UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

Troy Mertz,	:	
v.	:	CFTC Docket No. 13-E-01
CME Group Inc., Market Regulation Department.	:	OPINION & ORDER

Troy Mertz ("Mertz") appeals a final order of the CME Group, Inc. ("CME") disciplining him for violating Legacy CME Group Rule 432, which prohibits fraud, bad faith, or conduct inconsistent with just and equitable principles of trade. This is the second time this appeal is before us. Based on the initial briefs in this matter, it was unclear whether CME provided Mertz sufficient notice that his post-closing resolution of certain "outtrades"[1] could subject him to liability in the pending disciplinary proceeding, and, if not, whether he suffered any prejudice. Accordingly, we requested supplemental briefs to clarify those issues. *See Mertz v. CME Grp. Inc.*, No. 13-E-01, 2014 WL 495629, at *1 (CFTC Jan. 3, 2014). Both parties filed supplemental briefs, and CME requested an opportunity to respond to Mertz's factual claims of prejudice. This request was granted. Considering all the facts and circumstances of this case, we conclude that although better notice could have been provided, Mertz received sufficient notice of the charges against him. In any event, Mertz has failed to demonstrate that he suffered any prejudice

[1] An "outtrade" is "[a] trade that cannot be cleared by a clearing organization because the trade data submitted by the two clearing members or two traders involved in the trade differs in some respect (e.g., price and/or quantity)." *CFTC Glossary*, U.S. Commodity Futures Trading Commission, http://www.cftc.gov/consumerprotection/educationcenter/cftcglossary/glossary_o (last visited Mar. 7, 2016).

as a result of the notice he received. In addition, we find that Mertz's remaining claims lack merit. We therefore affirm.

Background

A. The Flash-Crash Trades

During the so-called "Flash Crash,"[2] which occurred on May 6, 2010, the market for options on S&P 500 futures experienced extreme volatility. This appeal concerns two orders during that event. The first was a sell order on one thousand September 2010 900 Put Options ("9/2010 Puts"), and the other a buy order on two thousand nine hundred ninety-five May 2010 1050 Put Options ("5/2010 Puts"). F-3-4. Both were market orders. F-3-4. Mertz received these orders, but did not completely fill either: One lot of two hundred fifty 9/2010 Puts failed to clear, as did one lot of one hundred ninety-five 5/2010 Puts. F-3-4. In each instance, the trades did not clear because the trader with whom Mertz claimed to have traded, Eric Ganser ("Ganser") of Citigroup,[3] professed ignorance of these trades. F-4. Mertz assigned both lots to his error account and offset them the next day.[4] F-4. Because of market volatility, Mertz realized significant profits on each transaction: $106,250 from offsetting the 9/2010 Puts and $973,900 from offsetting the 5/2010 Puts. F-4.

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[2] The "Flash Crash" was "one of the most turbulent periods" in the history of U.S. financial markets, characterized by a sharp, sudden collapse of major stock market indices coupled with an equally rapid rebound. *See generally* Andrei Kirilenko, et al., *The Flash Crash: The Impact of High Frequency Trading on an Electronic Market* 1 (May 5, 2014), http://www.cftc.gov/idc/groups/public/@economicanalysis/documents/file/oce_flashcrash0314.pdf; *see also* E-4; F-3.

[3] Mertz had no trades with Ganser for the 9/2010 Puts, C-10-11; *see also* E-23-24, but he did have two 100-lot trades with Ganser that cleared in the 5/2010 Puts. C-35-38; *see also* E-40-46, E-119-29 (further detail on the cleared trades).

[4] All CME floor traders must maintain an error account to which brokerage error trades are assigned. *See* CME Rule 516.

B. CME Proceedings

The CME's Market Regulation Department ("Market Regulation") investigated these transactions and requested that CME's Probable Cause Committee ("PCC") issue formal charges. The PCC determined that Mertz's actions in handling those orders provided a reasonable basis to charge him with several violations of CME rules. Accordingly, the PCC issued a 10-page charging memorandum (the "Charging Memorandum"), which described Mertz's alleged conduct, including conduct that took place after trading in the pit ceased, and charged Mertz with four counts of violating CME rules. The first count charged Mertz with violating CME Rule 527.D.1, governing unfilled or underfilled orders. The remaining three counts all charged violations of CME Legacy Rule 432.B, a catch-all provision, which prohibits fraud, bad faith, or conduct inconsistent with just and equitable trading.[5] The Charging Memorandum did not specifically charge Mertz with violating any other CME rules.

