HARD COPY

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

September 21, 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

REPLY 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

Table of Authorities

Page(s)

Cases

Statutes, Rules, and Regulations

Other Authorities

I. INTRODUCTION

FINRA's Brief in Opposition ("FINRA Br.") misconstrues the record and fails to show that FINRA met its burden of proof. FINRA has spent these disciplinary proceedings running away from the allegations in the Amended Complaint, and its brief before the Commission is no exception. FINRA continues to pursue theories of liability based on policies and discovery rules not identified in the Amended Complaint. Moreover, FINRA's overarching theory of the case—that Tysk unethically supplemented his personal Notes to improve his chances in a customer arbitration filed six months later—makes no sense. Tysk never used the Notes to "bolster his defense," 93% of the Notes were irrelevant to the customer's complaint letter (a few even included statements against interest), and FINRA did not prove that he knew his malfunctioning ACT! software prevented the "edits dates" for each Note from being included in a Contact Report that was produced in the later arbitration.[1]

For the reasons set forth here and in Tysk's opening brief, FINRA's findings of liability and sanctions should be set aside—or at minimum, reduced to "fit the crime" of truthfully supplementing personal customer notes after learning that a customer's complaint letter was without merit and six months before the initiation of an unanticipated arbitration.

II. ARGUMENT

FINRA's brief is wrong as a matter of and ignores key facts. First, Tysk cannot be held liable for misconduct not specifically alleged in the Amended Complaint. Second, FINRA did not meet its burden of proving its own allegations, which are inconsistent with the evidence in

---

[1] "Contact Reports" contain a variety of details, including customer contact information and notes about meetings, calls, transactions, etc. The details contained in the "notes," "history," and "activity" sections of those reports are referred to as "Notes."

the record. Finally, FINRA relied on an inapposite Sanction Guideline, and its excessive, punitive sanctions should be canceled or reduced.

A. FINRA Does Not Dispute That Tysk Cannot Be Held Liable on Theories Beyond Those of the Amended Complaint.

Federal law and FINRA's own rules require the Department of Enforcement ("DOE") to bring *specific* charges of misconduct (and to prove them before imposing sanctions). 15 U.S.C. § 78o-3(h)(1); FINRA Rule 9212(a)(1). FINRA does not deny—and thus tacitly concedes—that it cannot impose liability or sanctions based on conduct not alleged, or rules not identified, in the complaint. *See, e.g.*, *James L. Owsley*, Exchange Act Release No. 32491, 1993 WL 226056, at *3 (June 18, 1993); *DOE v. Zenke*, No. 2006004377701, 2009 WL 4886421, at*3 (FINRA NAC Dec, 14, 2009).

DOE alleged that Tysk violated Rule 2010 and IM-12000(c) by supplementing his Notes (1) with the intent to "bolster his defense," (2) knowingly violating two specific Ameriprise policies in the process, and (3) failing to "disclose" the supplements in the arbitration.[2] These allegations are unsupported by the record, which may explain why FINRA continues to pursue theories beyond the scope of the Amended Complaint.

FINRA's arguments for punishing Tysk have always been a moving target, and its latest brief continues that unfortunate trend. Among the new contentions are that Tysk "deceptively ma[d]e it appear that during the entire time GR was his customer he had a full and complete record of their investment discussions" and that he "backdated some of the notes to make it appear as though the newly inputted information had existed the entire time." (FINRA Br. 15, 16). These contentions suggest, for the first time, that Tysk violated some sort of duty to

---

[2] FINRA also incorrectly alleged that Tysk "continued to make alterations after the arbitration claim was filed." (R.548 (Am. Compl. ¶ 42).) The OHO and the NAC rejected this allegation (R.6302 (NAC 2 n.4)), and FINRA has finally abandoned it.

maintain "full and complete" contemporaneous Notes for his customers. Needless to say, this allegation was not contained in the Amended Complaint, and no FINRA rules impose such a duty.

In addition, FINRA now relies on allegations (without witness testimony) about Ameriprise policies not identified in the Amended Complaint, which refers to only two specific policies: (1) a 2008 firm policy on "Lawsuit and Arbitration Claims" and (2) a 2005/2006 "Ameriprise Code of Conduct." (R.544 (Am. Compl. ¶ 25).) Here, FINRA cites an alleged Ameriprise requirement to "maintain complete and accurate business records," the firm's supposed warning that "any documentation . . . is subject to discovery," and a general statement that "complete documentation is [the] best defense against complaints." (FINRA Br. 5 (brackets in original).) FINRA also cites its own interpretations of unspecified "policies and procedures" prohibiting "communications involving the customer . . . that are misleading," as well as a broad reference to conducting business "with the highest degree of integrity." (*Id.* at 6, 17.) FINRA cannot justify imposing sanctions for policy violations not alleged in the Amended Complaint, and the Commission should reject this attempt to circumvent Tysk's right to notice of the specific charges against him. *See Zenke*, 2009 WL 4886421, at *3 (dismissing complaint because "Hearing Panel improperly made a finding of liability [based on firm policy] for misconduct that was not alleged in the complaint").[3]

FINRA cannot change the nature of its allegations or its theory of liability in this appeal. Tysk had statutory and due-process rights to notice of the specific misconduct with which he was

[3] Moreover, the only evidence in the record—beyond FINRA's speculation—is Ameriprise's determination (recited numerous times) that Tysk did not violate any policies. (R.3795 (CX-96); R.5227 (JX-35)).

charged, and FINRA had an obligation to include that information in its complaint.[4] It is too late for FINRA to argue that "Tysk's alteration of a customer record" was "unethical" (FINRA Br. 13) on any ground other than the specific grounds alleged in the Amended Complaint.

