BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Westrock Advisors, Inc. New York, NY, Respondent.	DECISION Complaint No. 2006005696601 Dated: October 21, 2010

Respondent firm failed to produce documents in response to an arbitration claimant's discovery request and an order of an NASD arbitration panel. Held, findings affirmed, sanctions increased.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Gary M. Lisker, Esq., Robin Sardegna, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Richard A. Giacovas, Esq., Ronald Singh, Esq., Christopher R. Travis, Esq.

Decision

On May 6, 2009, a Hearing Panel found that Westrock Advisors, Inc. ("Westrock" or "the Firm") failed to produce documents as requested by an arbitration claimant's discovery request and as ordered by an NASD arbitration panel, in violation of NASD Rule 2110 and IM-10100.[1] For that violation, the Hearing Panel censured Westrock and fined it $35,000. Westrock

[1] Following the consolidation of NASD and the member regulation, enforcement and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are those that existed on December 14, 2008. The conduct rules and Code of Arbitration Procedure rules that apply are those that existed at the time of the conduct at issue.

appealed the Hearing Panel's decision. We affirm the finding that Westrock failed to produce documents in an arbitration as directed, but increase the sanctions to a $50,000 fine and a censure.

I. Background

Westrock is a broker-dealer that has been registered with FINRA since 2002. Westrock's primary offices are in New York, New York.

II. Factual Background

A. The Arbitration Proceeding

1. MS's Discovery Request

On June 30, 2005, MS, a former customer of Westrock, filed an arbitration claim before FINRA's Office of Dispute Resolution against Westrock and Gregory Martino ("Martino"), the Firm's president and chief executive officer. MS alleged, among other things, that a former Westrock registered representative had effected unauthorized trades in MS's account between January 2002 and September 2004. The large majority of the trades at issue pre-dated April 2004, when Westrock switched clearing firms from UBS to National Financial Services. In their answer, Westrock and Martino denied MS's allegations.

On or about September 20, 2005, MS served on Westrock and Martino a First Request to Respondents for Production of Documents ("Discovery Request"). Among the 23 separately numbered items were requests for "[a]ll the time stamped order tickets entered for [MS]" and copies of "[t]he daily blotters for the days of trades in [MS's] account" for the period November 2001 through December 2004. The Discovery Request further specified that all requests were for "documents," which was defined indirectly, through reference to certain definitions in the Federal Rules of Civil Procedure and the Federal Rules of Evidence, to include both written documents and electronic data compilations from which the requested information could be obtained. MS requested that responsive documents be produced "within 30 days after service of this request." On November 11, 2005, Westrock and Martino claimed during a prehearing conference that they had not received the Discovery Request, and MS e-mailed to them another copy.

On or about February 15, 2006, Westrock and Martino served their initial response to the Discovery Request. In response to MS's request for order tickets, Westrock and Martino responded that "[o]rders are electronic; thus, no such documents exist." In response to MS's request for blotters, Westrock and Martino responded that "[d]ocuments responsive to this request, to the extent that they exist, will be produced."

As of March 16, 2006, Westrock and Martino produced responsive documents, but did not produce order tickets or blotters. On that date, MS filed a motion to compel production of all documents that had not yet been produced. In a letter dated March 20, 2006, MS specifically challenged Westrock's and Martino's purported inability to produce order tickets. In a letter dated March 20, 2006, instead of indicating, as they had stated in February 2006, that the documents either did not exist or would be produced to the extent they exist, Westrock and Martino stated that order tickets and blotters either did not exist or "are not in [our] possession."

On March 30, 2006, the arbitration panel ordered Westrock to produce the requested blotters and order tickets by April 7 and 14, 2006, respectively. The panel further directed that "[i]n the event that [Westrock and Martino] [are] unable to comply with a specific request, on the grounds that the document in question does not exist, [they] shall provide a written affirmation." On April 11 and 12, 2006, Westrock produced some additional documents, but did not produce any order tickets or blotters. The Firm also submitted an affirmation from Martino in which he stated that "[t]o the extent that any responsive documents have not been produced, they either do not exist, or were unobtainable from a third party."

Subsequently, MS complained about the ongoing failure to produce responsive documents, including the order tickets and blotters. In several filings, Westrock and Martino asserted that the bulk of the requested order tickets fell outside the retention period required by Securities Exchange Act of 1934 ("Exchange Act") rules. As to those that fell inside the retention period, they contended that because "the majority of trades . . . were entered electronically and through [the Firm's] former clearing agent [UBS]," there was "no 'ticket' per se," and the records that UBS retained "have been impossible to retrieve during the very limited time frame" established by the arbitration panel's order. With respect to the blotters, Westrock and Martino represented that they "do not possess such documents."