Mertz, represented by counsel, contested those charges at an evidentiary hearing before the CME's Business Conduct Committee ("BCC"). Before the BCC, Mertz highlighted the chaos on the floor during the Flash Crash and argued that he did not intentionally underfill the orders in violation of CME Rule 527.D. Rather, Mertz maintained that he entered into good faith outtrades with Ganser that he properly assigned to his error account pursuant to CME Rule 527.C.

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[5] Count I charged "assigning . . . unfilled or underfilled orders into his error account[,]" in violation of CME Rule 527.D.1. A-11. Count II charged "failing to execute . . . unfilled or underfilled orders in the open market" and "improperly assigning the unfilled or underfilled orders into [Mertz's] error account," in violation of Legacy CME Rule 432.B." A-11. Count III charged "endorsing 250 contracts of the [9/2010] Puts into another member with whom he did not trade, thereby creating an outtrade," in violation of Legacy CME Rule 432.B. A-11. Count IV charged "endorsing 195 contracts of the [5/2010] Puts into a member with whom he did not trade that quantity, thereby creating a quantity outtrade with said member," in violation of Legacy CME Rule 432.B. A-12.

The BCC accepted Mertz's defense in part. It found that Market Regulation failed to prove by a preponderance of the evidence that Mertz intentionally underfilled the orders in the pit during normal trading hours, and therefore found Mertz not guilty on Counts III and IV. F-6. Similarly, the BCC found Mertz not guilty on Count I because Market Regulation did not establish that Mertz was "required to address [the] underfills in accordance with CME Rule 527.D.1." F-6.[6]

However, the BCC concluded that even accepting Mertz's argument that his failed trades with Ganser were outtrades made in good faith,[7] Mertz nonetheless violated CME Rule 432's prohibition on fraud, bad faith or conduct inconsistent with just and equitable principles of trade. The BCC explained that "[t]he difficulty for Mertz is that, even assuming he is correct that these were outtrades, the evidence is clear and uncontroverted that [Mertz] made no effort to comply with the requirements of [CME] Rules [527, 527.A,] 527.B and 527.C[,]"[8] which outline a trader's responsibility in the event he discovers an outtrade, including after trading in the pit has ceased. F-7-8 & n.3. Together, these rules permit the assignment of an outtrade to a member's error account only after the member confers with his erstwhile counterparty and (1) reconciles any discrepancy in the terms of the trade, (2) determines which party will cover the trade, and (3)

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[6] If the erroneous trades were *unintentional* underfills discovered during trading hours, pursuant to CME Rule 527.D.1, Mertz was still required upon discovery to fill the trade in the market, which he did not do. F-7. If the price received in the market was less favorable to the customer, Mertz was required to make the customer whole, and if the price was more favorable, the customer was entitled to the better price. *Id.*

[7] The BCC credited Mertz's testimony that he only learned he had outtrades with Ganser when the two trades did not clear. F-8.

[8] The BCC cited CME Rules 527, 527.A, 527.B, and 527.C to explain in part why Mertz's conduct violated Rule 432.B, the catchall provision. But Mertz was not charged with violating Rules 527, 527.A, 527.B, or 527.C. Instead, the BCC referenced those rules to reject Mertz's defense that the trades at issue were a good faith outtrade, as well as to suggest that Mertz's assignment of the two lots in question to his error account was not done in good faith or consistent with just and equitable principles of trade.

if applicable, apportions the financial results of the outtrade. F-7-8. The BCC explained that burdens of complying with CME Rule 527 "are not onerous," and that these rules "serve an important function in maintaining the integrity of the markets and in protecting customers and members when errors occur in the pit." F-8. In this case, the BCC worried that Ganser may have claimed some or all of the outtrades, and explained that "Mertz had no right to assume" that he could claim all of the trades and their associated profit. F-8-9. It concluded that Mertz's failure to contact Ganser was "inexcusable under any set of circumstances." F-8. The BCC found Mertz's conduct especially troubling because Mertz testified that by the time he assigned the outtrades to his error account, he knew they were "significantly profitable." F-9. In the BCC's view, the profitability of these trades "influenced Mertz's actions," and the BCC concluded that if the trades had been losers, Mertz would have contacted Ganser to avail himself of the protections of Rule 527. F-9. For these reasons, the BCC held that regardless of whether the faulty trades were intentional, Mertz's failure to adhere to the simple, straightforward requirements of CME rules after discovering the problem was "the very essence of conduct inconsistent with just and equitable principles of trade[,]" in violation of Rule 432.B. F-9.