B. FINRA Did Not Prove That Tysk Acted Unethically as Alleged in the Amended Complaint.

With respect to the claims actually asserted in the Amended Complaint, FINRA failed to meet its burden of proof. The evidence does not support the NAC's conclusion that Tysk acted with the intent to strengthen his defense in a future proceeding or that he violated Ameriprise policy. And no evidence supports the allegation that Tysk violated FINRA's Arbitration Code by failing to produce a document.

1. FINRA did not prove that Tysk intended to "bolster his defense."

FINRA's argument that Tysk supplemented his Notes with the intent to bolster his defense in GR's eventual arbitration is belied by the evidence. There is no *direct* evidence supporting this argument, which Tysk contradicted on the witness stand. (R.2288-89 (Tr.320:10-321:23).) And FINRA did not call any witnesses who might have given a different first-hand account to challenge Tysk's testimony. Rather, FINRA's case is based entirely on circumstantial evidence and counterfactual assumptions about how Tysk's supplements might have helped a hypothetical defense after GR sent a complaint letter to Ameriprise.

The weight of even the circumstantial evidence, however, favors Tysk. FINRA's brief lists four examples of supplemented Notes that "conveniently" (in FINRA's view) "contradicted [GR]'s suitability claims" (FINRA Br. 15), but two of those examples (5/15/06; 9/20/06) had

---

[4] As noted in Tysk's opening brief, FINRA also failed to follow its own Wells process, which would have provided an opportunity to respond to DOE's concerns and correct clear factual errors—such as the false allegation that Tysk "continued to make alterations after the arbitration claim was filed." (R.548 (Am. Compl. ¶ 42).)

nothing to do with the annuities in GR's letter (*id.* at 7). Examining all 70 supplements to the Notes reveals that only *five* of them—just 7% of the total—were relevant to GR's annuities at all. (*See* R.5950 (Tysk NAC Br. Ex. 1).) FINRA's claim that Tysk "made 67 substantive changes" to the Notes (FINRA Br. 1; *see also id.* at 7 & n.5) thus ignores the fact that 93% of the supplements were totally irrelevant—and that no one relied on the substance of *any* Notes in the subsequent arbitration (R.2291 (Tr.323:9-20)).

Tysk's supplements were part of a "brain dump" containing all sorts of information—some incidentally helpful, some possibly hurtful, and most irrelevant. (R.2391 (Tr.423:10-15); *see also* R.4194 (CX-97).) As noted in Tysk's opening brief, at least four supplements would have been against Tysk's interest in a suitability case because they suggested that he did not fully "know his customer." (*See* Tysk Opening Br. 10 & n.9.) And of the remaining 60 or so supplements, dozens were inconsequential, concerned purely personal matters, or otherwise had nothing to do with the annuities discussed in GR's letter.[5]

(a) FINRA misconstrues the chronology of events.

Tysk's lack of unethical intent is further demonstrated by the sequence of relevant events. FINRA repeatedly but incorrectly asserts that Tysk "did not inform anyone" about the supplements to his Notes or that he did so only after "concealing" them for "over a year." (*See, e.g.*, FINRA Br. 1, 2, 8, 13, 15, 28, 29.) Without repeating the statement of facts from Tysk's opening brief, the following timeline shows that FINRA's chronology is incomplete and misleading:

---

[5] For example, 20 supplemental Notes record trips to Germany, another eight concerned GR's wife or girlfriend, and at least three described dinners. And 12 supplements concerned events that occurred after GR's last annuity purchase. (*See generally* R.3721 (CX-68) (containing both pre-existing and supplemented Notes).)

