concluded that the respondent had run afoul of IM-10100 when it "disobeyed an arbitration panel's order to produce a [specific] document" for *in camera* inspection. In *DOE v. Westrock Advisors, Inc.*, No. 2006005696601, 2010 WL 4163739, at *7 (FINRA NAC Oct. 21, 2010), FINRA found conduct inconsistent with IM-10100 because 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."

Josephthal and *Westrock* thus involved parties who outright failed to produce documents that were indisputably within their possession or control. But 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).)[40] The

---

[39] *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.").

[40] FINRA misunderstood Lanterman's testimony when it incorrectly found that "Tysk knew or should have known that previous versions of the ACT! Notes existed." (R.6311 (NAC 11).) Lanterman testified that a number of saved and hidden ACT! Notes database files existed on the hard drive that he examined, but that other database files were missing. The databases that

Contact Reports that Lanterman created using his forensic tools and expertise were not within Tysk's possession or control when his counsel 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.

(b) IM-12000 and Rule 2010 did not require Tysk to notify "the claimant, or his firm, of these edits when Tysk responded to discovery requests."

In an effort to expand the scope of Rule 2010 and IM-12000, FINRA improperly found Tysk liable for failing to produce "*information* in accordance with the Arbitration Code." (R.6310 (NAC 10) (emphasis added).) This interpretation of the applicable rule is wrong for several reasons.

First, FINRA's would-be expansion of IM-12000(c) to cover "information" ignores that provision's text, which refers exclusively to "document[s]." FINRA has characterized this disciplinary proceeding as "an extremely important policy case that deals with considerations about how transparent firm[s] and register[ed] rep[resentatives] need[] to be with an arbitration." (R.3319 (Tr.1349:18-20).) Yet even its counsel conceded at oral argument before the NAC that its argument under IM-12000 is not "clearcut": "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." (R.6242 (Tr. of DOE oral argument to NAC 50:14-18).) Yet IM-12000(c) itself says nothing about "misleading" the other side in an arbitration.

Second, even the parts of the Arbitration Code that *do* refer to "information" would not have required Tysk to explain the supplements to his Notes. FINRA Rule 12507, for example,

---

Lanterman found did not allow anyone to compare the Contact Report that Kotila had created and printed with earlier versions of Tysk's Notes—not until Lanterman processed and recovered those earlier versions and created new Contact Reports using his forensic expertise. (R.3241-42, 3246-47 (Tr.1271:17-1272:6, 1276:25-1277:6).)

states, "Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require narrative answers or fact finding. Standard interrogatories are generally not permitted in arbitration." GR's counsel did not request "information" about the supplements to Tysk's Notes, but even if he had, the Arbitration Code would not have required Tysk to provide a narrative explanation until the hearing.[41]

Furthermore, FINRA's finding that Tysk "evidently . . . had the information" about previous versions of his Notes, on the ground that he "testified to the business practice of backing up the ACT! Notes database on a weekly basis" (R.6311 (NAC 11)), ignores the fact that Tysk's backups did not include 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).) Those backups, therefore, could not have provided *any* information about the Notes before they were supplemented in May 2008, more than a year before GR's request for "documents showing edits."

FINRA's finding that Tysk "stonewalled" is similarly misplaced. (R.6311 (NAC 11).) The only evidence in the record is that Tysk promptly gave all of his documents to Ameriprise, truthfully explained the supplements to his Notes when asked, and would have explained the supplements sooner if given a chance before the arbitration hearing. (*See generally* R.4193-96 (CX-97).) And as shown above, Tysk did not breach any affirmative duty to explain his Notes to Ameriprise or GR.[42]

---

[41] The record, however, shows that "[i]f given a chance, [Tysk] would have testified about the additions to the notes earlier." (R.4195 (CX-97).)

[42] 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.

1008, 1014 (3d Cir.1977). "Since it is a departure from the traditional governmental exercise of enforcement power in the first instance, confidence in the impartiality and fairness of the Association's procedures must be maintained. The S.E.C., therefore, should not cavalierly dismiss procedural errors affecting the rights of those subjected to sanctions but should insist upon meticulous compliance by the private organization." *Id.*

Accordingly, FINRA was required to follow its own rules before sanctioning Tysk for any alleged misconduct. Rule 9212(a) required FINRA to make its allegations with reasonable specificity, and Rule 9212(b) specified the means by which FINRA could amend its complaint to modify the scope of its original allegations. To be sure, FINRA took advantage of that very process to file the Amended Complaint. But findings beyond the scope of the Amended Complaint must now be set aside. *See James L. Owsley*, Exchange Act Release No. 32491, 1993 WL 226056, at *3 (June 18, 1993) (setting aside NASD findings of fraud based on allegations outside complaint, because "[b]asic due process requires that a respondent be given notice of the offenses with which he is charged").

