BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

In the Matter of the Application of THOMAS J. LYKOS, JR. For Review of FINRA Disciplinary Action by the National Adjudicatory Counsel Complaint No. 2018059510201

RESPONDENT THOMAS J. LYKOS, JR.'S BRIEF

Respondent Thomas J. Lykos, Jr. respectfully submits the following Brief to the United States Securities & Exchange Commission.

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OS Received 05/09/2022

TABLE OF CONTENTS

I. SUMMARY OF THE BRIEF 1
II. THE SCOPE OF REVIEW 1
III. LEGAL FRAMEWORK 2
FINRA RULES OF CONDUCT 2
NASD RULE 1080 3
FINRA RULE 2010 4
CHEATING IS A FORM OF FRAUD 5
REVIEW OF DISCIPLINARY PROCEEDINGS FOR FAIRNESS 6
IV. FACTUAL BACKGROUND 7
V. LEGAL ARGUMENTS 10
WRITING ON HIS PERSON 11
TAKING A 23-MINUTE BREAK 13
DECEPTIVE BEHAVIOR 14
THERE IS INSUFFICIENT EVIDENCE OF CHEATING 15
VI. SANCTIONS 16
VII. CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page(s)**

Enf. v. Jason David,
Discip. Proc. No. 2017053669301 (OHO October 30, 2018) 17

Enf. v. Travis Hughes,
Discip. Proc. No. 2019064416201 (OHO February 3, 2021). 16

Enf. v. David Kennedy,
Discip. Proc. No. 20090192761-05 (OHO April 17, 2012) 17

Enf. v. Matthew Logan,
Discip. Proc. No. 2019063570502 (OHO June 29, 2021) 16

Enf. v. Ricky Mantei,
Discip. Proc. No. 2015045257501 (February 18, 2021) 4

Enf. v. Nicholas Rubino,
Discip. Proc. No. 2008014873201 (OHO June 15, 2010) 17

Enf. v. Kenneth Shelley,
Compl. No. C3A050003 (NAC February 15, 2007) 17

Enf. v. Fredericka Watson,
Discip. Proc. No. 20060052704 (OHO November 7, 2007) 17

Enf. v. Andrew Yoro,
Discip. Proc. No. 2018056934901 (OHO October 4, 2019) 16

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 5

In the Matter of Bryan Cohen,
SEC Rel. No. 34-88506 5

In the Matter of Edward Becker,
SEC Rel. No. 252 5

In the Matter of Jesse Litvak,
SEC Rel. No. 739 5

In re Johnson,
2019 WL 4582831 (N.D. Ga. 2019) 5

In the Matter of Lane,
SEC Rel. No. 74269 2

OS Received 05/09/2022

In the Matter of Lawrence Allen Deshetler,
SEC Rel. No. IC-5411 5

In the Matter of Lek Securities,
SEC Rel. No. 34-82981 4

In the Matter of Springsteen-Abbott,
SEC Rel. No. 34-88156 4

Malik v. Network 1 Financial Securities, Inc.,
2022 WL 453439 (2d Cir. 2022) 5

Mark H. Love,
57 S.E.C. 315 (SEC 2004) 6

Mills v. Seawright,
2021 WL 785105 (S.D. Miss. 2021) 5

Paul C. Soper and David N. Daoud v. Simmons International, Ltd., et al.,
1985 WL 5967 (S.D.N.Y. 1985) 10

SEC v. One or More Unknown Traders in Securities of Onyx Pharmaceuticals, Inc.,
2014 WL 5026153 (S.D.N.Y. 2014) 5

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 6

United States v. Wynn,
684 F.3d 473 (4th Cir. 2012) 5

Statutes

Exchange Act Section 19(e)(1)(A) 2

Other Authorities

FINRA Rule 1200 Series 3

FINRA Rule 2010 ..... *passim*

NASD Rule 1080 ..... *passim*

NASD Rule 2110 17

Restatement of Torts 3d §10 11

Rule 460 (3) 1

OS Received 05/09/2022

I.
SUMMARY OF THE BRIEF

On July 20, 2018, Thomas Lykos did not enter FINRA's test center in Houston, Texas to take his Series 24 examination with the intent to cheat. Unlike all prior adjudicated cheating cases, Mr. Lykos did not deliberately hide a "cheat sheet" or other notes on his person, hide a cheat sheet or other notes in the test center's restroom or lockers, or use an imposter to take the exam for him. Indeed, he entered the test center with nothing on his person other than his driver's license and a pain pill. And during the exam, he did not use or access study materials or other devices, did not seek assistance in answering questions, and did not provide assistance to other candidates. Yet, his conduct during the exam nevertheless violated at least two of FINRA's Rules of Conduct for such examinations, which are strict liability rules. Mr. Lykos admits his violations of the two Rules of Conduct, and he should be sanctioned appropriately.

FINRA, however, has used evidence regarding the strict liability violations as circumstantial evidence to infer that Mr. Lykos must have cheated or attempted to cheat, without any evidence that an act of cheating or attempted cheating actually occurred, and to infer the requisite scienter to support the claim. But Mr. Lykos is responsible for the strict liability violations of the Rules of Conduct and nothing more. The distinction is important because if one cheats or attempts to cheat, a lifetime bar is often imposed. That result would be a travesty here.