After finding that Mertz violated Rule 432.B, the BCC invited further briefing from Mertz and Market Regulation on an appropriate sanction. In particular, the BCC reviewed "information . . . regarding sanctions issued in prior cases that Market Regulation stated were comparable to the case at bar and Mertz's prior disciplinary history." F-9. Importantly, Mertz "did not contest the evidence submitted by Market Regulation, nor did he submit any independent evidence on the issue of profits realized from the two trades at issue." F-9-10. Based on the record before it, the BCC ordered that Mertz disgorge his profits (totaling $1,080,150) from the two trades, pay a $100,000 fine, and it suspended Mertz's trading

privileges for 30 days. F-10. Mertz exhausted his remedies before CME and filed a timely appeal to the Commission.

C. Our Request for Supplemental Briefing

In an interlocutory decision, we explained that the record raised some questions about whether Mertz received sufficient notice of the charges against him, and, therefore, if the proceedings below had been fundamentally fair. *Mertz*, 2014 WL 495629, at *1-2. We noted, however, that even if notice to Mertz had been deficient, relief was only available if Mertz could show prejudice. *Id.* To clarify the record, we solicited supplemental briefing on the questions of notice and prejudice. *Id.* at *1, *3. Those additional issues are now fully briefed, and the entire appeal is ripe for decision.

Mertz's Arguments on Appeal

Mertz challenges the fundamental fairness of the proceedings before the BCC. He primarily argues that the proceedings below were unfair because he lacked fair notice of the charges against him, in that the Charging Memorandum did not state that the BCC might consider whether Mertz violated rules concerning unintentional outtrades. *See* Troy Mertz's Reg. 9.22 Appeal Br. Pet. to Set Aside Exch. Action, dated Dec. 3, 2012 ("Mertz Br.") at 11-12, 15; *see also id.* at 3 (arguing that Mertz was required "to guess as to how the BCC [would] apply the Rules of the Exchange[,]" and expressing incredulity that the BCC would "focus on actions that occurred after the market closed").[9] Separately, for the first time on appeal, Mertz raises several additional challenges to the fairness of the proceedings before CME. First, Mertz asserts that the proceedings were unfair because, he claims, CME violated the confidentiality of the

[9] Mertz's opening brief lacks page numbers. We excluded the cover page and began numbering the pages with the first full page of text to be consistent with how CME treated the pages of Mertz's brief. *See* Answering Br. of Complainant-Appellee CME Grp. Inc. Mkt. Reg. Dep't, dated Feb. 4, 2013 ("CME Br.") at 18 n.9.

disciplinary process. *Id.* at 32-33. Mertz also contends that he was unfairly targeted for prosecution and that others similarly situated were not charged. *Id.* at 13-14, 18-19. Finally, he argues that proceedings were unfair because he was not provided with certain video tape evidence until close to the hearing and that some of that footage was deleted. *Id.* at 19-20.

In addition, Mertz raises two evidentiary challenges to the BCC's decision. First, he argues that the decision goes against the weight of the evidence, which, he claims, does not support a finding of any violations against him. *E.g.*, *id.* at 8-10, 21-28. Second, Mertz claims that the verdict is internally inconsistent. He argues that he could not have been found guilty of violating Rule 432's prohibition on conduct inconsistent with just and equitable principles of trade charged in Count II, when he was found not guilty of Count I, which charged an improper endorsement of the disputed trades to his error account in violation of CME Rule 527.D.1. Similarly, he argues that the BCC verdict as to Counts III and IV, charging the intentional creation of outtrades in violation of CME Rule 432, indicated that he did not violate that rule in any respect. *See, e.g.*, *id.* at 2-3, 5-6.

Standard of Review

The Commission reviews exchange decisions pursuant to Part 9 of its rules. Under 17 C.F.R. § 9.33(c), the Commission must ensure that "[f]undamental fairness was observed in the conduct of the proceeding[,]" *id.* § 9.33(c)(2), and that there was substantial evidence of a violation of the exchange's rules, *id.* § 9.33(c)(3)(i). The Commission has explained that fundamental fairness requires a fair trial before a fair tribunal. *See Laken v. Chicago Mercantile Exch.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,968, at 37,535, No. 88-E-2, 1990 WL 294183, at *8 (CFTC Dec. 7, 1990); *see also Piccolo v. CFTC*, 388 F.3d 387, 391 (2d Cir. 2004). To meet that standard, among other things, the exchange must give fair notice of the

matters at issue. *Giarritano v. Chicago Mercantile Exch.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,132, at 38,250, No. 88-E-10, 1991 WL 192568, at *3 & n.8 (CFTC Sept. 25, 1991); *Piccolo*, 388 F.3d at 391. Relief is only available if an appellant can show prejudice. *See Jaunich v. Minneapolis Grain Exch.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,597, at 39,865, No. 91-E-8, 1992 WL 309004, at *3 n.9 (CFTC Oct. 16, 1992); *see also generally MBH Commodity Advisors, Inc. v. CFTC*, 250 F.3d 1052, 1064 (7th Cir. 2001).