An arbitration hearing was held May 1 through 4, 2006. On May 15, 2006, the arbitration panel denied MS's claim. There is no evidence concerning whether the arbitration panel ever resolved the outstanding discovery disputes, or the extent to which the missing order tickets and blotters were a factor in the arbitration panel's decision.

2. Shapiro's and Slader's Roles in Processing Document Requests and the Discovery Request

During the FINRA investigation that led to this proceeding, Andrew Shapiro ("Shapiro"), Westrock's compliance officer, and Charlene Slader ("Slader"), Westrock's former operations manager, provided testimony and information about their efforts to respond to the Discovery Request.

a. Shapiro

Shapiro joined Westrock in September 2004. Shapiro testified that his responsibilities included "responding" to arbitration discovery requests and FINRA requests for information. Shapiro testified that he followed certain procedures when processing requests for documents. He would "get a list" of specific requests. Where a discovery request was involved, Shapiro testified that the list would "[t]ypically" be something that Westrock's counsel prepared, rather than the "original request." With all request lists that he processed, Shapiro would assign each specific request to a specific person, give each such person a copy of the list, and instruct that any responsive documents be provided to him by a deadline. Shapiro explained that he would assign requests for order tickets and blotters to Slader. Shapiro testified that he would "typically" forward any responsive documents that he received to Westrock's attorneys, and that "[i]t's up to the attorney[s]" to decide what to do with such documents. When responding to a FINRA request for information, Shapiro would sometimes forward responsive documents directly to FINRA.

Shapiro stated that Slader was the "best" person to explain where Westrock maintained order-related documents, but he did offer his own understanding. Shapiro believed that order tickets dated prior to April 2004, when Westrock switched clearing firms from UBS to National Financial Services, were maintained at Westrock's "warehouse." Shapiro added that, at some point between April 2004 and September 2004, Westrock adopted an electronic order entry system that would not generate a "physical order ticket," but that would keep an "electronic record." He indicated that such electronic record would include "things like the exact commission" and "a time stamp of the execution," but that it would not contain "a broker's handwriting." As for blotters, Shapiro's understanding was that such documents were "typically" located "at the clearing firm." He added, however, that UBS "did not maintain blotters" but had the ability to "recreate[ ]" documents called "playbacks" that "could be considered 'blotters' and/or order tickets." To locate order-related documents, Shapiro understood that Slader would retrieve and review boxes stored in a warehouse.

Shapiro also testified about his own involvement in processing the Discovery Request. When shown a copy of the Discovery Request, Shapiro stated that he did not believe he had seen the request "in th[at] form." Shapiro did recall receiving "a request" with "a list of items on it." Shapiro did not address whether that list was substantially the same as the Discovery Request. Shapiro testified that he assigned "the bulk of" the list to Slader. Shapiro could not recall, however, whether Slader had found any responsive documents, but he "assume[d] that she did" and stated that any documents that she gave to him were turned over to Westrock's lawyers.

b. Slader

Slader worked for Westrock from summer 2001 until October 2006, and began reporting to Shapiro in September 2004. Slader's superiors began referring to her as "operations manager." Throughout her tenure, Slader handled "administrative type work," including maintaining the Firm's archives and gathering documents that were responsive to certain document requests.

Slader explained that, on a daily basis, she received "hard copy order tickets" and printouts that she called "playbacks." Slader asserted that a playback contains "the details of an order after you have entered it" and "the same information that was on the order ticket." Slader "guess[ed]" that "the clearinghouse" was involved in creating the playbacks that were printed in Westrock's offices. As for blotters, Slader claimed that Westrock "did not have anything that could be considered an organized trade blotter" during the period when the Firm cleared through UBS. Slader testified that the order tickets and playbacks would be placed in envelopes labeled by date, that the envelopes would be maintained in boxes, and that, at some point in 2006, she moved almost all such archived materials "to an offsite storage facility."

Slader also provided information concerning her efforts to respond to document requests in general and the Discovery Request.[2] Slader explained that, when assigned to gather order-

---

[2] The parties dispute the extent to which Slader addressed at her on-the-record interview with FINRA staff her efforts to respond to the Discovery Request. We agree with Westrock that Slader's investigative testimony related almost entirely to her efforts to process an August 29,

[Footnote continued on next page]

related materials, she "would review [the document request] with [Shapiro]," receive a deadline from either Shapiro or Martino, and search the "archives" for responsive documents. Slader did not recall ever seeing the actual Discovery Request. Slader also claimed that she was unaware of when exactly the arbitration took place. Slader did recall that while the arbitration was pending, Shapiro had asked her to search for order tickets and blotters. She recalled that her search was "a tedious and time consuming process," and that she "would have requested boxes from storage."

