

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

AMERIPRISE FINANCIAL SERVICES, INC.
(BD No. 6363),

and

DAVID B. TYSK
(CRD No. 1782289),

Respondents.

Disciplinary Proceeding
No. 2010022977801

Hearing Officer - MC

EXTENDED HEARING PANEL DECISION

October 13, 2014

By altering computer notes of customer contacts after the customer complained about the suitability of a recommendation, and failing to inform his firm of the alterations when he produced a copy of the notes in discovery in an arbitration proceeding, Respondent David B. Tysk violated NASD Rule 2110, FINRA Code of Arbitration Procedure for Customer Disputes IM-12000, and FINRA Rule 2010. For this misconduct, Tysk is suspended in all capacities for three months and is fined \$50,000.

By failing to inform the claimant in an arbitration proceeding that a copy of computer notes of customer contacts produced in discovery had been altered, Respondent Ameriprise Financial Services, Inc., violated FINRA Rule 2010. By failing to inform the claimant of the alterations, and failing to produce an exception report in discovery as required, Ameriprise violated FINRA Code of Arbitration Procedure for Customer Disputes IM-12000 and FINRA Rule 2010. For this misconduct, Ameriprise is censured and fined \$100,000.

Respondents are assessed the costs of the hearing.

Appearances

David M. Monachino, Esq. and Danielle I. Schanz, Esq., New York, New York, for the Department of Enforcement.

Edward Magarian, Esq., Dorsey & Whitney, Minneapolis, Minnesota, for Respondent Ameriprise Financial Services, Inc.

Brian L. Rubin, Esq. and Michael K. Freedman, Esq., Sutherland Asbill & Brennan LLP, Washington, D.C. and Atlanta, Georgia, for Respondent David B. Tysk.

I. Overview

This disciplinary proceeding originated from a referral by a FINRA Dispute Resolution arbitration panel to FINRA's Member Regulation Department pursuant to FINRA Code of Arbitration Procedure for Customer Disputes Rule 12104.¹ The arbitration panel made the referral because Respondents Ameriprise Financial Services, Inc. and David B. Tysk produced documents in an arbitration proceeding without disclosing that Tysk had altered the documents after receiving a complaint letter from a customer.

The altered documents were printouts of notes of Tysk's contacts with customer GR, which Tysk had maintained in a computer program. Tysk made the changes appear as if they were notes made contemporaneously with the events described. GR became suspicious because the notes seemed to be too-perfectly tailored to the defense of his claim. GR requested further discovery to determine whether the notes had been altered after he lodged his complaint with Ameriprise. Respondents opposed the requests.

For months after the firm provided the notes in discovery, Tysk said nothing about the alterations. In a meeting to prepare for the arbitration hearing, he finally disclosed to Ameriprise

¹ Rule 12104 provides in relevant part that "at the conclusion of an arbitration, any arbitrator may refer to FINRA for disciplinary investigation any matter that has come to the arbitrator's attention during and in connection with the arbitration ... which the arbitrator has reason to believe may constitute a violation of NASD or FINRA rules."

that he had altered the notes. Nonetheless, neither Ameriprise nor Tysk informed GR that the notes had been altered.

As the arbitration hearing date approached, GR continued trying to obtain information about whether the notes were what they appeared to be. Ameriprise and Tysk opposed GR's efforts.

Just before the hearing, Ameriprise found an exception report relevant to GR's claim, which it should have provided months earlier. As soon as it could, Ameriprise turned it over to GR. GR claimed that the report was a "smoking gun," which may have been intentionally withheld, because it could have prompted Tysk to doctor his notes. GR demanded to be allowed to examine Tysk's computer program to analyze the notes.

Over Respondents' objections, the arbitration panel ordered Ameriprise and Tysk to give GR access to Tysk's computer hard drive. A forensic examination of the hard drive revealed for the first time substantive edits that Tysk had made to the notes after receiving GR's complaint letter.

At the conclusion of the arbitration hearing, the arbitration panel sanctioned Ameriprise and Tysk for violating arbitration discovery rules. The panel referred the matter to FINRA's Member Regulation Department for a disciplinary investigation.

After the investigation, the Department of Enforcement filed a Complaint, which it subsequently amended. The gravamen of the Amended Complaint is that Ameriprise and Tysk violated just and equitable principles of trade and the Code of Arbitration Procedure by producing the notes during the arbitration without disclosing that Tysk had altered them.

The underlying facts are largely undisputed. Respondents assert nonetheless that they did not act unethically. In summary, Respondents contend that Tysk altered his computer notes in

good faith, to make them more accurately reflect the substance of conversations he had with GR.

They argue that they complied fully with FINRA's arbitration discovery rules because they produced the notes at the arbitration hearing. Respondents maintain that they planned to have Tysk disclose the alterations during his testimony at the arbitration. They argue that this was the appropriate approach because arbitration procedures do not provide for extensive discovery, such as pre-hearing depositions and written interrogatories, and do not require an explanation in advance of the hearing that the notes had been altered. As to the separate claim that Ameriprise failed to produce the exception report as required, the firm attributes this failure to simple error, which it corrected promptly.

For the reasons discussed below, the Extended Hearing Panel concludes that Tysk violated NASD Rule 2110, FINRA Code of Arbitration Procedure for Customer Disputes IM-12000, and FINRA Rule 2010 by altering the customer contact notes and failing to inform Ameriprise of the alterations when he produced them in the arbitration proceeding. The Panel further concludes that Ameriprise violated FINRA Code of Arbitration Procedure for Customer Disputes IM-12000 and FINRA Rule 2010 by failing to inform GR that Tysk had altered his notes before they were produced in discovery, and by failing to produce the exception report as required by the arbitration rules. For these violations, Tysk is suspended in all capacities for three months and fined \$50,000, and Ameriprise is censured and fined \$100,000.

II. Background

A. Tysk and his Act! Notes

Tysk is currently employed by Ameriprise where he has enjoyed a successful 26-year career in the securities industry.² During the relevant period, from 2005 through 2008, Tysk

² Hearing Transcript 80-81. References to the hearing transcript are referred to as "Tr." followed by the name of the witness testifying and the page cited. Joint exhibits submitted by the parties are referred to as "JX-"; Enforcement's

employed four to five people, including one junior financial advisor, and had approximately 200 clients.³

Tysk used a software program called Act! to manage his accounts at Ameriprise.⁴ Tysk described Act! as a "relationship management tool."⁵ Tysk purchased the Act! program and had it installed on his office computer system when he joined Ameriprise in 1993.⁶ This was his decision; Ameriprise did not require Tysk to use the program, did not pay for it, did not maintain it, and did not review Act! data in routine audits of his files.⁷

Tysk testified that the Act! program was "generally running all of the time"; he and his staff used it daily to enter client contact information, compose lists of things to do, track completed tasks, create appointment schedules, and transcribe notes after meetings.⁸ Tysk testified that it was not his practice to maintain any hardcopy handwritten notes of his meetings with clients.⁹ Instead, after client meetings, it was Tysk's practice to dictate "notes" of what occurred, provide a tape of the dictation to a transcription service, and then insert the transcribed

exhibits are referred to as "CX-"; Respondent Tysk's exhibits are referred to as "Tysk-"; Respondent Ameriprise's exhibits are referred to as "AFS-".

³ Tr. (Tysk) 162, 328.

⁴ Act! describes itself as a "Contact & Customer Manager" providing users with the ability "to quickly tap into all relationship details." <http://www.act.com/why-choose-act/>.

⁵ Tr. (Tysk) 87-88.

⁶ *Id.* at 88-92.

⁷ *Id.* at 335-36.

⁸ *Id.* at 341-42. When Tysk purchased the program, he obtained five licenses so that his staff could access the program from their computers. *Id.* at 102.

⁹ *Id.* at 224-26. Tysk testified that he made "notations and scribble" and identified notes he made on eight pages in the approximately 2000 pages of his file of account documents and other papers related to GR's accounts. These notations generally did not contain a narrative or quotations from conversations. *Id.* at 391-93.

notes into the Act! system.¹⁰ The only notes he regularly made and maintained were his Act! notes.¹¹

B. Customer GR

GR, a wealthy businessman, was in his mid-seventies when Tysk first met him in December 2004. They were introduced by Tysk's friend and client, JZ, who was dating GR.¹² GR gave Tysk the opportunity to manage some of his investments. In early 2005, GR opened an account with Tysk at Ameriprise with \$750,000.¹³

GR's Ameriprise account did well for the first year, earning a 24% rate of return. GR added \$250,000 to the account.¹⁴ Then, in June 2006, GR moved an additional \$20 million in investments to Ameriprise.¹⁵ By the end of 2007, GR had transferred assets valued at a total of \$28 million to Ameriprise for Tysk to manage.¹⁶

GR became Tysk's largest client. Tysk and GR quickly developed a close personal relationship.¹⁷ Tysk spent birthdays and holidays with GR and JZ, and traveled with them to Europe.¹⁸

C. Tysk's Recommendation of a Variable Annuity to GR

In late 2006, Tysk recommended that GR invest \$2 million in a variable annuity.¹⁹ GR initially decided to invest \$1 million. Then, in July 2007, GR decided to add another \$1 million

¹⁰ *Id.* at 342.

¹¹ *Id.* at 225-26.

¹² *Id.* at 349-51.

¹³ *Id.* at 162-63, 352.

¹⁴ *Id.* at 354.

¹⁵ *Id.* at 355.

¹⁶ *Id.* at 160-61, 355.

¹⁷ *Id.* at 163.

¹⁸ *Id.* at 356.

to the annuity.²⁰ The annuity had a provision imposing a ten-year surrender charge, starting at eight percent.²¹ If GR opted to surrender the annuity in the first year, the surrender charge would have amounted to approximately \$140,000.²²

On July 13, 2007, Ameriprise's supervisory system generated an exception report flagging the transaction because of the size of the investment and GR's age, which was 77 years at the time.²³ Ameriprise asked Tysk to provide a statement giving his rationale for recommending the annuity.²⁴ Tysk wrote that GR wanted the annuity for "tax deferral reasons in addition to the other features an annuity provides," that GR had "over \$29,000,000 invested with me" and "does not and will not need this money during his lifetime."²⁵ Based upon Tysk's response, Tysk's supervisor, Brett Storrar, concluded that the recommendation was suitable, based on GR's "net worth, available liquidity, [and] taxable income."²⁶

D. GR's Complaint

In a January 2008 meeting, GR expressed dissatisfaction with the performance of the accounts Tysk was managing for him.²⁷ In February, GR scheduled a surprise meeting with Tysk. GR had invited BZ, a business associate, to attend, which was unusual. At the meeting,

¹⁹ *Id.* at 357-58.

²⁰ *Id.* at 360.

²¹ Tr. (Storrar) 654-55; Tysk-061, at 1200.

²² Tr. (Tysk) 482.

²³ JX-3, at 2; Tr. (Storrar) 626-27.

²⁴ Tr. (Storrar) 559-60; CX-23.

²⁵ CX-13A, at 1-2.

²⁶ Tr. (Storrar) 630.

²⁷ *Id.* at 164-65, 362.

Tysk learned that GR “wasn’t happy” with the performance of his portfolio; it displeased him that Tysk was making money managing investments that were not providing profits to GR.²⁸

Shortly after the February meeting, in mid-March, BZ informed Tysk that GR was moving his investments from Ameriprise to another firm, a move that, Tysk said, left him “devastated.”²⁹ The only significant asset GR left at Ameriprise was the annuity.³⁰

Then, in a letter dated April 2, 2008, GR complained to Ameriprise that he had “concerns” that the \$2 million annuity was not a “good investment” for him. The letter stated that GR did not need the annuity and that it had “major disadvantages.” GR’s “concerns” included the annuity’s tax implications, the high surrender fee, and his inability to access the funds for ten years, when he would be nearly 90 years old. The letter stated that GR felt that Tysk did him “a major disservice” by recommending the annuity. Stating that GR “would prefer to work with Ameriprise directly and not involve the NASD, SEC, or the Minnesota Attorney General,” the letter ended with a request: “It is my hope that you will waive the surrender charges ... and forward the proceeds to me.”³¹

When Tysk received the letter, he was “bummed out”; first, there had been “the March transfer out of 20 some million, and now ... here’s a letter to try to get the other 2 million and not have the surrender charge.”³² If Ameriprise waived the surrender charge, it would have had to absorb costs of almost \$200,000.³³

²⁸ *Id.* at 383-84, 479-80. Tysk testified that, in 2007, he earned \$190,000 from managing GR’s accounts. *Id.* at 479-80.

²⁹ *Id.* at 383, 389.

³⁰ *Id.* at 188, 383-84.

³¹ JX-2.

³² Tr. (Tysk) 389.

³³ Tysk testified that the firm would not have charged him for these costs. *Id.* at 482-83.

E. Ameriprise's Review of GR's Complaint

GR's complaint prompted Ameriprise to conduct a review of Tysk's recommendation of the variable annuity. An Ameriprise compliance supervisor sent an e-mail to Tysk's supervisor, Storrar, with an attached "Information Request for this investigation."³⁴ The e-mail included a memorandum to Storrar dated April 21, 2008, and a copy of GR's letter. The memorandum instructed Storrar to have Tysk prepare a written statement, answer questions related to the suitability of GR's variable annuity, and provide documents. The documents requested included "a copy of the client meeting/smart pad notes, client summary letters, annuity contracts, financial plan(s) and all other documents associated with this matter." It contained a "Complaint/Investigation Checklist" for guidance, and instructed Storrar to interview GR and send a summary report to the compliance supervisor.³⁵ Storrar sent the memorandum and a copy of GR's complaint letter to Tysk.³⁶

Tysk sent his written statement to Storrar on April 25, 2008. In it, Tysk answered the questions posed in the memorandum. However, he did not mention his Act! notes, and did not provide any documents as requested.³⁷

Shortly thereafter, Storrar assigned an "RP delegate" to interview Tysk.³⁸ The delegate and Tysk reviewed some documents related to the annuity.³⁹ Tysk did not provide the delegate

³⁴ CX-19.

³⁵ CX-18.

³⁶ Tr. (Storrar) 558.

³⁷ CX-23; Tr. (Tysk) 196. Enforcement questioned him about these omissions at the hearing. When asked if he understood that Ameriprise was interested in his notes, he demurred, stating, "Ameriprise was interested in the questions that they asked me." *Id.* at 501. When asked, "And one of those questions refers to notes?" Tysk responded, "It says SmartPad notes" and claimed that he had no idea what "SmartPad notes" are. When asked whether he thought the request for "all other documents with this matter" included his Act! notes, Tysk replied, "I don't know." *Id.* He also testified that he did not need to provide notes or other documents with his written statement because he knew that he would meet with a supervisor in a few days to review GR's file. *Id.* at 529.

³⁸ Tr. (Storrar) 559, 562-63, 679, Tr. (Tysk) 196-97. Apparently, an "RP delegate" is a Registered Principal's delegate.

with the Act! notes.⁴⁰ The delegate prepared a document, titled "RP summary," summarizing his investigation. Storrar reviewed and signed it.⁴¹ The summary reviews the suitability of the recommendation, including "tax avoidance, deferred gains, account consolidation, and improved performance."⁴² The summary states that Tysk and GR discussed the annuity, including the surrender charge and tax consequences, "in late 2006, early 2007, and again in mid-2007."⁴³ The summary concluded that GR's "sales complaint is not justified."⁴⁴

Ameriprise declined to waive the surrender charge.⁴⁵

F. Tysk's Explanation for Editing the Act! Notes

According to Tysk, his staff made most of the entries in Act! to document the activity in GR's accounts.⁴⁶ Tysk testified that he did not take contemporaneous notes of his meetings with GR, and entered fewer notes of their conversations into Act! than he did for his other clients.⁴⁷ He testified that this was because he worked with GR "constantly," spoke with him regularly, and kept GR's file readily available on his desk. Consequently, Tysk explained, "I had the information in my head and I did not use Act! the way that I use it with other clients," whom he would see on far fewer occasions, perhaps only once or twice a year.⁴⁸

³⁹ Tr. (Tysk) 225-26, 422, 430, 432.

⁴⁰ *Id.* at 428.

⁴¹ Tr. (Storrar) 569-70.

⁴² Tr. (Tysk) 232.

⁴³ *Id.* at 264.

⁴⁴ *Id.* at 221.

⁴⁵ CX-24.

⁴⁶ Tr. (Tysk) 348.

⁴⁷ *Id.* at 160-61, 528-29.

⁴⁸ *Id.* at 348-49.

Tysk felt strongly that GR's annuity was suitable⁴⁹ and that Ameriprise's review confirmed that "everything" concerning the annuity was "in order."⁵⁰ However, while preparing for his interview with Storrar's delegate, Tysk noticed that his Act! notes relating to GR were deficient, "not like all of my other notes, with the exception of my mother."⁵¹ The Act! notes contained no references to the annuity, its cost, or surrender charge.⁵² At the hearing, Tysk testified that "[i]t bothered me that I had a lot of information and things in my head and pieces of the story that weren't there and I wanted to add them."⁵³ Therefore, Tysk said, "I added electronic notes in my contact management system."⁵⁴ Tysk made most of the edits from May 13 through May 27, 2008.⁵⁵ He added:

notes regarding meetings that I had with [GR] to essentially kind of preserve my thoughts and recollections I thought it was important to write things down. I think it felt good to review the file, I think it made me feel good, frankly, to just go through things kind of beginning to end.⁵⁶

In response to a Rule 8210 request, Tysk explained further:

At the time I thought it was rational and prudent for me to preserve facts and details known to me in chronological order ... to write down the details of his complex file and our complicated relationship for my personal use so I would not forget them over time My only thought and purpose was to preserve for myself and my file the details of my personal and business relationship with [GR] as I recalled those details at the time.⁵⁷

⁴⁹ *Id.* at 186.

⁵⁰ *Id.* at 395.

⁵¹ *Id.* at 396. A user can create and print a "contact report" containing all of the notes pertaining to a customer. Tr. (Tysk) 343.

⁵² *Id.* at 218-19.

⁵³ *Id.* at 396.

⁵⁴ *Id.* at 401.

⁵⁵ *Id.* at 205. He denied making substantive edits to the Act! notes after May 27, 2008. However, he testified that because he continued to manage GR's annuity for four to five months after GR removed his other assets from Tysk's management, he made some additional entries related to the annuity. *Id.* at 207.

⁵⁶ *Id.* at 396-97.

⁵⁷ *Id.* at 401.

Tysk testified that “[t]he notes weren’t written for another reader”; he wrote them for himself.⁵⁸ Tysk denied he acted to protect himself in light of GR’s complaint letter.⁵⁹ He also claimed that he was not worried that the references in GR’s letter to NASD, the SEC, and the Minnesota attorney general were an implied threat that GR would report the matter to regulatory authorities if Ameriprise refused his request to waive the surrender charge.⁶⁰ While Tysk asserted that he “wasn’t concerned” about the complaint, he conceded that he did have some “concerns with the letter ... because I knew the letter contained things that were not true.”⁶¹

G. Tysk’s Substantive Act! Note Edits

Tysk claimed that when he edited the notes, he reviewed his 2,000-page file of papers relating to GR’s accounts “to make sure everything [was] truthful and ... accurate,” relying on the documents as well as his memory.⁶² Some of the documents that he “likely reviewed” when making entries to Act! included GR’s initial account application, applications for the annuity, and sales literature relating to the annuity.⁶³ But Tysk had to rely solely on memory to compose many of the edits, which included quotes he attributed to GR, because he had no contemporaneous handwritten notes to use for reference.⁶⁴

Tysk made a total of 54 substantive entries to Act! relating to GR between May 23 and May 27, 2008.⁶⁵ He both created entirely new entries and supplemented prior entries with new

⁵⁸ *Id.* at 250, 253.

⁵⁹ *Id.* at 197.

⁶⁰ *Id.* at 177.

⁶¹ *Id.* at 179-80.

⁶² *Id.* at 397.

⁶³ *Id.* at 410-28.

⁶⁴ *Id.* at 253-54, 422.

⁶⁵ *Id.* at 793.

text. Tysk backdated new entries to make them appear as though they had been entered three years earlier than he wrote them.

The oldest note he edited was one he originally entered and dated March 29, 2005. It was for a "Meeting Held", and stated, "Sign paperwork for investments." No text appears to have accompanied the original entry. Sometime in early 2008, he added three paragraphs of text detailing a conversation with GR that supposedly occurred on March 29, 2005.⁶⁶ The notes Tysk added refer to GR's satisfaction with Tysk's advice, and their developing personal relationship.

The new language states, in part:

I met with [GR] and we reviewed my recommendation for his investments. He said that he would like to start with \$1,000,000 as he told me earlier but he just reduced his cash and would start with a check for \$750,000 and give me the other \$250,000 in a few weeks. He was eager to start the account and see how it did. He did not want this portion to be conservative as he said he has over \$20,000,000 in safer Muni bonds at piper/usbank. We discussed fee's [sic] ... He was very gracious [sic] and hospitable.⁶⁷

Other entries added narrative text to what originally only recorded the occurrence of a "Meeting Held." For example, to an entry that originally stated only "Meeting his office" dated August 17, 2005, Tysk added:

We met to review the portfolio. We review the allocation, performance, and details ... he is very happy. He apologized for not getting me the additional \$250,000 ... He is enjoying time with [JZ] and would like to gift her some money ... He asked me how much she was making. I deflected the question.⁶⁸

To another entry, which originally stated only "Go get a check from him; call him first" dated January 6, 2006, Tysk added, in part:

[GR] was pleased with the proposed funds and performance. I reviewed why each fund made sense ... We talked about past gifts to his kids and his gift tax return. He said he

⁶⁶ CX-68, at 11.

⁶⁷ *Id.*

⁶⁸ *Id.* at 12.

would get a copy of it for me. I told him that he needed to be careful ... or it would trigger a gift tax ... He was adamant [sic] that this not cause problems or taxes for [JZ].⁶⁹

To another entry referring to a June 2006 meeting, Tysk added, in part: "We met to reivew [sic] my proposed changes ... I want to proceed carefully and cautiously [sic]. He understood my reasoning and really did not question any of my recommendations"⁷⁰

Some entries seem worded to emphasize their contemporaneity by the use of the present tense and direct quotes. For example, a new entry Tysk dated May 14, 2007, details discussions between Tysk and GR about gifts of money to JZ. Tysk wrote:

[GR] needs to move money to [JZ's] account for the apartment It has gotten very complex ... I asked [GR] about what if they broke up and he said 'then it's hers', I asked about what if he died, he said 'then it's hers'. I said that I just needed to make sure that I advised him appropriate [sic].⁷¹

Some of the entries that mention the annuity detail Tysk's specific financial advice to GR. They contain Tysk's characterizations of GR's opinions and direct quotes from GR in conversations that occurred well over a year before Tysk made the edits. For example, in one of the first entries to mention the annuity, dated December 14, 2006, Tysk wrote:

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.' ... He said that he wants to move everything to me ... I proposed 2m into the annuity and he decided on 1m I reviewed the surrender charge options and he said 'why wouldn't I take the 10yr with the 3% bonus?' I said that he was right, for tax deferred growth her [sic] would likely never spend this money and his heirs would inherit it. He said fine, 'they can pay the taxes ... What do I care'. I reviewed the rider options with him but ... he wants tax deferred growth Every time I mention the large estate tax present with the estate as is he shuts me off.⁷²

⁶⁹ *Id.*

⁷⁰ *Id.* at 13.

⁷¹ *Id.* at 15.

⁷² *Id.* at 6.

A lengthy entry dated January 2007 mentions an IRA and then states, "We reviewed the annuity purchase with the bonus credit, the move from the money market account and the value to date [GR] wanted to talk about [JZ] and [another person] more than anything else. He asked about a Motorcycle trip in the spring I reviewed all of the issues I saw with him."⁷³ The entry describes GR's thoughts and intentions: "[GR] would like to get the IRA rolled over here asap He also want [sic] to move some money He thought they may need some money He want [sic] to avoid the taxes He realized that there are benefits to the 1035 exchange given he does not need the money"⁷⁴

In an entry dated July 4, 2007, Tysk wrote, "[GR's] foundation assets will be coming here soon. He will also be adding to the account via a deposit I told him I was on vacation ... He appricated [sic] me meeting today"⁷⁵ Regarding the annuity, Tysk wrote, "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."⁷⁶

Other entries emphasize GR's confidence in Tysk. For example, Tysk wrote, "[GR] would like to have absolutely everything moved to me."⁷⁷ In another entry, dated April 2007, Tysk wrote that "[GR] wants me to look at some individual stocks for him I asked if I could have a little time with this and he said 'of course, you make the decisions.'"⁷⁸

⁷³ *Id.* at 7.

⁷⁴ *Id.*

⁷⁵ *Id.* at 9.

⁷⁶ *Id.*

⁷⁷ *Id.* at 8.

⁷⁸ *Id.*

H. The Mechanics of Editing Act!

By default, the Act! program records the name of the user and the date and time of an entry.⁷⁹ Any change to the data is recorded. Even simply hitting the space bar without adding text results in the appearance of a notation showing that the notes were “edited on” the date of the entry.⁸⁰

As noted above, Tysk’s edits appear as if they were composed contemporaneously with the original entries, which were made as long as three years before. To accomplish this, Tysk had to override the Act! program’s default settings. Thus, to backdate an entry, Tysk had to manually change it.⁸¹ This meant that he had to delete the default date and type in the new date on which he wanted the entry to appear to have been made.⁸² Tysk was an experienced user of the program, and knew how to edit previously written Act! notes.⁸³

I. GR’s Arbitration Claim

In November 2008, GR filed his arbitration claim. It alleged, as GR had in the April complaint letter, that the annuity was unsuitable because of his age, the ten-year surrender period, and unfavorable tax consequences. GR claimed that Tysk had recommended the annuity as a \$2 million “alternative investment,” without explaining that it was an annuity or that it carried a surrender charge.⁸⁴

⁷⁹ *Id.* at 347-48.

⁸⁰ Tr. (Lanterman) 1274-75.

⁸¹ Tr. (Tysk) 249.

⁸² *Id.* at 487.

⁸³ *Id.* at 90-91.

⁸⁴ JX-9, at 1-4, 22.

On December 8, 2008, Ameriprise and Tysk retained counsel for the arbitration. The lawyers initially met with him at his office on December 16 for approximately three hours.⁸⁵ It is unclear if Tysk told them that he possessed Act! notes pertaining to GR. If he did, he did not disclose that he had edited them after receiving GR's complaint letter.⁸⁶

i. The Arbitration Discovery Process

FINRA's Arbitration Discovery Guide and arbitration code procedures governed the pre-hearing preparations of the Parties.⁸⁷ The Discovery Guide provides parties with document production lists that identify the documents that they must produce in particular types of cases. For cases involving customers, the guidelines require firms and associated persons to produce "[a]ll notes by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the customer's account(s) at issue"⁸⁸ and "notes of telephone calls or conversations about the customer's account(s) at issue."⁸⁹ They also direct firms and associated persons to provide "[a]ll records ... relating to the customer's account(s) at issue, such as, but not limited to, internal reviews and exception and activity reports which reference the customer's account(s) at issue."⁹⁰

GR's counsel filed his first document production request on January 23, 2009. The response was due in 60 days. The request sought all documents referred to in the FINRA

⁸⁵ Tr. (Swigert) 1211, 1218.

⁸⁶ *Id.* at 1213, 1221.

⁸⁷ Tr. (Jamison) 836-37; CX-32.

⁸⁸ JX-10, at 3 ¶ 6.

⁸⁹ *Id.* ¶ 7.

⁹⁰ *Id.* at 4 ¶ 11.

Discovery Guide document production list for customer cases, including notes, exception reports, and specifically noted that the term “documents” included electronic records.⁹¹

On March 25, 2009, Ameriprise and Tysk provided their initial discovery response, a CD with more than 3,600 pages of documents. Respondents provided a hard copy of the contact report from Act! relating to GR, with a last edited date of May 27, 2008.⁹² They did not produce the July 2007 exception report.⁹³

The contact report was important to GR’s counsel. He testified that in a case like this, involving a dispute over whether a broker made disclosures to a customer, “brokers will often rely on their contemporaneous notes of meetings ... to show that disclosures were made, that conversations happened, that meetings happened, and they can be difficult to rebut.” When a hearing occurs, often several years after the disputed events, such notes can be “very powerful evidence for a broker or a broker/dealer as to what happened on that particular day.”⁹⁴

When GR’s counsel reviewed the contact report, he became suspicious that some of the notes for key dates appeared “contrived” and “extraordinarily complete,” and that possibly “these were not notes that were made contemporaneously but that had been made later to support the story.”⁹⁵ Despite his suspicions, GR’s counsel could not tell if any specific entries in the notes had been edited after the fact; all he had was a “hunch.”⁹⁶

⁹¹ CX-34; Tr. (Jamison) 840-42.

⁹² Tr. (Swigert) 1173.

⁹³ *Id.* at 1144, Tr. (Jamison) 846; JX-12.

⁹⁴ Tr. (Jamison) 848.

⁹⁵ *Id.* at 847.

⁹⁶ *Id.* at 851.

ii. GR's Requests for Evidence of Edits

Acting on that hunch, on May 8, 2009, GR's counsel sent a supplemental request to Ameriprise and Tysk to produce "[a]ll documents showing edits made by Mr. Tysk to the notes in the contact report ... including but not limited to the edits made on May 27, 2008."⁹⁷ This prompted Tysk's counsel on June 22, 2009, to ask Tysk by e-mail, "Do you know anything about any edits being made to the contact reports?" The e-mail continued, "I assume he picked the date [May 27, 2008] b/c that is the 'created date' stamped on the contact report My assumption was that was simply the date the report was printed off the computer."⁹⁸ Tysk responded, "You are correct with your assumption. There are no other documents showing edits per the request."⁹⁹ Tysk did not reply to his counsel's query asking if he knew "anything about any edits."

Tysk testified that after receiving the June 22 e-mail, he searched Act! attempting to locate earlier versions of his notes but was unsuccessful.¹⁰⁰

On August 21, 2009, Tysk met for the second time with counsel to prepare for the arbitration hearing.¹⁰¹ This was when Tysk first disclosed that he had altered his Act! notes. His counsel immediately informed Ameriprise's legal department¹⁰² and asked Tysk to try to locate additional versions of his notes.¹⁰³

⁹⁷ *Id.* at 850; JX-13.

⁹⁸ CX-122, at 1-2.

⁹⁹ Tr. (Tysk) 287-90. CX-122 is the e-mail exchange that began on June 22, 2009, between Tysk and his counsel. Tysk did not produce this e-mail to Enforcement until a week prior to the hearing of this matter. Tr. (Tysk) 287.

¹⁰⁰ *Id.* at 292-93. One of the Act! contact reports recovered by Lanterman shows a last edited on date of June 22, 2009, the date Tysk surmised that he accessed his Act! files searching for prior versions of entries relating to GR. Tysk testified that he made no deletions or additions to the notes on June 22, but just searched for the information. *Id.* at 290-93. Enforcement examined him on his effort, questioning whether Tysk made good faith efforts to recover the prior versions of his notes. For example, he did not contact Ameriprise's internet technology support staff, ask for assistance in locating prior versions of the contact report, or call the Act! hotline. *Id.* at 296-304, 503-04. However, the Amended Complaint does not charge Tysk with any misconduct related to whether he made good faith efforts to respond to discovery requests for prior versions of the notes.

¹⁰¹ CX-96, at 3.

¹⁰² Tr. (Swigert) 1171-72.

iii. The Discovery of the Exception Report

Just before the arbitration hearing, Storrar, Tysk's supervisor, met with Ameriprise and Tysk's counsel. In preparation, Storrar had found and brought with him a copy of the July 2007 exception report that had triggered Ameriprise's initial review of Tysk's recommendation of the variable annuity to GR.¹⁰⁴

Realizing that the exception report should have been produced to GR more than nine months earlier, Ameriprise and Tysk's counsel immediately sent it to GR's counsel by e-mail. This was at 6:08 p.m. on December 11, 2009, the Friday before the Monday start of the arbitration hearing.¹⁰⁵ Ameriprise and Tysk's lawyers had not noticed previously that there was no exception report among the documents they had obtained from Ameriprise and produced to GR. They had mistakenly assumed that if an exception report existed, Ameriprise would have given it to them in the document production process.¹⁰⁶ As one of the lawyers testified at the hearing, it was an assumption that they "shouldn't have made," a "mistake," but not Ameriprise's fault.¹⁰⁷

iv. The Discovery Dispute

The following day, December 12, 2009, GR's counsel sent a letter to the arbitration panel calling the exception report "a proverbial 'smoking gun' document," "critical" to GR's claim. The lawyer argued that it showed that upon receiving GR's complaint letter, Ameriprise had

¹⁰³ *Id.* at 1174. At the disciplinary hearing, Tysk's lawyer testified that he did not ask anyone else at Ameriprise to search Act! for prior versions of the notes because Tysk was the custodian of the notes. *Id.* at 1184. Tysk testified that he searched his Act! program several times for prior versions of his notes but was unsuccessful. Tr. (Tysk) 295-96; JX-35, at 2-3.

¹⁰⁴ Tr. (Storrar) 621-22, 629.

¹⁰⁵ Tr. (Swigert) 1147; CX-47.

¹⁰⁶ Tr. (Swigert) 1145-46.

¹⁰⁷ *Id.* at 1209-10.

questioned the suitability of the annuity based on GR's age,¹⁰⁸ thereby putting Tysk "on notice" that his recommendation was "suspect, giving him a motive and opportunity to add [to] or edit his notes to try to justify the sales." He asserted that timely receipt of the exception report would have prompted a demand for a forensic examination of Tysk's hard drive "to determine when and how the notes in the contact reports were edited."¹⁰⁹ The letter added that Ameriprise's failure to produce the exception report earlier made GR suspect that Ameriprise may have withheld the report purposely during negotiations to press GR to "settle cheap."¹¹⁰

GR's counsel requested a continuance of the arbitration hearing to conduct further discovery. He asked for an order requiring Ameriprise and Tysk to produce "all relevant computer files and back-up media so that Claimant may perform a forensic examination and search for all relevant files," and sought imposition of sanctions and assessment of costs against Ameriprise and Tysk.¹¹¹

Ameriprise and Tysk opposed the postponement request and called GR's demand for sanctions "silly." Although they admitted that the exception report "should have been produced earlier" and that it was "our mistake for not finding and producing this document before Friday," they disagreed that it was a "smoking gun" and referred to GR's counsel's references to settlement discussions as "irresponsible."¹¹² They made no mention of Tysk's Act! note edits.

¹⁰⁸ CX-48, at 1-2.

¹⁰⁹ *Id.* at 2.

¹¹⁰ GR's counsel noted that Ameriprise and Tysk made a settlement offer on December 7, 2009, and by December 11 realized that GR would not accept it. *Id.* at 3.

¹¹¹ *Id.*

¹¹² JX-15. Ameriprise and Tysk's counsel also testified that the exception report was helpful to Ameriprise, not GR, because it showed "the supervisory system of the firm operating the way it should." Tr. (Swigert) 1150.

v. The Postponement of the Arbitration Hearing

The arbitration panel convened on December 14, 2009, to hear arguments from the Parties, and then suspended the hearing.¹¹³ On December 21, 2009, the panel issued an order rescheduling the hearing to April 12, 2010, and granting GR's request for additional expedited discovery.¹¹⁴

Because GR's counsel made references to a forensic examination of Tysk's computer, Ameriprise retained Mark Lanterman, a specialist in computer forensics. Lanterman made and preserved an image of Tysk's computer hard drive, but was not instructed to examine it.¹¹⁵

GR's counsel asked Ameriprise and Tysk to identify all computers and devices containing "data entries into the 'contact report' system" by Tysk.¹¹⁶ Ameriprise and Tysk declined, objecting that the request exceeded the scope of arbitration discovery guidelines. All they provided was a statement that "the software for Mr. Tysk's client contact management system resides on his office network server."¹¹⁷ GR's counsel filed a motion to compel, stressing the need for a forensic examination of Tysk's computer "to determine exactly when notes were made" to Tysk's Act! contact report.¹¹⁸

On March 18, 2010, the arbitration panel chairperson issued an order requiring Ameriprise and Tysk to provide information about the data entries in Tysk's contact report system, but not explicitly requiring a forensic examination of Tysk's computer.¹¹⁹

¹¹³ Tr. (Jamison) 865.

¹¹⁴ JX-46.

¹¹⁵ Tr. (Swigert) 1158-59.

¹¹⁶ JX-16, at 4.

¹¹⁷ JX-17, at 6.

¹¹⁸ JX-18, at 2.

¹¹⁹ JX-47.

vi. The Order Granting Access to Tysk's Computer

On March 29, 2010, with the hearing date fast approaching, GR's counsel filed a request for an emergency hearing, complaining that Ameriprise and Tysk refused to provide access to Tysk's computer.¹²⁰ Ameriprise and Tysk opposed the request. Citing the Arbitration Discovery Guide, they argued that the panel should deny "this late and extraordinary demand for a 'forensic examination.'"¹²¹

Finally, on April 6, 2010, the arbitration panel chairperson issued an order granting GR access to examine Tysk's computer hard drive and server, limited to "Tysk's contact note system regarding [GR]," and ordered Ameriprise and Tysk to provide access in time to permit the arbitration hearing to proceed as scheduled on April 12.¹²²

vii. The Forensic Examination

With so little time before the start of the hearing, the Parties conferred immediately. They agreed to have Respondents' computer specialist Lanterman examine Tysk's hard drive.¹²³ They asked Lanterman to identify all Act! information on Tysk's hard drive relating to GR.¹²⁴ Lanterman quickly produced a 285-page report¹²⁵ on the Friday prior to the hearing.¹²⁶

Using forensic software, Lanterman was able to recover multiple copies of three versions of the contact report relating to GR from Tysk's hard drive with last edited on dates of January

¹²⁰ JX-20.

¹²¹ JX-21, at 2.

¹²² JX-22, at 3.

¹²³ Tr. (Jamison) 881.

¹²⁴ Tr. (Lanterman) 1251-52.

¹²⁵ JX-27.

¹²⁶ Tr. (Jamison) 880-81.

28, 2008, March 13, 2008, and June 22, 2009.¹²⁷ The phrase “edited on” appearing in a contact report shows the date that the record pertaining to a particular person was “somehow modified”; that is, the date on which a change was made by the addition of data. As noted above, a new “edited on” date appears whenever a user opens Act! and enters data, whether the entry consists of substantive changes or merely tapping on the space bar.¹²⁸

By comparing the contact reports with the last “edited on” dates of January 28, 2008, and May 13, 2008, to the report Tysk produced in discovery, which was last edited on May 27, 2008, it is possible to see the edits Tysk made.¹²⁹ The comparison establishes that a number of Tysk’s notes were not contemporaneously made, but were entered from May 13 to May 27, after he received GR’s complaint letter.¹³⁰ GR’s counsel testified that this information strengthened GR’s case.¹³¹

viii. The Arbitration Panel Decision

The arbitration hearing started on April 12 and ended on April 16, 2010.¹³² On May 16, 2010, the arbitration panel issued its decision. Among its findings, four related to the Act! notes and the discovery process. The panel found that:

- (i) Tysk altered the record of his contacts after GR complained about the suitability of the annuity;

¹²⁷ Copies of the report last edited on January 28, 2008 are at JX-27, at 68, 166, and 278. The version last edited on May 13, 2008 is at JX-27, at 6. Copies of the report last edited on June 22, 2009 are at JX-27, at 215, 236, and 257.

¹²⁸ Tr. (Lanterman) 1274-75. Lanterman did not find the dates and times on which Tysk added entries to the Act! notes. Lanterman felt that this was unusual but probably resulted from databases that were missing from Tysk’s Act! program. *Id.* at 1271-72. Lanterman’s experience with Act! led him to expect that the program would back up data in three different databases. However, he was able to find only one. He thought it was odd, noted it as an anomaly, and attributed it to faulty installation of the program onto Tysk’s hard drive. *Id.* at 1257, 1336-37.

¹²⁹ *Id.* at 1278, Tr. (Leigh) 969, 973-74.

¹³⁰ Tr. (Jamison) 882-83.

¹³¹ *Id.* at 884-85.

¹³² JX-23, at 13.

- (ii) Ameriprise failed to update its discovery responses to GR after it learned of the changes to the record of contacts;
- (iii) Ameriprise did not make Tysk's computer available until after GR filed an Emergency Motion to Compel Discovery just before the rescheduled hearing; and
- (iv) Ameriprise and Tysk "engaged in other attempts to block discovery."¹³³

The panel held Ameriprise and Tysk jointly and severally liable and ordered them to pay \$20,000 in sanctions, in addition to compensatory damages and costs.¹³⁴

J. Ameriprise's Review of Tysk's Conduct

On October 11, 2010, approximately five months after the arbitration hearing ended, Ameriprise's Compliance Department sent a memorandum to Storrar and to Tysk noting, in reference to the GR arbitration case, that "[i]t appears that documentation entered into [Act!] Contact Manager was changed."¹³⁵ Ameriprise opened an internal review of Tysk's conduct to determine whether or not Tysk had violated firm policies.¹³⁶ Ameriprise's home office conducted the review, and a home office employee, Lisa Zapko, gathered information and consulted with Storrar. However, Storrar was responsible for the final phase of the review.¹³⁷

Ameriprise's Code of Conduct contained a document retention policy directing that representatives could not "shred, destroy or alter in any way documents that are related to any imminent or ongoing investigation, [or] lawsuit ... or are required to be maintained for regulatory purposes."¹³⁸ Ameriprise's written supervisory procedures also contained a section

¹³³ *Id.* at 10.

¹³⁴ *Id.* at 10-11.

¹³⁵ CX-85.

¹³⁶ Tr. (Storrar) 600.

¹³⁷ *Id.* at 602.

¹³⁸ JX-28, at 30.

titled "Lawsuit and Arbitration Claims." The policy explained that litigation and arbitration involve discovery, "which involves the exchange of documents and information between or among parties." It instructed representatives that, when made party to a "lawsuit or demand for arbitration," they "must retain copies of all documents and notes about the client," must "not destroy, revise or alter these documents in any way," and must "keep the entire client file."¹³⁹ The policy called for representatives to be "cooperative and honest with ... outside counsel ... when they call you to discuss your knowledge of the facts of the case."¹⁴⁰

Prior to Ameriprise's internal review, Storrar had been disappointed when he learned that Tysk had not disclosed his edits before August 21, 2009.¹⁴¹ In an on-the-record interview, he testified that Tysk should have made his edits "clear and forthright right up front.

Transparent is the word I'm trying to come up with."¹⁴² Storrar opined that Tysk had "some intent ... to add things after the fact," and "he shouldn't have done it that way."¹⁴³

After conducting the review, Storrar and Zapko initially concluded that Tysk had violated Ameriprise's Code of Conduct.¹⁴⁴ As a result, on January 31, 2011, Storrar sent Zapko a draft of

¹³⁹ CX-83, at 1-2.

¹⁴⁰ *Id.* at 2.

¹⁴¹ Tr. (Storrar) 588.

¹⁴² *Id.* at 604. At the disciplinary hearing, Storrar appeared to be uncomfortable with his pre-hearing characterization of Tysk's changes to the notes as lacking transparency. *Id.* at 605. Storrar also declined to refer to Tysk's changes to the notes as "alterations," testifying "I don't think he altered his notes." *Id.* at 607. Storrar preferred to use the word "added" to describe what Tysk did to his Act! notes. *Id.* at 610. Ameriprise, however, found that Tysk had "altered the record of his contacts with Claimant after Claimant complained about the suitability of the annuity he purchased." JX-34, at 4. When asked if Tysk was wrong to change the notes, Storrar testified that "right and wrong ... had very little bearing on it ... he didn't need to do that." Tr. (Storrar) 607.

¹⁴³ *Id.* at 609. At the hearing, Storrar appeared to want to back away from these statements, and called his use of the word "intent" in the on-the-record interview a "bad word choice," explaining that he thought Tysk's purpose was "to shore up his notes to detail that information that he felt transpired on specific days or events that took place." *Id.* at 610.

¹⁴⁴ *Id.* at 605. Storrar explained at the disciplinary hearing that "of all the policies we have," Tysk "most infringed upon" the Code of Conduct. *Id.* at 606.

a reprimand, called an "educational clarification notice" by Ameriprise,¹⁴⁵ which he proposed issuing to Tysk. Storrar asked Zapko to let him know if she was "comfortable" with it.¹⁴⁶ The draft stated:

Per our conversation, you are being issued this Educational Clarification Notice for failure to follow Ameriprise Financial Services, Inc. company policy. Please be aware that any further violations may result in more serious consequences per the Consequence Management process.

This ECN is being issued because you added notes to your [Act!] records after a client complaint was filed. Although it was found that the information added to your records was truthful and fact based, you did not notify Counsel for Ameriprise before you added to your records. Because of this, it brought to question whether the Code of Conduct was followed properly [I]t is clear to me that you understand the procedures to follow in the event of another client complaint, and no further steps are required on your part.¹⁴⁷

Ameriprise did not issue Storrar's draft to Tysk. Instead, on February 10, 2011, Zapko sent Storrar an e-mail informing him, "Here is the approved language" and directing him to issue a revision. The revision softened the draft. It did not conclude that Tysk had violated firm policy, did not state that Tysk failed to inform counsel of the changes he made to the notes, and did not threaten "more serious consequences" if Tysk should engage in "further violations." Instead, the revision informed Tysk, "you are being issued this Educational Clarification Notice because you added notes to your [Act!] records regarding certain interactions with a specific client after that client filed a complaint regarding a recommendation you made."¹⁴⁸ No one consulted with Storrar about the changes; he testified, "It wasn't my call."¹⁴⁹

¹⁴⁵ Tr. (Tysk) 463, Tr. (Storrar) 604.

¹⁴⁶ CX-86, at 2.

¹⁴⁷ *Id.*

¹⁴⁸ CX-87.

¹⁴⁹ Tr. (Storrar) 616.

Ameriprise concluded that Tysk did not try to "mislead the firm or claimant regarding his [Act!] notes."¹⁵⁰ Ameriprise "did not find that Mr. Tysk violated a specific provision of the code of conduct or engaged in any wrongdoing." However, "after considering the spirit of the Code in its entirety" and "[i]n light of the arbitration award, the firm believed it was appropriate" to issue the Educational Clarification Notice.¹⁵¹

III. The Amended Complaint

The Amended Complaint contains four causes of action. The first two are directed against Tysk. The third and fourth causes of action are directed against Ameriprise.

The first cause of action charges that Tysk altered his customer contact notes "to bolster his defense" after receiving GR's letter of complaint, continued to alter the notes after the arbitration claim was filed, and responded to GR's discovery requests without informing his firm or GR of the edits. The first cause of action alleges that this conduct violated Ameriprise's policies, NASD Rule 2110, and FINRA Rule 2010.

The second cause of action charges that these acts and omissions violated FINRA Code of Arbitration Procedure for Customer Disputes IM-12000, and thereby also FINRA Rule 2010.¹⁵²

The third cause of action charges that Ameriprise violated the ethical strictures of FINRA Rule 2010 in two ways. First, Ameriprise failed to produce the exception report until the eve of the first scheduled hearing date, when it should have been provided within sixty days after the arbitration claim was filed. Second, Ameriprise failed to take appropriate steps when it learned of

¹⁵⁰ CX-96, at 4.

¹⁵¹ JX-34, at 4.

¹⁵² FINRA's Code of Arbitration Procedure for Customer Disputes IM-12000 provides that "It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to ... fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code."

Tysk's alterations to the notes by: (i) failing to inform GR that the printout of the notes produced in discovery had been altered; (ii) failing to take sufficient steps to locate previous versions of the notes; and (iii) blocking GR from obtaining evidence of the alterations.

Finally, the fourth cause of action charges that by engaging in this conduct Ameriprise violated FINRA Code of Arbitration Procedure for Customer Disputes IM-12000 and FINRA Rule 2010.

IV. Discussion

A. The Respondents' Misconduct

As set forth in more detail below, the Extended Hearing Panel finds that Tysk engaged in the misconduct alleged against him. Tysk violated NASD Rule 2110 by altering his Act! notes in May 2008, after receiving GR's complaint letter. He violated FINRA Rule 2010, and FINRA Code of Arbitration Procedure for Customer Disputes IM-12000, by failing, until August 21, 2009, to disclose to Ameriprise that he had altered the notes.

The Panel finds that Ameriprise committed some, but not all, of the violations charged against it. Ameriprise violated FINRA Rule 2010 by failing to disclose, after learning of Tysk's alterations, that the notes it had produced in discovery had been altered. Ameriprise also violated the Code of Arbitration Procedure for Customer Disputes, albeit unintentionally, by failing to produce the relevant exception report as required. However, the Panel does not find that Ameriprise violated Rule 2010 by producing the exception report late, failing to locate previous versions of the notes, or opposing GR's efforts to examine Tysk's hard drive.

1. The First Cause of Action

a. Tysk's Defense

Tysk concedes that “a rep who modifies his notes makes us wince,” and that altering the Act! notes was “not a best practice.” But he insists that Enforcement failed to prove that he acted unethically in violation of NASD Rule 2110 and FINRA Rule 2010.

First, Tysk denies that he altered his notes to bolster his defense. He made the substantive edits in May 2008, six months *before* GR filed his arbitration claim. Even though this was after GR complained to Ameriprise about him, Tysk claims that he did not expect GR to file an arbitration action.¹⁵³ Tysk points out that Ameriprise’s review of GR’s complaint concluded that “there was no question” that the annuity was a suitable investment for GR.¹⁵⁴ Therefore, he was justifiably “100 percent comfortable with the transaction,” and confident that nothing would come of the concerns expressed in GR’s letter.¹⁵⁵

Second, Tysk argues, he acted ethically and in good faith, because his motivation was to “make sure that his notes were accurate.”¹⁵⁶ Therefore the first cause of action must fail because it requires proof that he acted unethically, or in bad faith.¹⁵⁷

As for the allegation that Tysk violated Ameriprise’s document retention policies, Tysk argues that he “could not have knowingly or intentionally violated the firm’s policies because he didn’t know about the firm’s policies.”¹⁵⁸ Furthermore, Ameriprise, which wrote and enforced

¹⁵³ Tr. 1409-10, 1412, 1436.

¹⁵⁴ *Id.* at 1410.

¹⁵⁵ *Id.* at 1438.

¹⁵⁶ *Id.* at 1408.

¹⁵⁷ Respondent David B. Tysk’s Pre-Hearing Br. 14-15 (*citing inter alia Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135, 2009 SEC LEXIS 4168 (Dec. 10, 2009)); *Daniel Joseph Alderman*, 52 S.E.C. 366 (1995), *aff’d*, 104 F.3d 285 (9th Cir. 1997).

¹⁵⁸ Tr. 1440.

the policies, evaluated Tysk's conduct and concluded that he did not violate them, a finding that Tysk believes the Panel should deem dispositive.¹⁵⁹

b. Tysk's Misconduct

Contrary to Tysk's assertions, the Panel finds that Tysk anticipated the possibility that GR would file a claim against him, and altered his Act! notes to strengthen his defense against a potential suitability complaint. By making the alterations indiscernible and failing to disclose them for many months, Tysk acted in bad faith. The Panel also finds that Tysk's claim that he was unaware of his firm's document retention policies is not credible, and concludes, notwithstanding the outcome of Ameriprise's internal review, that his actions were inconsistent with Ameriprise's policies.

i. Tysk Anticipated that GR Might File a Claim

Tysk's claim that he had no expectation that GR's letter might presage a formal complaint is not supported by the evidence. Before Tysk received GR's letter, GR had put Tysk on notice of his disapproval of Tysk's management of his investments, and had removed the investments from Tysk and Ameriprise. As the National Adjudicatory Council ("NAC") has observed, it is not uncommon in the securities industry for customers to file arbitration claims against representatives; indeed, "It is well established that arbitration proceedings initiated by dissatisfied customers are within the conduct of an associated person's business."¹⁶⁰ Just as "[c]ourt proceedings relating to arbitration are a foreseeable aspect of commercial dealings with customers,"¹⁶¹ arbitration proceedings relating to customer complaints are a similarly foreseeable

¹⁵⁹ *Id.* at 1441-43.

¹⁶⁰ *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *19 (N.A.C. June 2, 2000). The NAC also found that registered representatives who "fabricate evidence in arbitration proceedings" may run afoul of FINRA's rules. *Id.*

¹⁶¹ *Id.* at 20.

prospect in dealings with customers. Given Tysk's experience¹⁶² and the circumstances surrounding GR's dissatisfaction, the Panel concludes that Enforcement established by a preponderance of the evidence that Tysk reasonably anticipated that GR might pursue his concerns by filing an arbitration claim, and that this motivated him to edit his Act! notes.

ii. Tysk's Edits Countered GR's Concerns

Several of the edits to the Act! notes support the conclusion that Tysk crafted them to counter the concerns raised in GR's letter. GR's letter challenged the suitability of the annuity, particularly the 10-year surrender charge and the tax implications for GR's heirs. It is notable that Tysk's original Act! notes made no reference to the annuity and its surrender charge.¹⁶³

GR signed the application for the first million dollar investment in the annuity on December 14, 2006.¹⁶⁴ The unaltered contact report for GR has a single entry for that day. It reads, in its entirety, "Meeting Held 12/14/2006 9:30 a.m. Meeting his house. David Tysk".¹⁶⁵ Tysk did not enter any contemporaneous notes of the meeting in Act! and made no references to the annuity or surrender charge.

However, more than a year later, Tysk added a lengthy entry about a meeting with GR, and dated it December 14, 2006.¹⁶⁶ In it, as discussed above, Tysk described GR's satisfaction with Tysk's management of his account, and GR's praise for Tysk's "thoughtfulness."¹⁶⁷

¹⁶² Tysk is an experienced broker who had been the subject of previous customer complaints. He had a significant, similar prior experience with another customer who initially filed a letter of complaint to the firm and subsequently filed an arbitration claim in 2005. Tr. (Tysk) 137-38, 143, 152.

¹⁶³ CX-68; Tr. (Tysk) 216-18.

¹⁶⁴ CX-8.

¹⁶⁵ JX-27, at 73.

¹⁶⁶ CX-68, at 6. The entry for December 14, 2006, did not appear in the contact report with a last "edited on" date of May 13, 2008, but did appear in the report with a last "edited on" date of May 27. Compare JX-27, at 8 with CX-68, at 14. Thus, it was made after the last edits on May 13, 2008, approximately a year and five months after the December 14, 2006, meeting it describes.

¹⁶⁷ *Id.* See also *supra* Section II.G., at 14.

Tysk also composed a detailed description of how satisfied GR was with the annuity recommendation, including direct quotes to illustrate GR's full understanding of the surrender charge and other features.¹⁶⁸

In another entry Tysk made between May 13 and 27, 2008, but dated early 2007, he described in detail a discussion with GR that purportedly took place more than a year earlier. In it, Tysk summarized conversations about the annuity and its features. Tysk wrote, "We reviewed the annuity purchase with the bonus credit, the move from the money market account and the value to date."¹⁶⁹

The new entries clearly respond to GR's complaint letter. The Panel does not find credible Tysk's testimony that he made the entries solely to record, for personal purposes, the details of his relationship with GR. As Tysk acknowledged in his testimony, the import of the additions he made to the Act! notes could be helpful in defending against GR's claims that the annuity was unsuitable.¹⁷⁰

iii. Tysk Concealed the Dates of Edits

As previously mentioned, by default Act! records the date an entry is made. Thus, when Tysk made an edit, the system automatically displayed the date of his entry. To change the default date, Tysk had to delete the automatically entered date and replace it with the date on which he wished the entry to appear to have been made.¹⁷¹

Tysk could have chosen to edit the Act! notes without altering the default dates. If he had done so, the Act! notes would have accurately reflected the dates of the original entries, and the

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 7.

¹⁷⁰ Tr. (Tysk) 278.

¹⁷¹ *Id.* at 487.

dates of the subsequent edits – the last “edited on” dates. The contact report would have shown which edits Tysk made contemporaneously with the events they described, and which ones he added months, and years, later. The edits would have been visible. His editing process would have been transparent.

Tysk had no satisfactory explanation for why he did not let the Act! notes accurately show the dates of the edits. He simply said he saw no need to do so. When Enforcement asked why he did not just add a parenthetical next to one new entry, to show when he edited it, Tysk answered, “Because I created these notes for myself, I didn’t need to put a parenthetical in.”¹⁷²

Tysk’s testimony on this point is unpersuasive. Disguising the dates of new entries is inconsistent with an expectation that nobody else will read them. Leaving the default dates unaltered would not in any way have interfered with his stated purpose of making a more accurate, complete record memorializing his relationship with GR.

For these reasons, the Panel rejects Tysk’s claim that he altered the dates of his entries without realizing that he was giving the false impression that he made the edits earlier than he actually did.

iv. Tysk Concealed the Edits from Ameriprise

For months, when presented with opportunities to disclose the edits, Tysk chose not to do so. In his initial three-hour meeting with his attorneys to discuss the case, Tysk did not disclose that he had edited the notes. He remained silent even when his counsel later asked him directly, in June 2009, if he knew “anything about any edits made to the contact reports.” It was not until August 21, 2009, eight months after his first meeting with counsel, when GR was applying

¹⁷² *Id.* at 249-50.

increasing pressure to obtain more information about the notes, that Tysk finally disclosed to Ameriprise what he had done.

v. Tysk Violated Ameriprise's Policy

Ameriprise's document retention policy broadly mandates that representatives "may not shred, destroy or alter in any way documents that are related to any imminent or ongoing investigation, lawsuit, audit, examination, or are required to be maintained for regulatory purposes."¹⁷³ It also directs representatives, when a lawsuit or demand for arbitration is filed, to "retain copies of all documents and notes about the client. Do not destroy, revise or alter these documents in any way; keep the entire client file."¹⁷⁴ Enforcement argues, and the Amended Complaint charges, that Tysk violated these directives when he altered his Act! notes.¹⁷⁵ Ameriprise and Tysk argue, however, that the policy did not apply because Tysk made the edits before GR filed his arbitration claim.¹⁷⁶

In addition, Tysk claims that in 2008 he was unfamiliar with Ameriprise's retention policies. When asked if the firm had provided him with its policies and procedures when he was hired, Tysk said he could not recall. Under further questioning, he testified that although he had heard the phrase "policies and procedures," he did not know "what WSP's means," and that he had "[n]ever heard of that term [WSPs] before."¹⁷⁷ He acknowledged reading and understanding the firm's Code of Conduct, but only in "the last few years," after he edited the notes.¹⁷⁸ He testified that he did not even know Ameriprise's Code of Conduct existed until his attorneys

¹⁷³ JX-28, at 30.

¹⁷⁴ CX-83, at 2.

¹⁷⁵ Amended Compl. ¶ 25; Department of Enforcement's Pre-Hearing Br. 21.

¹⁷⁶ Tr. (Tysk) 127-28; JX-34, at 4.

¹⁷⁷ Tr. (Tysk) 103-04.

¹⁷⁸ *Id.* at 106.

reviewed it with him in connection with this case,¹⁷⁹ and that this was when he first learned of the document retention policy.¹⁸⁰

When asked about the Code of Conduct statement that “Dated notes ... will help guard against client complaints,”¹⁸¹ he claimed he did not know what “dated notes” means.¹⁸² But he conceded that he was aware from 2005 through 2008 that any documentation he produced in his work could be subject to discovery; thus, he knew that if litigation developed, he might have to produce the notes.¹⁸³

This testimony persuades the Panel that Tysk, particularly after Storrar conducted the suitability review of his recommendation in April 2008, knew or should have known that altering the notes as he did ran afoul of Ameriprise’s document retention policy. Tysk’s claimed unfamiliarity with Ameriprise policies and ignorance of the meaning of the term “WSPs” impressed the Panel as disingenuous and not credible. Tysk was not a newly hired novice. During his two decades as an Ameriprise broker, he had encountered customer complaints, and a customer had filed an arbitration claim against him. Tysk knew or should have known the importance of customer related notes in the event of complaints. His concealed alterations of his Act! notes did not comply with the clear import of the document retention policies in Ameriprise’s Code of Conduct.

¹⁷⁹ *Id.* at 109-11.

¹⁸⁰ *Id.* at 114. He testified that it was not until “[s]ometime in 2011” that he read Ameriprise’s Code of Conduct. *Id.* at 118.

¹⁸¹ JX-29.

¹⁸² Tr. (Tysk) 120-22.

¹⁸³ *Id.* at 122-23.

vi. **Tysk's Conduct Violated NASD Rule 2110 and FINRA Rule 2010**

NASD Rule 2110 governed Tysk's conduct when he altered the Act! notes, between May 13 and 27, 2008. FINRA Rule 2010, which took effect on December 15, 2008, governed Tysk's conduct thereafter, including his December 16, 2008 initial meeting with counsel on the GR claim; his June 22, 2009, response to questions about the edits; and thereafter until August 21, 2009, when he finally disclosed the edits to Ameriprise.¹⁸⁴

Both rules require that a "member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." A violation is committed if a respondent's misconduct: (i) occurs in the course of his business, and (ii) violates just and equitable principles of trade.¹⁸⁵

There is no question that Tysk's conduct falls within the ambit of NASD Rule 2110 and FINRA Rule 2010. It is well established that when a customer complains about an account, the representative's response to the complaint is "within the conduct of the associated person's business"; that arbitration proceedings are also within an associated person's business; and that tampering with evidence in an arbitration proceeding violates NASD Conduct Rule 2110.¹⁸⁶ The just and ethical conduct rules set a fundamental standard for the securities industry. That

¹⁸⁴ FINRA Rule 2010 superceded NASD Rule 2110 on December 15, 2008, as a result of NASD's consolidation with the regulatory arm of the New York Stock Exchange in July 2008. See NASD to FINRA Conversion Chart Spreadsheet, available at www.finra.org. A new Consolidated Rulebook was adopted on December 15, 2008. See *FINRA Regulatory Notice 08-57* (Oct. 2008). FINRA rules (including NASD rules) are available at www.finra.org/Rules.

¹⁸⁵ *Shvarts*, 2000 NASD Discip. LEXIS 6, at *18.

¹⁸⁶ *Id.* at *19-20 (finding that a representative violated NASD Rule 2110 when he failed to pay attorney fees and costs awarded in a court case related to a customer-initiated arbitration).

standard may be violated even when a member engages in unethical conduct that is not directly securities-related.¹⁸⁷

Based on the evidence presented at the hearing, the Panel finds that the manner in which Tysk edited his Act! notes in May 2008 violated NASD Rule 2110, and his subsequent failures to disclose the edits to Ameriprise, which until August 21, 2009, prevented his firm from disclosing the edits to GR, violated FINRA Rule 2010.

2. The Second Cause of Action

The second cause of action charges that by altering his Act! notes after receiving GR's letter, and after GR filed the arbitration claim, and by not informing GR or Ameriprise in response to discovery requests from GR, Tysk violated FINRA Code of Arbitration Procedure for Customer Disputes IM-12000, and thereby FINRA Rule 2010. As noted above, IM-12000 states "it may be deemed conduct inconsistent with just and equitable principles of trade ... for a member or a person associated with a member to fail ... to produce any documents in his possession or control."

a. Tysk's Defense

Tysk makes three main arguments defending this charge. First, as he posited in defense of the first cause of action, Tysk claims that he made all of the substantive edits between May 13 and 27, 2008, months before GR filed the arbitration claim.¹⁸⁸ He maintains that any entries thereafter, reflected in later "edited on" dates, were made either in connection with his

¹⁸⁷ *Id.* at *16 ("Conduct Rule 2110 is not limited to securities-related conduct; instead, it covers all unethical business-related conduct."). *See also Kirlin*, 2009 SEC LEXIS 4168, at *65 (citing *Thomas W. Heath, III*, Exchange Act Rel. No. 59223, 2009 SEC LEXIS 14 (Jan. 9, 2009), *aff'd*, 586 F.3d 122 (2d Cir. 2009)); *Chris Dinh Hartley*, 57 S.E.C. 767, 773 (2004) (citing *Calvin David Fox*, 56 S.E.C. 1371 (2003)).

¹⁸⁸ Tr. (Tysk) 205-06.

responsibility to manage GR's annuity still held at Ameriprise or in response to his attorney's request that he check the Act! program to try to find previous versions of his notes.¹⁸⁹

Second, Tysk claims that he "ultimately did produce the documents," and therefore the Code of Arbitration Procedure for Customer Disputes "doesn't apply."¹⁹⁰ Tysk argues that the allegation that he violated IM-12000, by failing to produce documents in discovery, is "unprecedented and without support." According to Tysk, cases brought under IM-12000 "generally involve a failure to pay an arbitration award, rather than a failure to produce documents" and involve violations of discovery orders, factors not present in this case.¹⁹¹ He claims that "the plain language of IM-12000 requires dismissal" of this charge because he produced "the only version of the customer notes that he reasonably understood was available and accessible."¹⁹²

Third, Tysk contends that he was under no obligation to disclose that he had edited the notes produced in discovery. In arbitration proceedings, Tysk maintains, parties are not required to "explain the documents" they produce.¹⁹³ He cites FINRA Rule 12507(a)(1), which states that in arbitration proceedings requests for information do "not require narrative answers or fact finding," and argues that this means that he had no obligation "to provide explanations for any potential ambiguity" in any document he produced.¹⁹⁴ Besides, he contends, the last edited date

¹⁸⁹ *Id.* at 207, 292-93.

¹⁹⁰ *Id.* at 1447-48.

¹⁹¹ Respondent David B. Tysk's Pre-Hearing Br. 20-21.

¹⁹² *Id.* at 20.

¹⁹³ Tr. 1445.

¹⁹⁴ Respondent David B. Tysk's Pre-Hearing Br. 11-12.

on the hard copy of the notes put GR on notice that the notes had been edited as recently as May 27, 2008, and that sufficed.¹⁹⁵

b. Tysk's Misconduct

The Panel accepts Tysk's first argument but rejects the other two.

With regard to the first, Tysk received GR's letter in April 2008, and substantively altered his notes between May 13 and May 27. Enforcement produced no evidence that Tysk made substantive entries after May 27, 2008. The evidence fails to establish, therefore, that Tysk substantively altered the notes after GR filed his arbitration claim.

Turning to Tysk's second argument, waiting until the eve of the arbitration hearing to produce Lanterman's report with the prior versions of notes did not excuse Tysk's earlier violations of the discovery and ethical rules. Those violations stemmed from his failure to disclose his edits to the Act! notes until August 2009, long after GR filed his claim. And, as the discussion above makes clear, the hard copy of the Act! contact report that Tysk provided to Ameriprise, and Ameriprise provided to GR in discovery, was misleading, as it appeared to consist of contemporaneous notes. The Amended Complaint does not charge Tysk simply with failing to produce documents in discovery. The gravamen of the charge is that he produced customer contact notes in discovery that were misleading absent a disclosure that he altered them. As such, the case is not entirely without precedent.

In *John F. Noonan*, a case also involving alleged arbitration discovery violations, a customer filed an arbitration claim charging that a representative had failed to make an important disclosure about a recommended investment. After receiving the complaint, the representative fabricated a letter and an enclosure which purported to document that he made the disclosure. He provided them to his firm, which produced them in discovery. The representative later admitted

¹⁹⁵ *Id.* at 12.

the fabrications, but claimed that they were truthful and accurate re-creations of documents he had actually sent to the customer. Noonan was charged with violating NASD Rule 2110. The Securities and Exchange Commission ("SEC") upheld a bar imposed for the violation.¹⁹⁶

Explaining its decision, the SEC noted that "[i]f arbitration is to be a meaningful alternative to litigation, its processes must be fair and free of abuse. Actions such as [Respondent's] totally subvert the arbitration process. Under no circumstances can such conduct be tolerated."¹⁹⁷

As for Tysk's third argument, as stated above, he did not err by failing to provide GR with "narrative answers or fact finding." He erred by providing Ameriprise, without explanation, with a substantially altered, misleading document to produce to GR in discovery. *Noonan* established the principle that parties may not produce falsified documents in discovery. Here, despite Tysk's claim that his were accurate, by hiding the edits, he made the contact report misleading, if not false. By producing notes that were misleading on their face, Tysk undermined the fairness of the discovery process in his case by putting GR at an unfair disadvantage. GR's counsel had no idea which notes were contemporaneous, and therefore more credible, and which ones may have been fabricated to fit Tysk's defense. GR's counsel could not know how to test the credibility of the notes, and Tysk's testimony about them.

As noted above, the arbitration system and the procedural rules governing it depend on fairness in the discovery process. Just as producing wholly fabricated evidence in discovery in an arbitration proceeding subverts the process, so does producing misleading documents as Tysk did here.

The Panel disagrees with Tysk's argument that the last "edited on" date of May 27, 2008, appearing in the contact report Ameriprise produced gave GR fair notice of Tysk's alterations.

¹⁹⁶ *John F. Noonan*, 52 S.E.C. 262, 265 (1995).

¹⁹⁷ *Id.* at 264-65.

The last “edited on” date was ambiguous; it could have reflected when the hard copy of the contact report had been printed. Viewing the report, GR’s counsel had no way of knowing whether Tysk had made substantive edits, and if so, when he had made them.¹⁹⁸ This put GR at an unfair disadvantage.

When GR’s counsel continued to press for clarifying information, Tysk’s failure to respond to his counsel’s pointed question – “Do you know anything about any edits being made to the contact reports?” – effectively continued to conceal information GR’s counsel was entitled to learn. By keeping silent, Tysk did not act “in good faith” to comply with his discovery obligations under IM-12000. His conduct fell far short of the obligation to “cooperate to the fullest extent practicable in the exchange of documents and information to expedite” arbitrations, as FINRA Rule 12505 requires.

For these reasons, the Panel finds that Tysk violated FINRA Code of Arbitration Procedure for Customer Disputes IM-12000, NASD Rule 2110, and FINRA Rule 2010.

3. The Third and Fourth Causes of Action

The third cause of action charges Ameriprise with violating FINRA Rule 2010 in three ways. First, when Tysk disclosed that he had altered the notes, Ameriprise asked him to search his computer for evidence of the edits, but took no additional steps to locate previous versions of the Act! notes. Second, Ameriprise failed to advise GR that the notes produced in discovery had been altered, and tried to prevent GR from obtaining evidence of the edits. Third, Ameriprise failed to produce the July 2007 exception report as required by the Code of Arbitration Procedure for Customer Disputes.

¹⁹⁸ Tr. (Jamison) 852-53.

The fourth cause of action repeats the allegations of the third cause of action, charging that by engaging in the described conduct, Ameriprise violated FINRA Code of Arbitration Procedure for Customer Disputes IM-12000, and FINRA Rule 2010.

a. Ameriprise's Defense

In a written response to a Rule 8210 request, Ameriprise capsulized the defense it presented later at the hearing concerning its failure to disclose Tysk's edits to GR:

The Firm did not notify counsel for Claimants in August, 2009 after learning that additions had been made to the contact notes. FINRA arbitrations generally are conducted in the absence of depositions or substantive interrogatories. The method for disclosing information in a FINRA arbitration is almost exclusively through documents and direct testimony at the hearing. After a reasonable search for edits to the notes ... the Firm had no additional documents to produce. Furthermore, no representations regarding the notes had ever been made to Claimant's counsel, and there existed no statement, interrogatory response, or deposition testimony to clarify or correct. Because of the adversarial nature of the arbitration process, there is no rule or obligation to, and it is not the practice to affirmatively provide information (other than discovery responses) to opposing counsel prior to a hearing, in particular information that can be fairly elicited through witness examination. As stated in prior responses, Mr. Tysk was available and fully prepared to (and did) testify at the hearing as to all of his contact notes, when they were made, and their accuracy. There is no other mechanism within the arbitration process to disclose this type of information to opposing counsel prior to the hearing.¹⁹⁹

At the hearing, Ameriprise emphasized that it was unnecessary to disclose the edits because the "claimant was going to be told" about them, "[i]t just was going to be at the hearing as opposed to before the hearing."²⁰⁰

As for the exception report, Ameriprise contends that it made a good faith effort to locate all of the documents it was required to produce by the Code of Arbitration Procedure. The exception report "slipped through cracks"; when Ameriprise discovered the omission, the firm rectified it immediately, and GR obtained a postponement for which Ameriprise paid the cost.²⁰¹

¹⁹⁹ JX-35, at 3-4.

²⁰⁰ Tr. 1475-76.

²⁰¹ Ameriprise Financial Services, Inc.'s Pre-Hearing Br. 18-19.

b. Ameriprise's Misconduct

The Panel finds that Ameriprise erred by not informing GR when it learned from Tysk that he had edited the Act! notes. We disagree with Ameriprise's assertion that it made "no representations regarding the notes." And we disagree that there was "no other mechanism," than through Tysk's testimony, to disclose the critical information to opposing counsel.²⁰²

By remaining silent, Ameriprise allowed GR to assume that the contact report was what it appeared to be. Without disclosure, GR had no way of knowing that the contact report had been significantly altered. This put GR at an unfair disadvantage in assessing the strengths and weaknesses of the case, an important ingredient in evaluating settlement possibilities in advance of a hearing, and also important in preparing for the trial of the arbitration claim. Ameriprise's silence disserved a principal purpose of the arbitration system, to provide a fair, equitable process for "speedy resolution of disputes among members, their employees, and the public."²⁰³

As for Ameriprise's assertion that there was "no other mechanism" available "to disclose this type of information to opposing counsel prior to a hearing," a simple telephone call would have provided GR with the fair notice to which he was entitled by the discovery rules.

Therefore, the Panel finds that Ameriprise's failure to disclose the alterations to Tysk's notes violated FINRA Rule 2010. We conclude that Rule 2010 required Ameriprise, at the very least, to disclose what it knew: that Tysk edited the notes after receiving GR's letter of complaint. Once armed with that information, GR would have been in an informed position to

²⁰² The Panel does not disagree with Ameriprise's general observations about the adversarial nature of the arbitration discovery process. The Panel does not find fault with Ameriprise's reliance on Tysk to search his computer for evidence of earlier versions of his Act! notes. We do not need to reach the question of whether, as Enforcement argues, Ameriprise had an obligation to take possession of Tysk's computer and conduct a forensic examination on its own, and to provide it to GR. We also do not fault Ameriprise for opposing GR's motions for further discovery, by which Enforcement charges "the firm actively tried to prevent claimant from obtaining any evidence of the spoliation." Amended Compl. ¶ 54.

²⁰³ *Shvarts*, 2000 NASD Discip. LEXIS 6, at *25 n.15 (quoting *James M. Bowen*, 51 S.E.C. 1152, 1153 (1994)).

determine what further steps were appropriate. Instead, GR's counsel operated in the dark, with Ameriprise holding to its position that there were no other versions of Tysk's Act! notes that it could produce. While that was perhaps accurate that Ameriprise had no other versions, Ameriprise concealed the fact that Tysk had made revisions.

As for the production of the exception report, a respondent's failure to produce documents in its "possession or control [in response to a discovery request] as directed pursuant to provisions of the [FINRA] Code of Arbitration Procedure" violates IM-12000.²⁰⁴ Proof of a violation does not require evidence that a respondent intentionally withheld documents or failed to search for them.²⁰⁵ Thus, Ameriprise's lack of bad faith does not suffice to defeat the fourth cause of action. The consequence is that by failing to produce the exception report as required, Ameriprise failed to comply with FINRA Code of Arbitration Procedure for Customer Disputes IM-12000, and therefore FINRA Rule 2010.

However, the Panel finds that Ameriprise did not violate FINRA Rule 2010 by the inadvertent failure to provide the report as required by the arbitration rules. As noted above, to prove an act or omission as a stand-alone violation of Rule 2010 requires evidence that a respondent acted in bad faith, or unethically.²⁰⁶ There is no evidence of bad faith or unethical behavior on Ameriprise's part with regard to the late production of the exception report.

V. Sanctions

For Tysk's misconduct, Enforcement recommends a censure, a one-year suspension, and a fine of \$50,000. Tysk's position on sanctions is that none should be imposed, but if the Panel

²⁰⁴ *Dep't of Enforcement v. Westrock*, No. 2006005696601, 2010 FINRA Discip. LEXIS 26, at *18 (N.A.C. Oct. 21, 2010).

²⁰⁵ *Id.* at *19-20 (citing *Dep't of Enforcement v. Josephthal*, No. CAF000015, 2002 NASD Discip. LEXIS 8, at *7-8 (N.A.C. May 6, 2002)).

²⁰⁶ *Kirlin*, 2009 SEC LEXIS 4168, at *65.

imposes a sanction, Tysk urges that it be a fine only, and not a suspension. For Ameriprise, Enforcement recommends a censure and a fine of \$350,000.²⁰⁷ Ameriprise argues that no sanctions should be imposed against it.²⁰⁸

A. Tysk

Presumably because Tysk's Act! notes were part of GR's customer file, and therefore can be considered firm records, Enforcement suggests that the most appropriate Sanction Guidelines are those relating to Forgery and/or Falsification of records.²⁰⁹ The Guidelines recommend a fine of \$5,000 to \$100,000, consideration of a suspension of up to two years when mitigating factors are present, and a bar in egregious cases.²¹⁰

Enforcement cites several aggravating factors. They include Tysk's concealment of his edits, the period of time the concealment lasted, the intentionality of his misconduct, the potential for monetary gain resulting from the misconduct, and the number of separate edits, constituting separate wrongful acts.²¹¹ In addition, Enforcement argues that Tysk has shown no remorse for his actions. Enforcement credits Tysk with one mitigating factor for informing Ameriprise of the edits before the firm detected them. This persuaded Enforcement to recommend a suspension instead of a bar.²¹²

Tysk believes that because he has "already paid a penalty for the purported discovery allegations that are at issue," the imposition of any additional sanctions "would be punitive, not

²⁰⁷ Department of Enforcement's Pre-Hearing Br. 32, 35, 39.

²⁰⁸ Ameriprise Financial Services, Inc.'s Pre-Hearing Br. 1.

²⁰⁹ Department of Enforcement's Pre-Hearing Br. 32.

²¹⁰ *FINRA Sanction Guidelines* 37 (2013).

²¹¹ Department of Enforcement's Pre-Hearing Br. 32-35.

²¹² *Id.* at 35.

remedial,” and a suspension of any length would cause him to “be forced out of the industry.”²¹³

Tysk stresses that he “has been truthful all along”; he has no disciplinary history; his supervisor testified that he is ethical; and even if he should not have altered his notes, he “was just trying to do the right thing ... to make them more complete and accurate.”²¹⁴

The Panel does not find the Guidelines for Forgery and/or Falsification of records to be helpful in this case. They focus on whether the respondent in good faith held a mistaken belief of express or implied authority to alter the documents, factors that are not applicable to Tysk’s alterations of his Act! notes.²¹⁵ Instead, the Panel relies on the Guidelines’ General Principles Applicable to All Sanction Determinations, and the Principal Considerations in Determining Sanctions, which are also applicable to all violations.

The Panel disagrees with Enforcement’s view that Tysk’s disclosure to Ameriprise constitutes mitigation. The Guidelines pair acknowledgement of misconduct with acceptance of responsibility.²¹⁶ Tysk has not accepted responsibility; he insists that he did nothing wrong. In addition, despite the findings of the arbitration panel, Tysk has not expressed remorse. At the hearing, Tysk read a statement in which he reflected on his conduct, and stated:

In retrospect, had I known the impact on the arbitration of choosing my contact note system to keep this history, I would have simply created a separate document entitled supplemental notes. I see now that I may have prevented what has turned into a very stressful time for me and my family personally.²¹⁷

The statement reflects regret for causing stress to himself and his family, not for violating rules designed to make the arbitration process fair. This falls short of acknowledging misconduct

²¹³ Respondent David B. Tysk’s Pre-Hearing Br. 26.

²¹⁴ Tr. 1451-52.

²¹⁵ *Guidelines* at 37.

²¹⁶ “Whether an individual accepted responsibility for and acknowledged the misconduct to his ... employer ... prior to detection.” *Id.* at 6 (Principal Considerations in Determining Sanctions No. 2).

²¹⁷ Tr. (Tysk) 402 (reading from CX-97, a response to a Rule 8210 request).

and accepting responsibility. Therefore, the Panel does not find that Tysk's disclosure to Ameriprise meets the Guidelines' criteria for mitigation.

As for Enforcement's argument that Tysk's multiple edits to the Act! notes constitute numerous acts, the Panel views Tysk's editing as an action taken in several steps, with a single purpose, accomplished between May 23 and 27, 2008. We agree with Enforcement, however, that Tysk's protracted silence over a period of months is an aggravating factor contributing to the seriousness of his conduct.²¹⁸ In June 2009, when Tysk's counsel asked pointedly if he knew "anything about any edits being made to the contact reports," Tysk's continued silence misled his counsel, his firm, and his former customer, and is an aggravating factor.²¹⁹ Furthermore, making the edits and concealing them were intentional actions, not inadvertent or negligent, designed to bolster his defense.

The Panel is not persuaded that Tysk was motivated significantly by the potential for monetary gain. It is true that when Tysk edited the Act! notes, he still had responsibility, and was compensated, for managing GR's annuity — a \$2 million investment. However, when Tysk edited the notes, GR had removed most of his assets from Ameriprise, and made it clear that he was not going to continue his previously close relationship with Tysk as friend and advisor. The substance and tone of a number of Tysk's edits appear to reflect Tysk's desire to have the record show that GR had previously been quite satisfied with his services, and that the recommendation of the annuity was suitable. While there were monetary consequences to GR's claims, it is not clear that monetary considerations dominated Tysk's motivation.

The Panel disagrees with Tysk's assertion that it would be punitive rather than remedial to impose sanctions in addition to the arbitration panel's order. In its findings, the arbitration

²¹⁸ *Guidelines* at 6 (Principal Considerations in Determining Sanctions No. 9).

²¹⁹ *Id.* (Principal Considerations in Determining Sanctions No. 10); Tr. (Tysk) 289-90.

panel did not address either Tysk's concealment of the alterations to the notes or the ethical implications of his course of conduct,²²⁰ which are important considerations in this disciplinary proceeding.

With regard to Tysk's argument that "he has no disciplinary history," we note that the lack of a disciplinary history is not a mitigating factor.²²¹ Similarly, his supervisor's testimony that Tysk is ethical, and Tysk's claim that he was only trying "to do the right thing" when he edited his notes, do not excuse his failure to disclose his alteration of the Act! notes.

Finally, the Panel can give no weight to Tysk's argument that a suspension of any length will cause him to be "forced out of the industry." Tysk did not explain why a suspension would lead to such a result. There is no evidence that Ameriprise would terminate his association with the firm. Moreover, even if there were such evidence, the Panel is required to "consider the disciplinary sanctions we impose to be independent of a firm's decisions to terminate or retain an employee."²²² We should neither credit a respondent who was terminated by a firm, nor seek additional remedies against a respondent who was retained by a firm.

Taking all of these factors into consideration, the Panel concludes that it is appropriate to impose a fine of \$50,000 and a suspension of three months for Tysk's violations of NASD Rule 2110 and FINRA Rule 2010, as alleged in the first cause of action, and violations of FINRA Code of Arbitration for Customer Disputes IM-12000 and FINRA Rule 2010, as alleged in the

²²⁰ See JX-23, at 10-13. See also *supra* Section II.I.viii., at 25.

²²¹ Although disciplinary history may be an aggravating factor, absence of it is not mitigating. "Registered individuals are required as part of the terms of their admission to the securities industry to comply with [FINRA's] Rules and observe high standards of conduct" and therefore are not to be rewarded because they have acted as required. *Dep't of Enforcement v. Balbirer*, No. C07980011, 1999 NASD Discip. LEXIS 29, at *10 (N.A.C. Oct. 18, 1999).

²²² *Dep't of Enforcement v. Prout*, No. C01990014, 2000 NASD Discip. LEXIS 18, at *11 (N.A.C. Dec. 18, 2000) ("We neither credit a respondent who was terminated by a firm, nor seek additional remedies against a respondent who was retained by a firm.").

second cause of action. The sanctions apply to both causes of action because they arise from the same conduct.²²³

B. Ameriprise

Enforcement recommends a censure and a \$350,000 fine for Ameriprise based on the totality of the misconduct charged against the firm in the Amended Complaint.²²⁴ Enforcement cites the same aggravating factors for Ameriprise as for Tysk, as well as injury to GR resulting from the delay in the arbitration hearing.²²⁵ Enforcement argues that Ameriprise has not accepted responsibility or expressed remorse for its wrongdoing, and that a substantial fine is required “for undermining the integrity and fairness of the arbitration forum through gross negligence (in connection with the exception report) and intentional concealment (in connection with the computer notes) in the discovery process.”²²⁶

As noted above, the Panel did not sustain all of the charges brought against Ameriprise. The Panel found Ameriprise culpable for failing to disclose the alterations from the time it learned of them on August 21, 2009, until the forensic examination was conducted by order of the arbitration panel in April 2010, and for inadvertently failing to produce the exception report as required by the Arbitration Discovery Guide. We have not found Ameriprise culpable for relying on Tysk to search for prior versions of the Act! notes, opposing GR’s request for a forensic examination of the hard drive, or engaging in unethical conduct by producing the exception report late.

²²³ *Guidelines* at 4 (General Principles Applicable to All Sanction Determinations No. 4).

²²⁴ Department of Enforcement’s Pre-Hearing Br. 35.

²²⁵ *Id.* at 35-36. Enforcement also asserts that Ameriprise attempted to delay FINRA’s investigation, tried to conceal information from FINRA, and provided inaccurate and misleading information to FINRA. However, the evidence does not support these assertions.

²²⁶ *Id.* at 37, 39.

Ameriprise insists that it “acted in good faith and violated no FINRA Arbitration rule,” and therefore did not violate FINRA Rule 2010. Ameriprise argues that it should not be sanctioned on the mistaken premise that it should have provided “some sort of narrative discovery response indicating that Tysk’s notes had been edited.”²²⁷

Ameriprise points out that it instructed Tysk to testify truthfully about his edits at the hearing. The instruction was proper. But the Panel agrees with Enforcement that Rule 2010 and the arbitration discovery rules required more of Ameriprise.

As we did with Tysk’s similar arguments, the Panel rejects Ameriprise’s contentions. We have not found Ameriprise culpable for failing to provide a “narrative” about the Act! notes. Ameriprise’s error was failing to disclose the fact that Tysk had edited the notes. Ameriprise withheld this fact despite GR’s repeated efforts to find out about the edits. The Panel disagrees with Ameriprise’s contention that it was not obligated under the Arbitration Procedure rules and FINRA Rule 2010 to disclose this otherwise unknowable fact to the complainant. As we have explained, the Panel finds that Ameriprise’s wrongful conduct was intentional, persisted over a period of months, and was inconsistent with the principles of fairness promoted by the rules governing the arbitration discovery process.

The Panel notes that, as is typical, the Parties engaged in settlement discussions before the hearing. GR’s counsel testified persuasively that not knowing what Tysk had changed in the notes hindered his ability to know what impact the notes might have on the issues surrounding the dispute over the suitability of the annuity. This, in turn, impaired GR’s ability to make informed judgments concerning possible settlement and the hearing.

²²⁷ Ameriprise Financial Services, Inc.’s Pre-Hearing Br. 12-13.

The sanctions need to be sufficient to ensure that Ameriprise and similarly situated respondents appreciate the importance of disclosure under circumstances like these, when they know relevant, important discovery documents produced in discovery are not what they appear to be. The Panel notes that Ameriprise could have avoided wrongdoing by simply making a phone call. Doing so would not have required Ameriprise to waive its objections to GR's motion for a forensic examination of Tysk's computer, but would have allowed the arbitration panel to make an informed decision as to what, if anything, further needed to be done.

As for the exception report, as we have noted, Ameriprise's failure to produce it was an inadvertent mistake by its counsel.²²⁸

For these reasons, the Panel concludes that it is appropriately remedial to impose a censure and fine of \$100,000 upon Ameriprise for violating FINRA Rule 2010 by failing to disclose that the Act! notes it had produced in discovery had been altered by Tysk, and by violating FINRA Code of Arbitration Procedure for Customer Disputes IM-12000, and thereby Rule 2010, by failing to produce an exception report as required.²²⁹

VI. ORDER

By altering computer notes of customer contacts after the customer complained about the suitability of a recommendation, and failing to inform his firm of the alterations when he provided a copy of the notes to be produced in discovery in an arbitration proceeding, Respondent David B. Tysk violated NASD Rule 2110, FINRA Code of Arbitration Procedure for Customer Disputes IM-12000, and FINRA Rule 2010. For this misconduct, he is suspended

²²⁸ Enforcement argued that Ameriprise's failure to produce the exception report was grossly negligent. Tr. 1393, 1396. The Panel disagrees.

²²⁹ The Panel has considered and rejects without discussion any other arguments made by the Parties that are inconsistent with this decision.

in all capacities for three months and is fined \$50,000. If this Decision becomes FINRA's final disciplinary action against Tysk, the suspension shall become effective on December 1, 2014, and shall end on February 28, 2015. The fine shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.

By failing to inform the claimant in an arbitration proceeding that a copy of computer notes of customer contacts produced in discovery had been altered, Respondent Ameriprise Financial Services, Inc., violated FINRA Rule 2010. By failing to inform the claimant of the alterations, and failing to produce an exception report in discovery as required, Ameriprise violated FINRA Code of Arbitration Procedure for Customer Disputes IM-12000 and FINRA Rule 2010. For this misconduct, Ameriprise is censured and fined \$100,000. If this Decision becomes FINRA's final disciplinary action against Ameriprise, the fine shall be payable immediately.²³⁰

Respondents are assessed the costs of the hearing jointly and severally in the amount of \$3,173.84, consisting of an administrative fee of \$750 and the cost of hearing transcripts.

EXTENDED HEARING PANEL.


By: Matthew Campbell
Hearing Officer

²³⁰ Consistent with Principal Considerations in Determining Sanctions No. 14, allowing adjudicators to consider whether a respondent has been sanctioned by another authority, the Panel has also taken into consideration that the arbitration panel imposed a \$20,000 sanction jointly and severally upon Tysk and Ameriprise in part for Tysk's alterations of the Act! notes. JX-23, at 10-11.

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