

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 91268 / March 5, 2021

Admin. Proc. File No. 3-17294r

In the Matter of the Application of

DAVID B. TYSK

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY
PROCEEDING

Registered representative formerly associated with a FINRA member firm appeals from findings that he engaged in conduct inconsistent with just and equitable principles of trade. FINRA fined the registered representative and suspended him for one year. *Held*, FINRA's findings of violations and imposition of sanctions are *set aside*.

APPEARANCES:

Brian L. Rubin and Lee A. Peifer of Eversheds Sutherland (US) LLP for David B. Tysk

Alan Lawhead, Andrew Love, and Lisa Jones Toms for FINRA

Appeal filed: April 10, 2019

Last brief received: August 7, 2019

David B. Tysk, formerly a registered representative of a FINRA member firm, seeks review of a FINRA decision fining him \$50,000 and suspending him for one year following our remand of the matter for clarification of FINRA's previous findings.¹ On remand, FINRA determined that Tysk violated FINRA Rule 2010 and its predecessor, NASD Rule 2110, by engaging in conduct inconsistent with just and equitable principles of trade when he supplemented his customer contact notes after a customer complained about his investment recommendations. FINRA also found that Tysk separately violated FINRA Code of Arbitration Procedure for Customer Disputes IM-12000 and FINRA Rule 2010 by failing to disclose the supplementation of his notes during discovery in a subsequent arbitration brought by the customer. Upon our independent review of the record and for the reasons set forth below, we find that FINRA failed to establish that the record supports the alleged violations. Accordingly, we set aside FINRA's findings of violations and its imposition of sanctions.

I. Background

Tysk entered the securities industry in 1987. From that time until 2017 he was associated with FINRA member firm Ameriprise Financial Services, Inc. (and its predecessor firms) in Bloomington, Minnesota, until around 2012, and thereafter in Eden Prairie, Minnesota, until he left Ameriprise. Tysk has not been associated with a FINRA member firm since 2017.

A. Tysk supplemented his notes after receiving a complaint letter from his client.

In December 2004, a family friend introduced Tysk to a new client. Shortly thereafter, the client invested \$750,000 with Tysk on a trial basis. Ultimately, he transferred approximately \$20 million to accounts managed by Tysk. This made him by far Tysk's biggest client. Tysk and the client developed a close professional and personal relationship, which included them vacationing together. The client's investments with Tysk did well initially—they were worth over \$29 million by the summer of 2007—but they began to lose money around the beginning of 2008. One of the client's business partners, who viewed Tysk as a rival, convinced the client to move nearly all of his assets out of Tysk's management, which he did in March 2008.

In early April 2008, the client sent a complaint letter to Ameriprise concerning certain assets remaining in Tysk's management—a \$2 million annuity investment—that the client had purchased through Tysk in December 2006 and July 2007. The letter asserted that the annuity was unsuitable and asked Ameriprise to liquidate it, waive any surrender charges, and return the invested funds. Ameriprise forwarded the letter to Tysk, told him it was going to look into the client's complaint, and asked Tysk to respond to twelve written questions about the relevant annuity investment; Tysk responded on April 25, 2008. Tysk's supervisor at Ameriprise assigned a reviewer to conduct an internal review of the matter. The reviewer, who did not testify at the FINRA disciplinary hearing, met with Tysk shortly thereafter and reviewed Tysk's paper files related to the client. This internal review led Ameriprise to conclude that the annuity recommendations were suitable. According to Tysk, his meeting with the reviewer made him believe that "things were in order." Based on the review, Ameriprise responded to the client on July 7, 2008, that it believed his complaint was without merit.

¹ *David B. Tysk*, Exchange Act Release No. 80135, 2017 WL 782153 (Mar. 1, 2017).

In addition to Tysk's paper files, which were the focus of the internal review, Tysk used a computer program called ACT! to document and manage his relationships with his clients. ACT! enabled users to track appointments and other interactions with clients and take electronic notes related to client relationships. Tysk and those in his office used ACT! to document client interactions, including a chronological record of client meetings, notes, and to-dos. After Tysk's client withdrew most of his assets and sent the complaint letter, Tysk was "bothered" that his ACT! notes related to the client were not as complete as he would have liked them to be. As his biggest client, Tysk was in contact with him much more frequently than his other clients and did not make notes of each interaction at the time the interaction occurred. Consequently, Tysk's ACT! notes for his biggest client were much sparser than for nearly all of his other clients.