Slader recalled locating some order tickets and giving copies of them to Shapiro. She did not recall, however, how many order tickets she found or how long it took her to find the first one. As for the requested blotters, Slader asserted that, because most of the relevant trades occurred when Westrock cleared through UBS, there were no blotters. With respect to the playbacks, in a December 2006 written statement and in her May 2007 investigative testimony, Slader recalled that she "cop[ied] . . . playbacks and provided these documents to Mr. Shapiro." However, in a May 2007 written statement, Slader stated that she did not recall whether she searched for playbacks.

B. Enforcement's First Request for Order Tickets and Blotters

In a letter dated August 29, 2006, FINRA's Department of Enforcement ("Enforcement") informed the Firm that it was reviewing the Firm's "compliance with . . . books and records requirements." Pursuant to NASD Rule 8210, Enforcement requested that Westrock produce order tickets for six specific trades and daily blotters for six specified trade dates identified in MS's statement of claim ("Enforcement's First Request"). The documents that Enforcement requested were a subset of the order tickets and blotters that MS had requested.

Under a cover letter dated September 14, 2006, Shapiro produced to Enforcement four of the order tickets and four documents that were responsive to Enforcement's request for blotters.[3] Shapiro informed Enforcement that he was "working with [his] Operations Manager" to inventory Westrock's archived materials and investigate whether the missing documents had been inaccurately filed. In a letter dated November 15, 2006, Shapiro informed Enforcement that the missing documents had not been located and that he had "made direct inquiries for these [missing documents] from UBS." On December 19, 2006, Shapiro provided to Enforcement "'restored' records or 'playbacks' and a 'log' of order memorabilia," which Shapiro stated were obtained from UBS and contained the same information that would have been on the missing order tickets and blotters. On January 5, 2007, Shapiro provided to Enforcement copies of the two missing order tickets, which Westrock had located while working on an unrelated

---

[cont'd]

2006 request from Enforcement for order tickets and blotters (discussed in detail below), not the Discovery Request.

[3] The parties stipulated that the documents produced in response to Enforcement's First Request included "blotters." It is not clear, however, whether the documents that Westrock produced on September 14, 2006, included actual blotters, playbacks, or something else.

examination. Shapiro represented that there were irregularities in the way both missing order tickets had been filed.

During FINRA's investigation, Shapiro and Slader testified about their roles in processing Enforcement's First Request.

1. Shapiro

Shapiro testified that he assigned FINRA's First Request to Slader. Shapiro testified that Slader was able to retrieve all but two of the blotters and two of the order tickets but, at some point, reported that she could not locate the missing documents.

Shapiro claimed that he asked Slader if she had "looked thoroughly," and that Slader told him that she had. Shapiro testified that he "expressed [his] frustration . . . and asked [Slader] to follow up within the confines of the deadline." Shapiro did not, however, ask Slader for a "detailed explanation" about why she could not locate the missing documents, stating that Slader was "pretty diligent and meticulous," had "been there for six years," is "college educated and capable," and that he "take[s] [Slader] at her word." Shapiro testified that he did not know if Slader had contacted any external parties, like UBS, to obtain the missing documents.

Shapiro stated that he did not initially make any independent search because "[S]lader . . . knows where everything is" and "I would be fumbling in the dark." Shapiro further testified that, after receiving "follow up letters" from FINRA, he called UBS and was able to obtain "remanufacture[d]" responsive records within a few weeks. Shapiro testified that, a few months later, Westrock found the two missing order tickets, when Shapiro asked an unidentified "assistant" to re-search the boxes in which the missing order tickets should have been located.

2. Slader

Slader recalled that Shapiro provided her with a copy of Enforcement's First Request. She explained that, to locate responsive documents, she retrieved from storage at least 50 boxes that correlated to the dates of the requested order tickets and blotters. Slader testified that "there were no trade blotters" and that she instead searched for and provided playbacks. Slader testified that she found "some" of the requested items and gave photocopies to Shapiro. Slader stated that she did not have to contact UBS to gather any documents.

Slader recalled that Shapiro asked her to keep searching for the missing items but gave no directions on where to look. Slader explained that she "ordered more boxes." Slader testified that she was able to locate some of the missing documents because they had been "misfiled." Slader did not recall if she ultimately found all of the documents requested by Enforcement.

C. Enforcement's Second Request for Documents

On April 23, 2008, Enforcement requested, pursuant to NASD Rule 8210, that Westrock produce order tickets and daily blotters for the 56 trades that MS had identified in his statement of claim ("Enforcement's Second Request"). In an attachment, Enforcement identified each of the 56 such trades by security, quantity, date, and whether it involved a purchase or a sale. The dates of the 56 trades ranged between January 24, 2002, and September 2004. Fifty-three of the trades were dated prior to April 2004.