The Commission reviews an exchange's factual findings for "substantial evidence." *In re First Commodity Corp. of Boston*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,694, at 33,800, Nos. 86-E-4, 86-E-5, 1987 WL 106851, at *8 (CFTC May 29, 1987). In determining whether substantial evidence supports an exchange action, the Commission does not reweigh the evidence. *Jaunich*, 1992 WL 309004, at *3. Instead, the Commission asks whether the record reflects "such evidence as a reasonable mind might accept as adequate to support a conclusion." *In re First Commodity Corp.*, 1987 WL 106851, at *8 (citation and internal quotations omitted); *accord In re Clark & Auciello*, Nos. 96-E-1, 96-E-2, 1998 WL 422570, at *10 (CFTC July 22, 1998); *see also Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

Discussion

A. Fundamental Fairness

Mertz raises a number of arguments challenging the fundamental fairness of the proceedings of the BCC. The notice issue presents a close question. Clearly notice would have been better had the Charging Memorandum stated that, in the alternative, Mertz violated rules related to unintentional outtrades. Ultimately, however, we conclude that BCC's decision to find a violation of CME Rule 432.B on that basis did not render the proceedings fundamentally unfair

and, in any event, even if the notice was deficient, Mertz failed to demonstrate any prejudice. Mertz's other claims of unfairness lack any merit.

Notice. Mertz argues that because Market Regulation consistently framed the trades as intentional underfills that violated CME Rules 432.B and 527, including in the Charging Memorandum, he had inadequate notice of the possibility that the BCC might (and ultimately did) find violations based on unintentional outtrades. Indeed, much of the evidence before the BCC focused on whether the trades at issue were intentional underfills. *See* F-6-7. CME argues that Mertz nevertheless had adequate notice because the factual paragraphs of the Charging Memorandum mentioned Mertz's actions after the close of trading on May 6. CME Br. at 23-24 (citing A-5-8, 10); Suppl. Br. of Complainant-Appellee CME Grp. Inc. Mkt. Reg. Dep't, dated Mar. 5, 2014 ("CME Suppl. Br.") at 2-3. In that context, as CME notes, Mertz himself injected the issue of outtrades, arguing that these trades should be treated as such because they were made and resolved in good faith. CME further points out that in making his case to the BCC, Mertz specifically referenced Rule 527.C, which concerns outtrades. CME Br. at 17, 25, 27-28; E-7-11.

Commission rules require exchanges to furnish their members with notice of pending disciplinary charges. *See* 17 C.F.R. § 8.11 (2010).[10] The notice must, among other things, state the "acts, practices, or conduct in which the person is alleged to have engaged[,]" *id.* § 8.11(a), and "state the rule alleged to have been violated[,]" *id.* § 8.11(b). But the notice requirement in administrative proceedings is lower than other cases, *Flying Food Grp. Inc. v. NLRB*, 471 F.3d 178, 183 (D.C. Cir. 2006), and is relatively easy to satisfy, *Giarritano*, 1991 WL 192568, at *3

[10] Part 8 of the Commission's rules was removed and reserved after the BCC decided this matter. *See* 77 Fed. Reg. 66288, 66304 (Nov. 2, 2012). Current Commission Rule 38.703 continues to maintain the same requirements. 17 C.F.R. § 38.703 (2015).

& n.8; *Katz v. SEC*, 647 F.3d 1156, 1161-62 (D.C. Cir. 2011). Deficiencies in notice can be cured during the course of litigation, including during the conduct of the hearing. *See Abercrombie v. Clarke*, 920 F.2d 1351, 1360 (7th Cir. 1991) ("Administrative pleadings not only may be amended prior to a hearing but also may be clarified during a hearing.") (citing *Swift & Co. v. U.S.*, 393 F.2d 247, 252 (7th Cir. 1968)); *Perez v. Lorraine Enterprises, Inc.*, 769 F.3d 23, 28-29 (1st Cir. 2014); *Clawson v. SEC*, No. 03-73199, 2005 WL 2174637, at *1 (9th Cir. Sept. 8, 2005) (unpublished decision) (citing *Cal. Dep't of Educ. v. Bennett*, 864 F.2d 655, 659 (9th Cir. 1988)).