Recognizing this discrepancy, Tysk decided to supplement his ACT! notes for the client in May 2008 by relying primarily on his hard copy client file and his own memory. Tysk made approximately 70 supplements, the vast majority of which were new entries.² When Tysk made a new note entry in ACT!, he would first manually enter the date in the date field that corresponded to the event he was describing. Consistent with his normal practice, Tysk entered the supplemental notes chronologically based on the day of the meeting, communication, or transaction, rather than the date that the entry was made. Thus, a May 2008 supplement to Tysk's notes regarding a 2007 meeting would bear a 2007 date.

In May 2008, a registered representative who worked for Tysk printed a hard-copy "contact report" of Tysk's ACT! notes relating to the client, which included the supplements that Tysk made to the notes, and placed it in the paper file Tysk maintained. The contact report stated that it was "Created on 5/27/08" and that the information contained in it was "Last edited by David Tysk" and "Edited on 5/27/08." The "Created" date showed the date the report was printed and the "Edited" date showed the last time changes were made to the client notes.

Tysk described his process of supplementing the notes as a "brain dump" to "add[] factually accurate relevant details." He testified that he supplemented the notes because he knew the professional relationship "was coming to an end" and "wanted to preserve . . . details of a complicated and personal relationship." Tysk's supplemental notes varied greatly in terms of length, detail, and subject matter. The notes ranged from brief descriptions of trips Tysk and the client had taken together (e.g., "another motorcycle trip") to detailed notes on their conversations (e.g., "[He] confirmed that we are going ahead with my suggestions on buying the suggested funds.")³ No witness testified that the suitability review of the annuity involved Tysk's ACT! notes.⁴ Nor did Tysk subsequently rely on the notes to try to establish the annuity's suitability. FINRA does not dispute the accuracy of any of the supplements Tysk made.

² FINRA contends that there were 67 supplements—54 new entries and 13 additions to existing entries. Tysk argued that there were 70 total supplements. The parties stipulated that at least 10 supplements were additions to existing entries.

³ Fewer than ten percent of the supplemental notes dealt with the client's annuity.

⁴ Tysk's supervisor testified that a representative's notes would be given very little weight in a suitability review in any event because such a review would be based "on applications, contracts, statements, and on any form of correspondence to the client."

B. The client prevailed in an arbitration against Tysk and Ameriprise.

In November 2008, Tysk's client filed a FINRA arbitration claim against Tysk and Ameriprise alleging that the annuity investment he had previously complained about was unsuitable and that the fees he had been charged were too high. As part of discovery in the arbitration proceeding, Tysk provided to his attorneys through Ameriprise "everything that [he] had" from the client's file, including the hard copy of the contact report.

On May 8, 2009, noting the contact report's last edited and created dates, the client's counsel requested that the attorney representing Tysk and Ameriprise produce "documents showing edits made by Mr. Tysk to the notes in the Contact Report . . . including but not limited to the edits made on May 27, 2008." In June 2009, Tysk's counsel forwarded the request to Tysk and asked, "Do you know anything about any edits being made to the contact reports? I assume he picked the date b/c that is the 'created date' stamped on the contact report. Do you know why the contact report [was] 'created' on that date? My assumption was that was simply the date the report was printed off the computer and then probably placed in a hardcopy file." Tysk searched his ACT! system "everywhere and every place" he knew to, but he could not find any documents that showed the edits that he had made in May 2008. As a result, Tysk responded: "You are correct with your assumption. There are no other documents showing edits per the request." On July 7, 2009, Tysk's attorney responded to the client's counsel that "there are no such responsive documents." The client's counsel did not ask for further explanation and neither Tysk nor his counsel ever represented that the notes were made contemporaneously with the events they described.⁵

In August 2009, at the first meeting with his counsel following the document request, Tysk told his attorney about the supplements he had made to his ACT! notes. Anticipating that Tysk would be asked about them at the hearing, his attorney advised him to tell the truth when questioned, which Tysk said he would do.⁶ Tysk's attorneys confirmed with Tysk that he could find neither paper nor electronic copies of prior versions of his ACT! notes, and they took no further action at that time in relation to the request for documents showing revisions to Tysk's notes.