On May 20, 2008, Westrock provided to Enforcement: (1) a CD-ROM that contained copies of documents that were responsive to most of the Enforcement's requests; and (2) paper copies of two order tickets that Westrock had located.[4] In the same mailing, Westrock provided to Enforcement a written statement from Kunjan Sheth ("Sheth"), an assistant compliance officer, who had the primary responsibility for gathering the documents requested in Enforcement's Second Request.

Sheth wrote that, for a variety of reasons, it had taken her "slightly more than 100 hours to gather this data over the last few weeks." With respect to the order tickets, Sheth explained that, although MS's registered representative had the ability to enter trades electronically through his terminal, Sheth was able to find most of the requested order tickets in paper form. Specifically, Sheth located handwritten order tickets for all but 12 of the trades identified by Enforcement.

With respect to the requested blotters, Sheth produced 32 documents that she called "blotters" and six "dot matrix executions" that appeared to cover all but ten of the trades at issue. Sheth asserted that she had "considerable difficulty" locating the blotters, explaining that most of the trades occurred when Westrock cleared through UBS, that Westrock's "former Compliance Director . . . kept the physical blotters in his office," and that "[s]ome of those blotters are now missing." Sheth further explained that, where she was unable to locate a blotter, she instead produced "dot matrix executions," but "only for the trade[s] in question, not a whole day of trading execution." Sheth did not explain where she found the order tickets, "blotters," and dot matrix executions.

III. Procedural History

On June 5, 2008, Enforcement filed a one-cause complaint alleging that Westrock failed to produce documents in its possession or control in response to the Discovery Request and the arbitration panel's order, in violation of NASD Rule 2110 and IM-10100. Westrock filed an answer, in which it admitted that it had not located or produced certain documents that MS had requested prior to the arbitration hearing, but denied engaging in the alleged violations and advanced a number of affirmative defenses.

In August 2008, the Hearing Officer issued an original and revised scheduling order that included a hearing. On November 24, 2008, the parties filed a joint motion in support of a revised schedule. Representing that they had "agreed to stipulate to certain facts and evidence on the issue of liability and to limit this proceeding to a determination of appropriate sanctions," the parties "expressly waive[d] their right to a hearing." The Hearing Officer granted the joint

---

[4] In stipulations, the parties agreed that Westrock's response to Enforcement's Second Request included documents that were responsive to the request for blotters. There is no evidence, however, concerning whether the produced documents were actual blotters, playbacks, or something else. Each document consisted of a printout titled "Daily Commission Report" that listed daily securities transactions by registered representative.

motion, canceled the hearing, established a new schedule for submitting stipulations, exhibits, and written submissions, and ordered that the proceeding "be decided on the written record."

On May 6, 2009, the Hearing Panel issued a decision finding that Westrock had "failed to produce documents in its 'possession or control as directed pursuant to provisions of the NASD Code of Arbitration Procedure,'" in violation of NASD Rule 2110 and IM-10100. The Hearing Panel censured the Firm and fined it $35,000. Westrock appealed.

IV. Discussion

IM-10100 provided that "[i]t may be deemed conduct inconsistent with just and equitable principles of trade and a violation of [NASD] Rule 2110 for a member or person associated with a member to: . . . (c) fail . . . to produce any document in his possession or control as directed pursuant to provisions of the NASD Code of Arbitration Procedure." We affirm the Hearing Panel's findings that Westrock violated NASD Rule 2110 and IM-10100.

Both the Discovery Request and the arbitration panel's order directed Westrock to produce copies of time-stamped order tickets and daily blotters covering trades in MS's account from November 2001 through December 2004. The Discovery Request and the arbitration panel's order were consistent with, and pursuant to, the NASD Code of Arbitration Procedure. *See generally* NASD Rule 10321 (governing discovery in arbitration proceedings in arbitrations filed prior to April 16, 2007). As Westrock's efforts to respond to Enforcement's First and Second Requests show, Westrock had in its possession and control many of the order tickets and blotters (or an adequate substitute in the form of playbacks or "daily commission reports") that it was directed to produce in the arbitration, but it did not produce them. Such actions violated NASD Rule 2110 and IM-10100.