The notice supplied by the Charging Memorandum in this case was imperfect as to the possibility of charges based on outtrades. On balance, however, we cannot agree with Mertz that the process here was fundamentally unfair. CME is correct that the charging document makes clear that the BCC was going to examine the facts concerning the assignment of the relevant trades, and that Mertz could be liable if he acted fraudulently, in bad faith, or inconsistently with just and equitable principles of trade in violation of Rule 432.B. Once Mertz himself argued that the trades were unintentional outtrades, it was predictable and appropriate for the BCC to look to his compliance with the relevant outtrade rules to see if Mertz's version of the facts would nevertheless constitute a violation of Rule 432.B, which he was charged with violating, in Count II. In any event, as explained below, Mertz was not prejudiced by BCC's deviation from the gravamen of the Charging Memorandum. We base this conclusion in part on Mertz's actions in presenting his defense, some of which also provide objective evidence that Mertz was fairly on notice.

Prejudice. Our precedents require a showing of prejudice before relief can be granted in most instances, *In re Clark & Auciello*, 1998 WL 422570, at *11-12; *Daiwa Sec. Am., Inc. v.*

Chicago Bd. of Trade, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,103, at 41,648-49, No. 93-E-4, 1994 WL 249800, at *5 & n.11 (CFTC June 9, 1994); *Jaunich*, 1992 WL 309004, at *3 n.9, and we see no reason to create an exception here, even assuming Mertz had established that the notice was deficient. Indeed, federal courts will not disturb administrative proceedings on notice grounds unless there is evidence "a party is misled by an administrative complaint, resulting in 'prejudicial error[.]'" *Abercrombie*, 920 F.2d at 1360 (quoting *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971)); *St. Anthony Hosp. v. U.S. Dept. Health and Human Servs.*, 309 F.3d 680, 708 (10th Cir. 2002); *see also generally MBH Commodity Advisors, Inc.*, 250 F.3d at 1064. Despite the opportunity for supplemental briefing, Mertz has failed to make the requisite showing.

Mertz first argues as to the 5/2010 Puts that, with better notice, during the hearing he would have focused on a meeting of himself and Ganser, along with Jake Zsuppon ("Zsuppon") and Pat Carrey ("Carrey"), their respective trade checkers, and called Zsuppon and Carrey as witnesses. Troy Mertz's Suppl. Br. as Ordered by CFTC Unfair Notice and Prejudice, dated Mar. 5, 2014 ("Mertz Suppl. Br.") at 1-2. Mertz contends that this meeting was an effort to resolve his outtrades, fulfilling the requirements of CME Rule 527.C. *Id.* at 3. According to Mertz, Ganser agreed at the meeting to take on 100 additional lots, leaving Mertz with 195 lots.

Mertz's argument fails, however, because both Mertz and CME addressed this meeting during the BCC hearing. Both Mertz and Ganser testified about the meeting, and Mertz presented video evidence of the event. *E.g.*, E-123-24, E-127-33, E-154, E-245-47, E-273-78, E-280-83; *see also* Mertz Suppl. Br. at 1. Ganser testified that he had no recollection of agreeing to apportion a 195 (or 200) lot outtrade with Mertz during either the 2:29 pm meeting or another conversation with Mertz after trading ceased in the pit. E-133-37, E-153-54. Instead, Ganser

testified that he recalled trading 200 lots of the 5/2010 Puts in total: he traded 100 right away and sought a balance trade for all remaining lots, which eventually was confirmed as another 100 lots. Ganser believed this second 100 lots represented the remaining lots that Mertz had yet to trade. E-123-24, E-127-33. Ganser testified he was prepared to accept a considerably larger balance trade and acknowledged that he was bound to do so regardless of losses he could incur.[11] E-130-32, E-265. By contrast, Mertz was equivocal before the BCC, testifying that he "can't be certain" that he and Ganser discussed or resolved any quantity discrepancy at the 2:29 pm meeting. E-245-47. Mertz also testified that he did not remember what was said in the 2:29 meeting, *id.*, and later testified that he did not realize he had an outtrade with Ganser or make an assignment to his error account until *after* the pit had closed. *E.g.*, E-251 ("I still hadn't assigned anything at . . . close [of trading.]"), E-248, E-253, E-276-78. After considering this and other evidence, the BCC rejected Mertz's version of events as not credible and inconsistent with his own testimony. F-8 & n.3.[12] With respect to the prospect of calling Zsuppon or Carrey as witnesses, Mertz has not proffered any indication (much less any evidence) of what testimony he would have elicited.[13] Accordingly, there is no indication that Mertz would have actually