II.
THE SCOPE OF REVIEW

Pursuant to SEC Rules of Practice Rule 460 (3), the scope of review in this case is based upon the record, the application for review, and the briefs submitted. As such, the FINRA findings should receive no deference.

OS Received 05/09/2022

The Commission will conduct "an independent review of the record and apply the preponderance of the evidence standard. Pursuant to Exchange Act Section 19(e)(1), in reviewing an SRO disciplinary action, [the SEC] determine[s] whether the respondent engaged in the conduct found by the SRO, whether such conduct violates the SRO's rules, and whether such SRO rules are, and were applied in a manner, consistent with the purposes of the Exchange Act." *In the Matter of Lane,* SEC Rel. No. 74269, Admin. Proc. No. 3-15701 (Feb. 13, 2015).

III.

LEGAL FRAMEWORK

FINRA RULES OF CONDUCT

FINRA's Rules of Conduct ("ROCs") governing qualification exams were provided in summary form to Mr. Lykos before the July 20, 2018 exam (hereinafter, the "Exam"):[1]

> FINRA requires that all candidates attest to the FINRA Rules of Conduct, which prohibit assistance on a test, the use of study materials and misconduct at any time during the testing event. The FINRA Rules of Conduct strictly prohibits cellular phones, handheld computers or any other devices, electronic or otherwise, including wrist watches, to be taken into the testing room or used during the qualification examination and/or restroom breaks. If you violate any of these rules, you will be advised of the violation and the test center administrators will report the violation to FINRA. Any violation of the FINRA Rules of Conduct will subject you to possible disciplinary action by FINRA, another self-regulatory organization, or the Securities and Exchange Commission. For a complete review of the FINRA Rules of Conduct, please review - http://www.finra.org/industry/compliance/registration/qualificationsexams/testcentersappointments/p016189.

A more detailed set of conduct rules was presented to Mr. Lykos during orientation prior to commencing the Exam.[2] In addition to the list of prohibited personal items set forth above, the more detailed set of rules provided that:

- engaging in conduct that is disruptive, disrespectful or threatening, or creates a disturbance or interferes with test center operations is prohibited;

[1] Hearing Panel Ex. CX-9.
[2] Hearing Panel Exs. CX-15, CX-17.

- unscheduled breaks are only permitted for restroom use;
- receiving or attempting to receive assistance related to the exam during the exam, or providing or attempting to provide assistance to another related to the exam during the exam is prohibited; and
- reproducing or attempting to reproduce exam materials or content through memorization or other means at any time, to include discussing, posting or disclosing such content via email, social media or other internet presence, or otherwise, is prohibited.

The above ROCs[3] for qualification exams are not part of FINRA's numbered rule set; however, they state that a violation of a ROC by a person associated with a FINRA member firm may be deemed a violation of FINRA Rule 2010.

Notably, the ROCs are strict liability rules and do not require evidence of intent. Further, the ROCs do not prohibit writing on one's person, nor do they define or mention the term "cheating."

NASD RULE 1080

NASD Rule 1080, in effect at the time of the exam,[4] focused on protecting the confidentiality of the exams by prohibiting both receiving assistance during the exam and removing exam content from the exam center:

> NASD considers all of its Qualification Examinations to be highly confidential. The removal from an examination center, reproduction, disclosure, receipt from or passing to any person, or use for study purposes of any portion of such Qualification Examination, whether of a present or past series, or any other use which would compromise the effectiveness of the Examinations and the use in any manner and at any time of the questions or answers to the Examinations are prohibited and are deemed to be a violation of Rule 2110 [now FINRA Rule 2010]. An applicant cannot receive assistance while taking the examination. Each applicant shall certify to the Board that no assistance was given to or received by him during the examination.

[3] *See* https://www.finra.org/registration-exams-ce/qualification-exams/exam-day/finra-rules-conduct.
[4] NASD Rule 1080 was superseded by the FINRA Rule 1200 Series effective October 1, 2018; *i.e.,* after the Exam date herein.

NASD Rule 1080 is also a strict liability rule, requiring no evidence of intent. It too does not prohibit writing on one's person, nor does it define or mention the term "cheating."

FINRA RULE 2010

While a violation of a strict liability ROC constitutes a violation of FINRA Rule 2010, the Rule 2010 violation in such cases does not require additional evidence of intent or unethical or bad-faith conduct. FINRA Rule 2010 is violated simply by the violation of another rule. "[A] violation of another Commission or NASD rule or regulation constitutes a violation of . . . FINRA Rule 2010."[5] In other words, a derivative Rule 2010 violation does not require proof of intent or unethical or bad-faith conduct; it only requires that another FINRA rule be violated.