- April 2008: GR sends complaint letter to Ameriprise (R.4207 (JX-2)); Tysk responds to Ameriprise questionnaire (R.3561 (CX-23)
- April 2008: Tysk meets with John Casement, the firm principal reviewing the letter, who assures him that GR's complaint is meritless (R.2164-65, 2363, 2415, 2471 (Tr.196:19–197:5, 395:18-22, 447:8-13, 503:15-17))[6]
- May 2008: Tysk realizes that his business relationship with GR is likely ending and does a "brain dump," truthfully supplementing his Notes about GR (R.2366, 2391 (Tr.398:8-14, Tr.423:10-15); R.4193 (CX-97))—but he does not share them with Ameriprise[7]
- July 2008: Ameriprise denies GR's complaint (R.3565 (CX-24)), without reviewing Tysk's Notes
- November 2008: GR initiates arbitration against Ameriprise and Tysk (R.4631 (JX-9)); Ameriprise sends Tysk a litigation hold (R.2161–62 (Tr.193:20–194:22))
- December 2008: Respondents' counsel meets with Tysk for the first time, but they do not discuss or review his Notes (R.2427, 3180 (Tr.459:7-14, 1211:11-17))
- January 2009: GR's counsel serves his first set of arbitration requests (R.3575 (CX-34))
- March 2009: Without involving Tysk, Respondents' counsel produce over 4,000 pages of documents in arbitration (R.4717 (JX-12)), including a Contact Report (created, printed and filed by Tysk's employee Michael Kotila) that plainly showed "Created" and "Edited On" dates of May 27, 2008 (R.4846 (JX-24); R.2291, 3263-64 (Tr.322:19-323:5, 1293:18-1294:13))
- May 2009: GR's counsel requests "[a]ll *documents* showing edits made by Mr. Tysk to the notes in the Contact Report . . . , including but not limited to the edits made on May 27, 2008" (R.4724 (JX-13) (emphasis added))

---

[6] FINRA's characterization of GR's letter as a "threat[]" of potential litigation (FINRA Br. 4) is inconsistent not only with Tysk's understanding of the letter and their relationship but also with Casement's notes from a follow-up interview with GR, in which GR reiterated that he "would like to settle in a non-adversarial manner" (R.3559 (CX-21)).

[7] FINRA concedes that Tysk did not send his Notes to Ameriprise before Ameriprise denied GR's complaint. (*See* FINRA Br. 5 ("[Tysk] did not include his notes on the customer when he provided his written response on April 25, 2008").)

- June 2009: Tysk searches for documents showing "edits being made to the contact reports" and truthfully emails his counsel that "[t]here are no other documents showing edits per the request" (R.4198, 4197 (CX-122)) (as explained below, forensic-expert Mark Lanterman confirmed this fact)

- July 2009: Respondents' counsel informs GR's counsel that "there are no such responsive documents" (R.5284 (JX-45))

- August 2009: Tysk meets with Respondents' counsel, discusses documents, and explains the supplements to his Notes; Tysk's counsel makes legal judgment that no further disclosures to GR are necessary (R.2290-91, 3140 (Tr.322:23-323:5, 1171:12-18))

- December 2009: Ameriprise produces a previously existing exception report that prompts GR's counsel to request a forensic examination of Tysk's office computer;[8] Tysk volunteers for such an exam and turns the computer over to Lanterman, though his counsel objects based on legal judgment (R.4195 (CX-97); R.4749 (JX-18); R.4801 (JX-21); R.2431 (Tr.463:3, 9-13))

- April 2010: The arbitration panel orders a forensic examination; Lanterman uses incomplete database files found on the office computer to create new Contact Reports for comparison with the Kotila Contact Report

The timeline above shows that FINRA downplays the months that passed between the Notes' supplementation and the initiation of the arbitration, while simultaneously exaggerating the amount of time before Tysk explained the supplements to his counsel and his firm. FINRA ignores the fact that Tysk supplemented his Notes *after* Ameriprise (through firm-principal Casement) assured him that GR's complaint letter was meritless, and six months *before* GR initiated an arbitration. And FINRA's assertion that Tysk "concealed" his supplements "for well over a year" (FINRA Br. 29) ignores the fact that only two months elapsed between June 2009,

[8] GR's counsel made this request based on the mistaken assumption that the exception report had given Tysk "notice" of potential annuity concerns as well as "a motive and opportunity to add or edit his notes to try to justify the sales." (R.4750-51 (JX-18).) In reality, Tysk did not learn about the exception report until the arbitration. (R.2273 (Tr.305:11-17).)

when Tysk's counsel forwarded GR's first request for "documents showing edits," and August 2009, when Tysk met with counsel and truthfully explained the supplements.

Tysk thus did not "confess[]"(FINRA Br. 10, 28, 29) to anything. Instead, he candidly explained his Notes and the supplements to his counsel during their first conversation about the documents produced in discovery. There is no evidence that Tysk's counsel asked him about the Notes during their introductory meeting in December 2008[9]—before *any* documents had been requested or produced—and Tysk's email to counsel in July 2009, explaining that he had no documents showing edits to the Contact Report that Kotila had printed, was accurate. Indeed, there *were* no documents showing edits until Lanterman created them in April 2010 (as explained in Part II.B.3 below).

(b) FINRA's "bolstering" theory is incorrect.

FINRA wants the Commission to believe that Tysk (1) secretly supplemented his Notes *after* Ameriprise told him GR's claim was meritless, (2) chose *not* to rely on the Notes or share them with Ameriprise while the firm was evaluating GR's complaint letter, (3) deliberately allowed a Contact Report containing the Notes to be included in a 4,000-page document production in an arbitration that he supposedly saw coming months in advance, and (4) decided not to tell his counsel about the Notes until after Respondents had filed an Answer in the arbitration and the parties had almost completed discovery. With due respect, that conspiracy theory defies common sense.