Shortly before the scheduled date of the arbitration hearing, counsel who represented both Ameriprise and Tysk discovered a document that Ameriprise should have produced but had not. The document came from Ameriprise's files, was never in Tysk's possession or control, and did not relate to his ACT! notes. Ameriprise produced the document, but its late production caused the hearing to be delayed, and Tysk's client argued to the arbitrator that Tysk's hard drive should be forensically examined. Although counsel for Tysk and Ameriprise opposed the client's motion for a forensic examination as unwarranted, Tysk testified that he told his counsel

⁵ As discussed above, the contact report stated that it was "Last edited by David Tysk" and "Edited on 5/27/08."

⁶ Tysk waived attorney-client privilege in the FINRA disciplinary proceeding, and one of his attorneys testified at the hearing.

when the issue was first broached that he would willingly submit to the forensic examination of his hard drive.

The arbitrator granted the motion and ordered the forensic examination. A week before the rescheduled hearing in April 2010, an independent forensic computer expert examined Tysk's laptop and the ACT! files contained on it. After identifying all ACT! files, including some that were "hidden to Mr. Tysk," the forensic expert created new contact reports with data from before Tysk made his supplements. A comparison of those contact reports and the report already produced showed Tysk had supplemented his ACT! notes sometime between May 13 and May 27, 2008. The forensic expert also concluded that although ACT! should normally retain the date each entry was modified, in addition to the date assigned by the user to the note, this function did not work for Tysk's ACT! notes. The forensic expert believed that this failure was likely attributable to a "bad installation" of ACT! on Tysk's computer.

During the arbitration hearing, no party relied on any version of the ACT! notes to support arguments on the issue of the annuity's suitability. Following the hearing, the FINRA arbitration panel ruled in favor of Tysk's client on the issue of the annuity's suitability and awarded him \$197,000 plus fees. In its award, the panel faulted Tysk for altering his ACT! notes. It also faulted Ameriprise (but not Tysk) for failing to update its discovery responses after it learned that Tysk had supplemented his notes and for producing Tysk's computer only after an emergency motion to compel its production had been filed.⁷ For this and unspecified attempts to block discovery, the panel sanctioned Ameriprise and Tysk for discovery violations and ordered them to pay an additional \$20,000 in damages. The arbitration panel also referred Ameriprise and Tysk to FINRA's Department of Enforcement for potential disciplinary action.

Following the arbitration decision, Ameriprise issued an Educational Clarification Notice ("ECN") to Tysk, which was a type of firm discipline. The ECN stated that "[a]lthough we have determined that the additions you've made to your ACT! notes were accurate and fact-based, the additions raised the question whether the [Ameriprise] Code of Conduct was properly followed." Although Ameriprise issued the notice to Tysk "after considering the spirit of the Code in its entirety," it determined that Tysk's "addition to his ACT! notes did not violate any section of [Ameriprise]'s policies and procedures" or any "specific provision of the Code of Conduct." Moreover, Ameriprise did not find that Tysk had "engaged in any wrongdoing."

C. FINRA brought a disciplinary action against Tysk and Ameriprise.

FINRA investigated and ultimately brought charges against Tysk and Ameriprise in March 2012. The operative complaint charged Tysk with two causes of action. The first cause of action alleged that Tysk violated FINRA Rule 2010 and NASD Rule 2110 by "alter[ing] his customer contact notes after receiving" the complaint letter "to bolster his defense of the

⁷ As noted, although counsel who represented both Ameriprise and Tysk opposed the motion, Tysk testified that he personally did not object to the request to examine his hard drive.