Where another FINRA rule is *not* violated, however, a stand-alone Rule 2010 violation may be found where unethical or bad-faith conduct is shown.[6] "Unethical conduct is that which is 'not in conformity with moral norms or standards of professional conduct,' while bad faith means 'dishonesty of belief or purpose.'"[7] In other words, a stand-alone FINRA Rule 2010 violation, unlike a derivative violation, requires establishing, as a minimum, unethical or bad-faith conduct.

[5] *In the Matter of Lek Securities*, SEC Rel. No. 34-82981, Admin. Proc. No. 3-17677, at *10 (April 2, 2018).
[6] *In the Matter of Springsteen-Abbott*, SEC Rel. No. 34-88156, Admin. Proc. No. 3-17560, at *11 (February 7, 2020) ("In determining whether a respondent's conduct is inconsistent with Rule 2010's mandate where the alleged violation is not premised on the violation of another FINRA rule, we must determine whether the respondent has acted unethically or in bad faith"); *Enf. v. Ricky Mantei*, Discip. Proc. No. 2015045257501 (February 18, 2021) ("Because Mantei's alleged FINRA Rule 2010 violation is not based on the violation of another FINRA rule, we must determine whether he acted unethically or in bad faith").
[7] *Id.*

CHEATING IS A FORM OF FRAUD

FINRA has no rule specific to "cheating" and does not define the term. The Hearing Panel did not define the term other than to say that it "constitutes unethical conduct that violates both NASD Rule 1080 and FINRA Rule 2010."[8] The NAC defined cheating in its opinion by stating that Mr. Lykos "cheated by receiving assistance on the exam during his unscheduled break."[9]

But cheating is a form of fraud[10] and therefore requires proof of both the act that would constitute cheating *and* "scienter."[11] Scienter generally requires specific intent[12] but extreme recklessness may suffice.[13] In short, proving scienter requires establishing "the defendant's

[8] Hearing Panel Decision, p. 12.
[9] NAC Decision, p. 12.
[10] Merriam-Webster.com: "to deprive of something valuable by the use of deceit or fraud" available at: https://www.merriam-webster.com/dictionary/cheat; *see also Mills v. Seawright,* 2021 WL 785105, at *5 (S.D. Miss. 2021) ("Actual fraud, by definition, consists of any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another—something said, done or omitted with the design of perpetrating what is known to be a cheat or deception"); and *In re Johnson,* 2019 WL 4582831, at *3 (N.D. Ga. 2019) ("Actual fraud "encompasses forms of fraud ... that can be effected without a false representation." [citation omitted]. It is a much broader term than false pretenses or false representation and may encompass "deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another").
[11] *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976).
[12] *United States v. Wynn,* 684 F.3d 473 (4th Cir. 2012) ("[t]he intent to defraud is the **specific intent** to deceive or cheat someone…") (emphasis added); s*ee also In the Matter of Edward Becker,* SEC Rel. No. 252, Admin. Proc. No. 3-11367 (June 3, 2004) (wire fraud case: scienter required for criminal conviction of securities fraud is no different than for civil liability; conviction requires proof of **specific intent** to defraud); *In the Matter of Bryan Cohen,* SEC Rel. No. 34-88506, Admin. Proc. No. 3-19739, at *2 (March 27, 2020) (securities fraud case: count in indictment to which respondent pled guilty alleged **specific intent** to defraud); *In the Matter of Lawrence Allen Deshetler,* SEC Rel. No. IC-5411, Admin. Proc. No. 3-18854, at *3 (November 21, 2019) (mail fraud case: "Mail fraud requires a **specific intent** to defraud"); and *In the Matter of Jesse Litvak,* SEC Rel. No. 739, Admin. Proc. No. 3-16050, at *7 (January 22, 2015) (TARP fraud case: jury found Litvak acted "knowingly, willfully, and with **specific intent** to defraud").
[13] *Malik v. Network 1 Financial Securities, Inc.,* 2022 WL 453439, at *2 (2d Cir. 2022) (recklessness is sufficient [for pleading in a securities fraud claim] to establish scienter only if the defendant's conduct is "an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it"); *see also SEC v. One or More Unknown Traders in Securities of Onyx Pharmaceuticals, Inc.,* 2014 WL 5026153, at *6 (S.D.N.Y. 2014).

intention to deceive, manipulate, defraud."[14] Here, FINRA must establish by a preponderance of the evidence both that Mr. Lykos either received assistance while on his unscheduled break or removed exam content from the test center *and* that he did so with scienter; *i.e.*, that he specifically intended to do so or was so extremely reckless that he must have been aware he was doing so. Thus, a violation of ROCs or NASD Rule 1080, without evidence of scienter, is insufficient to establish cheating. To be sure, they are strict liability violations that trigger a derivative FINRA Rule 2010 charge, but they do not establish cheating, which requires scienter.