FINRA argues that "the exact sequence in which Tysk's defense played out is immaterial to the NAC's finding that he engaged in unethical acts" (FINRA Br. 19 n.16), but that argument

---

[9] Tysk testified that the Notes were not discussed until the meeting in August 2009, and his former counsel did not contradict that testimony. (R.2290–92, 2427-29, 3180, 3191 (Tr.322:19-323:5, 459:7-461:11, 1211:11-17, 1222:5-7).)

overlooks the specific-intent element that FINRA *itself* included in the First Cause of Action. FINRA alleged that Tysk's intent to "bolster his defense" is what made his supplements unethical. FINRA does not need to "prove scienter" (*id.*), but it cannot dodge its burden of proving the intent alleged in the Amended Complaint.

This case is readily distinguishable from typical falsification cases, in which respondents forge or fabricate documents and then actually *use* them for improper purposes. *See, e.g.*, *Mitchell H. Fillett*, Exchange Act Release No. 75054, 2015 WL 3397780, at *12 (May 27, 2015) (respondent falsified official books and records to give FINRA "the false impression he had conducted his supervisory review"); *John F. Noonan*, Exchange Act Release No. 35731, 1995 WL 315521, at *1 (May 18, 1995) (respondent "admittedly fabricated the evidence that is the subject of this proceeding as a means of defeating" the customer's arbitration). Here, the Contact Report that Kotila had created and printed in May 2008 was buried in GR's paper file, and there is no evidence that Tysk even remembered producing it. If Tysk really intended to bolster his defense with the Notes, then he surely would have done so.

Indeed, Tysk did not supplement his Notes until after he had responded to his firm's questionnaire and met with Casement, who told him that GR's complaint letter was meritless. Tysk did not send the supplemented Notes to Ameriprise for six months, and did not rely on the Notes at any point in the arbitration proceedings. None of the supplemented Notes were false, and Tysk's only deletion was of a meeting that had not actually occurred—an accurate deletion that FINRA initially viewed as unethical, but later recanted. (*See* R.6312 (NAC 12 n.18); R. 207 (DOE Mot. to Amend Compl. 3); R.2247-48, 2417-18 (Tr.279:11-280:20; 449:24-450:11).) Nor is there evidence that Tysk knew a faulty installation prevented the ACT! software he used for his Notes from automatically producing the create and edit dates for each entry. (*See* discussion

infra Part II.B.3.)[10] Tysk cannot be held liable for acting unethically when the record shows that the motivations for his "brain dump" were innocent. (R.2391 (Tr.423:10-15).)

2. FINRA did not prove that Tysk knowingly violated firm policy.

FINRA must prove Tysk knew about—and knowingly violated—the specific Ameriprise policies identified in the Amended Complaint. *See DOE v.* [*Redacted*], No. 2007011915401, at 15 (FINRA OHO Oct. 11, 2011), https://www.finra.org/sites/default/files/OHODecision/p125275_0.pdf (dismissing complaint because "Enforcement failed to prove that Respondent knowingly or intentionally attempted to evade [his] Firm's policies. Likewise, there is no evidence that he acted with reckless indifference to his responsibilities."). The policies cited in the Amended Complaint concerned (1) altering client documents "once a lawsuit or demand for arbitration about a firm client is received" (2008 policy on "Lawsuit and Arbitration Claims") and (2) altering "documents that are related to any imminent or ongoing investigation, lawsuit, audit, examination, or [that] are required to be maintained for regulatory purposes" (2005/2006 "Ameriprise Code of Conduct"). (R.544 (Am. Compl. ¶ 25).) Yet neither of these policies applied to Tysk's conduct (and FINRA did not prove that Tysk *knowingly* violated them in any event).

Tysk clearly could not have violated the 2008 policy on "Lawsuit and Arbitration Claims," because had not received "a lawsuit or a demand for arbitration" when he supplemented his Notes. Indeed, FINRA made no argument that Tysk violated this specific policy. (*See*

---

[10] As explained in Tysk's opening brief, the dates he typed into his supplements were the dates when the events described took place, not the dates when the entries were made. Tysk wanted to preserve the chronology of his relationship with GR. The dates when individual Notes were supplemented should have been recorded automatically by the ACT! software, but it malfunctioned.

FINRA Br. 17-18 (argument on firm policy omitting any reference to the 2008 policy on "Lawsuit and Arbitration Claims").)

With respect to the only other firm policy specifically identified in the Amended Complaint (the 2005/2006 "Ameriprise Code of Conduct"), FINRA failed to prove that Tysk had altered documents related to an "imminent or ongoing investigation." (R.544 (Am. Compl. ¶ 25.) Despite FINRA's repeated mischaracterizations of Ameriprise's inquiries as an "investigation" (FINRA Br. 1, 5, 6, 13, 15, 17, 18), the record shows that Ameriprise did *not* open a formal investigation[11] of GR's complaint letter. The only party that reviewed these policies, and whether there was an "investigation," was Ameriprise which reached a definitive conclusion, repeated on multiple occasions, that Tysk had not violated *any* of the firm's policies—including its Code of Conduct. (*See* R.3795 (CX-96) ("The Firm does not perceive the addition of notes to Mr. Tysk's ACT! records as misconduct."); 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.").)[12]

FINRA's argument that the firm's conclusion "has no bearing or effect on FINRA's disciplinary action" (FINRA Br. 17) makes little sense in the context of the Amended Complaint,

---

[11] Both the Commission and FINRA similarly distinguish between formal "investigations" and other inquiries like examinations. *See, e.g.*, 17 C.F.R. § 203.2 (titled, "Information obtained in investigations and examinations"; highlighting "information obtained in individual investigations or examinations, including formal investigations conducted pursuant to Commission order"); FINRA Rule 8210.

[12] FINRA incorrectly stated that "Ameriprise's compliance department initially concluded that Tysk's actions violated Ameriprise's Code of Conduct." (FINRA Br. 18 n.14). Instead, the firm's conclusion was embodied in Tysk's Educational Clarification Notice ("ECN"), which found no violation. (R.3771 (CX-87).) FINRA selectively cites testimony about the opinions of Tysk's supervisor, Brett Storrar—not the compliance department—while ignoring Storrar's unequivocal testimony that he had no "responsibility," "ability," or "authority to determine whether a financial advisor violated an Ameriprise Financial procedure or policy or rule." (R.2641 (Tr.673:3-16).)

which requires FINRA to prove that Tysk acted unethically *by violating firm policy.* FINRA did not call any Ameriprise witnesses with the authority to determine violations of firm policy or refute the firm's definitive conclusion that Tysk had not violated its policies.[13]

3. FINRA did not prove that Tysk unethically failed to produce documents within his possession or control under IM-12000(c).

Despite FINRA's references to the production of "information" (*e.g.*, FINRA Br. 23), the Second Cause of Action in the Amended Complaint is based solely on an alleged failure to produce *documents*. (*See* R.548 (Am. Compl. ¶ 46) (citing IM-12000(c).) Regardless of "other discovery provisions within the Arbitration Code" that refer to "information" (FINRA Br. 23), the Second Cause of Action specifically alleged that Tysk violated Rule 2010 and IM-12000(c), which refers solely to "documents." The question, then, is whether Tysk engaged in unethical conduct by failing "to produce any *document* in his possession or control as directed pursuant to provisions of the [Arbitration] Code." FINRA IM-12000(c) (emphasis added).

(a) FINRA did not prove that Tysk failed to produce any existing documents.

FINRA's suggestion that Tysk could or should have produced "previous versions" of his Notes reveals a fundamental misunderstanding of ACT!, the customer relationship management (CRM) software that Tysk used to maintain his Notes. The ACT! software must be distinguished from the Notes that Tysk maintained, the limited "backups" that Tysk's office staff routinely overwrote, the incomplete database files that forensic-expert Mark Lanterman found, and the various Contact Reports that were produced in the arbitration.

---

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

ACT! is a CRM tool with many functions, including (but not limited to) a function that allows users to record details about customer relationships. Tysk and his employees used ACT! to make chronological Notes about interactions and dealings with his customers, including GR, and those Notes were typically entered after the fact to reflect what happened on a date that a meeting, for example, occurred (and not the date that the information was entered). (R.2055-56, 2303-05, 2308-09, 2423, 3224 (Tr.87:24-88:13, 335:18-337:15, 340:23-341:19, 455:3-5, 1254:2-4).)

Although Tysk's office staff (specifically, Michael Kotila, who created the relevant May 27, 2008 Contact Report and whom DOE inexplicitly did not call as a witness) kept backups of the ACT! database, FINRA's suggestion that those backups gave Tysk access to "previous versions" of his Notes (FINRA Br. 24) is incorrect. It is true that Kotila generally "backed up the ACT! database on a weekly basis." (*Id.*) But "each week he would copy over the previous week," and none of the backups were "kept longer term." (R.2064, 2065 (Tr.96:18-19, 97:8-10).) Tysk's backup files thus could not have recovered any data more than a month old. (R.2063-65, 2306-08, 2423 (Tr.95:19-97:10, 338:4-340:9, 455:12-25).)

The version of ACT! that Tysk used was designed to rely on several different kinds of database files. If all the database files had been present and functioning as intended, ACT! would have automatically recorded the date and time when Tysk made each of the supplements to his Notes—regardless of the dates that Tysk typed to maintain an accurate chronology of his relationship with GR. Yet Lanterman testified that two-thirds of the normal database files (including data showing when entries were made) were missing from the office computer that he examined. Lanterman found no signs that those files had been deleted, and "the only explanation" he could think of was "a bad installation." (R.3306-07 (Tr.1336:24-1337:2; *see*

also R.3227, 3241-42, 3246-47, 3305-07, 3309-10 (Tr.1257:7-25, 1271:17-1272:6, 1276:25-1277:6, 1335:7-1337:3, 1339:24-1340:22).) Thus, if ACT! had functioned properly, the times of Tysk's supplements could have been included on the May 28, 2008 Contact Report (and presumably FINRA would not have brought this case).