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[11] By the time of the 2:29 meeting, Ganser testified that as a result of market volatility, the trade opposite Mertz for the 5/2010 Puts was profitable and he had "tons of room" before he would incur a loss. E-130.

[12] On appeal, Mertz continues to maintain that that he did not assign any outtrades to his error account until well after closing because he was unsure of whether such outtrades occurred. *See, e.g.*, Mertz Br. at 11, 17. Mertz's supplemental briefs add little new or different information, and fall well short of the threshold necessary to persuade us that the BCC would reach a different outcome.

[13] In fact, BCC panel members expressed an interest in hearing from Zsuppon, but Mertz failed to confer with his own clerk during the pendency of the investigation, E-297-98. Instead, Mertz became standoffish when BCC panel members specifically inquired about Zsuppon's testimony, which was relevant to his good faith defense below and now appears central to his prejudice claim on appeal. *See* E-216. It is hard to credit Mertz's claim of prejudice, since the relevance of the testimony in question was clear at the time – the finders of fact actually inquired about it –

adduced different evidence, and even if he did, we have no reason to believe that such evidence would persuade the BCC to reach a different outcome, especially given the substantial evidence supporting the BCC's factual findings.

Mertz also fails to show prejudice based on deficient notice as to the 9/2010 Puts. Instead, he repeats arguments raised in his opening brief that 30 seconds of missing videotape deprived him of evidence he could use to impeach Ganser. Mertz Suppl. Br. at 4-5. As explained more fully below, Mertz waived these arguments by not preserving them before the BCC, and Mertz suffered no prejudice because other video angles depicting the same time were available and they provided ample basis to support the BCC's factual findings.

More generally, Mertz argues that had he known his good faith and/or compliance with Rule 527.C was in issue below, he would have presented additional evidence attesting to his presence on the trading floor long after the close, his attempts to confer with Ganser during trading hours, and the improbability of Ganser's testimony. *Id.* at 6-7.[14] This is a difficult position to take as Mertz had every incentive to put on such evidence in the first place, since it was Mertz himself who put his good faith in issue. In fact, Mertz did offer such evidence, as did Market Regulation. *Compare* Mertz Suppl. Br. at 1-2, *with* E-245-47. For example, in addition to the specifics discussed above, Mertz presented evidence of his presence on the floor after the close, along with his post-closing consultations with Ganser and his clearing member. *E.g.*, E-171, E-174, E-178, E-247-50, E-273-74. Market Regulation introduced evidence from Ganser that he was not aware of any trade with Mertz involving the 9/2010 Puts until Market Regulation

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and he, while represented by counsel, did not object to these questions, or seek a continuance to protect his rights and obtain testimony from Zsuppon.

[14] In addition, Mertz claims that he would use transcripts of previous Market Regulation interviews with Ganser to refresh his recollection regarding the meeting. The problem for Mertz is that he did in fact refer to these transcripts before the BCC, *see, e.g.*, E-203-04, and they did not persuade the BCC to doubt Ganser's testimony. Mertz therefore suffered no prejudice.

brought this trade to his attention. E-122. The evidence was similar for the disputed 195 lot of the 5/2010 Puts. E-134-35. Ganser testified that he would have traded opposite Mertz for that lot, if he had been aware of it. E-127-34. Mertz also argues that with proper notice, he would have introduced video evidence that he discussed outtrades with Ganser's clerks after the close. Mertz Suppl. Br. at 6. But some such video was introduced into evidence. E-153. To the extent Mertz alludes to additional video, he fails to show that such video exists or describe what the video would depict and how it would contradict the other evidence before the BCC.

Thus, despite the opportunity for supplemental briefing, Mertz has proffered little in the way of additional or different evidence or even that he would have conducted a materially different cross examination. *See Mertz*, 2014 WL 495629, at *3. What little he did put forward falls short of a credible claim that the outcome before the BCC would have been different. Accordingly, Mertz's notice claim fails.