REVIEW OF DISCIPLINARY PROCEEDINGS FOR FAIRNESS

Disciplinary proceedings against members of an exchange and their associated persons are governed by Section 6(b)(7) of the Exchange Act, which provides that an exchange may not be registered with the Commission unless its rules "provide a fair procedure for the disciplining of members and persons associated with members[.]" Section 19(e)(1)(A) of the Exchange Act governs the Commission's review of disciplinary actions taken by self-regulatory organizations, including FINRA. "In applying this section, [the Commission has] indicated that a fundamental principle governing all SRO disciplinary proceedings is fairness." *In the Matter of Hayden*, Admin. Proc. File No. 3-9649 (SEC May 11, 2000). The Commission has explained that the fairness of the proceeding is determined based on "the entirety of the record" and looks to whether the respondent has shown that his "ability to mount a defense was harmed[.]" *Mark H. Love*, 57 S.E.C. 315, 324-25 (SEC 2004) (addressing effect of prejudicial delay in an enforcement action).

[14] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

IV.

FACTUAL BACKGROUND

On April 24, 2018, Mr. Lykos took and failed the Series 24 exam ("April Exam"). During the underlying investigation, FINRA staff reviewed video of Mr. Lykos' behavior and conduct during the April Exam. FINRA staff noted that, "[a]fter reviewing the candidates April 9th exam I am extremely confident that he did not attempt to remove exam content or cheat in any other manner… [H]e displayed no suspicious behavior during the April appointment."[15]

On July 20, 2018, Mr. Lykos sat again for the Series 24 exam (previously referred to herein as the Exam), which is the subject of this appeal.

FINRA has proffered no evidence and, in fact, has admitted the lack of any evidence that Mr. Lykos brought any personal items into the Exam, including any mobile device or camera, cellular phone, handheld computer, recording device, watch, personal notes, study materials, or formulas.[16] To the contrary, during the check-in process at the test center, Mr. Lykos underwent a security inspection wherein "[n]o prohibited items were discovered during the inspections."[17]

FINRA, however, has cited three aspects of Mr. Lykos' conduct during the Exam that are relevant. First, during the exam, Mr. Lykos wrote on his left hand, fingers, and forearm.[18] Mr. Lykos testified that he wrote on his person during the exam to assist in answering the multiple choice questions presented on his screen.[19] He further testified that he wrote on his left hand, fingers, and forearm a total of approximately eight times.[20] Prometric provided dry-erase

[15] *See* CX-23, p.1.
[16] *See, e.g.*, FINRA Rules of Conduct, "Personal Items," at CX-8, p. 2; *see also* Hearing Transcript dated January 28, 2020 ("January 28 Hearing") at 334:23 – 336:4; Hearing Transcript dated January 29, 2020 ("January 29 Hearing") at 451:9 – 452:2.
[17] *See* CX-21, p.6.
[18] *See* CX-21, pp. 6, 8-9; *see also* January 28 Hearing at 126:18 – 133:2.
[19] *See* January 28 Hearing at 219:6 – 221:16; 266:18 – 267:25.
[20] *Id*. at 237:13 – 238:1.

markers and a small board during the Exam, but Mr. Lykos testified that the markers did not work properly in conjunction with the note board and, as a result, he chose to use his left hand, fingers, and forearm at various times during the Exam, which he could moisten to draw out the ink.[21]

Second, Mr. Lykos took an extended break – approximately 23 minutes – during the Exam (hereinafter referred to as the "Break").[22] Mr. Lykos testified he took the Break due to a medical condition: he was suffering from [redacted], as well as [redacted], and he sought a place to take pain medication to alleviate the pain before returning to the Exam.[23] The building where Mr. Lykos took the Exam features an interior lobby with glass entry doors to both the test center and to a bank for which Mr. Lykos had performed work and with which he was therefore familiar.[24] Thus, he did not leave the test center building when he entered the bank lobby and asked a bank vice-president, whom he knew, for water and a place to sit, because he was not feeling well.[25] The bank employee provided him access to an empty office where he turned off the lights, took his medicine, and rested.[26]

FINRA has proffered no evidence that Mr. Lykos obtained third-party assistance with the Exam during the Break. To be sure, the Break provided him *an opportunity* to obtain, or attempt to obtain, such assistance, but there is no evidence he did. Instead, the only evidence about the Break itself admitted at the Hearing was that Mr. Lykos was not feeling well, took a pain pill, and rested.[27]

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[21] *Id*. at 107:9 – 21; 258:23 – 259:12.
[22] *Id*. at 78:9 – 16.
[23] *Id.* at 79:25 – 80:18; 224:12 – 20.
[24] *Id.* at 142:1 – 143:20.
[25] *Id*. at 224:21 – 225:12.
[26] *Id*.
[27] *See, e.g.*, January 28 Hearing at 161:15 – 18 (Mr. Lykos testified that he did not write on his fingers during the Break); 222:19 – 223:18 (Mr. Lykos testified that he did not access any prohibited items or

During this period, Mr. Lykos did not leave the building or access his locker, and he did not request any additional time to complete the Exam.[28] When he returned from the Break, Prometric performed a security check on Mr. Lykos, wherein a proctor discovered an eyeglass wipe and a business card in his outer left breast pocket.[29] Mr. Lykos tore the business card in half and placed it in the trash.[30] Although Mr. Lykos testified that he may have made notes on the business card during the Break,[31] Prometric did not recall "any extra writing being on the business card that was found"[32] and FINRA itself is unaware of any additional writing on the card.[33] Thereafter, Prometric permitted Mr. Lykos to return to the Exam.[34]

Third, Mr. Lykos attempted to hide or remove the writing on his left hand, fingers and forearm. When Prometric confronted him as he exited the Exam, Mr. Lykos quibbled with the test proctor and attempted to lick and rub his fingers.[35] Mr. Lykos testified the writing on his hands was "[n]ot sentences and not stuff from the exams or formulas from the exam."[36] He further stated that, at this time, he was "pretty upset" because he was concerned that the writing on his hands would be "misconstrued" as cheating.[37] Mr. Lykos ultimately permitted Prometric to check and photograph his hands.[38]

Mr. Lykos testified that he did not receive any assistance from any source for any answer on the Exam, and that he never accessed any books, study materials, or computer or electronic

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materials during the Exam or the Break); and 226:3 – 8 (Mr. Lykos testified that he did not access any computer or other source during the Break).

[28] *See, e.g.*, FINRA Rules of Conduct, "Unscheduled Breaks" at CX-8, p. 3; *see also* CX-21, p. 8.
[29] *See* CX-21, p.8.
[30] *See id.*; s*ee also* January 28 Hearing at 149:25 – 151:9.
[31] *See* January 28 Hearing 227:9 – 228:11.
[32] *See* CX-23, p. 3.
[33] *See* January 28 Hearing at 330:15 – 331:2.
[34] *See* CX-21, p. 11.
[35] *See* CX-21, pp. 9-10; *see also* CX-23, p. 5; January 28 Hearing at 170:18 – 176:3.
[36] *See* January 28 Hearing at 237:11 - 12; *see also id*. at 266:18 – 267: 25.
[37] *Id.* at 238:9 - 20.
[38] *See* CX-23, p. 5.

devices.[39] Mr. Lykos further testified that he did not cheat on the Exam: he utilized only the "content of his brain," did not transcribe any questions, and had no intent to write down test materials. [40] FINRA has proffered no evidence to the contrary.

Following the Exam, Mr. Lykos discussed with the Prometric proctor why he had ink on his hands and requested that the evidence be preserved.[41] The proctor indicated they would keep the evidence, stating "I have to got [sic] put all in a packet and send it to them [FINRA]."[42] And at the hearing, the FINRA witness testified that it is "standard practice" that Prometric "gather up the materials at the end of the exam."[43] But, as it turned out, after placing them into a packet, Prometric "did not keep them…as part of any type of evidence"[44] and the evidence was not available to Mr. Lykos at the hearing. Prometric also failed to retrieve another key piece of evidence from the trash - the torn business card.[45] Further, FINRA did not determine the name of the Prometric proctor working during the Exam[46] and did not speak with the key Prometric employees working on the day of the Exam.[47]

V.

LEGAL ARGUMENTS

To prove a fraudulent tort, FINRA must establish, by a preponderance of the evidence, both the prohibited act and the requisite scienter.[48] For example, "a party who makes a false

[39] *See* January 28 Hearing at 221:22 – 223:18.
[40] *Id.* at 242:6 - 20.
[41] *Id*. at 170:18 – 176:1.
[42] *Id*. at 175:14 – 25.
[43] *Id.* at 333:18 – 334:9.
[44] *See* CX-23, p. 2.
[45] *Id.* at p.3
[46] *See* January 28 Hearing at 330:8 – 14.
[47] *See* January 29 Hearing at 373:19 – 374:20; 382:8 – 383:8.
[48] *See Paul C. Soper and David N. Daoud v. Simmons International, Ltd., et al.*,1985 WL 5967, at *1 (S.D.N.Y. 1985) ("the complaint must include facts constituting scienter when a party is charged with fraud[;]" "mere allegations are insufficient").

statement carelessly, but in good faith, is not liable for fraud, but may be liable for negligent misrepresentation."[49] Therefore, for the fraud of cheating, FINRA must establish, by a preponderance of the evidence, both the prohibited act and the scienter behind it. As set forth below, however, the prohibited acts that can be established here are only violations of the ROCs, *not* acts that would support a cheating violation. In other words, there is a preponderance of the evidence that Mr. Lykos violated two ROCs while taking the Exam, *not that he violated Rule 1080 by receiving assistance or removing exam content from the test center*. Further, even if there were a strict liability violation of NASD Rule 1080, there is not a preponderance of the evidence that he acted with the requisite scienter to establish that he cheated or attempted to cheat. In short, FINRA has overcharged this case, resulting in an inequitable bar of Mr. Lykos from the industry of which he has been a member for more than 25 years. A lesser sanction is warranted.

WRITING ON HIS PERSON

First, there is no allegation or evidence in the record that Mr. Lykos brought prohibited personal items into the Exam or that he had any writing on his left hand, fingers, or forearm (or anywhere on his person) when he first entered the test center. Nor is there any evidence that he brought prohibited personal items into the Exam or that he had any new writing on his left hand, fingers, or forearm (or anywhere on his person) when he re-entered after the Break. In both instances, he was subject to search and no such evidence was found (note: upon re-entry, he was asked to discard a business card he picked up while on the Break, which he did, prior to re-entry). Further, FINRA has not produced *any* evidence – neither testimony nor video – that Mr. Lykos wrote *exam content* on himself, as opposed to writing letters and symbols to assist him in

[49] Restatement of Torts 3d § 10.

answering the test questions. Further, the video evidence confirms Mr. Lykos' testimony that he attempted to lick his fingers and hands clean at various times throughout the Exam, which is consistent with his stated purpose of using his left hand, etc., to write notes to assist in answering more questions, not in preserving a record of exam content. No reasonable inference from the record indicates an effort to record exam content by writing letters on one's hand, etc. and then licking it clean to do it again. Nor is there evidence of an intended recipient of such exam content – *e.g.*, someone else he knew that would be taking the same exam – or evidence of some nefarious purpose behind the writing. Instead, the preponderance of the evidence is that Mr. Lykos wrote letters and symbols on his left hand, etc. to assist in answering questions, just as he would have with the dry-erase boards. These actions do not violate the ROCs or NASD Rule 1080 any more than writing on a dry-erase board would violate a rule.

In addition, that Mr. Lykos requested the proctor to retain the board and markers makes it more likely that their lack of effectiveness was the reason for writing on his left hand, etc., and not some nefarious purpose. The reasonable inference from this evidence (the request to retain the board and markers) was that Mr. Lykos believed that the condition of the boards and markers would support his innocent purpose. Unfortunately for Mr. Lykos, FINRA or its agents lost this key evidence.

In sum, it is undisputed that Mr. Lykos wrote on his left hand, fingers, and forearm during the Exam. But these actions do not violate the ROCs or NASD Rule 1080. No rule prohibits it. And given that writing on the dry-erase board was permissible at the test center to aid in answering test questions, it is difficult to imagine how writing, instead, on one's person for the same purpose would somehow be unethical. The ambit of FINRA Rule 2010 may be large, but not large enough to comprehend any behavior that FINRA considers unusual.

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TAKING A 23-MINUTE BREAK

Second, Mr. Lykos left the testing room for 23 minutes during the Break. Unscheduled breaks, such as his, are only permissible to use the restroom. But presumably, if an examinee needed a 23-minute restroom break due to a handicap or medical condition, the examinee would not have been charged with cheating. Similarly, if an examinee stepped outside to smoke a cigarette, the examinee would presumably not have been charged with cheating. But in either example, the examinee could properly be charged with a ROC violation (and a derivative Rule 2010 violation) for taking too long a break or for leaving the test center premises by stepping outside. A sanction would be appropriate, perhaps for the examinee to be required to take the test again, to be fined, or to receive a short suspension. But neither example would be considered cheating because neither act involved conduct that would support a claim of cheating – either obtaining assistance or removing exam content – and neither involved the scienter to do so.

Here, Mr. Lykos did not use the restroom during the Break and thus violated the ROC regarding unscheduled breaks. But this is not conduct that constitutes cheating even if done with scienter. To be sure, taking a long break provides *an opportunity* to cheat – whether in the restroom or other area out of view of proctors and test center cameras. And if coupled with other evidence of actual or attempted cheating – such as finding hidden study guides or witness testimony regarding Mr. Lykos' activities during the Break – then that would be evidence that Mr. Lykos cheated or attempted to cheat.

But FINRA did not present such evidence here; instead, the only direct evidence that we have of what transpired during the Break was provided by Mr. Lykos, who testified he was in pain and needed to rest before continuing the Exam. Further, the indirect evidence that, upon returning from the Break, he immediately continued with the next question on the Exam is

consistent with an innocent purpose. Had he obtained assistance on questions during the Break, one would expect he would have immediately returned to prior problematic questions. Instead, he continued with the next question in sequence, where he had left off. After that question, he did review prior answers, changing two, albeit only one correctly. While this is not evidence that he did not necessarily obtain assistance on the Break, it is also not evidence that he did.

We are left, then, with an absence of evidence that he obtained or attempted to obtain assistance during the Break or that he possessed the requisite scienter to support a claim of cheating. Under these circumstances, there is insufficient evidence to charge an intentional fraud. There is, however, sufficient evidence that Mr. Lykos committed a violation of the ROC regarding unscheduled breaks. This violation of the ROC does not constitute a violation of NASD Rule 1080, but it does trigger a derivative violation of FINRA Rule 2010.

DECEPTIVE BEHAVIOR

Third, Mr. Lykos engaged in videotaped activity regarding the writing on his left hand, fingers, and forearm that may suggest he was attempting to conceal the writing. He also quibbled with the test proctor at the end of the Exam about the ink on his left hand, fingers, and forearm. Although, in retrospect, no ROC was violated by writing on his person, it appears that Mr. Lykos became concerned about it at the time. But FINRA has not provided *any* evidence that Mr. Lykos had written exam content on himself, as opposed to letters and symbols to assist in answering the questions, or that he was attempting to remove exam content from the test center. Thus, his efforts to conceal or minimize the writing on his person ultimately concerned non-violative behavior; *i.e.*, his use of his person instead of the dry-erase board to assist in answering questions. Nevertheless, the efforts to conceal or minimize may have ultimately interfered with Prometric's operations and were, arguably, disrespectful and disruptive. As a result, Mr. Lykos

OS Received 05/09/2022

does not dispute that he violated the ROC prohibiting such conduct, which would also trigger a derivative violation of FINRA Rule 2010.

It is also arguable that Mr. Lykos' behavior constituted unethical conduct inasmuch as it was not in conformity with the moral norms or standards of professional conduct for associated persons. While not done in bad faith, Mr. Lykos accepts responsibility for his actions,[50] actions that arguably merit a stand-alone FINRA Rule 2010 violation.

But even if his actions may be considered unethical, it would not be a reasonable inference to conclude that, by engaging in deceptive behavior regarding ink on his person inside the test center, he must have cheated while on the Break when there is no evidence he did so or that he possessed the scienter to do so. Here, the most reasonable inference is simply that Mr. Lykos attempted to conceal and minimize the writing on his person because he believed it might be construed as a violation of the ROCs.

THERE IS INSUFFICIENT EVIDENCE OF CHEATING

While Mr. Lykos violated the ROCs (and derivatively, FINRA Rule 2010) by taking the Break as he did and by his deceptive behavior in concealing or minimizing the writing on his person, and arguably violated FINRA Rule 2010 for unethical conduct, there is no evidence that he actually obtained assistance or removed exam content during the Exam, or that he had the scienter to do either. Thus, there is insufficient evidence to find that he cheated or tried to cheat.

It is true that this is a circumstantial evidence case, but FINRA lost circumstantial evidence that may have been key to Mr. Lykos' defense – the dried-out markers and dry-erase board, as well as the torn business card. Because FINRA claimed that he had engaged in misconduct by writing on his person, the physical evidence that he requested FINRA retain to

[50] *See, e.g.*, January 28 Hearing at 242:21 – 245:16.

support his explanation of events was critical to Mr. Lykos' defense. FINRA's failure to preserve this evidence harmed Mr. Lykos' ability to mount a defense at the hearing. Thus, drawing any negative inferences now in the absence of such key evidence would be unfair to Mr. Lykos.

In sum, this is a circumstantial evidence case, but there are too few pieces of circumstantial evidence to support a finding of cheating.

VI.

SANCTIONS

Unlike every other case that FINRA has brought to a hearing, this case does not involve direct evidence of cheating or attempted cheating. In all of those cases, the direct evidence of cheating was also direct evidence of the requisite scienter to cheat. Both the *actus reus* and the *mens rea* were established by the nature of the conduct itself, whether by admission, default, or adjudication. In other words, the use of an imposter to take the exam, the hiding of study guides in one's shorts or locker or in the test center restroom under a trash can are all cases where the nature of the act itself provided sufficient evidence of scienter, as none of the established conduct could be performed without the specific intent to do so.

The following is a brief summary of every other case that FINRA or the NAC has adjudicated to date involving alleged "cheating" on a qualification exam:

- *Enf. v. Matthew Logan*, Discip. Proc. No. 2019063570502 (OHO June 29, 2021). Logan admitted using an imposter to take his Regulatory Element training and continuing education courses on his behalf. This constituted cheating and a violation of FINRA Rule 2010 for unethical conduct. A bar was imposed.

- *Enf. v. Travis Hughes*, Discip. Proc. No. 2019064416201 (OHO February 3, 2021). Hughes admitted violating the ROC and FINRA Rule 2010 by using cheat sheets hidden in his shorts on two Series 79 exams. This constituted a violation of the ROC and FINRA Rule 2010 both for unethical conduct and as a derivative violation. A bar was imposed.

- *Enf. v. Andrew Yoro*, Discip. Proc. No. 2018056934901 (OHO October 4, 2019) (default decision). Evidence indicated Yoro cheated on a Series 7 exam by consulting study

OS Received 05/09/2022

materials in his locker during three unscheduled breaks, then changing several incorrect answers to correct answers. This constituted a violation of NASD Rule 1080 and FINRA Rule 2010. A bar was imposed.

- *Enf. v. Jason David*, Discip. Proc. No. 2017053669301 (OHO October 30, 2018) (default decision). Evidence indicated David cheated on Series 66 exams by consulting study materials in his locker during an unscheduled break, then reviewing approximately 30 questions and changing nine of his answers. On a second exam, he cheated by consulting study materials on an unscheduled break, then reviewing at least nine questions and changing the answers in three. David admitted consulting with his study guides. This constituted a violation of NASD Rule 1080 and FINRA Rule 2010. A bar was imposed.

- *Enf. v. David Kennedy*, Discip. Proc. No. 20090192761-05 (OHO April 17, 2012) (default decision). Evidence indicated that Kennedy cheated on Firm Element Continuing Education proficiency tests by improperly receiving assistance on the exam from an operations manager at his firm who provided the answers ahead of time. In addition, Kennedy gave the answers to another RR to use for the same tests. This constituted a violation of FINRA Rule 2010 and a bar was imposed.

- *Enf. v. Nicholas Rubino*, Discip. Proc. No. 2008014873201 (OHO June 15, 2010). Evidence indicated that Rubino cheated on his Series 7 exam by consulting a study guide in his locker during an unscheduled break, which he admitted. This constituted a violation of NASD Rule 1080 and NASD Rule 2110 (predecessor to FINRA Rule 2010). A bar was imposed.

- *Enf. v. Fredericka Watson*, Discip. Proc. No. 20060052704 (OHO November 7, 2007) (default decision). Evidence indicated that Watson cheated on a Continuing Education exam by referencing notes from her pocket during the exam. By bringing notes into the test center, she violated NASD Conduct Rule 2110. A bar was imposed.

- *Enf. v. Kenneth Shelley*, Compl. No. C3A050003 (NAC February 15, 2007). Evidence indicated that Shelley had previously boasted of cheating on exams, to include boasting of using study materials hidden in the restroom, and that on the day of the exam his study materials were found hidden in the restroom. The hearing panel also found that the restroom had been cleaned the morning of the exam and no materials were found at that time, that Shelley admitted bringing study materials into the restroom before the exam, that after the exam began materials were found hidden behind a trash can in the restroom, and that Shelley admitted the hidden materials were his. This violated the ROCs and NASD Conduct Rule 2110. A bar was imposed.

In each of the above cases, the Hearing Panel found that acts constituting cheating (or attempted cheating) had occurred under circumstances where the scienter to do so was unequivocal and, in most instances, admitted by the respondent. That is to say, the penultimate

charge in each case was a stand-alone violation of FINRA Rule 2010 (or its predecessor) for cheating, not merely for unethical conduct or a ROC violation.

FINRA's Sanction Guidelines contain "General Principles" that state that adjudicators should tailor sanctions to respond to the misconduct at issue.[51] The Guidelines also provide "Principle Considerations in Determining Sanctions" that lists various factors to consider, including the individual's relevant disciplinary history (Mr. Lykos had none), whether the misconduct consisted of numerous acts or occurred over an extended period of time (it did not), and whether the misconduct was the result of an intentional act, recklessness, or negligence (at most, the conduct was unethical under FINRA Rule 2010).[52]

The Guidelines also provide guidance specific to allegations of cheating or possessing unauthorized materials during an exam: the standard sanction for "Cheating, Using an Impostor, or Possessing Unauthorized Materials in Qualifications Examinations" is a bar, but for unauthorized possession *that does not rise to the level of cheating*, a fine of $5,000 to $39,000.[53] The Guidelines also provide guidance specific to failures to comply with rule requirements regarding Continuing Education, where the sanction, in an egregious case *"such as where there is intentional misconduct and/or repeat violations,"* is for the individual to be suspended for 30 or more days (up to two years) or to consider a bar.[54] Also relevant, the Guidelines provide guidance specific to "Fraud, Misrepresentations or Material Omissions of Fact," where the sanction range for negligent misconduct is a suspension of between 31 days to up to two years. And even for intentional or reckless misconduct where mitigating factors predominate, a

[51] FINRA Sanction Guidelines, p. 3.
[52] *Id.* at 7-8.
[53] *Id.* at 40.
[54] *Id.* at 41-42.

suspension of six months to two years may suffice.[55]

FINRA has proffered no evidence and, in fact, has admitted the lack of any evidence that Mr. Lykos brought any personal items into the Exam, including any mobile device or camera, cellular phone, handheld computer, recording device, watch, personal notes, study materials, or formulas. Moreover, FINRA has proffered no evidence that Mr. Lykos obtained third-party assistance with the Exam during the Break. Mr. Lykos testified that he did not receive any assistance from any source for any answer on the Exam, and that he never accessed any books, study materials, or computer or electronic devices. Mr. Lykos further testified that he did not cheat on the Exam: he utilized only the "content of his brain," did not transcribe any questions, and had no intent to write down test materials. FINRA has proffered no evidence to the contrary. As such, the appropriate sanction here is for misconduct that does not rise to the level of cheating; *i.e.,* a fine. But given that Mr. Lykos has already been out of the industry now for more than three years as a result of these proceedings and at great personal and professional cost, a fine or suspension appears altogether inappropriate. He has already paid a significant price. Alternatively, for the reasons set forth above, a fine at the lower end of the sanction range set forth in the Guidelines would be appropriate.

VII.

CONCLUSION

Respondent Thomas J. Lykos respectfully requests that the Securities and Exchange Commission enter the following findings and orders:

(1) order that the decision of the NAC on December 16, 2021, affirming the FINRA panel decision dated May 1, 2020, be vacated, set aside for all purposes, and rendered void;

[55] *Id.* at 90.

(2) find that the decisions of the NAC and the Hearing Panel were not supported by substantial evidence on the record; and

(3) find that the decisions of the NAC and Hearing Panel were arbitrary and capricious;

(4) in the alternative, even if the NAC's findings are upheld, the sanction of a bar is excessive and oppressive in light of the circumstantial evidence and should be substantially reduced.

Dated: May 9, 2022
Washington, D.C.

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By: _____

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