The ACT! software could be used to prepare "Contact Reports," in which a user could print out specific information pulled from those ACT! database files that existed. The supplemented Notes at issue here, for example, were contained in a Contact Report that Kotila created, printed on May 27, 2008, and placed in GR's paper file. Tysk did not specifically remember providing Ameriprise with a copy of that Contact Report, but he gave the firm every document that he had concerning GR for the arbitration. And Lanterman found no evidence that any other Contact Reports had been created or saved on the office computer. (R.2414, 3232-33, 3263-64 (Tr.446:4-17, 1262:3-1263:13, 1293:18-1294:13).)[14]

Using his forensic expertise and special software, however, Lanterman *did* find several ACT! database files—including hidden files that Tysk would not have been able to find. Lanterman described the files as follows:

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

(R.3274 (Tr.1304:17-24) (emphasis added); *see also* R.3228-30 (Tr.1258:14-1260:25).)

Lanterman used these files to create brand new Contact Reports, which included "even entries that the user couldn't possibly have printed out in a contact report." (R.3282

---

[14] Nor did Lanterman find "multiple versions" of Tysk's Notes on the computer. (*Compare* FINRA Br. 10., *with* R.3274 (Tr.1304:17-24).)

(Tr.1312:14-16); *see also* R.3280-81 (Tr.1310:6-1311:24).) Lanterman "wasn't able to produce the dates and times of when individual entries were modified," but he "relied on the data contained inside of the [database] files that [he] did locate" to "generate contact reports related to [GR]." (R.3242 (Tr.1272:5-16).) These new Contact Reports were then compared with the one that Kotila had placed in Tysk's paper file to show (roughly) which Notes had been supplemented between May 13 and 27, 2008.

FINRA's brief distorts these facts about the Contact Reports by relying on irrelevant and misleading testimony from Christopher Leigh (FINRA Br. 24), a FINRA employee with "self taught" "database experience" (R.2731 (Tr.762:5-6)), who made a convoluted effort to demonstrate the ACT! software at the disciplinary hearing. Leigh used a different version of ACT! than Tysk had used,[15] and he made no effort to recreate the unique conditions of the "bad installation" that Lanterman said had limited the software's functionality on Tysk's computer. Leigh also admitted that he was "not intimately familiar with the distinction[s] between" the various kinds of ACT! database files. Finally, FINRA does not explain its choice to cite Leigh's testimony at the 11th Hour when neither the OHO nor the NAC relied on his purported "demonstration" below. (R.2705-06, 2736, 2743, 3004-09 (Tr.736:9-737:15, 767:18-24, 774:8-9, 1035:12-1040:2).)[16]

---

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

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

(b) FINRA did not allege or prove that Tysk failed to use his best efforts to produce documents.

FINRA also raises the new argument that Tysk somehow "failed to use his best effort in accordance with the Arbitration Code to produce the requested documents." (FINRA Br. 24.) This argument is unpersuasive for several reasons.

First, FINRA waived this argument. This theory of liability was not alleged in the Amended Complaint, and DOE failed to present it to the OHO or the NAC. *Cf. Nicholas T. Avello*, Exchange Act Release No. 51633, 2005 WL 1006827, at *2 (Apr. 29, 2005) ("Avello has waived his right to raise any new issues not raised in the initial appeal." (citing *Nw. Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("[W]here an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal . . . .")")). In fact, the OHO specifically noted that "the Amended Complaint does not charge Tysk with any misconduct related to whether he made good faith efforts to respond to discovery requests for prior versions of the notes." (R.5773 (OHO 19 n.100).)

Second, this argument relies on the unfounded premise that "previous versions of his . . . Notes were in Tysk's possession and *control*." (FINRA Br. 24 (emphasis added).) Even in federal court—where litigants do not enjoy "the traditional advantages of speed, informality, and reduced costs" that characterize FINRA arbitration[17]—notions of "control" do not imply a duty to create *new* documents. Quite the contrary: "A document or thing is not in the possession, custody, or control of a party if it does not exist. Production cannot be required of a document no longer in existence *nor of one yet to be prepared*." 8B Charles Alan Wright & Arthur R.

---

[17] FINRA Dispute Resolution Task Force, *Final Report and Recommendations of the FINRA Dispute Resolution Task Force* 3 (December 16, 2015), https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf; *accord* FINRA Office of Dispute Resolution, *Arbitrator's Guide* 9 (June 2016), https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf ("In short, arbitration is a quick, fair, and relatively inexpensive alternative to litigation.").

Miller et al., Federal Practice and Procedure § 2210 (3d ed.), Westlaw (database updated April 2016) (emphasis added); *cf.* Fed. R. Civ. P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.").

Here, Lanterman had to rely on his specialized technical knowledge and expertise to create *new* Contact Reports from incomplete ACT! database files that he found scattered around the office computer's hard drive. Contrary to FINRA's assertion that Tysk "deliberately withheld producing" those Contact Reports (FINRA Br. 24), Tysk did not have "control" over documents that had not yet been created and had to be assembled from fragments of old, partially hidden databases. Tysk thus did not have any "documents showing edits" to his Notes, because those documents did not exist until a forensic expert *created* them months after Tysk's counsel produced documents in the arbitration.