customer’s claim . . . in violation of his firm’s policies.”⁸ The first cause of action also alleged that Tysk had revised his ACT! notes during the arbitration—an allegation FINRA ultimately found unsupported by the facts. The second cause of action alleged that Tysk violated IM-12000 of the FINRA Code of Arbitration and FINRA Rule 2010 by not notifying his client or Ameriprise of the edits to his ACT! notes when he “responded to discovery requests for his notes and when he responded to subsequent requests for edits to his notes.”⁹

Following a five-day hearing, a FINRA extended hearing panel found Tysk liable on both causes of action, suspended him in all capacities for three months, and fined him \$50,000.¹⁰ Tysk appealed to FINRA’s National Adjudicatory Council (“NAC”). In May 2016, the NAC affirmed the panel’s findings of violations and its imposition of a \$50,000 fine. The NAC increased Tysk’s suspension from three months to one year. Tysk appealed to the Commission.

We determined that FINRA’s decision lacked the clarity necessary for us to discern why FINRA had found violations. With respect to the first cause of action, we could not discern from FINRA’s decision “whether it concluded that Tysk violated firm policies by altering his notes,” and we sought an explanation of “how Tysk’s conduct violated Rules 2010 and 2110.”¹¹ We found it unclear if FINRA had relied on a determination that Tysk’s conduct “called into serious question” whether he complied with Ameriprise’s document retention policies or if FINRA had concluded that he actually violated them and relied on that finding.¹² With respect to the second cause of action, FINRA “did not explain . . . why Tysk’s conduct was inconsistent with just and equitable principles of trade, other than to explain that he violated IM-12000.”¹³ We observed that IM-1200 provides that “[i]t *may* be deemed conduct inconsistent with just and equitable

⁸ These rules, although effective at different times, each provide that members and associated persons must “observe high standards of commercial honor and just and equitable principles of trade” in the conduct of their business. *See* FINRA Regulatory Notice 08-57, <https://www.finra.org/rules-guidance/notices/08-57> (explaining that, on December 15, 2008, FINRA Rule 2010 superseded the identically worded NASD Rule 2110); *see also* NASD Rule 0115(a) (“Persons associated with a member shall have the same duties and obligations as a member under these Rules.”); FINRA Rule 0140(a) (same).

⁹ IM-12000(c) provides that “[i]t may be deemed conduct inconsistent with just and equitable principles of trade and a violation of 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.”

¹⁰ *See Dep’t of Enf. v. Ameriprise Fin. Servs., Inc.*, Discip. Proc. No. 2010022977801 (OHO Oct. 13, 2014), http://www.finra.org/sites/default/files/OHO%20Web%20Decision%20Proceeding%20Number%202010022977801_0.pdf. The extended hearing panel also found Ameriprise liable for some but not all of the allegations against it. Ameriprise did not appeal.

¹¹ *David B. Tysk*, Exchange Act Release No. 80135, 2017 WL 782153, at *3 (Mar. 1, 2017).

¹² *Id.*

¹³ *Id.*

principles of trade and a violation of Rule 2010” for an associated person to fail “to produce any document in his possession or control,” but does not purport to mandate such a finding.¹⁴ FINRA also failed to “explain the extent to which its conclusions rest on any violation of” other cited FINRA rules and “did not clearly address Tysk’s argument that he relied on his counsel’s advice.” We remanded to FINRA for it “to clarify its findings” in light of these issues.¹⁵

FINRA explained in its decision on remand, with regard to the first cause of action, that “Tysk’s conduct contravened Ameriprise’s retention policies under its Code of Conduct” and “violated FINRA’s ethical rule.” According to FINRA, Tysk did this by “intentionally backdat[ing]” his ACT! notes when he supplemented them in May 2008, which “created the false impression that he wrote contemporaneous notes of his conversations” with his client. With regard to the second cause of action, FINRA found that Tysk violated arbitration discovery rules “when he produced his altered ACT! Notes during discovery and did not disclose that he had” supplemented them. This violated FINRA Rule 2010, FINRA explained, because Tysk acted in bad faith by “deliberately produc[ing] a misleading document in discovery” and later “intentionally withholding . . . discoverable information.” FINRA re-imposed the one-year suspension in all capacities and \$50,000 fine. Tysk again appealed to the Commission.