Although Westrock conceded liability before the Hearing Panel, its arguments on appeal suggest that it challenges the Hearing Panel's liability findings. To the extent it does so, however, its arguments lack merit. For example, Westrock argues that a violation of IM-10100 and NASD Rule 2110 requires a showing that it affirmatively "withheld" documents or "failed to search for responsive documents." Intent, however, is not a required element for a violation of NASD Rule 2110. *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *18 (Feb. 10, 2004); *Eliezer Gurfel*, 54 S.E.C. 56, 63 (1999), *petition for review denied*, 205 F.3d 400 (D.C. Cir. 2000). Moreover, nothing in IM-10100 or NASD Rule 2110, or in authorities interpreting these provisions, provides that proof of a respondent's election to withhold responsive documents or failure to conduct a diligent search is required to demonstrate a violation, or that proof of a respondent's good faith search for responsive documents excuses such a violation. *See Dep't of Enforcement v. Josephthal & Co.*, Complaint No. CAF000015, 2002 NASD Discip. LEXIS 8, at *7-8 (NASD NAC May 6, 2002) (holding that proof of bad faith is not required to show that a firm violated its obligation to produce responsive documents in arbitration, and that proof of good faith is not relevant to whether a violation occurred).

Westrock also argues that the documents it failed to produce "had no affect [sic] on the outcome of the arbitration."[5] *See Josephthal*, 2002 NASD Discip. LEXIS 8, at *8 n.1 (holding that an arbitration party's failure to produce a document as directed by an arbitration panel may not rise to a violation of NASD Rule 2110 if the "action was of insufficient consequence"). There is, however, no such showing here. Order tickets are expressly "discoverable" in unauthorized trading cases and must be produced, irrespective of whether an arbitration claimant requests them. *NASD Notice to Members 99-90* (Nov. 1999) (*Discovery Guide*). This is for good reason. Order tickets can provide highly relevant information in unauthorized trading cases, including the times an order was received and executed, whether the orders were solicited or unsolicited, and whether any irregularities appeared on the order tickets. Westrock did not demonstrate that any documents it did produce contained all of the information that would be found on an order ticket. Moreover, there is no evidence concerning why the arbitration panel dismissed MS's claim, or whether, if at all, the missing order tickets and blotters were a factor in the decision.

Westrock also suggests that the arbitration panel gave it inadequate time to locate the responsive documents. That argument ignores, however, that Westrock had notice of its discovery obligations when MS served the arbitration claim and the Discovery Request, which occurred *months* before the arbitration panel issued its order. *See NASD Notice to Members 99-90* (requiring parties in arbitration cases involving unauthorized trading allegations to produce order tickets "not later than thirty days from the date the answer is due or filed, whichever is earlier") (footnote omitted).

Thus, we conclude that Westrock's various challenges to the liability findings are inadequate. Accordingly, we find that Westrock failed to produce documents in its possession and control as directed pursuant to the NASD Code of Arbitration, in violation of NASD Rule 2110 and IM-10100.

V. Sanctions

For Westrock's violation, the Hearing Panel censured Westrock and imposed a $35,000 fine. For the reasons set forth below, we find that stronger sanctions are needed to remedy Westrock's violation.

The FINRA Sanction Guidelines ("Guidelines") do not specifically address a firm's failure to comply with a discovery request or an arbitration panel's order to produce documents. Instead, we look to the Guidelines' General Principles Applicable to All Sanction Determinations ("General Principles") and Principal Considerations in Determining Sanctions ("Principal Considerations"), as we did in an analogous case. *See Josephthal*, 2002 NASD Discip. LEXIS 8, at *14-15, 22. The General Principles provide that "[a]djudicators should

---

[5] In this regard, Westrock claims that "all of the disputed trades were verified through . . . confirmations, account[ ] statements and testimony of both [MS] and the subject broker," and that the dismissal of MS's claim "within a week of the hearing is strong evidence that [the order tickets and blotters] were irrelevant."

tailor sanctions to respond to the misconduct at issue."[6] They also provide that "[d]isciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall standards in the securities industry."[7]

With those principles in mind, we start by considering the import of the regulatory responsibilities at issue. A member firm's compliance with its discovery obligations in arbitrations is a critical component of the FINRA arbitration forum. "Discovery abuse hinders the efficient and cost-effective resolution of disputes . . . , and undermines the integrity and fairness of the [arbitration] forum." *NASD Notice to Members 03-70* (Nov. 2003). The need to ensure the integrity of the arbitration forum is heightened considering that many broker-dealers require that customers seeking to open accounts agree to arbitrate account disputes, typically in a forum sponsored by a self-regulatory organization. *NASD Notice to Members 05-09* (Jan. 2005). A party's noncompliance with its discovery obligations is not an "acceptable part of arbitration strategy." *NASD Notice to Members 03-70.*

There are numerous aggravating factors in this case. Westrock was able to locate and produce many (if not all) of the order tickets and blotters (or an adequate substitute in the form of playbacks or daily commission reports) requested by MS when Enforcement requested them, in relatively short periods of time. Its failure to apply the same efforts when processing the Discovery Request—by itself—creates an inference that Westrock was willfully indifferent to its obligations to respond to MS's Discovery Request and the arbitration panel's order.