(c) FINRA's improper attempt to expand disclosure obligations in discovery should be rejected.

Nor is there anything "exceedingly technical" (FINRA Br. 22) about Tysk's argument that FINRA's Arbitration Code does not require affirmative explanations of discovery documents. This argument is merely a straightforward reading of the Arbitration Code's discovery rules. If FINRA believes that arbitration participants should have a pre-hearing duty to explain the documents that they produce, it should seek the Commission's approval and amend the Arbitration Code to allow standard interrogatories or to remove the qualification that requests for information should "not require narrative answers." FINRA Rule 12507(a)(1).[18]

---

[18] As noted above, DOE did not allege that Tysk failed to provide "information" under Rule 12507. For that matter, GR's counsel did not request "information" about Tysk's Notes. Instead, he specifically sought only "*documents* showing edits"—a presumably deliberate choice

Such a dramatic expansion of the parties' discovery obligations should occur only through a regular rulemaking process—not in an ad hoc disciplinary proceeding.

FINRA dismisses these concerns in a footnote, suggesting that the potential "Tysk Rule" is already captured within "an existing ethical duty of fairness and transparency." (FINRA Br. 22 n.22.)[19] But FINRA's lack of clarity about the contours of these alleged disclosure obligations could turn almost every arbitration into a mini-trial about the provenance and history of a representative's records.[20] FINRA's position seems to be that a customer complaint letter is sufficient to impose a de facto litigation hold, and that subsequent arbitrations entail affirmative duties to "fully disclose[]" any information that that the customer might deem "critical" in an arbitration. (*Id.* at 20.) FINRA thus contends that "Tysk had a duty to either produce the previous . . . Note versions as requested"—even if creating such a document required a forensic expert—"or disclose that he altered the version he produced." (FINRA Br. 13.) This contention does not reflect the proper discovery standard under the Arbitration Code. Because the discovery rules do not permit standard interrogatories and strongly discourage depositions, *see* FINRA Rules 12507, 12510, parties are expected to ask most of their questions about documents

---

given his previous requests for documents *and* information related to other topics. (*Compare* R.3575 (CX-34), *with* R.4724 (JX-13) (emphasis added).)

[19] For this proposition, FINRA relies on *Noonan* and *DOE v. Josephthal & Co.*, No. CAF000015, 2002 WL 939504 (NASD NAC May 6, 2002)—neither of which supports FINRA's argument. In *Noonan*, the respondent admitted having fabricated evidence favorable to his position in a pending arbitration. In *Josephthal*, the respondents willfully disobeyed an arbitration panel's order to produce an existing document for *in camera* review. The allegations against Tysk—that he (truthfully) supplemented personal notes outside the context of litigation—have almost nothing in common with these cases.

[20] It is perplexing that FINRA suggests (without citation) that because Tysk is an associated person with a FINRA firm, he assumed the duty to act "in the customer's best interest." (FINRA Br. 20.) That standard is, of course, the standard for investment advisers, not broker-dealers. *See* SEC Staff, *Study on Investment Advisers and Broker-Dealers* 106 (Jan. 2011), https://www.sec.gov/news/studies/2011/913studyfinal.pdf (comparing "the fiduciary duty of investment advisers," which includes acting "in the best interests of clients," with "[t]he standard of conduct for broker-dealers," which has no such requirement).

at the hearing. These restrictions are designed to maintain the relative efficiency of arbitration: "Limiting the scope of requests for documents and information to the facts of a case keeps the discovery process moving." FINRA Office of Dispute Resolution, *Arbitrator's Guide* 31 (June 2016), https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf. To maintain that balance, FINRA arbitrators are taught to discourage the parties from asking each other to explain documents during discovery. "[A] question asked of a witness such as, 'What is your understanding of this document?' should generally be left for the hearing." *Id.*

Even if FINRA's proposed disclosure obligations were required by the Arbitration Code, they would not be workable. Imposing an ethical disclosure duty on respondents would require them to anticipate and answer potential questions that claimants might not even ask. Take Tysk's Notes, for example: Would ACT! users in future arbitrations need to explain who input each entry, when it was input, and all of the various reporting options for Contract Reports? How much information would they have to disclose to prevent a dynamic set of CRM databases from "misleading" a claimant? The Arbitration Code avoids these difficult questions. But if FINRA's broad new disclosure expectations become the standard under Rule 2010, the predictability of the Arbitration Code's discovery rules will be cold comfort.[21]

C. Tysk Did Not "Falsify" Documents, and FINRA's Sanctions Are Excessive.

Tysk should not be held liable for innocently and truthfully supplementing his personal customer Notes (as opposed to official books and records)[22] when there was no pending litigation and he did not expect the customer to file a demand for arbitration. But even if the Commission disagrees on that point, Tysk's alleged misconduct warrants much lighter sanctions than those

---

[21] Had Tysk been allowed to call his expert at the OHO Hearing, she would have testified about these issues. (R.720 (Resp'ts' Mot. to Allow Expert Test. 2).)

