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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

David B. Tysk

For Review of Disciplinary Action Taken by

FINRA

File No. 3-17294

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

I. INTRODUCTION

In December 2004, David B. Tysk—a general securities representative at Ameriprise Financial Services, Inc. ("Ameriprise")—met a 75 year old wealthy businessman who became Tysk's "biggest and most important client." After the market had regressed in early 2008, the customer became dissatisfied with the performance of his investments and on April 2, 2008, the customer filed a complaint letter demanding that Ameriprise close his accounts, return his invested funds, and waive any associated fees.

During Ameriprise's investigation of the suitability claims raised in the complaint, Tysk accessed the section of his customer contact management program and made 67 substantive changes to his notes on the customer. Tysk altered his notes by adding new note entries that related to the variable annuities that he recommended and backdating new note entries to make it appear that they were made contemporaneously with the event. Tysk did not inform anyone that he altered his notes on the customer for over one year, even after the customer filed an arbitration

complaint against him. Rather than disclosing that he altered his ACT! Notes or providing its previous versions, Tysk produced the altered ACT! Notes in discovery purporting it to be an unspoiled record of his customer interactions. The arbitration panel sanctioned Tysk for circumventing the discovery process in violation of FINRA's Code of Arbitration Procedure for Customer Disputes ("Arbitration Code"), and referred this matter to FINRA's Department of Enforcement for disciplinary action.

In a decision rendered on May 16, 2016, the National Adjudicatory Council ("NAC") found that Tysk's actions were patently unethical and violated the high standards of commercial honor and just and equitable principles of trade by which all FINRA members and their associated persons must abide. For altering his notes after receiving a customer complaint and intentionally concealing his actions from his firm and the customer for over a year, the NAC found that Tysk violated FINRA Rule 2010, and its predecessor, NASD Rule 2110. The NAC also found that Tysk's producing falsified notes during an arbitration proceeding violated IM-12000 of the Arbitration Code and FINRA Rule 2010. Finding that his deceptive actions were serious misconduct, the NAC fined Tysk $50,000 and suspended him from association with a FINRA member in all capacities for one year. The evidence in the record overwhelmingly supports the NAC's findings and the sanctions imposed are neither excessive nor oppressive. The Commission should sustain the NAC's decision in its entirety.

II. STATEMENT OF FACTS

A. Tysk's Background

Tysk entered the securities industry in 1987 and is currently associated with Ameriprise. RP 540, 2048, 3481-3500, 6321.[1] At all times relevant to the misconduct at issue in this case, Tysk worked in Ameriprise's Bloomington, Minnesota office as an independent sales representative with approximately 200 clients and sold traditional investment products, including mutual funds, stocks and bonds. RP 2049, 2130, 2295-96, 3481-3500, 6321. Sales in variable annuity products accounted for roughly three percent of Tysk's book of business. RP 2296.

B. Tysk's Relationship with Customer GR

In December 2004, Tysk met GR through a mutual friend at a holiday party. RP 8, 541, 5875. At the time of their introduction, GR was a 75 year old wealthy businessman with a net worth of approximately $55 million. RP 8, 541, 5875. In March 2005, GR became an Ameriprise customer, investing an initial $750,000 with Tysk as his financial advisor. RP 3537-44. After achieving positive returns on his initial investment, GR then invested an additional $250,000 in June 2006, and ultimately transferred his $20 million fixed income portfolio to Ameriprise, thus becoming Tysk's "biggest and most important client."[2] RP 2153, 5876, 6321.

C. Tysk's Recommended Annuity Investments to GR

In December 2006, Tysk recommended that GR purchase $2 million of an Ameriprise variable annuity. RP 8-9, 541, 1129, 2141. Based on this recommendation, GR initially invested

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[1] "RP" refers to the page number in the certified record of this case filed with the Commission.

[2] GR eventually had eight accounts opened at Ameriprise with approximately $30 million of total investments. RP 541, 2129.

$1 million in variable annuities on December 14, 2006. RP 542. GR then purchased another $1 million in variable annuities on July 11, 2007, which raised red flags at the firm because of GR's total investment size in variable annuities and his age. RP 1129-30. Tysk defended his recommendation as suitable in response to the firm's request for additional information in an email dated August 16, 2007. RP 1129-30. Tysk's supervisor, Brett Strorrar ("Strorrar"), also reviewed the variable annuity transactions and determined that GR's annuity investments were suitable. RP 1130.

D. GR's Demand Letter to Ameriprise

Around October 2007, after the market regressed, the relationship between Tysk and GR began to deteriorate. RP 2132, 5872. GR became dissatisfied with the performance of his investment portfolio and the corresponding fees he incurred. RP 230, 1130. Tysk met with GR in January 2008, and again in February 2008, to discuss GR's concerns with his investments but about a month later, GR proceeded to transfer out some of his investments. RP 6322.

In a letter dated April 2, 2008, GR complained to Ameriprise about Tysk's variable annuity recommendations and whether his investments were suitable.[3] RP 9, 542, 1130, 4207, 6322. GR's complaint, among other things, requested that Ameriprise close GR's accounts, waive any surrender fees, and return his invested funds. RP 4207. GR's complaint also threatened that GR would prefer to work with Ameriprise directly in resolving his concerns

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[3] GR's complaint raised several suitability concerns. GR stated that he did not need to insure any of his assets for his heirs. He further stated, "I am currently 78-years old. I do not know how it could possibly be in my best interest to have my money in an investment with a ten-year surrender charge." GR was also concerned that he would pay federal tax on his assets at the ordinary income rate instead of the lower capital gains tax rate. He was disappointed to learn that his annuity investments did not include a step-up in basis for his heirs, and thus they would have to pay higher taxes upon his death. He expressed concern that he was paying for a death benefit that he did not need. RP 4207.

rather than involving securities regulators such as the Commission, FINRA, or the Minnesota Attorney General. RP 4207.

Ameriprise commenced an internal investigation of GR's complaint on April 22, 2008. RP 3551. The investigation included interviews with GR and his business partner, and a review of Tysk's written response to GR's complaint. RP 3561-63. Ameriprise also requested that Tysk provide supporting documentation, including his file notes and other customer records. RP 3061-62, 3551-53. Although Tysk provided some supporting documentation, he did not include his notes on the customer when he provided his written response on April 25, 2008. RP 1130-31, 2530, 3551-55. By letter dated July 7, 2008, Ameriprise denied GR's request in his complaint letter to reverse the annuity purchases and waive the surrender fees, stating that "we are unable to substantiate your allegations of lack of disclosure and suitability." RP 3565-67, 6322.

E. Ameriprise Document Retention and Integrity Procedures

Ameriprise had robust procedures on the retention of customer files and other business records when a customer filed a customer complaint and arbitration claim. RP 3763-64, 5155-5207. Ameriprise's Code of Conduct, which governed an advisor's ethical business conduct, expressly required advisors to "maintain complete and accurate business records" and not to "shred, destroy, or alter in any way documents that are related to any imminent or ongoing investigation, lawsuit, audit, [or] examination." RP 5157, 5159, 5183-84, 5779, 6324.

With particular regard to customer complaints, Ameriprise's compliance policy and procedures advised that "any documentation . . . produce[d] is subject to 'discovery' in litigation," to "[b]e careful and accurate regarding what you say" and that "complete documentation is [the] best defense against complaints." RP 5207. Section 12.4.3 of Ameriprise's Regulatory Information Center Manual covered litigation proceedings and

specified that, upon receipt of a lawsuit or arbitration claim by a client, advisors "must retain copies of all documents and notes about the client" and not destroy, revise or "alter" documents in any way. RP 3764, 5779-80. Tysk was aware of Ameriprise's policies and procedures regarding altering documents and knew that he should not have communications involving the customer, including any notes or written correspondence, that are misleading. RP 2071-77, 2080-81.

F. Tysk Altered and Backdated His Notes on GR

Tysk used an off-the-shelf computer program called "ACT! Notes" to keep track of customer contact information and to manage his business relationships with customers while at Ameriprise.[4] RP 5759, 6323. Tysk's ACT! Notes contained a customer file on GR—including GR's contact information, records of meetings between Tysk and GR, and Tysk's notes, including notes that concerned Tysk's investment recommendations. RP 2056, 6323.

From May 13 through May 27, 2008, after Tysk and Ameriprise received GR's complaint, but before Ameriprise completed its investigation, Tysk opened the ACT! Notes program on his computer and made substantial alterations to his notes on GR. RP 9, 1143-44, 5872, 5879, 6323. Other users had access to Tysk's ACT! Notes, but it is undisputed that Tysk altered his own notes on GR. RP 2171, 4193-4196.

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[4] ACT! Notes by Sage is a contact relationship management system designed to record events as they occur and provide reminders of tasks and future events. RP 5759. Features of ACT! Notes include a chronological display of customer-related events, calendar appointments, notes, "to-do" lists, and summaries of meetings and conversations. RP 5874, 6323. Tysk purchased the ACT! program in the early 1990s and used it regularly. RP 5759. Although Ameriprise did not require its employees to use ACT! Notes, at least half of Ameriprise's Bloomington, Minnesota office used the program. RP 2056-57, 5874, 6323.

Although Tysk's note alterations were from his memory, his revisions included very detailed conversations he had with GR; in fact, Tysk included quoted statements from GR as part of his recollection of conversations from memory. RP 2171. Many of Tysk's newly created ACT! Notes related to the variable annuity recommendations he made to GR. Following are examples of new note entries on GR about recommended investments that Tysk backdated:

- 5/15/2006: [GR] added another $250,000 to the account and wants to invest it more aggressively. . . . His other assets are conservative. I reconfirmed that this money being invested aggressively was okay. I did not want to pay the price if the markets dropped. . . . I made sure we reviewed the PMT for the first year with the account he was very, very happy. RP 3723.

- 9/20/2006: He mentioned that his tax return was done and that the office would get me a copy. He said that he is paying a lot of taxes and AMT. We spent a lot of time talking about a tax strategy . . . He would like to make changes that will reduce his taxes if possible. I committed to incorporating this into my recommendations. RP 3725.

- 12/14/2006: We met and reviewed the account and our recent changes. He is very pleased with the pace of changes and the thoughtfulness going into [the] changes. He said that "I am very impressed at the thought you are putting into things." . . . I reviewed the surrender charge options and he said "Why wouldn't I take the 10yr [annuity] with the 3% bonus?". . . I said that he was right, for tax deferred growth he[] would likely never spend this money and his heirs would inherit it. He said fine, "they can pay the taxes...What do I care". RP 3726.

- 7/4/2007: I reminded him of my recommendation on the annuity and he said he remembered. He will not need some of the cash . . . so he said that I could put the additional amount into the existing annuity. I reminded him of the purchase credit and the surrender charge. RP 3729.

Tysk claimed that his purpose for altering his notes was to ensure that his ACT! Notes contained a complete account of his relationship with GR. RP 2289, 4193. Tysk's alterations, however, were not minimal. He made a total of 67 substantive revisions to his ACT! Notes.[5] In

[5] Of the 67 substantive alterations, Tysk added 54 new note entries and supplemented 13 pre-existing note entries to his ACT! Notes. RP 1144-45, 1159, 6323 n.6.

some cases, Tysk altered his ACT! Notes by adding entries to existing notes. RP 6323. In other cases, Tysk backdated his notes by manually deleting the prepopulated current date and entering a previous date to make it appear that the new note entries he added were contemporaneous with the past event.[6] RP 5770, 6323. Even Tysk admitted at the hearing that the changes to his ACT! Notes were extensive. RP 2208. Some of the extensive alterations related to events that occurred more than two years prior to his revisions in May 2008. RP 2171.

Tysk's substantial revisions and backdating of his ACT! Notes went undetected for over a year. Tysk testified that he knew that, if he were subject to litigation, he would have to produce his ACT! Notes and other customer records. RP 2091. In the arbitration proceeding that followed, Tysk produced the substantially altered version of his ACT! Notes in discovery, but did not inform GR or his firm of his alterations.

G. GR's Arbitration Claim and Discovery Sanctions Against Tysk

GR filed an eleven-count arbitration complaint against Tysk and Ameriprise on November 21, 2008. RP 4631-4651, 6324. The complaint alleged that Tysk and Ameriprise recommended and sold more than $2 million in "unsuitable" variable annuities using funds from a fixed-income account and charged excessive fees in connection with the management of his portfolio.[7] RP 4631, 6324.

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[6] Upon entering new information, ACT! Notes included certain defaults. Notably, when entering a new note for a contact, the program would automatically populate the date that the new entry was made. A user could bypass this prompt by manually deleting the default date and entering a previous date to make it appear as if the entry was made in the past. RP 6323.

[7] The issues raised in GR's arbitration claim were similar to those raised in his demand letter, including that "Tysk sold two annuities contracts to [GR], a financially secure 77-year old, knowing that these annuities were unsuitable, carried heavy surrender fees for 10 years, and would generate income taxed at a rate nearly double that of other more prudent investment choices." RP 4631-51, 4821.

Soon after GR filed his arbitration complaint, Tysk met with his arbitration counsel for several hours to discuss the arbitration. Tysk's counsel testified that, at that meeting, he talked with Tysk about documents and document preservation. RP 3173. Although he had the opportunity, Tysk elected not to mention to his counsel that he altered his ACT! Notes on the customer. During discovery, GR requested Tysk to provide, among other things, the following documents:

> 6) All notes by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the custom[]er's account(s) at issue.[8]

Tysk produced, through his counsel, the revised and backdated version of his ACT! Notes pursuant to GR's discovery request but did not tell anyone that he altered the notes he produced. RP 4717, 4846-63, 6324. Based on a hunch that the version of ACT! Notes Tysk produced was tampered evidence, GR's counsel requested in a letter dated May 8, 2009 that Tysk produce "[a]ll documents showing edits made by Mr. Tysk to the notes . . . including but not limited to the edits made on May 27, 2008." RP 4721-24, 6324-25.

Before responding to the discovery request, Tysk's counsel sent Tysk an email asking whether he knew anything about "any edits being made to the contact reports?" RP 4198. This question opened the window for Tysk to divulge that he made substantive changes to his ACT! Notes shortly after GR complained. But Tysk failed to seize the opportunity to disclose that he altered his notes. Instead, Tysk replied, "There are no other documents showing edits per the request" and based on this reply, Tysk's counsel responded to GR's discovery request stating that "there are no such responsive documents." RP 4197-98, 6324-25.

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[8] RP 3575-78, 4655, 5771, 6324.

Tysk finally confessed to his counsel that he made alterations to his ACT! Notes in August 2009. RP 2427, 3141. Eventually, GR did discover that Tysk had altered his notes, but only after repeated discovery requests and an order by the arbitration panel mandating a forensic examination of Tysk's computer.[9] In April 2010, Mark Lanterman ("Lanterman"), chief technology officer of Computer Forensics Services, performed the forensic search of Tysk's computer, the results of which confirmed the suspicions of GR's counsel. RP 3799-4189. Lanterman found multiple versions of Tysk's ACT! Notes on his computer and identified when, and to what extent, Tysk revised his notes. RP 6325; *see also* RP 4270 (listing 12 saved ACT! Notes database files that existed on Tysk's computer at the time GR's counsel requested previous version of the notes).

The arbitration panel found that Tysk attempted to block the discovery process during an arbitration proceeding and imposed arbitration sanctions. Specifically, by order dated May 14, 2010 the arbitration panel found:

- Respondent Tysk altered the record of his contacts with [GR] after [GR] complained about the suitability of the annuity he purchased;
- Ameriprise failed to update its discovery responses to [GR] after it became aware that Tysk had altered the file;

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[9] Suspecting that previous versions of Tysk's ACT! Notes were accessible, but not produced in discovery, GR's counsel requested a continuance of the hearing so that further discovery could be conducted. RP 3617-20. Specifically, GR's counsel requested that Tysk and Ameriprise "turnover all relevant computer files and back-up media" so that a forensic examination and search for all relevant files could be completed, which Tysk and Ameriprise refused. RP 3617-20. By order dated December 21, 2009, the arbitration panel granted GR's counsel's request for expedited discovery and postponed the hearing. RP 5293-5303. The arbitration panel also subsequently ordered a forensic search of Tysk's computer and server. RP 4811.

- Only after an Emergency Motion to Compel Discovery was filed on the eve of the rescheduled hearing did Ameriprise make Tysk's computer available to [GR] and allow [him] to discover the changes; and

- [Ameriprise and Tysk] engaged in other attempts to block discovery by [GR]. RP 4813-43, 6325-26, n.10.

For obstructing the discovery process, the arbitration panel ordered Tysk and Ameriprise, jointly and severally, to pay $20,000. RP 4823, 6325. The arbitration panel then referred Tysk's discovery abuses to FINRA's Department of Enforcement ("Enforcement") for disciplinary action.[10] RP 547, 3671, 6320.

III. PROCEDURAL BACKGROUND

Enforcement filed an amended complaint on July 24, 2013 that alleged two causes of action against Tysk. RP 539-552. The first cause of action alleged that Tysk altered his ACT! Notes after receiving GR's complaint to bolster his defense to GR's suitability claims and concealed his alterations when he responded to subsequent discovery requests, in violation of NASD Rule 2110 and FINRA Rule 2010. RP 547-548. The second cause of action alleged that Tysk failed to adhere to discovery rules in an arbitration proceeding when he altered his ACT! Notes to bolster his defense and failed to notify GR or his firm of the changes after repeated discovery requests for his notes, in violation of IM-12000 of the Arbitration Code and FINRA Rule 2010. RP 548-549.

The Extended Hearing Panel issued a decision on October 13, 2014 that found Tysk engaged in the misconduct, as alleged. RP 5755-5808. Specifically, the Extended Hearing Panel

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[10] *See generally* FINRA Rule 12212 (permitting the arbitration panel to issue sanctions for a party's failure to comply with any provision of the Arbitration Code, and initiate a referral for disciplinary action under FINRA's conduct rules).

found that Tysk's alteration of his ACT! Notes after receiving GR's complaint in May 2008 and deliberate concealment of his note alterations for several months violated FINRA's just and equitable principles of trade rule. RP 5792. In addition, the Extended Hearing Panel found that Tysk produced a misleading document in contravention of the discovery rules and his failure to disclose that he altered the ACT! Notes he produced in discovery violated IM-12000 of the Arbitration Code and FINRA Rule 2010. RP 5794-96. For his misconduct, the Extended Hearing Panel suspended Tysk from associating with a FINRA member in all capacities for three months and fined him $50,000. RP 5806-07. Tysk appealed the Extended Hearing Panel's decision to the NAC. RP 5809-11.

After an independent review of the record, on May 19, 2016, the NAC affirmed the Extended Hearing Panel's findings of violation. RP 6326. In deciding to affirm the Panel's findings, the NAC rejected the defenses Tysk raised before it on appeal, including Tysk's argument that motive and bad faith must be proven to establish a just and equitable principles of trade rule violation. RP 6327. Instead, the NAC found that Tysk altered his ACT! Notes to strengthen his defense in anticipation of GR filing a claim, in violation of NASD Rule 2110 and FINRA Rule 2010. RP 6327. The NAC also affirmed the Extended Hearing Panel's finding that Tysk violated IM-12000 of the Arbitration Code and FINRA Rule 2010, when he produced a misleading document in discovery. RP 6329.

In assessing sanctions, the NAC found that Tysk's backdating of a customer record and concealment for several months during an arbitration proceeding was serious misconduct that, for the protection of investors, warranted more stringent sanctions than what the Extended Hearing Panel had originally imposed. RP 6331, 6333. The NAC found that Tysk's concealment—although ultimately uncovered—was nonetheless a threat to the arbitrators ability

to find the truth. The NAC "intensely condemned" Tysk's actions. RP 6331. Thus, the NAC fined Tysk $50,000 and suspended him from associating with any FINRA member in any capacity for one year for his violations. RP 6333. This appeal before the Commission followed.

IV. ARGUMENT

FINRA has determined that, by a preponderance of the evidence, Tysk committed the rule violations alleged against him. Tysk's alteration of a customer record and nondisclosure of his fabrication for over a year were unethical acts that violated FINRA's just and equitable principles of trade rule. Tysk also violated FINRA's Arbitration Code. It is undisputed that Tysk produced a copy of his altered ACT! Notes in discovery and did not inform GR or his firm that he had altered them. His failure to disclose his alterations made his production of the revised ACT! Notes misleading. Tysk knew or should have known that prior versions of his ACT! Notes existed. Yet, he did not produce them in response to GR's discovery request for the previous versions, responding that no documents showed edits to his ACT! Notes. Tysk had a duty to either produce the previous ACT! Note versions as requested or disclose that he altered the version he produced. Tysk failed to do both. Indeed, the arbitration panel found that Tysk had violated the discovery rules and fined him $20,000 for this violation.

The NAC found the Extended Hearing Panel's sanctions imposed on Tysk were too lenient, and accordingly increased Tysk's suspension from three months to one year. The misconduct that Tysk engaged in deeply conflicted with his ethical obligations as a securities professional to act with candor and transparency and to fully cooperate during an arbitration proceeding. With over twenty years in the industry, Tysk should have known that altering and backdating a customer record during the firm's investigation and failing to inform his firm and GR of his actions is wrongful conduct. His continued concealment and production of an altered

customer record during arbitration further exacerbated Tysk's unethical misconduct. Tysk's one year suspension and $50,000 fine are neither excessive nor oppressive, but strike the appropriate balances of deterring future misconduct and protecting investors. The Commission should uphold the NAC's decision in all respects.

A. The Record Overwhelmingly Supports the NAC's Findings of Misconduct.

1. Tysk Violated the Just and Equitable Principles of Trade Rule.

"FINRA has a compelling interest in regulating the conduct of its associated persons that threatens the integrity of the industry." *Dep't of Enforcement v. Akindemowo*, Complaint No. 2011029619301, 2015 FINRA Discip. LEXIS 58 at *20 (FINRA NAC Dec. 29, 2015), *appeal docketed*, SEC Admin. Proceeding No. 3-17076 (Jan. 29, 2016); *accord Brian L. Gibbons*, 52 S.E.C. 791, 794 (1996) (holding that the Exchange Act empowers self-regulatory organizations like FINRA to discipline its members and their associated persons for unethical behavior), *aff'd*, 112 F.3d 516 (9th Cir. 1997). Accordingly, FINRA Rule 2010, as did its predecessor, NASD Rule 2110, requires that members, in the conduct of their business, observe high standards of commercial honor and just and equitable principles of trade.[11] The rule is not limited to legal conduct; rather, the rule "states a broad ethical principle . . . .intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace." *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11-12 (NASD NAC June 2, 2000) (internal quotation marks and citations omitted).

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[11] FINRA Rule 2010 replaced NASD Rule 2110 on December 15, 2008. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50, at *32-33 (Oct. 2008). NASD Rule 2110 and FINRA Rule 2010 are applicable to associated persons pursuant to NASD Rule 0115(a) and FINRA Rule 0140, respectively.

The NAC's findings of violation under NASD Rule 2110 and FINRA Rule 2010 are supported fully by the record. After GR filed a customer complaint, and in the midst of the firm's investigation of whether Tysk recommendations were suitable, Tysk opened the ACT! Notes program on his computer and altered his customer's record. His alterations included backdating new notes to deceptively make it appear that during the entire time GR was his customer he had a full and complete record of their investment discussions, when in fact, he did not. RP 1159. Tysk admitted that the alterations to his ACT! Notes were extensive, and conveniently, many of his altered notes contradicted the suitability claims raised in GR's complaint letter. He informed no one that he altered his customer's file in ACT! Notes for over a year and produced a copy of his fabricated notes in discovery during an arbitration proceeding. *See Dep't of Enforcement v. Pierce*, Complaint No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *58 (FINRA NAC Oct. 1, 2013) (finding that falsifying customer records on annuity transactions and its concealment is unethical conduct in violation of FINRA's just and equitable principles of trade rule). FINRA has previously upheld that a firm's misconduct—when defending an arbitration—of refusing to produce documents was a violation of just and equitable principles of trade. *See Dep't of Enforcement v. Josephthal & Co.*, Complaint No. CAF000015, 2002 NASD Discip. LEXIS 8, at *7 (NASD NAC May 6, 2002). Likewise, Tysk's alterations, his failure to disclose, and production of altered notes were unethical, in violation of NASD Rule 2110 and FINRA Rule 2010.

Tysk raises several arguments regarding his just and equitable principles of trade rule violation. *See* Applicant Brief, at 18-30. First, he contends that FINRA failed to prove that his conduct was unethical especially since his altered ACT! Notes were truthful, there was no pending legal action, and the firm found no violation of its policies. Applicant Brief, at 19-20.

None of these assertions however—even if true—undermine the NAC's findings that Tysk acted unethically in violation of the just and equitable principle of trade rule.

Tysk's first assertion—that there is no proof his ACT! Notes were false—is a red herring. Enforcement did not allege in its amended complaint that Tysk's altered notes were untrue or incorrect, and neither the Extended Hearing Panel nor the NAC ruled on the accuracy of the note content. Therefore, the extent to which Tysk's altered ACT! Notes were truthful is irrelevant to this disciplinary proceeding. Tysk acted unethically when he altered his ACT! Notes on his computer and backdated some of the notes to make it appear as though the newly inputted information had existed the entire time. Tysk created the appearance that he was making contemporaneous notes of his advice to GR and quoted what GR purpotedly said during those conversations. Tysk then concealed the fact that he altered his ACT! Notes for more than a year after he altered them and produced them in arbitration. Tysk's actions were unethical; he demonstrated *low* standards of commercial honor and violated FINRA rules.

Second, Tysk's assertion that there was no pending legal action when he altered his notes does not excuse his unethical behavior. A legal or corporate action is not a prerequisite to the NAC's findings of violation under NASD Rule 2110 and FINRA Rule 2010. *See, e.g., Benjamin Werner*, 44 S.E.C. 622, 624-625 (1971) (upholding penalties against respondent for conduct inconsistent with just and equitable principles of trade even though such conduct was not held to be unlawful). FINRA's just and equitable principles trade rule is an ethical proviso that more broadly protects investors from dishonest practices that are unfair to them or hinders transparency in the industry even if such practices "may not be illegal or violate a specific rule or regulation." *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *16 (Dec. 11, 2014), *aff'd*, 637 F. App'x 49 (2d Cir. 2016). Notwithstanding the

precise timing of Ameriprise's issuing of a legal hold, altering a business record and passing it off as untampered evidence is unquestionably unethical under FINRA's high standards of commercial honor and just and equitable principles of trade. Tysk bypassed system prompts in ACT! Notes, deleted the prepopulated current date, and replaced it with a previous date to make it appear that his new note entry was there all along when, in reality, the note never existed.[12] His backdating was substantial, and in some cases, he portrayed events and conversations with GR that happened up to three years prior to his alterations. RP 2171, 6323.

Tysk's third assertion that the firm found no violation of its policies, has no bearing or effect on FINRA's disciplinary action for his unethical behavior.[13] In any event, Tysk was not, as he claims, exonerated of wrongdoing by his firm. Ameriprise's policies and procedures made clear that Tysk was not permitted to alter or change his ACT! Notes or any business records during its investigation. The Ameriprise Code of Conduct—expected to be observed *at all times*—required Tysk to conduct business ethically and with the highest degree of integrity, RP

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[12] Tysk suggests that his backdated notes were no different than when FINRA's Office of Hearing Officers issues a revised decision using the original decision date. Applicant Brief, at 23 n. 28. This comparison is fundamentally flawed. Tysk did not edit his ACT! Notes in the same manner that an adjudicator might correct a factual error, note what the correction was, and issue a revised decision. Tysk backdated his notes by putting an earlier date to his ACT! Notes entries rather than the *actual* date to make it appear that the content was written on the earlier date. Further, unlike the case of a revised OHO decision, Tysk failed to make available previous versions of his ACT! Notes even after GR repeatedly requested them. His conduct was unequivocally impermissible under FINRA rules. *See Dep't of Enforcement v. Taboada*, Complaint No. 2012034719701, 2016 FINRA Discip. LEXIS 7, at *67-68 (FINRA OHO Mar. 18, 2016) (finding no exception under FINRA rules permitting a registered person to create a backdated replica of a document and then presenting it to a regulator as an original), *appeal docketed*, Complaint No. 201203419701 (Apr. 5, 2016).

[13] *See Dep't of Enforcement v. McGee*, Complaint No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *54 (FINRA NAC July 18, 2016) (deeming the firm's investigation of respondent's misconduct "irrelevant" to FINRA's disciplinary proceeding because FINRA "is not bound by" another adjudicator's investigation or findings).

5162, and refrain from altering or changing any existing documents even when an investigation was "imminent or ongoing." RP 5162, 5184. Tysk, on the other hand, altered his ACT! Notes while the firm was in the midst of its investigation without the firm's knowledge.[14] Tysk's deception continued in the arbitration proceeding that followed and the arbitration panel sanctioned him $20,000 for producing his fabricated notes in discovery and failing to inform GR's counsel that he altered his notes. RP 4813-43, 6325-26, n.10.

Tysk's brief next argues that FINRA did not prove that he acted with the intent to "bolster his defense" in response to GR's complaint. Applicant Brief, at 21. The record fully supports the NAC's finding that Tysk intentionally made substantive edits to his ACT! Notes in defense of the suitability claims GR raised in his complaint. Many of his altered ACT! Notes directly contradicted the claims raised in GR's complaint.[15] Tysk admitted as much at the

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[14] Tysk's supervisor and Ameriprise's compliance department initially concluded that Tysk's actions violated Ameriprise's Code of Conduct. RP 3768, 5780. Ultimately, Ameriprise issued Tysk an "Educational Clarification Notice" that warned Tysk that his misconduct raised questions as to whether he complied with the firm's Code of Conduct. *See* RP 3771, 5781. Tysk's supervisor testified that, based on the firm's policy, he believed that Tysk "shouldn't have done that" (i.e., alter his ACT! Notes concerning GR). RP 2575; *see also* RP 2576 (Strorrar testifying: "I don't feel that [Tysk] adding ACT! notes was in the spirit of our code."). Tysk also admitted that, in retrospect, the course of actions he took to memorialize his relationship with GR were not the best. *See* RP 4194 ("In retrospect . . . I would have simply created a separate document entitled 'Supplemental Notes'. I see now that may have prevented what has turned into a very stressful time for me and my family personally.").

[15] For example, Tysk created a 12/14/06 note entry in his ACT! Notes that responded to his allegedly improper sale of the $1 million annuity to GR. The newly created entry stated in part:

> 12/14/2006: We met and reviewed the account and our recent changes. He is very pleased with the pace of changes and the thoughtfulness going into changes. He said that "I am very impressed at the thought you are putting into things." . . . I reviewed the surrender charge options and he said 'Why wouldn't I take a ten-year annuity with 3 percent bonus?'. . . I said that he was right, for tax deferred growth [heirs] would likely never

(Footnote continued on next page)

hearing. *See* RP 2229-31, 2246. Thus, the evidence strongly supports the NAC's finding that Tysk altered his notes in an attempt to strengthen his defense.[16]

Next, Tysk unsuccessfully attempts to trivialize the concept of backdating in claiming that his conduct was proper. Applicant Brief, at 22-23 ("Tysk was not 'backdating' his truthful Notes any more than one 'backdates' a calendar . . . by penciling in something that happened last week"). But Tysk's unethical conduct involved more than just "penciling in" an event that happened "last week." Tysk completely overhauled his ACT! Notes, making 67 alterations and giving many of those entries dates that were more than a year earlier. The Commission has made clear that backdating customer records and providing misleading information is conduct contrary to high standards of commercial honor and inconsistent with just and equitable principles of trade. *See Fillet*, 2015 SEC LEXIS 2142, at *50 (finding a J&E violation when respondent backdated customer-account records and attempted to deceive regulatory authorities with documents he deliberately falsified).

(cont'd)

> spend this money and his heirs would inherit it. He said fine, "they can pay the taxes...What do I care". RP 3726.

[16] Tysk's brief also argues that his intention to bolster his defense is further belied by that fact that he did not share his ACT! Notes with the firm until *after* the firm responded to GR's complaint and was told that the complaint was meritless. Applicant Brief, at 21-22. But the exact sequence in which Tysk's defense played out is immaterial to the NAC's finding that he engaged in unethical acts and practices in violation of NASD Rule 2110 and FINRA Rule 2010. Tysk altered his notes in response to GR's complaint letter and he produced his altered notes in the arbitration. Moreover, FINRA need not prove scienter for a just and equitable principles of trade rule violation. *See Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *50 (May 27, 2015) ("[A] violation of Rule 2110 does not require any showing of scienter.").

Lastly, Tysk exhaustively argues that the NAC's findings of violation were based on an "unacceptable vague duty" that bore no relation to the applicable rules or existing precedent. He is mistaken. As early as 1942, the Commission has held that "[i]nherent in the relationship between a dealer and his customer is the vital representation that the customer will be dealt with fairly, and in accordance with the standards of the profession." *Trost & Co.*, 12 S.E.C. 531, 535 (1942) (citation omitted). When Tysk became an associated person with a FINRA firm, he assumed the duty to act not for self-promoting purposes but in the customer's best interest. In an industry that "relies heavily on candor and truthful representation," Tysk must unequivocally deal fairly and honestly with the customer and the firm on a fully disclosed basis when conducting his business. *Henry Irvin Judy, Jr.*, 52 S.E.C. 1252, 1256 (1997). Tysk did not act within the industry's standard of profession and just and equitable principles of trade when he altered his ACT! notes after GR complained and withheld this critical knowledge from his customer, his firm and—until ordered to turn over his computer—from the arbitration panel.

2. Tysk Violated FINRA's Code of Arbitration Procedure for Customer Disputes.

IM-12000(c) of the Arbitration Code states that it is inconsistent with just and equitable principles of trade and a violation of FINRA Rule 2010 for an associated person to "fail to . . . produce any document in his possession or control as directed pursuant to provisions of the Code."[17] Pursuant to the Code, an associated person is required in good faith to use their best

[17] *See* IM-12000(c) of FINRA Rule 12000 ("Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes"). The Arbitration Code applies to any dispute between a customer and a member or associated person of a member. *See* FINRA Rule 12101 ("Applicability of Code and Incorporation by Reference").

effort to produce all required documents during discovery.[18] The failure to produce documents and information in accordance with the Arbitration Code, along with other discovery abuses, is subject to disciplinary action under FINRA's conduct rules.[19]

The NAC correctly found that Tysk violated IM-12000 of the Arbitration Code and FINRA Rule 2010 when he deliberately produced a misleading document in discovery and failed to disclose that he had altered his notes.[20] The Arbitration Code requires the parties in an arbitration proceeding to cooperate in the voluntary exchange of documents and information "to the fullest extent practicable . . . to expedite the arbitration." *See* FINRA Rule 12505; *NASD Notice to Members 03-70*, 2003 NASD LEXIS 80 (Nov. 6, 2003) (reminding members and associated persons of their duty to cooperate in the exchange of documents and information).

The NAC found that Tysk violated the Arbitration Code and FINRA Rule 2010 for two independent reasons. First, Tysk produced a fabricated document during an arbitration

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[18] *See* FINRA Rule 12506(b)(2) (requiring good faith efforts by the parties in producing requested documents).

[19] *See* FINRA Rules 12104(e) and 12212(b); *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *15 (Mar. 31, 2016) (holding that a violation of any FINRA rule constitutes a violation of FINRA Rule 2010), *appeal docketed*, No. 16-1739 (2d Cir. May 31, 2016).

[20] We disagree with Tysk's suggestion that he cannot be held to the provisions of IM-12000 of the Arbitration Code because it is not a freestanding rule. Applicant Brief, at 31. IM-12000 is interpretive material that was subject to Commission approval upon the filing of a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 19b-4 thereunder, and thus is legally binding. *See* Order Granting Approval of Proposed Rule Changes, Exchange Act Release No. 58643, 2008 SEC LEXIS 2279, at *10 (stating that stand-alone supplementary material sets forth the same type of "legally binding guidance and additional information" as interpretive materials); *see also* FINRA Rule 0130 ("Interpretation") (governing the interpretation of FINRA rules); FINRA By-Laws, Article XI, Sec. 1 ("Rules") (authorizing FINRA to adopt, administer, and enforce any rules or amendments thereto approved by the Commission).

proceeding that was misleading—the only cure of which would have been disclosure.[21] Second, Tysk in bad faith failed to produce the previous versions of his ACT! Notes in discovery after repeated requests. RP 6328.

Tysk's brief makes the exceedingly technical point that the Arbitration Code does not require him to provide "affirmative explanations" or "narrative answers" to discoverable documents. Applicant Brief, at 31. The Arbitration Code, however, does require Tysk to exchange documents *and information* in good faith, which he failed to do. *See* FINRA Rule 12507. Tysk produced his ACT! Notes in discovery without telling anyone that he had tampered with them by adding substantial text and had backdated newly created notes. Absent disclosure, the document Tysk produced was misleading. As the NASD held in *Noonan*, producing fabricated evidence during an arbitration proceeding violates the just and equitable principles of trade. *See DBCC v. John Francis Noonan*, Complaint No. C04930026, 1994 NASD Discip. LEXIS 25, at *13 (NASD NBCC Aug. 3, 1994) (barring respondent for knowingly producing fabricated evidence in an arbitration proceeding and concealing his actions until his later confession), *aff'd*, 52 S.E.C. 262 (1995).[22]

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[21] Altering a customer record in secret and producing a fabricated copy in discovery during an arbitration proceeding offended FINRA's mission to preserve ethics and transparency in the securities industry. *See John F. Noonan*, 52 S.E.C. 262-265 (1995) (finding a J&E violation when respondent admittedly fabricated evidence and produced it as a means to defeat the customer's arbitration case against him).

[22] In this regard, Tysk appears to suggest in his brief that disclosing that he altered his ACT! Notes would create a Tysk Rule or new discovery standard under the Arbitration Code. *See* Applicant Brief, at 27-28. This is incorrect. Tysk had an existing ethical duty of fairness and transparency, which has long covered the conduct of an association person during an arbitration proceeding. *See e.g., Dep't of Enforcement v. Josephthal & Co.*, Complaint No. CAF000015, 2002 NASD Discip. LEXIS 8, at *7 (NASD NAC May 6, 2002) (finding respondent's arbitration code violation to also be conduct in violation of FINRA's J&E rule).

In his brief, Tysk admits: "The discovery rules, of course, govern the exchange of *information* with other parties," Applicant Brief, at 35, n. 42, but then argues that it would be an expansion of IM-12000(c) of the Arbitration Code for FINRA to find that Tysk's nondisclosure of information violated the Code. Applicant Brief, at 34. This defies logic. As the NAC found, IM-12000 subparagraph (c) of the Arbitration Code prohibits the failure of production of a discoverable document "as directed pursuant to provisions of the Code," and other discovery provisions within the Arbitration Code directly require "information" in addition to "documents" when referring to discovery. *See e.g.*, FINRA Rule 12505 (requiring parties to cooperate to the fullest extent practicable in the exchange of documents *and information* to expedite an arbitration proceeding) (emphasis added); *see also FINRA Regulatory Notice 14-40*, 2014 FINRA LEXIS 53, at *5 (Oct. 2014) (noting that "[t]he discovery process allows the parties to an arbitration to obtain facts and *information* from other parties to the arbitration to support their case and prepare for the hearing.") (emphasis added). When Tysk produced his misleading ACT! Notes, without disclosing that he had altered them, he acted contrary to the Arbitration Code, in violation of IM-12000(c).[23]

Tysk's brief next argues that, in compliance with the Arbitration Code, he did provide all documents that he *possessed* at that time. Applicant Brief, at 33. But he too narrowly constricts the tentacles of the rule. IM-12000(c) of the Arbitration Code required Tysk to produce any

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[23] Even if Tysk could not readily produce previous versions of his notes, his lack of providing full information in cooperation with the discovery process ran afoul of FINRA rules. *See Dep't of Enforcement v. Westrock Advisors, Inc.*, Complaint No. 2006005696601, 2010 FINRA Discip. LEXIS 26, at *24 (FINRA NAC Oct. 21, 2010) ("A party's noncompliance with its discovery obligations is not an 'acceptable part of arbitration strategy.'") (citation omitted).

document via electronic or hard copy that was in his possession or control.[24] When GR's counsel specifically requested Tysk to produce all previous version of his ACT! Notes, Tysk's discovery obligation was not limited to just printing the latest ACT! Notes contact report from his computer. Per the Arbitration Code, Tysk was required to do more. He had to use his "best efforts to produce all documents required or agreed to be produced." FINRA Rule 12506(b)(2). Tysk failed to use his best effort in accordance with the Arbitration Code to produce the requested documents.

Remarkably, FINRA forensic tech investigator, Christopher Leigh, testified that a simple click on "file" and then another click on "open database" in Tysk's ACT! Notes would have taken Tysk to a "default location within the ACT! program of the databases that have been created and saved." RP 2719-20. Even Tysk himself admitted that he backed up the ACT! database on a weekly basis. RP 2064. Therefore the evidence strongly indicates that previous versions of his ACT! Notes were in Tysk's possession and control; yet, he deliberately withheld producing them. *See Westrock Advisors, Inc.*, 2010 FINRA Discip. LEXIS 26, at *19 (rejecting respondent's "not in our possession" claim and finding violation of the Arbitration Code when the firm withheld electronic documents requested in discovery). Even if, for argument's sake, Tysk could not open the ACT! Notes database files that were stored on his computer, a reasonable search would have produced a list of the saved files in response to GR's discovery

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[24] "Control" includes the production of documents that a member or associated person has the legal right, authority or ability to obtain upon demand. *See* Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2. Relating to FINRA Rule 8210, Exchange Act Release No. 68386, 2012 SEC LEXIS 3798, at *5 (Dec. 7, 2012).

request. Tysk's failure to use his best effort to produce documents that were requested in discovery violated the Arbitration Code and FINRA Rule 2010.

B. The NAC's Sanctions are Consistent with the Sanction Guidelines and Appropriate for Tysk's Misconduct.

The FINRA Sanction Guidelines ("Guidelines") assist adjudicators by recommending a broad range of monetary and non-monetary sanctions in disciplinary proceedings.[25] In determining sanctions, the NAC carefully considered the Guidelines, rejected the mitigating factors that Tysk raised, and found only aggravating ones. RP 6331. "Falsifying documents is dishonest and suggests that [respondents] are willing to bend the rules where regulation is concerned to suit their own needs." *Pierce*, 2013 FINRA Discip. LEXIS 25, at *95, citing *Dep't of Enforcement v. Cohen*, Complaint No. EAF0400630001, 2010 FINRA Discip. LEXIS 12, at *64-64 (FINRA NAC Aug. 18, 2010). Tysk acted against the customer's best interest when he intentionally altered and backdated a customer record and concealed his misconduct to avoid detection.[26] To make matters worse, Tysk's wrongful conduct persisted in arbitration and he "undermined the regulatory function of fostering an effective dispute resolution system." *Shvarts*, 2000 NASD Discip. LEXIS 6, at *25 n. 15.[27] Drawing the conclusion that Tysk's misconduct was serious, the NAC increased Tysk's suspension from three months to one year in all capacities and fined him $50,000. RP 6331, 6333. Tysk's sanctions, while more stringent, are neither excessive nor oppressive but instead serve the remedial purpose of deterring future

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25 *FINRA Sanction Guidelines* (2013) (hereinafter "*Guidelines*").

26 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, Nos. 13 and 10).

27 "Discovery abuse hinders the efficient and cost-effective resolution of disputes . . ., and undermines the integrity and fairness of the [arbitration] forum." *Westrock Advisors, Inc.*, 2010 FINRA Discip. LEXIS 26, at *24.

misconduct and protecting investors. The Commission should sustain the NAC's sanctions determination in all respects.

1. The NAC Correctly Relied on the Forgery and/or Falsification of Records Sanction Guideline.

The Guidelines contain recommendations for many, but not all, violations for which FINRA can bring disciplinary actions. When the Guidelines do not have an on-point guideline, adjudicators are instructed to "look to the guidelines for analogous violations." *Guidelines*, at 1. With no sanction guideline directly addressing Tysk's unethical misconduct, the NAC consulted the Forgery and/or Falsification of Records guideline and found it most analogous to the present case. That guideline recommends a fine ranging between $5,000 and $100,000 and a suspension in any or all capacities for up to two years if mitigating factors exists. In egregious cases, the guideline recommends a bar.[28]

Tysk argues that the Forgery and/or Falsification of Records sanction guideline is inapplicable because there was no allegation that his notes were inaccurate. Applicant Brief, at 39-40. But the veracity of the contents of each altered note entry is not an issue of fact presented in this case. Rather, the NAC sanctioned Tysk's unethical misconduct in connection with him altering his ACT! Notes to create the deceptive appearance that Tysk made contemporaneous notes of his interactions with GR. It is in this sense that Tysk's alteration of his ACT! Notes was analogous to falsification of records. The sanctions imposed on Tysk by the NAC should be upheld.

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28 *See Guidelines*, at 37.

2. The NAC's Sanctions Serve to Remediate Tysk's Conduct.

Tysk argues in his brief that the NAC's increased sanctions are excessive and oppressive and should be either eliminated or reduced in keeping in line with *Dep't of Enforcement v. Decker*, a settled FINRA action. Applicant Brief, at 39-41. The sanctions imposed on Tysk are not excessive or oppressive but serve the remedial purpose of deterring future misconduct and protecting investors. *See Tomlinson*, 2014 SEC LEXIS 4908, at *16 (noting that FINRA's just and equitable principles of trade rule "protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market"); *see also* Guidelines, at 2 (recommending that disciplinary sanctions be designed protect the investing public by deterring misconduct and upholding high standards of business conduct).

In arguing for a lesser sanction, Tysk's brief references the *Decker* case, which he cited in his appeal before the NAC. Applicant Brief, at 40-41. Tysk's reliance on a settled FINRA case in arguing for a lesser sanction has minimal to no probative value in comparing sanctions because settled cases tend to result in lower sanctions against the respondent. *See Tomlinson*, 2014 SEC LEXIS 4908, at *40 (stating that the sanctions imposed in each case depend on the facts and circumstances and "cannot be precisely determined by comparison with action taken in other proceedings."); *Gibbons*, 52 S.E.C. at 795 ("It is well-established that sanctions in settled cases will differ from those in litigated cases. Respondents who settle typically receive lesser sanctions than they otherwise might have received."); *see also* Guidelines, at 1 (acknowledging the broadly recognized principle that settled cases generally result in lower sanctions than fully litigated cases to provide incentives to settle). That being said, the *Decker* case is dissimilar to the case at hand. Tysk's backdating and alterations to his ACT! Notes were much more

extensive than an initialed backdated notation on spreadsheets in the *Decker* case. Tysk backdated and made changes to *several* entries in his ACT! Notes over a two-week period.[29] Tysk then concealed the fact that he altered his ACT! Notes for over a year—a much longer time than the two months the respondent took to confess his actions in the *Decker* case. For these reasons, Tysk's argument that *Decker* is the yardstick by which to measure excessive or oppressive sanctions is incorrect.

3. Tysk's Additional Arguments for A Lesser Sanction Lack Merit

Tysk's brief lists several considerations that he claims supports a mitigation of the sanctions imposed by the NAC. Each of these arguments lack merit. Applicant Brief, at 41-42.

First, Tysk claims that he has no prior disciplinary history. Applicant Brief, at 41. The absence of disciplinary history, however, is not mitigating for sanctions. *See Dep't of Enforcement v. Craig*, Complaint No. E8A2004095901, 2007 FINRA Discip. LEXIS 16, at *24 (FINRA NAC Dec. 27, 2007) ("[A] lack of disciplinary history is not mitigating for purposes of sanctions."), *aff'd*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844 (Dec. 22, 2008).

Second, Tysk claims that he "promptly informed" his firm about his altered ACT! Notes, citing to Principal Considerations in Determining Sanctions No. 2 of the Guidelines. Applicant Brief, at 42; Guidelines, at 6. His claim, however, is baseless and has no evidentiary support. For Principal Consideration No. 2 to be mitigative, Tysk must demonstrate that he informed his firm or a regulator of his misconduct prior to detection and intervention by the firm or a regulator. *See* Guidelines, at 6. But neither the record, nor Tysk, provides any evidence that he promptly confessed. By the time Tysk did finally inform his counsel that he altered his ACT!

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[29] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, Nos. 8 and 9).

Notes in August 2009, he had concealed his misconduct for well over a year. By no reasonable definition was his confession "prompt" and it did not happen before the arbitration panel intervened.

Third, Tysk unbelievably suggests that he "volunteered" to have his computer forensically examined, which he believes should be mitigating under Principal Consideration Nos. 3 and 4. Applicant Brief, at 42. He also admits in his brief, however, that he—through his counsel—vehemently opposed GR's discovery requests for previous versions of his ACT! Notes. Applicant Brief, at 42. Not only does this contradiction demonstrate Tysk's lack of cooperation during the arbitration proceeding (as further evidenced by the arbitration panel's order for a forensic search of his computer), the evidence in the record demonstrates that Tysk neither volunteered any information regarding his altered ACT! Notes nor attempted to correct his misconduct in any way until he finally confessed to his counsel in August 2009.

As noted in the NAC's decision, Tysk's fourth defense that he relied on his counsel's judgment not to further disclose that he altered his notes is misapplied. Applicant Brief, at 42. In order for Tysk's reliance on counsel defense to be mitigating under Principal Consideration No. 7 of the Guidelines, he was required to seek legal advice upon providing full disclosure so that he could reasonably rely on such advice *before* his misconduct occurred. *See Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994) (finding reliance on counsel defense misplaced when petitioner failed to demonstrate that "he made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith") (citation omitted). Tysk, however, did not seek such advice. Instead, Tysk informed his counsel about his alterations well after his altered ACT! Notes were submitted in discovery and GR's counsel had repeatedly requested more information about them that Tysk

neglected to provide. Any legal determinations made by Tysk's counsel after Tysk already altered his ACT! Notes and produced them in arbitration is not mitigating under the Guidelines.

Fifth, Tysk's contention that "FINRA has not identified any pattern of misconduct" is entirely indefensible. Applicant Brief, at 42. Although only one act of falsification is sufficient to justify the sanctions that FINRA imposed on Tysk, the record amply supports that, contrary to Tysk's assertion, the alterations he made to his ACT! Notes were substantial and extensive and Tysk continually failed to disclose his misconduct to his firm or the customer over an extended period of time. *See* RP 6331; *see also Blair Alexander West,* Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *36 (Jan. 9, 2015) (finding it aggravating that respondent engaged in multiple deceptive acts to conceal his actions from his customer, and despite numerous inquiries, he continually failed to disclose his misconduct), *aff'd*, 641 F. App'x 27 (2d Cir. 2016).

Lastly, in an attempt to invoke Principal Consideration No. 15 as a mitigating factor, Tysk argues that the level of his sanction should reflect that he was given no notice of Enforcement's "novel" interpretation of IM-12000 of the Arbitration Code. Applicant Brief, at 42. The NAC addressed and refuted this same argument in its decision. RP 6332. Principal Consideration No. 15 is inapplicable as a mitigating factor as it relates to a respondent that engages in misconduct notwithstanding prior warning by a regulator or supervisor that the conduct is in violation of FINRA rules. In the present case, there was no regulatory detection or intervention before Tysk committed wrongful conduct. Furthermore, the NAC's finding of violation under IM-12000 is not a new or a novel interpretation. Tysk should have known that producing misleading and inaccurate information during an arbitration proceeding is conduct that violates the Arbitration Code and his ethical duty to act in accordance with FINRA's high standards of commercial honor and just and equitable principles of trade. *See Gibbons*, 52

S.E.C. at 794-95; *Noonan*, 52 S.E.C. at 264; *Westrock Advisors, Inc.*, 2010 FINRA Discip. LEXIS 26, at *22. Accordingly, Tysk's novelty claim has no merit. None of Tysk's arguments support eliminating or reducing his sanctions.

V. CONCLUSION

The NAC's findings of violation are well supported by the record and Tysk's sanctions are appropriate. FINRA urges the Commission to sustain the NAC's decision in all respects.

Respectfully submitted,

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APPENDIX OF APPLICABLE FINRA SANCTION GUIDELINES

This appendix sets forth the relevant text of FINRA's Sanction Guidelines on Forgery and/or Falsification of Records.

(Source: *See FINRA Sanction Guidelines* (2015 ed.))

FINRA

Financial Industry Regulatory Authority

Sanction Guidelines

VI. Improper Use of Funds/Forgery

- Conversion or Improper Use of Funds or Securities
- Forgery and/or Falsification of Records

Forgery and/or Falsification of Records

FINRA Rule 2010

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature of the document(s) forged or falsified. 2. Whether the respondent had a good-faith, but mistaken, belief of express or implied authority.	Fine of $5,000 to $146,000.	In cases where mitigating factors exist, consider suspending respondent in any or all capacities for up to two years. In egregious cases, consider a bar.

CERTIFICATE OF COMPLIANCE

HARD COPY

I, Lisa Jones Toms, certify that the foregoing FINRA's Brief in Opposition to the Application for Review (File No. 3-17294) complies with the length limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 9,670 words.

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September 7, 2016

CERTIFICATE OF SERVICE

HARD COPY

I, Lisa Jones Toms, certify that on this 7th day of September 2016, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review (File No. 3-17294) to be sent via messenger and fax to:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915 – Mailstop 1090
Washington, DC 20549-1090

and via overnight delivery and electronic mail to:

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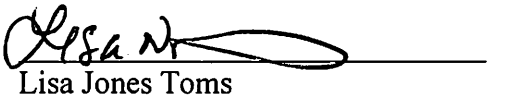
Service was made on the Securities and Exchange Commission by messenger and on the Applicant's counsel by overnight delivery service and electronic mail between the offices of FINRA and the counsel for the Applicant.



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