That inference is even stronger given the dubious manner in which Westrock responded to the Discovery Request. For example, during the arbitration, Westrock inaccurately represented that the requested order tickets covered orders that were entered electronically. It is simply not believable, however, that Westrock could have been mistaken about something as basic and fundamental as whether it maintained its order tickets in paper or electronic form. Moreover, Westrock's responses during the arbitration evinced an ignorance of the content of the Discovery Request itself. Westrock's initial response was that the requested order tickets did not exist because the underlying orders were placed electronically, but the Discovery Request was broad enough to capture electronic order tickets. Likewise, in a subsequent response, Westrock informed MS that most of the requested order tickets fell outside the required retention period, but a significant portion of the orders outlined in the arbitration complaint fell within the retention period.

Further aggravating Westrock's conduct, there is no evidence that Westrock had developed reasonable supervisory procedures or controls for its processing of discovery requests.[8] For example, there is no evidence that the Firm made Shapiro and Slader fully aware

---

6 *FINRA Sanction Guidelines* 3 (2007) (General Principles Applicable to all Sanction Determinations, No. 3), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

7 *Id.* (General Principles Applicable to all Sanction Determinations, No. 1).

8 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 5).

of the documents MS was requesting. Neither Shapiro nor Slader recognized or recalled seeing the original Discovery Request, and there is no evidence that the Firm informed them that the Discovery Request broadly defined "documents" to encompass electronic records. Likewise, although Slader would typically search archived boxes—and possibly did so here—the Firm offered no evidence concerning whether Slader shouldered and fulfilled the other responsibilities that were needed, in this case, to conduct a diligent search for responsive records.[9] In addition, the Firm failed to demonstrate that Shapiro, the compliance officer and the person whom the Firm chose to supervise Slader's search for responsive order tickets and blotters, was capable of doing so.[10] The result of these evidentiary gaps is that the Firm has not shown that it had sufficient controls in place to ensure that it processed discovery requests properly and comprehensively.[11]

Moreover, the Firm did not properly implement appropriate supervisory controls.[12] Westrock argues that Slader reported that the requested order tickets and blotters either did not exist or were unobtainable from a third party, that it "relied in good faith" on what Slader "reported," and that it "had no reason to believe" that Slader's search was "deficient." As an initial matter, there is no evidentiary support for the Firm's assertion about what Slader reported. But even if Slader did report that the requested documents did not exist or were unobtainable, the Firm had numerous warning signs that she had not conducted an adequate search for responsive documents:

- The Exchange Act required Westrock to create and maintain most of the order tickets and all of the blotters that MS had requested, regardless of whether such orders were placed

---

9 Here, such responsibilities would have included: (1) researching the specific dates of responsive order tickets and blotters within the range of dates that MS specified; (2) attempting to obtain, from either in-house sources or from a clearing firm, electronic records of order tickets, playbacks, or daily commission reports, in the event that physical order tickets, blotters, or playbacks could not be found in the archives; and (3) reviewing MS's complaints about the Firm's discovery production.

10 Until Shapiro personally contacted UBS, his understanding of Westrock's maintenance of order-related documents was based only on information that Slader had told him, rather than any direct personal knowledge. Shapiro also did not know "the actual route that [Slader] takes to locate the documents." And when Slader was unable, at first, to locate two order tickets and blotters in response to Enforcement's First Request, Shapiro simply "[took] her at her word," did not ask for a "detailed explanation," and did not conduct an independent search, explaining that he "would be fumbling in the dark."

11 Because there is no evidence that the Firm had developed adequate supervisory controls, Westrock's argument that it did not "deviate[ ]" from its normal procedures in processing the Discovery Request is not mitigating.

12 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 5).

electronically.[13] For the first two years of the required retention periods, Westrock was required to preserve the order tickets and blotters "in an easily accessible place." Exchange Act Rule 17a-4(a), (b). Thus, the Firm's purported inability to locate the requested documents would have meant that the Firm may have been in violation of these books and records provisions. This purported inability should have caused Westrock to be concerned about the adequacy of Slader's search.

- On March 20, 2006, after Westrock claimed that order tickets did not exist because they had been entered electronically—which was factually incorrect—MS correctly alerted Westrock that "[r]egardless of whether the orders were placed electronically, [Westrock and Martino] would still be able to produce an electronic version of an order ticket or a document that contains the information that would be contained on an order ticket."[14]

- On various dates from March 20 through April 24, 2006, the Firm represented that the blotters either did not exist or were not in the Firm's possession. While it remains unclear whether actual blotters existed, the Firm should have known that playbacks or daily commission reports—which the parties appear to agree were a substitute for the blotters— either were maintained in-house or were available by request from UBS.