[22] Tysk's Notes were *not* official books and records, as FINRA conceded: "[T]he notes in issue are not subject to SEC and FINRA record-keeping rules." (R.6110 (DOE NAC Br. 27).)

imposed by the NAC, as indicated by the 20-day suspension and $7,500 fine handed down for worse misconduct of a chief compliance officer in *DOE v. Decker*, AWC No. 2011025434002, at 2 (May 22, 2014), http://disciplinaryactions.finra.org/Search/ViewDocument/36098 (regarding sanctions for "caus[ing 17] spreadsheets," which were firm books and records, "to become inaccurate" and then producing them to FINRA).

FINRA's reliance on its Sanction Guideline for "Forgery and/or Falsification of Records" is strained. The OHO decision rejected that guideline as not "helpful" (R.5801 (OHO 47)), a conclusion that seems all the more reasonable given FINRA's argument that "the extent to which Tysk's altered . . . Notes were truthful is irrelevant to this disciplinary proceeding" (FINRA Br. 16; *see also id.* at 26 ("[T]he veracity of the contents of each altered note entry is not an issue of fact presented in this case.")). FINRA cannot have its cake and eat it too. Tysk either "falsified" his Notes, by writing false information, or he did not. Because FINRA never alleged and could not prove that Tysk's supplemented Notes were false in any way—all of the Notes described events as they occurred on the dates when they took place—the falsification guideline is not an appropriate benchmark for sanctions.

Furthermore, FINRA's argument that *Decker* "has minimal to no probative value" because it settled (FINRA Br. 27) is incorrect. There is no rule against considering the sanctions imposed in a settled case, and the Commission has "recognized that it may be appropriate for an SRO to review settled precedent as one of many guideposts to determine the appropriate sanction." *Schon-Ex, LLC*, Exchange Act Release No. 57857, 2008 WL 2167941, at *6 (May 23, 2008) (internal quotation marks omitted).

FINRA also incorrectly asserts that Tysk "concealed" his supplements for "a much longer time than the two months the respondent took to confess his actions in the *Decker* case" (FINRA

Br. 28). As explained above in Part II.B.1, only two months after Tysk received GR's discovery request for "documents showing edits," he explained the supplements to his counsel (who decided, based on legal judgment, that no further disclosures to GR were necessary). And to the extent that FINRA argues Tysk's reliance on counsel is not a mitigating factor (or suggests that he should be held liable for his counsel's subsequent discovery objections), that position is inconsistent with an important concession that DOE made at the hearing: "Mr. Tysk says he cannot be blamed if his attorneys did not tell the customer in the arbitration that the notes were backdated. *That may be true for after August 21, 2009*, the date he told the attorneys of his edits." (R.1983 (Tr.15:8-12) (emphasis added).)

The NAC's sanctions are also out of line with those in similar contested cases. In *DOE v. Nouchi*, No. E102004083705, 2009 WL 2436676 (FINRA NAC Aug. 7, 2009), for instance, DOE brought a complaint alleging that the respondent "falsely represented that 15 customers were disabled [on mutual fund order tickets] in order to obtain CDSC [contingent deferred sales charge] waivers." *Id.* at *1. The respondent admitted that she had entered false information into her firm's official books and records, and the NAC sanctioned her with a 90-day suspension and $10,000 fine.

Unlike this case, *Nouchi* involved the submission of undisputedly false information, multiple customers, and the potential for monetary gain. The respondent there "had no good faith belief that her falsification of the order tickets was authorized," and her misconduct lasted for about six months before it was discovered. *Nouchi*, 2009 WL 2436676, at *3. That case was also a clear candidate for the application of the Sanction Guideline for falsification of records. Yet the sanctions that the respondent received for her "serious" misconduct were just a fraction

of the size—both in terms of money and the length of her suspension—than the year-long suspension and $50,000 fine that FINRA seeks to defend here. *Id.* at *4.

Tysk did not act unethically as alleged in the Amended Complaint, but even if the Commission reaches the opposite conclusion, his sanctions for any misconduct should be commensurate with those in *Decker*—and should certainly not exceed the sanctions imposed for creating admittedly false books and records in *Nouchi*.

III. CONCLUSION

FINRA erroneously found that Tysk had violated Rule 2010 and the Arbitration Code through the acts and omissions alleged in the Amended Complaint. Tysk should not be found liable or sanctioned for making truthful supplements to improve the accuracy (while preserving the chronology) of his personal customer Notes—which, again, were not official books and records. FINRA did not prove that Tysk made his supplements for an unethical purpose or in knowing violation of his firm's policies, and FINRA decided *not* to charge Tysk for the one (also truthful) deletion. Nor did FINRA prove that Tysk failed to produce documents within the meaning of IM-12000(c). The Commission should therefore reject FINRA's findings of liability and set aside or reduce its sanctions.

Filed: September 21, 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 Reply 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 6,961 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 September 21, 2016, I caused a copy of the foregoing Reply 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