2. FINRA's findings impermissibly exceeded the scope of the Amended Complaint.

Given the breadth of the disclosure duties that FINRA seeks to impose, its findings that Tysk violated firm policies and discovery rules other than those described in the Amended Complaint come as no surprise.

In addition to the specific firm policies identified in connection with the First Cause of Action, FINRA also relied on Ameriprise policies that supposedly "required its employees" to "maintain complete and accurate business records." These additional policies further advised that "complete documentation"—including "dated notes and documented conversations"—is the

"best defense against complaints." (R.6306 (NAC 6).)[43] This policy does not appear to apply to Tysk because he is not an Ameriprise employee (he is an independent contractor) and because FINRA admitted that the Notes are not official books and records. (R.2295 (Tr.327:12-15); *see also* R.6110 (DOE NAC Br. 27).)

With respect to the Second Cause of Action, FINRA relied not only on IM-12000 and Rule 2010, but also on a FINRA Regulatory Notice from 2014—which could not possibly have governed Tysk's conduct during the arbitration in 2009 and 2010. (*See* R.6311 (NAC 11 (citing FINRA Regulatory Notice 14-40 (2014))).) And as noted above, FINRA improperly relied on provisions of the Arbitration Code that concern the exchange of "information," even though IM-12000(c), as acknowledged in the Amended Complaint, refers only to "document[s]."

FINRA's findings based on policies or rules other than those "specif[ied] in reasonable detail" in the Amended Complaint, as required by FINRA Rule 9212(a), should be set aside. For example, in *DOE v. Zenke*, No. 2006004377701, 2009 WL 4886421 (FINRA NAC Dec, 14, 2009), FINRA itself reversed a finding that the respondent had violated NASD Rule 2110 by violating his firm's policies. Regardless of whether the evidence supported such a finding, "the Hearing Panel [had] improperly made a finding of liability for misconduct that was not alleged in the complaint" (which instead alleged violations of investment prospectuses), and FINRA dismissed the complaint altogether. *Id.* at 3. The Commission should hold FINRA to the same standard here and set aside any findings beyond the specific allegations of the Amended Complaint.

---

[43] The Amended Complaint's catch-all phrase referring to specifically identified firm policies "among other prohibitions" (R.543 (Am. Compl. ¶ 25)) cannot support a finding that Tysk violated policies other than the ones specifically alleged. *See Owsley*, 1993 WL 226056, at *3. ("We do not consider that the addition to a complaint of words such as 'including but not limited to' or 'among other things' can justify findings of misconduct on matters that have not been charged and which respondents have not had a fair chance to rebut.").

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).

For one thing, 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 statement in his notes or arbitration testimony, and sanctioning him as if he had forged or falsified records was inappropriate.

The sanctions that FINRA imposed—a one-year suspension and $50,000 fine—also far exceed what is necessary to protect the investing public. "The purpose of a sanction is to protect investors, not to penalize brokers, although deterrence may be an additional consideration as part of the overall remedial inquiry." *West v. SEC*, 641 Fed. App'x 27, 30 (2d Cir. 2016) (citing *McCarthy v. SEC*, 406 F.3d 179, 188-89 (2d Cir. 2005)). 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))—strongly suggests that they are more punitive than remedial.

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

"Though not bound by FINRA's Sanction Guidelines, [the Commission uses] them as a benchmark for [its] review under Exchange Act Section 19(e)(2)." *Dratel Grp.*, 2016 WL 1071560, at *14. Here, however, 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. Fillett*, Exchange Act Release No. 75054, 2015 WL 3397780 (May 27, 2015) (applying guideline for forgery or falsification where respondent had signed and backdated documents to cover up his failure to supervise annuity transactions involving ten sets of documents for seven customers, thus undermining the accuracy of his firm's records); *John F. Noonan*, 1995 WL 315521 (applying falsification guideline where the respondent had used fabricated notes to defend his conduct in an arbitration proceeding) (underlying NASD decision cited in R.6311 (NAC 11). And the Contact Report that Kotila created and printed accurately showed that its contents had been edited in May 2008. FINRA has not alleged or proved that the Notes or Contact Report was false in any respect, and the Commission should therefore reject FINRA's application of this guideline in determining any sanctions to be imposed on Tysk.[44]

2. 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).

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

---

[44] The OHO did "not find the Guidelines for Forgery and/or Falsification of records to be helpful in this case." (R.5801 (OHO 47).) After turning to the Sanction Guidelines' General Principles and Principal Considerations, the OHO recommended less punitive (but still excessive) sanctions of a three-month suspension and $50,000 fine. (R.5803 (OHO 49).)

[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*.[45]

FINRA's Sanction Guidelines similarly support the imposition of minimal sanctions here. There is no specific guideline for failing to disclose one's supplements to personal customer notes, but a number of Principal Considerations under the Sanction Guidelines are instructive:

- Tysk has no prior disciplinary history (*see* Principal Considerations 1);

---

[45] FINRA refused to consider *Decker* on the ground that as a settled case, it "has minimal to no probative value." (R.6315 (NAC 15).) The Commission, by contrast, 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).

- He promptly informed Ameriprise about the supplements to his Notes when asked by their joint counsel (*see* Principal Consideration 2);
- He volunteered to have his computer forensically examined, even as his counsel continued to object to GR's discovery requests (*see* Principal Considerations 3 and 4);
- He explained the supplements to his counsel at their first substantive meeting and then relied on counsel's judgment with respect to further disclosures to GR in the arbitration (*see* Principal Consideration 7);
- FINRA has not identified any pattern of misconduct beyond the specific circumstances of Tysk's relationship with GR (*see* Principal Consideration 8);
- Tysk supplemented his Notes during a limited two-week period in May 2008, without continuing to supplement the notes further over an extended period of time (*see* Principal Consideration 9);
- FINRA's finding that Tysk "concealed" the supplements to his Notes (R.6313 (NAC 13)) is contravened by Tysk's prompt and unqualified explanation to his counsel and his firm during the arbitration, as well as his offer to allow a forensic examination of his computer (*see* Principal Consideration 10); and
- FINRA has provided absolutely no notice of its novel interpretation of Rule 2010 and IM-12000 (*see* Principal Consideration 15).

Finally, it bears repeating that "[t]he purpose of a sanction is to protect investors, not to penalize brokers . . . ."). *West*, 641 Fed. App'x at 30; *accord* FINRA Sanction Guidelines 2 (General Principle 1) ("The purpose of FINRA's disciplinary process is to protect the investing public, support and improve the overall business standards in the securities industry, and

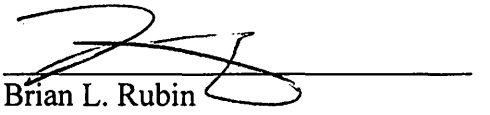
decrease the likelihood of recurrence of misconduct by the disciplined respondent.") Tysk consistently ranks among the top one percent of Ameriprise representatives in customer-satisfaction surveys. (R.2298-99 (Tr.330:5-331:7).) Imposing a lengthy suspension or other harsh sanctions thus would not protect 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. The positions that FINRA has taken suggest that it wants to use this case to set a dangerous precedent that lets DOE take a standardless, we-know-it when-we-see-it approach to supposedly "unethical" conduct. But under existing precedent and a straightforward reading of the applicable rules, Tysk did nothing wrong when he accurately supplemented his Notes and (months later) the Contact Report containing those Notes and revealing an "edited on" date was produced in the arbitration. 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: August 8, 2016

Respectfully submitted,

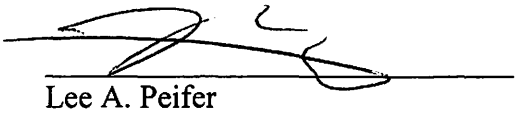


Brian L. Rubin
Lee A. Peifer
SUTHERLAND ASBILL & BRENNAN LLP

Attorneys for Respondent David B. Tysk

CERTIFICATE OF COMPLIANCE

In accordance with SEC Rule of Practice 450(d), I certify that the foregoing Opening Brief of Respondent 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 13,782 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 8, 2016, I caused a copy of the foregoing Opening Brief of Respondent to be served upon the other parties to this action as follows:

Original and three copies via overnight delivery and fax to:

The Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Room 10915
Washington, D.C. 20549
Fax: 202-772-9324

One copy via overnight delivery and email to:

FINRA
Office of General Counsel
Attn: Lisa Jones Toms
1735 K Street, N.W.
Washington, D.C. 20006
nac.casefilings@finra.org

Lee A. Peifer