Confidentiality. Mertz claims that Market Regulation violated the confidentiality of the disciplinary process. Mertz Br. at 32-33. He claims that he first learned of a possible action against him in an email from a third party. *See* Mertz Br. Ex B (the email). CME notes that this email is not part of the record below, which ordinarily precludes its consideration on appeal. *See In re Clark & Auciello*, 1998 WL 422570, at *13 (matter not raised before exchange was waived); 17 C.F.R. §9.30 (noting that Commission can treat issues as waived). Moreover, as CME points out, there is no indication of (and it is difficult to conceive of) prejudice from this alleged breach, which would be required to reverse an exchange's disciplinary order. *See Jaunich*, 1992 WL 309004, at *3 n.9; *MBH Commodity Advisors, Inc.*, 250 F.3d at 1064. Accordingly, Mertz's confidentiality claim lacks merit.

Differential Treatment of Mertz and Ganser/Citigroup. Mertz argues that the proceedings were flawed and unfair because Ganser and Citigroup acted similarly to Mertz, but were not charged. *E.g.*, Mertz Br. at 13-16; 18-19. CME notes that this claim was not raised below, and argues that it should be treated as waived. *See In re Clark & Auciello*, 1998 WL 422570, at *13. We agree. In any event, the argument is unavailing as a factual matter because the BCC's decision contains no indication that Ganser or Citigroup violated any CME Rules.[15]

The Video Tapes. Mertz argues that proceedings were unfair because, although some video tapes depicting trading on the floor during the relevant times were made available to him early in the process, other tapes depicting the same activity from different cameras at different angles were not made available until the day before the hearing. Mertz Br. at 19-20. CME responds that because of the extraordinary events of the Flash Crash, standard video deletion policies were not followed and video from additional cameras was in fact preserved. CME Br. at 30. CME states that Market Regulation only became aware of that additional video depicting the trades at issue five days before the hearing and that it notified Mertz and his attorney of the video's existence that same day. *Id.* at 30-31.

CME argues that this issue is waived because Mertz, then represented by counsel, did not raise it below. Mertz has not suggested that he preserved the issue for review. Accordingly, it is waived. *See In re Clark & Auciello*, 1998 WL 422570, at *13. In any event, Mertz has not made a convincing case of prejudice: CME primarily relied on video that it did produce months before the hearing, and Mertz, for his part, actually utilized the later-provided video during the BCC hearing. *See* CME Br. at 31-32; *see also* Mertz Br. at 8-11. We therefore reject this claim.

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[15] In fact, the BCC concluded that Ganser and Citigroup were *not* similarly situated because Mertz failed to inform Ganser about the failed trades or to seek to apportion the results of those trades. That factual finding, which, as described below (*see infra* at pages 17-18) is supported by substantial evidence, disposes of Mertz's claim of disparate treatment.

Mertz also argues that Market Regulation intentionally deleted a portion of the videotape that would be helpful to his defense. Mertz Br. at 29; *see also* Mertz Suppl. Br. at 4-7. However, he points to no evidence suggesting an intentional deletion, nor did he raise such a claim below. CME agrees that there is a "30-second skip on one of the video angles . . . during the filling of the Sept 10 900 Puts," but maintains that this skip was "due to a glitch in the technology . . . ." CME Br. at 31. CME argues that this glitch was harmless because "several more angles showed the exact time period," and the BCC concluded that the video blackout was not relevant. CME is correct that Mertz did not raise this issue below, and it is therefore waived. *See In re Clark & Auciello*, 1998 WL 422570, at *13. In any event, CME largely relied on another video that covered the entire time period, which cured any possible prejudice. *Jaunich*, 1992 WL 309004, at *3 n.9; *MBH Commodity Advisors, Inc.*, 250 F.3d at 1064. We therefore reject this claim both because it is waived and because Mertz has not adduced any evidence of prejudice or spoliation on the part of CME.

In sum, we conclude, based on the whole record, that the proceedings below satisfied 17 C.F.R. § 9.33(c)(2) because Mertz received a fair hearing before a fair tribunal.

B. Sufficiency of the Evidence

Mertz mounts two challenges to the evidence supporting the BCC's decision. He first argues that the BCC's decision goes against the weight of the evidence. He also argues that the BCC's decision is internally inconsistent. We disagree in both respects.