- On April 12, 2006, after Martino submitted his affirmation claiming that any documents not produced "do not exist or were unobtainable from a third-party," MS complained that Martino was "silent about what efforts [he] made of third parties to obtain documents," including whether he contacted the Firm's clearing firm "to ask for the electronic order tickets."

- On April 24, 2006, after Westrock implied that it had not produced any responsive order tickets because most of them purportedly fell outside of the three-year retention period—which was factually incorrect—MS justifiably questioned, "[i]f [Westrock and Martino]

---

[13] *See* Exchange Act Rule 17a-3(a)(1) (requiring every registered broker or dealer to make "[b]lotters . . . containing an itemized daily record of all purchases and sales of securities"); Exchange Act Rule 17a-3(a)(6)(i) (requiring every registered broker or dealer to make "[a] memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities," and contemplating the situation where the "memorandum of each brokerage order" is generated by an "electronic system" into which orders are entered); Exchange Act Rule 17a-4(a) (requiring that blotters be preserved for at least six years); Exchange Act Rule 17a-4(b)(1) (requiring that memoranda of brokerage orders be preserved for three years).

[14] Indeed, Shapiro testified that Westrock: (1) had the ability to obtain "electronic records" of orders placed electronically; and (2) to obtain from UBS—which cleared most of the trades at issue—recreated documents that show the same information that would have been on an order ticket or blotter.

feel [MS] is only entitled to those order tickets entered three years prior to [the date of the Discovery Request], then why haven't we received any of these order tickets."

The Firm made no showing that it meaningfully responded to these various warning signs. For example, the Firm did not demonstrate that it ever inquired into the extent of Slader's search; conducted an independent search; attempted to obtain electronic order tickets or daily commission reports; or promptly contacted its clearing firm to obtain playbacks.[15] *Cf. Edwin Kantor*, 51 S.E.C. 440, 447 (1993) ("Red flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review.").[16] The need for such steps was further bolstered considering that, as the Firm concedes on appeal, Slader "may have been ill-equipped to handle" the Discovery Request.[17]

Given all of the above-described facts and circumstances, we conclude that Westrock was willfully indifferent to its obligations to respond to the Discovery Request and the arbitration panel's order. In sum, we agree with the Hearing Panel that "Westrock took its responsibility to provide documents to an arbitration claimant much less seriously than its duty to provide documents to Enforcement staff," and that Westrock demonstrated "a complete disregard for its discovery obligations in a customer arbitration."

We assign some limited mitigation to Westrock's acceptance of some level of accountability by conceding liability below. Westrock argues that it is also mitigating that its conduct caused no harm to the investing public.[18] There is no evidence, however, concerning whether the Firm's violation resulted in injury to MS. The arbitration panel dismissed MS's claim, but nothing in the record shows the extent to which MS was or was not prejudiced by his lack of access to the order tickets and blotters. *Cf. Josephthal*, 2002 NASD Discip. LEXIS 8, at *18 (considering as part of a sanctions determination whether the arbitration panel considered a

---

[15] Judging by Westrock's correspondence during the arbitration, Westrock may have attempted to contact UBS, but not until after the arbitration panel issued its order. That was unreasonably late, given that the arbitration panel's order came more than nine months after MS's claim was filed and six months after MS had made the Discovery Request.

[16] Martino's summary assertion that the Firm undertook a "diligent search" is of no evidentiary value, considering that he offered no further explanation. *Cf. NASD Notice to Members 99-90* (requiring that an affirmation that no responsive documents exist "describe the extent of the search").

[17] The character of Westrock's violation also is aggravating, considering that Westrock failed to produce two categories of requested documents, one of which was expressly discoverable per the Discovery Guide. *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 18) (directing that adjudicators consider the "number, size, and character of the transactions at issue").

[18] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 11).

withheld document "essential to its ability to reach a judgment"); *NASD Notice to Members 99-90* (explaining that adverse inferences may, in certain circumstances, be drawn against a firm that fails to produce documents or information as required).