II. Analysis

In reviewing FINRA’s disciplinary action, we must determine whether Tysk engaged in the conduct FINRA found, whether that conduct violated the provisions specified in FINRA’s determination, and whether those provisions are, and were applied in a manner, consistent with the purposes of the Securities Exchange Act of 1934.¹⁶ We base our findings on an independent review of the record and apply a preponderance of the evidence standard.¹⁷

A. The record does not establish that Tysk violated FINRA Rule 2010 and NASD Rule 2110 with respect to the first cause of action.

FINRA Rule 2010 and its predecessor, NASD Rule 2110, require that members and associated persons in the conduct of their business “observe high standards of commercial honor and just and equitable principles of trade.” Associated persons violate these rules (where the alleged violation is not premised on the violation of another FINRA rule) if they act unethically

¹⁴ *Id.*

¹⁵ *Id.* at *4.

¹⁶ 15 U.S.C. § 78s(e)(1).

¹⁷ *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, *9 (May 27, 2011), *aff’d*, 693 F.3d 251 (1st Cir. 2012).

or in bad faith.¹⁸ 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.”¹⁹ Upon our independent review of the record, we find that the record does not show that Tysk violated Rules 2010 and 2110 as FINRA found with respect to the first cause of action. Accordingly, we set aside FINRA’s finding of violation.

1. The record does not establish that Tysk unethically created a “false impression” that he made his notes contemporaneously with the events he documented.

As FINRA concedes, there is no evidence or even allegation that the contents of Tysk’s supplements to his ACT! notes were false or inaccurate. Instead, FINRA found that Tysk acted unethically by “deliberately creat[ing] misleading evidence.” Specifically, FINRA found that Tysk created “the false impression that he wrote contemporaneous notes of his conversations” with his biggest client when in fact those notes were written many months later.

We find that the record does not show that Tysk attempted to create a false impression as to the date he created the notes, either affirmatively or by implication. In May 2008, Tysk added information to his ACT! notes about earlier conversations and interactions with his client and assigned to those notes the dates the events occurred. But Tysk did not explicitly or implicitly represent that he made those entries on the dates of the events to which they pertained. Rather, the only physical record of the notes in the client file—the printed contact report at issue—stated on its face that it was last edited by Tysk on May 27, 2008. Testimony from the forensic expert also suggests that it was a “bad installation” of the ACT! program on Tysk’s computer—and not any action on Tysk’s part—which resulted in the program not saving the date each note entry was modified.²⁰

FINRA relies on the fact that Tysk manually “overrode the ACT! Notes default prompts that would automatically populate the current date” when he supplemented his notes with new entries. But Tysk says that he entered information about past conversations and events in order to create a chronological record of his relationship with his client, which is a plausible explanation for why Tysk electronically labeled that information with the dates the conversations and events took place rather than the dates he made the notes. Unlike in the cases that FINRA cites, there was no evidence or even allegation that the events Tysk recorded occurred at a

¹⁸ See *Heath v. SEC*, 586 F.3d 122, 132 & n.5 (2d Cir. 2009); see also, e.g., *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *8 n.29 (July 2, 2013) (“According to ‘our long-standing and judicially-recognized policy ... a violation of another Commission or NASD rule or regulation ... constitutes a violation of [NASD] Rule 2110.’” (citation omitted)), *petition denied sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

¹⁹ *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *10 (Nov. 15, 2013).

²⁰ As we noted in our prior opinion remanding the case, “FINRA did not allege that Tysk violated books and records requirements applicable to broker-dealers.” *Tysk*, 2017 WL 782153, at *1 n.2.

different time than the dates that he documented they occurred, which if present would suggest unethical conduct and an intent to mislead.²¹

2. The record does not establish that Tysk supplemented his notes “to bolster his defense” of a potential claim by his former client.

FINRA predicated the first cause of action on its view that Tysk supplemented his notes after receiving his client’s complaint letter “to bolster his defense of the customer’s claim.” Despite reciting this allegation in its decision on remand, FINRA made no finding that Tysk’s conduct was aimed at bolstering his defense. Nor would the record support such a finding.

To be clear, the fact that notes are accurate does not necessarily diminish the significance of whether they were made contemporaneously with the events detailed therein. Indeed, the act of subsequently creating a more thorough set of even accurate records could be intended to create a false impression of a person’s diligence and attention to detail. This in turn might benefit that person by preventing these considerations from becoming issues in litigation.

But the record does not support a finding that Tysk intended his supplementation to be misleading here. As noted above, over 90% of Tysk’s supplements to his notes did not concern the annuity about which the client had complained. And there is no evidence that Tysk or Ameriprise relied upon the supplemented notes during the firm’s suitability review. There is also no evidence that after Tysk’s client filed his arbitration claim in November 2008 Tysk relied upon his supplemented notes in discussions with Ameriprise or his lawyers—not even the notes relevant to the annuity in question. No party to the arbitration used any version or aspect of the notes to support its case on the issue of suitability during the arbitration hearing. Finally, Tysk’s testimony that he told his lawyer that he would not oppose a forensic examination of his computer is undisputed and suggests a lack of unethical purpose in supplementing his notes.

²¹ See *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *12 (May 27, 2015) (finding that Fillet, who “was responsible for conducting a supervisory review” of certain transactions, “intentionally backdated the documents to give the false impression he had conducted his supervisory review of the transactions closer to the time that the transactions had been executed”); *Dept. of Enf’t v. Taboada*, Complaint No. 2012034719701, 2017 WL 3725356 (FINRA NAC July 24, 2017) (finding that Taboada “generated a backdated invoice” over two years after the date shown on the invoice in order to provide the falsified document to FINRA in response to a document request); see also *The Dratel Grp.*, Exchange Act Release No. 77396, 2016 WL 1071560, at *6 (Mar. 17, 2016) (“Dratel allocated trades after they had been executed, and falsified and backdated trade tickets to make it appear as if the allocations occurred when the trades were placed.”); *Michael C. Pattison*, Exchange Act Release No. 67900, 2012 WL 4320146, at *3 (Sept. 20, 2012) (“These stock options were backdated, *i.e.*, the date of the strike price on the stock option was earlier than the date that [the CEO] approved the grant.”); *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 WL 4336702, at *6 (Sept. 16, 2011) (finding that applicant failed to supervise individual who “began backdating documents to create the impression that his reviews had occurred closer to the transaction dates”).

3. The record does not establish that Tysk’s alleged violation of his firm’s policies violated Rules 2010 and 2110.

FINRA also found that Tysk violated a provision of Ameriprise’s Code of Conduct, which stated that firm personnel were not to “shred, destroy, or alter in any way documents that are related to any imminent or ongoing investigation, lawsuit, audit [or] examination.” FINRA concluded that Tysk violated this provision by “altering his ACT! Notes during the firm’s pending investigation,” and it relied on this determination, among others, in finding that he violated FINRA Rule 2010 and NASD Rule 2110.

We need not decide whether Tysk violated the cited provision of Ameriprise’s Code of Conduct because even if he did so FINRA failed to establish he thereby violated FINRA Rule 2010 and NASD Rule 2110. A violation of a firm policy does not necessarily mean that a registered representative has also violated these rules.²² On remand, FINRA explained that its conclusion Tysk violated Rules 2010 and 2110 was based on its findings that his “actions violated his firm’s policies and constituted unethical conduct.” But for the reasons discussed above, we find insufficient evidence that Tysk engaged in unethical conduct.

B. The record does not establish that Tysk violated FINRA Rule 2010 with respect to the second cause of action.

The second cause of action alleged that Tysk violated IM-12000 of FINRA’s Arbitration Code and FINRA Rule 2010 by failing to “notify” his client of the edits to his ACT! notes when he produced them and “responded to subsequent requests” for those edits. IM-12000 provides that “[i]t may be deemed conduct inconsistent with just and equitable principles of trade and a violation of 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.” On remand, FINRA explained that Tysk violated Rule 2010 under the second cause of action in two ways. First, “[a]bsent disclosing that he altered his ACT! Notes, Tysk deliberately produced a misleading document in discovery, in violation of just and equitable principles of trade.” Second, “Tysk acted in bad faith when he knowingly withheld providing his edits to his ACT! Notes in response to [his client’s] discovery request.” We find that there is insufficient evidence to support FINRA’s conclusion of a Rule 2010 violation on these bases. Accordingly, we set it aside.

1. The record does not establish, as FINRA found, that Tysk deliberately produced a misleading document or acted in bad faith.

First, FINRA has not established that Tysk “deliberately produced a misleading document” as part of the initial discovery. The hard copy contact report of the ACT! notes that Tysk produced made clear on its face that Tysk edited them in May 2008. This weighs against a determination that the document was misleading about when the notes were made. In its decision, FINRA implied that Tysk “threatened the integrity of the arbitration process” because, “[h]ad the arbitration panel not granted [the] motion for a forensic search of Tysk’s computer,

²² See *supra* note 18 (stating that where not premised on a violation of another FINRA rule, these rules require an associated persons to act either unethically or in bad faith).

Tysk may well have hidden the truth from the arbitration panel.” But FINRA cannot base liability on this suggestion because it is speculative and has no basis in the record.²³

Second, with regard to the allegation that Tysk acted in bad faith in responding to the subsequent request about edits to his ACT! notes, there is insufficient evidence that Tysk’s response exhibited the dishonesty required for a finding of “bad faith.”²⁴ The document request sought “documents showing edits made by Mr. Tysk to the notes in the Contact Report . . . including but not limited to the edits made on May 27, 2008.” Tysk testified that upon receiving the request from his counsel he searched “everywhere and every place” he knew and “tried every way that I could within ACT! to find documents showing edits” but could not find documents showing the edits he had made. Ameriprise also explained in a response to a FINRA request for information that “Tysk found that ACT! does not have a function that allows a user to access or view past versions of notes, nor does it create redline versions or otherwise identify changes made to notes.” Tysk thus responded to his counsel that there were “no other documents showing edits per the request.” The record does not show that this response was made in bad faith.²⁵

FINRA found that “a reasonable search of the ACT! database on [Tysk’s] computer would have produced the discoverable information requested.” But the forensic expert’s testimony about his independent forensic examination of Tysk’s computer undermines FINRA’s assertion that Tysk easily could have found prior versions of the notes. Although through his examination he was able to create contact reports from before Tysk supplemented his ACT! notes, the forensic expert testified that user-generated contact reports “wouldn’t reflect the entries that I recovered out of the database” because “a user,” as opposed to someone applying forensic expertise, would not have been able to create the documents that he did.

When asked if the ACT! files that he recovered to create the reports would “appear to you in the same way they would appear to a user of the computer before you undertook your process

²³ See, e.g., *Boss v. Castro*, 816 F.3d 910, 919 (7th Cir. 2016) (“[S]peculation is not evidence.”); *Loops, LLC v. Phoenix Trading, Inc.*, 594 F. App’x 614, 619 (Fed. Cir. 2014) (holding that discovery sanctions were improperly imposed “on the basis of mere speculation”) (citing *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1185 (9th Cir. 1988) (“A district court cannot award Rule 11 sanctions on the basis of its speculation that a party would have filed certain papers had that party been given the opportunity.”)); cf., e.g., *Adesanya v. Novartis Pharmaceuticals Corp.*, 755 F. App’x 154, 156-57 (3d Cir. 2018) (affirming dismissal of complaint for discovery violations where plaintiff “failed to turn over evidence and gave false responses to interrogatories and false deposition testimony”).

²⁴ See *supra* note 19.

²⁵ Cf. *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007) (stating that “a party is not obligated to produce, at the risk of sanctions, documents that it does not possess or cannot obtain”); *Searock v. Stripling*, 736 F.2d 650, 654 (11th Cir. 1984) (finding that district court abused its discretion in imposing sanctions for a response to a discovery request because the evidence showed that the defendant “was diligently and in good faith seeking to obtain the documents” and his “noncompliance with the production order was due to his inability, after a good faith effort, to obtain these documents”).

of locating and restoring them,” the forensic expert responded: “No. Because of the entries that were no longer visible, any report that I would generate would contain more information than what the user would be able to generate.” He explained further, when asked about whether the database files from which he extracted the information would have been “viewable” to a user of ACT!, that a user would have to spend “a lot of time” trying to find them “because they are kind of scattered around into different folders.” Indeed, one of the database files “was hidden from Mr. Tysk’s user account” and several others were hard to find because they were inside another file. In addition, the forensic expert testified that, for reasons he did not know and contrary to the proper functioning of the program, had Tysk found the database files with the extracted information he would not have been able to open them by simply double-clicking on their icon. In light of this testimony, we find that the record does not show that Tysk failed to undertake a reasonable search for additional documents or that Tysk responded untruthfully when he said that his search did not reveal any documents showing the edits that he had made.

FINRA also concluded that the testimony of FINRA’s forensic tech investigator showed that Tysk easily could have found the additional information requested about Tysk’s notes. But FINRA’s investigator demonstrated only how one version of ACT! worked. His demonstration used a different version of ACT! than Tysk used. And FINRA’s investigator did not address the forensic expert’s conclusion that the ACT! program on Tysk’s computer was likely installed incorrectly. The testimony of FINRA’s investigator about ACT! does not rebut the forensic expert’s specific testimony with regard to the ability and degree of difficulty with which Tysk could have accessed the information the forensic expert extracted.

2. The record does not establish that Tysk violated FINRA Rule 12506(b).

FINRA also found that Tysk’s conduct was inconsistent with his discovery obligations under FINRA Rule 12506(b), which requires parties to FINRA arbitrations to produce “all documents in their possession or control” for certain categories of documents described in FINRA’s Discovery Guide (which would include his client notes) and to act in “good faith” and use “best effort[s] to produce all documents required or agreed to be produced.” But Tysk’s discovery obligations—under both FINRA Rule 12506(b) and IM-12000—extended only to documents in his possession or control. He was under no obligation to create new documents.²⁶ FINRA found that the contact reports the forensic expert produced “were not *creations* as Tysk suggests, but rather were printouts of ACT! database files saved on the hard drive.” As discussed above, the forensic expert’s testimony made clear that his contact reports were not printouts that an ordinary user could generate without forensic expertise.

FINRA’s decision suggests that if Tysk could not produce documents showing edits to his ACT! notes he was nevertheless required to provide additional explanation of those edits during discovery. But FINRA has not shown that Tysk was required by the arbitration rules or by Rule 2010 to include an explanation of the ACT! notes that he produced, particularly here

²⁶ Cf. *Alexander v. FBI*, 194 F.R.D. 305, 310 (D.D.C. 2000) (stating that under the Federal Rules of Civil Procedure a “party is not required ‘to prepare, or cause to be prepared,’ new documents solely for their production” in discovery) (citation omitted).

where the document disclosed on its face that it had been edited in May 2008, and Tysk took no other action to state or imply that the notes were created contemporaneously.²⁷

* * *

For these reasons, we find that the record does not show that Tysk violated FINRA Rule 2010 and NASD Rule 2110 by intentionally backdating his ACT! notes to create the false impression that he wrote contemporaneous notes of his conversations with his client. We also find that the record does not show that Tysk violated FINRA Rule 2010 with regard to the production of his ACT! notes during the arbitration proceeding. Accordingly, we set aside FINRA's finding of liability on both the first and the second causes of action.

An appropriate order will issue.

By the Commission (Acting Chair LEE and Commissioners PEIRCE, ROISMAN, and CRENSHAW).

Vanessa A. Countryman
Secretary

²⁷ Cf. *Heath v. City of Philadelphia*, No. 95-3047, 1997 WL 560606, at *9 (E.D. Penn. Aug. 22, 1997) (stating that defendants could not “successfully claim bad faith in the discovery process because [plaintiff] did not spontaneously volunteer information they did not request”).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 91268 / March 5, 2021

Admin. Proc. File No. 3-17294r

In the Matter of the Application of

DAVID B. TYSK

For Review of Disciplinary Action Taken by

FINRA

ORDER SETTING ASIDE DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the findings of violations and the sanctions imposed by FINRA in this action against David B. Tysk be, and hereby are, set aside.

By the Commission.

Vanessa A. Countryman
Secretary