Evidentiary Sufficiency. Among other things, Mertz argues that the BCC mischaracterized testimony, improperly credited Ganser's testimony over his own, and drew unreasonable factual conclusions and inferences. We see no basis to overturn the BCC's factual findings or its decision to credit Ganser's testimony, particularly under the deferential standard

of review, *In re First Commodity Corp.*, 1987 WL 106851, at *8; *accord Dickinson*, 527 U.S. at 162, which is heightened with respect to credibility determinations, *Baker v. Dain Bosworth, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,752, at 31,129, 1985 WL 55280, at *1 (CFTC Sept. 30, 1985).

The BCC's resolution of the disputed issues of fact is supported by evidence in the record that a reasonable mind could rationally accept to draw conclusions adverse to Mertz, thus satisfying the deferential standard of review. *In re First Commodity Corp.*, 1987 WL 106851, at *8.[16] For example, Ganser testified that he first learned that he had outtrades with Mertz only when he was interviewed by Market Regulation. E-118 (9/2010 Puts); E-134-35 (5/2010 Puts). By contrast, Mertz now maintains that he and Ganser resolved quantity issues with respect to the 5/2010 Puts either around 2:29 pm or alternatively after the close, even though his testimony before the BCC was more equivocal. *See* E-245-47. And Mertz conceded below that he did not contact Ganser and offer him an opportunity to cover the 195 lot outtrade on the 5/2010 Puts, which were profitable, which suggests Ganser's testimony was credible. *See, e.g.*, E-305; *see also* E-137 (Ganser testifying that Mertz did not offer the 195 lots of 5/2010 Puts). Nonetheless, Mertz suggested that he would have asked that Ganser cover this outtrade if faced with a loss. *E.g.*, E-298-300. Ganser, however, maintained that, as to the 5/2010 Puts, he would have traded the remaining balance of the order, regardless of whether it was profitable. E-123-24, E-127-32.[17] (Ganser consistently maintained that he never traded the 9/2010 Puts with Mertz.) In sum,

[16] As CME correctly points out, many of the key facts in this case, such as the identity of the traders, the size of the outtrades, Mertz's profits, and the reason the two disputed trades did not clear, were undisputed. CME Br. at 15-16.

[17] Mertz now suggests that the BCC should not have accepted Ganser's testimony regarding a balance trade because Ganser was subject to risk limits on his trading that would have prevented him from trading the full 400 lots of 5/2010 Puts. Mertz Br. at 13. Mertz did not make this argument below, and it is therefore waived. *See In re Clark & Auciello*, 1998 WL 422570, at

based on the whole record, we are satisfied that the BCC's factual determinations of contested questions, such as whether Mertz made any attempt to contact Ganser or otherwise reconcile the trades, the consistency and credibility of Ganser's testimony, and the possibility of a windfall,[18] are supported by substantial evidence. No more is required under the applicable standard of review.

BCC's Consistency. Mertz argues that the BCC's not guilty finding as to Count I (improper assignment violating Rule 527.D) necessarily meant that the assignment was valid. If the assignment was valid, Mertz argues, the guilty finding on Count II, which was based on the assignment of the trades to his error account in bad faith or inconsistent with just and equitable principles of trade, is insupportable. *See* Mertz Br. at 3, 5, 25.

Mertz's argument lacks merit because its premise is flawed—the BCC did not find that the assignment was valid. Rather, the BCC's not guilty finding as to Counts I, III, and IV merely established that Mertz did not *intentionally* underfill the orders in question during trading hours to obtain a windfall profit in violation of Rules 432 or 527.D. The BCC was clear that even if the trades were unintentional outtrades when they were first recorded in the trading pit, Mertz lacked good faith in his handling of those trades once trading in the pit ceased and the outtrade was discovered. The BCC's guilty finding on Count II rests on the conclusion that in failing to follow appropriate procedures to determine how the outtrades would be covered and how financial responsibility – in this case a significant profit – would be apportioned once they were

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*13. In any event, the record does not support this claim. Although Ganser did testify that he was subject to risk limits, E-148, he indicated that he would have had approval from his risk manager to do the balance trade, E-153.

[18] Mertz's counsel conceded that the 195 lot outtrade of 5/2010 Puts was consistently profitable, *see* E-10, and indeed it accounts for the majority of the profit Mertz was ordered to disgorge. *See supra* at page 2

discovered, Mertz did not act in good faith or consistently with just and equitable principles of trade. As such, there is no inconsistency in the BCC's verdict.

Conclusion

For the foregoing reasons, the BCC's verdict is affirmed.

IT IS SO ORDERED.

By the Commission (Chairman MASSAD and Commissioners, BOWEN, and GIANCARLO.)

Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: May 9, 2016