We reject both Enforcement's argument that the Firm's disciplinary history is an aggravating factor, and the Firm's counter-argument that its lack of a history of disobeying discovery orders, or other orders of an arbitrator, is mitigating.[19] While the Firm has several disciplinary events, none involves failing to produce documents requested in arbitration proceedings or similar violations. *Cf. Josephthal*, 2002 NASD Discip. LEXIS 8, at *22 (finding that there was "no relevant disciplinary history" because "[t]he record contains no other instances of [respondent] failing to obey an arbitrator's order"). A member firm, however, "should not be rewarded for acting in accordance with [its] duties" as a member of the securities industry. *Dennis Todd Lloyd Gordon*, Exchange Act Rel. No. 57655, 2008 SEC LEXIS 819, at *66 (Apr. 11, 2008).

Westrock's suggestion that its purported post-violation adoption of certain corrective procedures is mitigating is unpersuasive. In its brief, Westrock asserts that "in specific response to what happened in this case, Westrock requires that all discovery be coordinated and supervised by a [general securities principal]." A member firm's employment of "subsequent corrective measures" to revise general or specific procedures to avoid the recurrence of misconduct can be mitigating, but only where the firm does so "prior to detection or intervention . . . by a regulator."[20] *Cf. Gordon*, 2008 SEC LEXIS 819, at *68 ("Remedial action taken after the initiation of an examination has little mitigative value."). Here, there is no evidence that Westrock adopted any corrective measures in response to the events at issue, let alone that it did so prior to FINRA initiating its examination.[21]

Westrock also argues that it is mitigating that it "substantially complied with voluminous discovery demands in the . . . arbitration" and "produced 21 out of 23 categories of documents." Where a respondent member firm "can demonstrate that the misconduct at issue was aberrant or not otherwise reflective of the firm's historical compliance record," such a fact can be mitigating.[22] Westrock, however, failed to make such a showing. The fact that Enforcement's complaint relates to only two of MS's 23 specific discovery requests says nothing about the

---

19 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 1). On appeal, Enforcement requests that we take official notice of Central Registration Depository ("CRD"®) records concerning Westrock's disciplinary history. Westrock did not oppose that request. We take official notice of these CRD records.

20 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 3).

21 Nothing in this decision is intended to imply that a member firm must assign the front-line responsibility of locating responsive documents to general securities principals or general securities representatives.

22 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 16).

extent to which Westrock complied with the Discovery Request. Moreover, MS raised complaints about several of Westrock's responses to his discovery requests, and there is no indication whether the arbitration panel ever resolved those other complaints or any independent proof that Westrock's responses were sufficient. We also note that Westrock provided certain responsive documents well after all applicable deadlines had expired.

Westrock also suggests that the record demonstrates that responding to the Discovery Request was not a simple task, and that that is somehow mitigating. Even if responding to the Discovery Request would have involved significant efforts, that does not address why the Firm failed to produce a single order ticket or blotter during the several months it was on notice of its discovery obligations.

Finally, Westrock asserts that discovery abuse in FINRA arbitrations is "not a rampant problem," and that there is no need to impose a sanction that achieves general deterrence. We disagree that general deterrence is not among the appropriate purposes to be served by the sanctions we impose. The Guidelines expressly provide that adjudicators should design sanctions that, among other things, "are significant enough . . . to deter others from engaging in similar misconduct."[23] Moreover, federal courts of appeals have confirmed that general deterrence "may be considered as part of the overall remedial inquiry." *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (citing *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)). Thus, while our primary purpose is to prevent and discourage Westrock from engaging in similar violations in the future, we also have considered whether the sanctions sufficiently impart to FINRA's membership the importance of complying with arbitration discovery obligations, particularly in light of FINRA's expressed concern in the past about the rise of discovery abuse. *See NASD Notice to Members 03-70*.

* * * * *

Considering all of the facts and circumstances described above, stronger sanctions are needed to remedy Westrock's violation. Accordingly, we impose on Westrock a censure and a $50,000 fine. Such a fine is significant enough to deter Westrock from failing in future arbitrations to comply with discovery requests and discovery-related orders, and to impart to Westrock and the membership the importance of cooperating in the arbitration discovery process.[24]

---

[23] *Id.* at 2 (General Principles Applicable to All Sanction Determinations).

[24] Westrock argues that any sanction should be less than the $10,000 fine and censure that were imposed in *Josephthal*, which Westrock claims involved more serious conduct. The appropriate sanction, however "depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings." *Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997), *petition for review denied*, 168 F.3d 478 (3d Cir. 1998).

VI. Conclusion

Accordingly, we find that Westrock failed to produce documents in response to an arbitration claimant's discovery request and an order of an NASD arbitration panel, in violation of NASD Rule 2110 and IM-10100. For that violation, we censure Westrock and fine it $50,000.[25] We also impose appeal costs of $1,600.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith
Senior Vice President and Corporate Secretary

[25] We also have considered and reject without discussion all other arguments advanced by respondent.

Pursuant to FINRA Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment.