

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Christopher Peter Tranchina,
Neptune, N.J.,

Respondent.

Decision

Complaint No. 2018058588501

Dated: March 23, 2023

Respondent acted unethically when he gained unauthorized access to firm information by breaking into his former employer's office after business hours and removing customer files. Respondent failed to timely amend his Form U4 to disclose related criminal proceedings. Held, findings of violation and sanctions modified.

Appearances

For the Complainant: Megan P. Davis, Esq., Jennifer L. Crawford, Esq., Matthew M. Ryan, Esq., Amanda E. Fein, Esq., Kevin Hartzell, Esq., Lisa M. Colone, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Jon Jorge Aras, Esq.

Decision

Christopher Peter Tranchina appeals a Hearing Panel decision finding that he engaged in conversion and gained unauthorized access to firm information when he broke into his former employer's office, after business hours, and removed customer files. For this misconduct, the Hearing Panel barred Tranchina. The Hearing Panel further found that Tranchina violated FINRA's By-Laws and rules by failing to timely amend his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to disclose a related criminal proceeding brought against him. For this misconduct, the Hearing Panel assessed on Tranchina a six-month suspension and a \$10,000 fine. Because of the bar that it imposed for Tranchina's other violations, the Hearing Panel did not impose the suspension or the fine. The Hearing Panel also

found that Tranchina was statutorily disqualified because he willfully failed to disclose the criminal proceeding on his Form U4.

After reviewing the record de novo, we modify the Hearing Panel's findings of violation and the sanctions it imposed.

I. Facts

A. Tranchina Begins Working at the Company

The facts of this case are largely undisputed. Tranchina entered the securities industry in 2009 when he associated with Hornor, Townsend & Kent, Inc. ("HTK"), the broker-dealer arm of Penn Mutual Life Insurance Company ("Penn Mutual") (together with HTK, the "Company").¹ Tranchina registered with HTK as an investment company and variable contracts products representative and was an insurance adviser for Penn Mutual. Tranchina worked as an independent contractor for HTK and Penn Mutual and executed separate agreements with each entity.

When Tranchina started at the Company, he worked with a more senior adviser, JG. JG gave Tranchina leads on customers, and Tranchina and JG shared any resulting commissions. Tranchina also generated some business on his own by making cold calls and soliciting family members, friends, and referrals.

After a few years, the relationship between Tranchina and JG began deteriorating. JG formed his own sales team and Tranchina became a team member. According to Tranchina, around this time, JG changed the commission structure so that JG received a larger commission on the business he referred to Tranchina. JG also began requiring Tranchina to share any commissions from business Tranchina generated independently. Over the next few years, Tranchina and JG often argued about the working conditions on JG's sales team, including the commission-sharing arrangement.

In early 2018, Tranchina quit JG's sales team and formed his own, but this did not end his feuding with JG. According to Tranchina, JG maintained that he was entitled to a portion of any future commissions generated from the customers he and Tranchina formerly had shared, including customers that Tranchina had "brought to the table" and serviced by himself without JG's help. Tranchina thought this was unfair.

Tranchina's animosity towards JG caused him to make what he described as "the childish and regrettable decision" to try to divert business from JG's sales team to his own. When Tranchina purchased the domain name for his sales team's website, he also purchased two domain names containing the name of JG's sales team. In April 2018, Tranchina instructed the internet domain host to redirect any traffic intended for the websites containing the name of JG's sales team to his own sales team's website.

¹ Tranchina has not been registered with any FINRA member since May 2021.

About one week later, the Company learned what Tranchina had done and suspended him. On April 19, 2018, the office's managing partner, Edward Barrett, telephoned Tranchina, told him he was suspended, and ordered him not to return to the office until the Company concluded its investigation. Barrett revoked Tranchina's access to the Company's office by deactivating his electronic keycard. He also ordered the lock changed on the door to Tranchina's personal office and disabled Tranchina's access to the Company's information systems.

B. The Company Terminates Tranchina

Eight days later, on Friday, April 27, 2018, the Company terminated Tranchina for attempting to divert business from JG's sales team. Barrett telephoned Tranchina that afternoon and gave him the news. Barrett told Tranchina that he was not allowed to return to the Company's office, and that the Company would ship to Tranchina's home any personal belongings he had left in the office. Barrett also instructed Tranchina to send back to the Company any Penn Mutual or HTK customer files and information in his possession.

During the call, Tranchina asked Barrett whether the Company would return to him any of the customer files that he kept in his personal office. Barrett told Tranchina that the Company would return the files for any customers that Tranchina did not share with JG, "minus any Penn Mutual or HTK content," but would not return any part of any file for any customer that Tranchina had shared with JG. Tranchina found this "unacceptable" because he shared about 95 percent of his customers with JG, even though, according to Tranchina, he had originated and serviced most of those customers without JG's help. Tranchina believed the Company's position on the customer files was a "great injustice," and he feared that it would "put [him] out of business."

C. Tranchina Breaks into the Company's Office and Removes Customer Files

A few hours after Barrett terminated him, Tranchina drove approximately 30 minutes to the Company's office, broke in, and removed several customer files. Tranchina arrived at the office around 8:30 p.m., when he knew everyone but the cleaning staff would be gone for the evening. He entered the building and took the stairs to the Company's office on the third floor. The door from the stairwell to the office was supposed to be locked, but Tranchina knew that the lock was broken, and that he could open the door by jiggling its handle, which he did. Tranchina then walked to his former personal office. He tried opening the door, but his key did not work because the Company had changed the lock. Tranchina asked a member of the cleaning staff to open the door, but her key did not work, either. Tranchina then placed a chair in front of his office door, stood on it, and used a broom handle to move several drop-ceiling tiles out of the way. While Tranchina was doing that, he broke at least one of the ceiling tiles, and pieces of it fell to the floor. With the ceiling tiles out of the way, Tranchina was able to access his former office by climbing over the wall. Once inside, he removed a stack of customer files.²

² Tranchina testified that, other than his handwritten notes about his customers, the customer files he kept in his office contained only copies of documents, and that the Company held all of the originals.

Before leaving the Company's office that night, Tranchina stopped to clean up the mess from the broken ceiling tile. Tranchina grabbed the cleaning staff's vacuum cleaner and began vacuuming up the debris. While he was doing that, the cleaning staff's supervisor confronted him and asked his name. Tranchina said that his name was "Mike," and quickly left the building. At the hearing, Tranchina admitted that he had never been known as "Mike," and that he gave the false name because he "panicked and [had] never been in that situation before."

Barrett learned about the break-in the following Monday and called the police the next day.³ A police officer came to the Company's office, created a report, and told Barrett how to file a complaint. A few days later, a police officer telephoned Tranchina and told him that the Company would not press criminal charges against him if he returned the customer files he had taken.

D. The Company Demands that Tranchina Return the Customer Files

On May 3, 2018, a Penn Mutual attorney sent Tranchina a letter demanding that he return everything he had removed from the Company's office. The attorney warned Tranchina that if he failed to do so, the Company would pursue criminal charges against him. Four days later, on May 7, 2018, Tranchina hand-delivered a box of documents to the Company's office. The Company, however, did not believe that Tranchina had returned everything.

On May 18, 2018, a different Penn Mutual attorney sent a letter to Tranchina's attorney once again demanding that Tranchina return everything he had removed from the Company's office.⁴ The Penn Mutual attorney wrote that the Company had received "a box containing documents from Mr. Tranchina," but the contents "did not match the description of the items provided by building security and the cleaning personnel that [Tranchina] removed from the [office][.]" The Penn Mutual attorney asked for "an itemized list of the items that were removed from the [Company's office] . . . along with a [c]ertification signed by Mr. Tranchina . . . that he does not possess any Penn Mutual policyholder data, any other property belonging to Penn Mutual or HTK, and that he has abided by all his obligations" under his agreements with HTK and Penn Mutual.

On May 30, 2018, Tranchina's attorney mailed additional documents to the Company. In a cover letter, Tranchina's attorney wrote that he was returning "what [he] was informed are the remaining Penn Mutual/HTK files in Mr. Tranchina's possession." Tranchina also provided a signed statement certifying that he had returned "all policyholder data and other records" to the Company. Tranchina testified that the files his attorney returned to the Company were not among those he removed from the Company's office on April 27, 2018, but instead were files he had taken home with him while he was still employed by the Company.

³ The cleaning staff reported the incident to the building's security guard the night it happened. The cleaning staff identified Tranchina using a photograph he left in his former personal office.

⁴ Tranchina testified that, by this time, he had hired the attorney to represent him in his employment dispute with the Company.

In May 2018, HTK filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) for Tranchina disclosing the incident. The Form U5 stated:

[Tranchina] was terminated for purchasing domain names for websites containing the name of another adviser’s DBA, and direct[ing] [his] website hosting vendor to re-direct traffic from the websites of the newly acquired domain names to his own DBA website. In addition, on the day of his termination (and, after his termination), [Tranchina] entered the [Company’s] premises after business hours, accessed his locked, former office without authorization, and removed items from the office without authorization.

E. Tranchina Registers with Another FINRA Member

In early July 2018, Tranchina registered with another member firm, Chelsea Financial Services, and signed a new Form U4. Question 14B(1)(b) on Form U4 asked Tranchina whether he had ever been charged with a misdemeanor involving wrongful taking of property. Tranchina answered “no.” Tranchina promised Chelsea that he would update his Form U4 on a timely basis when necessary, and that he would disclose to Chelsea any material events, including “[a]rrests and or [sic] convictions of felonies or misdemeanors[.]”

F. A State Court Issues a Complaint-Summons Charging Tranchina with Theft

About two weeks later, in mid-July 2018, Barrett filed a complaint against Tranchina in the Edison Township Municipal Court. As part of that process, Barrett testified before a judge about the events surrounding Tranchina’s termination. After hearing Barrett’s testimony, the judge found probable cause to issue a complaint-summons to Tranchina. The complaint-summons alleged that Tranchina entered the Company’s office after normal business hours on April 27, 2018, without authorization, and removed “business papers.” It further alleged that a member of the cleaning staff saw Tranchina “place a chair in front of his office, break a ceiling tile, climb over the wall, and end up in his office.” The complaint-summons alleged that, by this conduct, Tranchina violated three criminal statutes, including section 2C:20-3.a of the New Jersey Code of Criminal Justice, which is titled “Theft by unlawful taking or disposition; movable property.”⁵ The court mailed the complaint-summons to Tranchina, and Tranchina received it in early August 2018.

Tranchina appeared in court twice to respond to the allegations against him—once in September and again in October 2018.⁶ At both appearances, Tranchina was represented by a criminal-defense attorney he hired to represent him.

⁵ The complaint-summons alleged that Tranchina also violated sections 2C:18-3 and 2C:17-3 of the New Jersey Code of Criminal Justice. Those sections are titled “Unlicensed entry of structures; defiant trespasser; peering into dwelling places; defenses,” and “Criminal mischief,” respectively.

⁶ This was not the same attorney who represented Tranchina in his dispute with the Company over his termination.

During the October 2018 court appearance, Tranchina pleaded guilty to the three offenses alleged against him in the complaint-summons, including “theft by unlawful taking or disposition.” The court, however, did not enter a judgment of conviction. Instead, the court placed Tranchina on “conditional dismissal.” This meant that if Tranchina did not commit another offense within one year, the court would dismiss the complaint-summons. *See* N.J. Rev. Stat. § 2C:43-13.5 (2021).⁷

G. Tranchina Fails to Disclose the Theft Charge

Tranchina never disclosed the theft charge on his Form U4. He did not amend his Form U4 to disclose the theft charge after receiving the complaint-summons in August 2018 nor did he do so after pleading guilty to the charge in October 2018. While he amended his Form U4 three times in 2019 and 2020 for other reasons, he did not change his answer to question 14B(1)(b), which asked whether he had ever been charged with a misdemeanor involving wrongful taking of property. Each time, he answered “no” to that question.

Tranchina did not timely disclose the theft charge to Chelsea, either. Chelsea was unaware of the charge until it received a copy of a FINRA Rule 8210 request that FINRA’s Department of Enforcement (“Enforcement”) sent to Tranchina seeking information about the complaint-summons.

II. Procedural History

Enforcement opened its investigation in this matter after receiving the Form U5 that HTK filed for Tranchina.

In June 2020, Enforcement filed a three-cause complaint against Tranchina. Under cause one, Enforcement alleged that Tranchina engaged in conversion, in violation of FINRA Rule 2010, when he broke into the Company’s office and removed customer files after the Company had terminated him. Under cause two, Enforcement alleged that Tranchina gained unauthorized access to HTK information, in violation of FINRA Rule 2010, by breaking into the Company’s office and removing customer files after the Company had terminated him. Under cause three, Enforcement alleged that Tranchina violated FINRA’s By-Laws and rules by not disclosing the theft allegation on his Form U4.

Following a two-day hearing in January 2021, which was conducted by videoconference because of health and safety concerns caused by the COVID-19 pandemic, the Hearing Panel found Tranchina liable on all three causes of action alleged in the complaint. The Hearing Panel imposed a bar as a unitary sanction for Tranchina’s violations under causes one and two. It assessed a six-month suspension and a \$10,000 fine as a sanction for Tranchina’s violation under cause three, but it did not impose the suspension or the fine because of the bar it imposed on Tranchina for his other violations. The Hearing Panel also found that Tranchina was statutorily

⁷ The court dismissed the complaint-summons in 2020.

disqualified because he willfully failed to disclose the theft charge on his Form U4. Tranchina appealed the Hearing Panel's decision.

III. Discussion

After a de novo review of the record, we modify the Hearing Panel's findings of violation. We affirm the Hearing Panel's finding under cause two that Tranchina acted unethically when he gained unauthorized access to HTK information by breaking into the Company's office and removing HTK customer files. We do not decide, however, whether this same conduct constituted conversion, as alleged under cause one, and we dismiss the allegation of violation. We affirm the Hearing Panel's finding under cause three that Tranchina violated FINRA's By-Laws and rules by not disclosing the theft allegation on his Form U4. We also affirm the Hearing Panel's finding that Tranchina is statutorily disqualified because the theft allegation is material and Tranchina willfully failed to disclose it.

A. Tranchina Acted Unethically When He Broke into the Company's Office and Removed HTK Customer Files

FINRA Rule 2010 requires members and associated persons, in the conduct of their business, to "observe high standards of commercial honor and just and equitable principles of trade."⁸ The rule applies to all business-related conduct, regardless of whether it involves a security. *Dep't of Enf't v. Vedovino*, Complaint No. 2015048362402, 2019 FINRA Discip. LEXIS 20, at *14 (FINRA NAC May 15, 2019). FINRA Rule 2010 is not limited to rules of legal conduct, but rather states a broad ethical principle. *Dep't of Enf't v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NASD NAC June 2, 2000) (discussing FINRA Rule 2010's predecessor, NASD Rule 2110). We may find a violation of FINRA Rule 2010 when no legally cognizable wrong has occurred. *Id.* at *11. To find a violation of FINRA Rule 2010 when there is no violation of any other FINRA rule or federal securities law, we must find that the respondent acted unethically or in bad faith. *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013) (discussing FINRA Rule 2010's predecessor, NASD Rule 2110). Unethical conduct is defined as conduct "not in conformity with moral norms or standards of professional conduct." *Id.* at *21.

Tranchina acted unethically when he broke into the Company's office and removed HTK customer files.⁹ Tranchina knew that the Company had terminated him and that it had prohibited him from entering its office. He also knew that the Company claimed ownership and the exclusive right to possess almost all customer files in his former personal office. Tranchina was concerned that the Company's refusal to turn over most of the customer files would hurt his business, and so he waited until after normal business hours, forcibly entered the office, and

⁸ FINRA Rule 2010 applies to persons associated with a member pursuant to FINRA Rule 0140(a), which provides that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules."

⁹ Enforcement's allegation under cause two is limited to Tranchina's removal of HTK customer files.

removed some of the files he feared the Company would not provide to him. Tranchina's behavior did not conform with moral norms or standards of professional conduct.

No reasonable person in Tranchina's position would have acted as he did. Rather, a reasonable person would have resolved the dispute with the Company through negotiation and, if necessary, litigation. Indeed, disputes like this are common in the securities industry, and they are often the subject of litigation between firms and their former registered representatives. *See NEXT Fin. Grp., Inc.*, Initial Decisions No. 344, 2008 SEC LEXIS 1393, *59 (June 18, 2008) (acknowledging the "longstanding dispute between some brokerage firms and their registered representatives about who 'owns' the customer relationship when a representative resigns from one firm to associate with another"). By forgoing industry-standard dispute-resolution practices, and instead opting for imprudent and reckless self-help measures, Tranchina acted unethically, in violation of FINRA Rule 2010.¹⁰

Tranchina argues that Enforcement failed to establish a violation under cause two because, he contends, it did not prove that the files he removed from the Company's office contained HTK information. In its complaint, Enforcement alleged that Tranchina gained unauthorized access to HTK information because the files he removed contained "nonpublic personal information" about HTK customers.¹¹ Tranchina argues that Enforcement failed to establish the contents of the folders at the hearing because it did not introduce "a single document" from the "stack" of customer files that he removed from the office on April 27, 2018.¹² "Without evidence of the actual files," Tranchina argues, the Hearing Panel "inappropriately speculated as to what those files contained." We disagree.

¹⁰ *See Dist. Bus. Conduct Comm. v. Pope*, Complaint No. C04920041, 1993 NASD Discip. LEXIS 249, at *9 (NASD NBCC June 7, 1993) ("We do not condone [respondent's] decision to use 'self-help' to obtain leverage in his dispute with his prior employer. His dispute with his former employer should have been addressed in an appropriate forum."); *Dist. Bus. Conduct Comm. v. Sallustio*, Complaint No. NY-4051, 1988 NASD Discip. LEXIS 25, at *14 (NASD Bd. of Governors June 15, 1988) ("Resort to self-help measures is never to be encouraged, particularly not in the securities industry where the investing public may be harmed.").

¹¹ Neither party offered a definition of "nonpublic personal information." Under Regulation S-P, "any information given by consumers or customers to broker/dealers to obtain a product or service will generally be considered to be nonpublic financial information." *NASD Notice to Members 00-66*, 2000 NASD LEXIS 75, at *8 (Sept. 2000). Tranchina, however, is not charged with violating Regulation S-P, and therefore we do not apply that broad definition here. Under the particular facts and circumstances of this case, we consider "nonpublic personal information" to mean information about HTK customers that is not freely available to the public.

¹² Barrett testified that the Company did not make a record of the customer files Tranchina removed from its office on April 27, 2018, or the files he returned to the office on May 7, 2018. Enforcement therefore was not able to introduce those files into evidence.

Enforcement established by a preponderance of the evidence that the files Tranchina removed contained HTK information, as alleged in the complaint.¹³ Tranchina admitted that he removed HTK customer files after breaking into the Company's office. He testified that, in the usual course of business, a customer's file would contain account-opening documents, and that these documents would contain nonpublic personal information about the customer, including the customer's email address, telephone number, and social security number. He further testified that a customer's file typically would contain the customer's HTK account statements, which would show the customer's HTK securities holdings. The customer files that Tranchina's attorney returned to the Company on May 30, 2018, corroborate Tranchina's testimony; they contain extensive nonpublic personal information about HTK's customers.¹⁴ By contrast, there is no evidence in the record that the customer files Tranchina removed from the Company's office were not typical customer files. We can reasonably infer from this record that the customer files Tranchina removed from the Company's office contained HTK information, including "nonpublic personal information" about HTK customers, as alleged in the complaint.¹⁵

For these reasons, we affirm the Hearing Panel's finding under cause two that Tranchina acted unethically, in violation of FINRA Rule 2010, when he gained unauthorized access to HTK information by breaking into the Company's office and removing HTK customer files.¹⁶

We do not decide whether Tranchina engaged in conversion when he removed customer files from the Company's office, as alleged under cause one, and we dismiss the allegation of violation. Conversion is "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it." *Dep't of Enf't v. Doni*, Complaint No. 2011027007901, 2017 FINRA Discip. LEXIS 46, at *21 (FINRA NAC Dec. 21, 2017).

Enforcement's conversion allegation is rooted in the terms of Tranchina's agreements with HTK and Penn Mutual. Both agreements contain broadly worded provisions under which the Company claims ownership over all customer-related information, including all customer files. These provisions also require Tranchina to return to the Company all customer files upon termination of the agreements. Enforcement alleges that Tranchina converted the customer files he removed from the Company's office on the night of April 27, 2018, because, under the terms

¹³ Preponderance of the evidence is the standard of proof in FINRA disciplinary proceedings. *David M. Levine*, 57 S.E.C. 50, 73 n. 42 (2003).

¹⁴ Tranchina testified that the files his attorney returned to the Company on May 30, 2018, were not among the files he removed from the office on April 27, 2018.

¹⁵ See *Allen Mansfield*, 46 S.E.C. 356, 358 (1976) ("[FINRA] is a lay body, composed of businessmen purporting to make a businessman's judgement. As such, it may properly draw inferences from evidence a reasonable layman would deem sufficient in formulating a decision with respect to a matter of moment in his own affairs.").

¹⁶ Tranchina does not dispute that his conduct was business related.

of his agreements with HTK and Penn Mutual, he did not have any right to possess those files. We decline to decide this issue for the following reasons.

The Commission has cautioned that a disciplinary action brought under FINRA Rule 2010 “is not the proper forum . . . to decide the private contract rights between the [contracting] parties[.]” *Lerner & Co.*, 37 S.E.C. 850, 855 (1957). Rather, FINRA’s “function under the [Securities Exchange] Act and its rules is to determine whether a member’s conduct violates ethical standards of ‘commercial honor and just and equitable principles of trade.’” *Id.* In this case, we do not need to decide the Company’s or Tranchina’s private contract rights to determine whether Tranchina acted unethically. The conversion allegation under cause one and the unauthorized access allegation under cause two are based on the same conduct: Tranchina’s breaking into the Company’s office and removing customer files. We already have found under cause two that this conduct was unethical in violation of FINRA Rule 2010. We made this finding without regard to whether Tranchina had any right, contractual or otherwise, to possess those files. Put simply, we cannot envision any scenario in which it would be ethical for a person to break into his former employer’s office, after normal business hours, and remove customer files, regardless of whether he had any right to possess them. Making an additional finding that Tranchina was not entitled to possess the customer files, and that he therefore engaged in conversion, would not materially change the nature of Tranchina’s misconduct or the appropriate sanction for it.¹⁷

Moreover, the question of whether Tranchina had a contractual right to possess the customer files post-termination is particularly ill-suited for resolution in a disciplinary proceeding. Many firms include in their agreements with their registered representatives contract provisions like the ones on which Enforcement relies to establish conversion, and these provisions are frequently the subject of litigation. In some cases, courts and arbitration panels have enforced these provisions, but in others they have refused to do so on various grounds. Compare *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham*, 658 F.2d 1098 (5th Cir. 1981) (holding that the district court did not abuse its discretion by permanently enjoining former registered representatives from violating the portion of employment contracts fixing title to brokerage firm records with the firm), with *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. E.F. Hutton & Co., Inc.*, 403 F. Supp. 336 (E.D. Mich. 1975) (denying firm’s proprietary claim to documents containing information about customers because the records in question related to accounts the registered representatives had obtained themselves without the firm’s help).¹⁸

¹⁷ Cf. *Dep’t of Enf’t v. Leopold*, Complaint No. 2007011489301, 2012 FINRA Discip. LEXIS 2, at *14-15 (FINRA NAC Feb. 24, 2012) (declining to adjudicate a books-and-records charge arising from the respondent’s falsification of documents because the appellate record was insufficient and “any sanction imposed for [the books-and-records] violation would not be materially different from the suspension [] impose[d] for the falsification of documents, because both violations resulted from identical conduct.”).

¹⁸ See also *Bates Sec., Inc., v. First Union Sec., Inc.*, 2002 NASD Arb. LEXIS 1325 (Dec. 4, 2002) (ordering registered representative to return customer files to his former firm); *First Command Fin. Planning, Inc., v. Washnock*, 2008 NASD Arb. LEXIS 577, *1 (July 30, 2008) (denying registered representatives’ request to declare unenforceable contractual provisions

[Footnote continued on next page]

Regardless of the outcomes in these cases, however, firms' efforts to enforce these provisions against registered representatives typically raise complex questions of state employment, contract, and intellectual property law requiring fact-intensive inquiries into the contracting parties' past dealings with each other and with third parties.¹⁹ In this case, we do not need to resolve those questions to determine whether a violation of FINRA's rules has occurred, and therefore we decline to do so.²⁰

For these reasons, we do not decide whether Tranchina engaged in conversion by removing the customer files from the Company's office, and we dismiss the allegation of violation under cause one.²¹

B. Tranchina Violated FINRA's By-Laws and Rules by Not Disclosing the Theft Charge on Form U4

Under FINRA's By-Laws, an applicant for registration must provide all of the information requested on Form U4. FINRA By-Laws Art. V, § 2. The applicant has a continuing obligation to keep this information current by filing amendments to Form U4 as changes occur. FINRA By-Laws Art. V, § 2(c). Any amendment must be filed "not later than 30 days after learning of the facts or circumstances giving rise to the amendment." *Id.* FINRA Rule 1122 prohibits an applicant from providing on Form U4 information "which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct

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governing former firm's confidential information and ordering the registered representatives to return confidential information to their former firm); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Smith Barney Shearson, Inc.*, Case No. 95-00176, 1995 NASD Arb. LEXIS 134 (Feb. 27, 1995) (declaring unenforceable certain provisions in registered representative's agreement with his former firm that prohibited him from retaining copies of client records); *Morgan Stanley DW, Inc. v. Frisby*, 163 F. Supp. 2d 1371, 1380 (N.D. Ga. 2001) (observing that "[a]s long as the departing broker obeys the unwritten rules against taking original records or soliciting clients before resigning, the brokerage firms have a long record of losing arbitration proceedings").

¹⁹ See, e.g., *J.C. Bradford & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1998 NASD Arb. LEXIS 1524, at *6 (Apr. 8, 1998) (finding that "as it pertains to this case only based on the particular facts and circumstances of this case, after considering applicable law, [] the confidentiality clause in [the registered representative's] employment contract with [his former firm] is void and unenforceable as a matter of Georgia law").

²⁰ At the time of the hearing in this matter, Tranchina and the Company were litigating Tranchina's alleged breaches of his agreements in court.

²¹ Cf. *Dep't of Enf't v. DiFrancesco*, Complaint No. 2007009848801, 2010 FINRA Discip. LEXIS 37, at *18 n.12 (FINRA NAC Dec. 17, 2010) (declining to decide whether the respondent violated FINRA Rule 2010 based on a breach-of-contract theory), *aff'd*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54 (Jan. 6, 2012).

such filing after notice thereof.” *See Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *16 (Oct. 20, 2011).²²

Two questions on Form U4 are relevant to the allegation of violation:

- Question 14B(1)(a) asks whether the applicant has ever “been convicted of or pled *nolo contendere* (‘no contest’) in a domestic, foreign, or military court to a *misdemeanor involving*: investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?”
- Question 14B(1)(b) asks whether the applicant has ever “been *charged* with a *misdemeanor* specified in 14B(1)(a)?”²³

Tranchina answered “no” to question 14B(1)(b) when he initially registered with Chelsea in July 2018, and it appears his answer was correct at that time. The circumstances changed, however, once the court issued the complaint-summons.

In the complaint-summons, Tranchina was charged with an offense involving wrongful taking of property. The complaint-summons alleged that Tranchina violated a statute titled “Theft by unlawful taking or disposition; moveable property.” *See* N.J. Rev. Stat. § 2C:20-3.a (2021). That statute provides, in relevant part, that “[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.” N.J. Rev. Stat. § 2C:20-3.a (2021).

“Theft by unlawful taking or disposition” is at least a misdemeanor for purposes of Form U4. The New Jersey Code of Criminal Justice does not classify offenses as felonies and misdemeanors. Instead, it classifies offenses as “petty disorderly persons offenses,” “disorderly persons offenses,” and “crimes.” N.J. Rev. Stat. § 2c:1-4 (2021). For states like New Jersey that do not classify offenses as misdemeanors or felonies, FINRA provides the definitions of those terms in the Form U4 Explanation of Terms. The Explanation of Terms defines “misdemeanor” as an “offense punishable by a sentence of less than one year imprisonment and/or a fine of less than \$1,000.” It defines “felony” as an offense “punishable by a sentence of at least one year imprisonment and/or a fine of at least \$1,000.”

Whether “theft by unlawful taking or disposition” is a misdemeanor or felony for purposes of Form U4 depends on the value of the property involved. When the property is

²² A violation of FINRA Rule 1122 is also a violation of FINRA Rule 2010. *See Dep’t of Enf’t v. Harari*, Complaint No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *25 n.10 (FINRA NAC Mar. 9, 2015).

²³ Form U4 directs the applicant to “[r]efer to the Explanation of Terms section of Form U4 Instructions for explanations of italicized terms.”

valued at less than \$200, the offense is a misdemeanor because it is punishable by a sentence of less than six months imprisonment and/or a fine of less than \$1,000. *See* N.J. Rev. Stat. §§ 2C:20-2.b.(4)(a) (2021) (stating that “theft constitutes a disorderly persons offense” if “[t]he amount involved was less than \$200”); 2C:43-8 (stating that a person convicted of a disorderly persons offense may be imprisoned for up to six months); 2C:43-3.c (stating that a person convicted of a disorderly persons offense may be fined up to \$1,000). When the property is valued at more than \$200, the offense is a felony because it is punishable by a sentence of more than one year imprisonment and a fine of at least \$1,000. *See* N.J. Rev. Stat. §§ 2C:20-2.b(3) (2021) (stating that theft is a “crime of the fourth degree” if “the amount involved is at least \$200 but does not exceed \$500”); 2C:43-6(a)(4) (stating that a person convicted of a crime of the fourth degree may be imprisoned for up to 18 months); 2C:43-3.b(2) (stating that a person convicted of a crime of the fourth degree may be fined up to \$10,000).²⁴ Accordingly, “theft by unlawful taking or disposition” may be a felony for purposes of Form U4, but is always at least a misdemeanor.²⁵

Because the complaint-summons charged Tranchina with at least a misdemeanor involving wrongful taking of property, Tranchina was required to change his answer to question 14(B)(1)(b) from “no” to “yes” within 30 days after receiving the complaint-summons, and he was required to answer “yes” to question 14(B)(1)(b) when he amended Form U4 three times in September 2019 and July 2020. He did not do so.

Tranchina makes two arguments as to why he was not required to answer “yes” to question 14B(1)(b). Neither argument has merit.

First, Tranchina contends he was not required to answer “yes” to question 14B(1)(b) because, he claims, he was not “charged” with a misdemeanor in the complaint-summons. The Explanation of Terms defines “charged” as “being accused of a crime in a formal complaint, information, or indictment (or equivalent formal charge).” Tranchina asserts that, under New Jersey law, “theft by unlawful taking or disposition” is not classified as a “crime,” but rather as a “disorderly persons offense.”²⁶ Tranchina argues that, because the complaint-summons accuses him of a “disorderly persons offense” rather than a “crime,” as New Jersey defines those terms,

²⁴ The maximum sentence of imprisonment and the maximum fine for the offense continue to increase as the value of the property increases.

²⁵ The complaint-summons did not specify the value of the customer files Tranchina removed.

²⁶ Tranchina asserts that “theft by unlawful taking or disposition” is a “petty disorderly offense” under New Jersey law, but he does not cite any authority to support that assertion. Ultimately, it does not matter because a “petty disorderly persons offense” is also a misdemeanor for purposes of Form U4, as it is punishable by a sentence of up to 30 days imprisonment and/or a fine of up to \$500. N.J. Rev. Stat. §§ 2C:43-8, 2C:43-3(c) (2013).

he could not have been “charged” with a misdemeanor involving wrongful taking of property in the complaint-summons.²⁷ We reject this semantical argument.

When interpreting FINRA’s rules and policies, we are not bound by New Jersey’s unusual classification of offenses.²⁸ Rather, because the Explanation of Terms does not define the term “crime,” as used in its definition of the term “charged,” we apply the “familiar rule of legal interpretation that undefined words in a given law or rule should be given their common or ordinary meaning.” *Dep’t of Enf’t v. Sisung Sec. Corp.*, Complaint No. C05030036, 2006 NASD Discip. LEXIS 16, at *52 n.39 (NASD NAC Aug. 28, 2006).²⁹ The *Merriam-Webster Dictionary* defines “crime” as “an illegal act for which someone can be punished by the government.” “Theft by unlawful taking or disposition” fits squarely within that definition. Tranchina therefore was “accused of a crime” in the complaint-summons and, accordingly, he was “charged” with a misdemeanor involving wrongful taking of property.

Tranchina’s second argument fares no better. Tranchina argues that he was not charged with a misdemeanor because he was not “accused . . . in a formal complaint, information, or indictment (or equivalent formal charge).”³⁰ Tranchina contends that the complaint-summons is not a “formal complaint” or “equivalent formal charge” because “it was initiated by [Barrett] individually, and [Tranchina] was not arrested, but received a copy of the complaint in the mail.” Tranchina’s argument has no merit. The complaint-summons was issued to Tranchina in accordance with New Jersey law. Under the New Jersey Rules of Court, any person may file a criminal complaint. *See* N.J. Court Rules, R. 3:2-1(a)(1). If a judicial officer finds probable cause that an offense was committed and that the defendant committed it, the judicial officer may issue a complaint-summons to the defendant. N.J. Court Rules, R. 3:3-1(b). The complaint-summons may be served by mail. N.J. Court Rules, R. 3:3-3(d); R. 4:4-4(c). In this case, the Edison Township Municipal Court issued a complaint-summons to Tranchina after a judge held an evidentiary hearing at which Barrett testified. Based on Barrett’s testimony, the judge found probable cause that Tranchina committed three offenses, including “theft by unlawful taking or disposition.” The complaint-summons that Tranchina received is captioned “*The State of New*

²⁷ As noted above, when the value of the property involved exceeds \$200, “theft by unlawful taking or disposition” is indeed classified as a “crime” under New Jersey law. *See* N.J. Rev. State § 2C:20-2(b)(3) (2013) (stating that theft is a “crime of the fourth degree” if “the amount involved is at least \$200 but does not exceed \$500”).

²⁸ *See, e.g., United States v. Dean*, 329 F. App’x 377, 379 n.1 (3d Cir. 2009) (“[W]e do not read the [New Jersey] legislature’s statement that a disorderly person offense is not a crime ‘within the meaning of the [New Jersey] Constitution’ to suggest that such an offense can never be considered a crime in any context.”).

²⁹ *See also Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

³⁰ As noted above, the Explanation of Terms defines “charged” as “being accused of a crime in a formal complaint, information, or indictment (or equivalent formal charge).”

Jersey vs. Christopher P. Tranchina.” It required Tranchina to appear in court on the date specified to respond to the charges against him or face arrest. Given these facts, the complaint-summons manifestly is a “formal complaint” or “equivalent formal charge,” and we reject Tranchina’s assertion to the contrary.

For these reasons, we find that Tranchina violated Article V, Section 2(c) of FINRA’s By-Laws and FINRA Rules 1122 and 2010 by failing to disclose on Form U4 that he had been charged with a misdemeanor involving wrongful taking of property.

C. Tranchina Is Statutorily Disqualified

A person is subject to statutory disqualification under Section 3(a)(39) of the Securities Exchange Act of 1934 (the “Exchange Act”) if, among other things, he “has willfully made or caused to be made” on Form U4 “any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state . . . any material fact which is required to be stated therein.” 15 U.S.C. § 78c(a)(39)(F). A person also is subject to statutory disqualification if he willfully fails to amend Form U4 to disclose material information. *See Michael Earle McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *13-23 (Mar. 15, 2016). Tranchina is statutorily disqualified because the theft charge is material and he willfully failed to disclose it on his Form U4.

1. The Theft Charge Is Material

“In the context of Form U4 disclosures, a fact is material if there is a substantial likelihood that a reasonable regulator, employer, or customer would have viewed it as significantly altering the total mix of information made available.” *McCune*, 2016 SEC LEXIS 1026, at *21-22. The information that applicants provide on Form U4 is important because FINRA and employers use it to screen applicants and monitor their fitness for registration within the securities industry. *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *8 (Dec. 22, 2008). “Because of the importance that the industry places on full and accurate disclosure of information required by the Form U4, we presume that essentially all the information that is reportable on the Form U4 is material.” *Dep’t of Enf’t v. Knight*, Complaint No. C10020060, 2004 NASD Discip. LEXIS 5, at *13-14 (NASD NAC Apr. 27, 2004).

We previously have found that information relating to a misdemeanor theft charge is material. *See Dep’t of Enf’t v. Zdzieblowski*, Complaint No. C8A030062, 2005 NASD Discip. LEXIS 3, at *14 (NASD NAC May 3, 2005). Without question, a reasonable regulator, employer, or customer, would view any theft charge as significantly altering the total mix of information. In this case, the theft charge is particularly significant because it involves Tranchina’s alleged theft of customer files from his former employer. Any reasonable employer would view the theft charge against Tranchina as extremely relevant when considering whether to hire him.³¹

³¹ *See Knight*, 2004 NASD Discip. LEXIS 5, at *14.

Tranchina argues that the theft charge is not material because the circumstances surrounding his termination already were “known to the public.” Tranchina notes that, on his Form U5, HTK disclosed that, “on the day of his termination (and, after his termination), [Tranchina] entered [HTK’s] office without authorization, and removed items from the office without authorization.” Tranchina asserts that, because some of the conduct underlying the theft charge already had been publicly disclosed, the fact that he had been charged with theft was not material. We disagree. There is a qualitative difference between a former employer’s allegation of misconduct on a Form U5 and a criminal theft charge. Tranchina’s “no” response to question 14B(1)(b) could lead a reasonable regulator, employer, or customer to erroneously believe that HTK’s allegation on Form U5 was exaggerated, disputed, or even untrue. The theft charge substantiates HTK’s allegation. It shows that a neutral third party found probable cause that Tranchina engaged in the conduct alleged by HTK, and that the conduct was serious enough to warrant a criminal charge. Any reasonable regulator, employer, or customer undoubtedly would consider that as significantly altering the total mix of information.

2. Tranchina Willfully Failed to Disclose the Theft Charge on Form U4

In this context, “willfully” means intentionally committing the act which constitutes the violation. *Allen Holeman*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *37 (July 31, 2019). It does not require that Tranchina knew he was violating the securities laws or FINRA’s rules. *Id.* We may find that Tranchina acted willfully if his failure to disclose the theft charge on his Form U4 was the result of extreme recklessness. *Id.* at *38. Extreme recklessness is “an extreme departure from the standards of ordinary care” which presents a danger of misleading regulators, employers, or investors “that is either known to the [respondent] or is so obvious that the [respondent] must have been aware of it.” *Id.* at *39. Tranchina was at least extremely reckless in not disclosing the theft charge on his Form U4.

Any reasonable person in Tranchina’s position would know that, by not disclosing the theft charge in response to question 14B(1)(b), he was in danger of providing materially false information about whether he ever had been charged with a misdemeanor involving wrongful taking of property. The complaint-summons plainly charged Tranchina with a criminal offense. It is captioned “*The State of New Jersey v. Christopher P. Tranchina*.” It alleges that Tranchina “attempted unlawful entry and trespass,” and “commit[ed] the offense of theft by unlawfully taking or exercising control over certain moveable property.” Under the heading “original charge,” it lists three sections of the New Jersey Criminal Code, including 2C:20-3.a, which is titled “Theft by unlawful taking or disposition; movable property.” At a minimum, the theft charge was punishable by up to six months imprisonment and/or a \$1,000 fine, which makes the offense a misdemeanor according to the Explanation of Terms. Tranchina was required to appear in court on the date specified to respond to the charge. The complaint-summons stated that, if he failed to appear, “a warrant may be issued for [his] arrest.” After Tranchina pleaded guilty to the theft charge, the court conditionally dismissed the charges. Under the terms of the dismissal, the theft charge remained pending for one year, and if Tranchina had committed another crime during that period, the court could have entered a judgment of conviction on the theft charge and imposed punishment for it. Under these circumstances, any reasonable person would know that, by not disclosing the theft charge on Form U4, he was in danger of misleading

regulators, employers, or customers about whether he ever had been charged with a misdemeanor involving wrongful taking of property.

Tranchina contends he did not act willfully because he had a “reasonable belief” that he was not required to disclose the theft charge on his Form U4. Tranchina asserts he did not believe the theft charge had to be disclosed because (1) “it was initiated by Mr. Barrett individually, and [Tranchina] was not arrested, but rather received a copy of the complaint in the mail,” (2) a disorderly persons offense “is not even considered a crime in New Jersey,” and “[t]he FINRA definition of ‘charged’ requires that a person be charged with a crime,” and (3) Chelsea “did not require him to disclose the [theft charge], even though [Chelsea was] in possession of all material information related to it.”

After considering all the evidence, we find that Tranchina must have known that, by stating that he had not been charged with a misdemeanor involving wrongful taking of property, he was in danger of providing materially false information on his Form U4. Tranchina’s claim that he did not believe he had to disclose the theft charge is implausible. At the hearing, Tranchina repeatedly stated that, at the time, he did not think he had to disclose the theft charge because he “understood [the complaint-summons] was like a parking ticket, something that I received in the mail,” and that he “didn’t think it was a big deal.” The Hearing Panel did not find Tranchina’s testimony on this issue credible. Rather, it found that Tranchina intended to conceal the theft charge by not disclosing it on his Form U4. We defer to the Hearing Panel’s credibility finding, which is supported by the record. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1161-62 & n.6 (2002) (explaining that a credibility determination is entitled to deference absent substantial evidence to the contrary). Indeed, the record amply shows that Tranchina must have known that he had been charged with at least a misdemeanor. As described above, the complaint-summons and the judicial proceedings that followed had the indicia of a criminal prosecution. Tranchina understood that it was, in fact, a criminal prosecution, because he hired a criminal-defense attorney to represent him. Tranchina would not have hired a criminal lawyer had he thought the charges against him were no more serious than a parking ticket, as he now claims.

To the extent Tranchina had any doubt about whether he was required to disclose the theft charge on his Form U4, he had “a duty to determine whether disclosure was required.” *See Neaton*, 2011 SEC LEXIS 3719, at *23. Tranchina made no effort to do so. Tranchina admits that he did not discuss the issue with his attorney, nor did he discuss it with anyone at Chelsea. In fact, Tranchina did not tell Chelsea about the theft charge when he received the complaint-summons, or even after he pleaded guilty to it. The firm learned about the charge sometime later when it received a copy of a FINRA Rule 8210 request that Enforcement had issued to Tranchina. By this time, Tranchina already had decided not to disclose the theft charge on his Form U4. Tranchina’s failure to conduct any investigation into whether he was required to disclose the theft charge was an extreme departure from the standard of ordinary care.

Tranchina’s failure to disclose the theft charge was the product of his extreme recklessness, and therefore it was willful. Because Tranchina willfully failed to disclose material information on his Form U4, he is statutorily disqualified.

D. The Disciplinary Proceeding Against Tranchina Was Fair

Tranchina argues that the hearing in this case was unfair because it was held by videoconference, and he asks us to remand this case for an in-person hearing before a new hearing panel. Specifically, Tranchina contends that conducting the evidentiary hearing by videoconference violated “his basic due process rights,” and that the hearing was unfair “because Covid-19 restrictions limited his ability to prepare in-person with his counsel.” These arguments are meritless.

The record shows that Tranchina was afforded the fair process due him under the Exchange Act and FINRA rules.³² The disciplinary hearing was held by videoconference pursuant to a temporary amendment to FINRA Rule 9261. *See Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Temporarily Amend FINRA Rules 1015, 9261, 9524 and 9830 to Permit Hearings Under Those Rules to Be Conducted by Video Conference*, Exchange Act Release No. 89737, 2020 SEC LEXIS 4034 (Sept. 2, 2020). The temporary amendment authorizes the Chief Hearing Officer, “[u]pon consideration of the current public health risks presented by an in-person hearing,” to order that a hearing “be conducted, in whole or part, by videoconference.” The temporary amendment allows “FINRA’s critical adjudicatory processes to continue to function in these extraordinary times—enabling FINRA to fulfill its statutory obligations to protect investors and maintain fair and orderly markets—while protecting the health and safety of hearing participants.” *Id.* at *6.

The temporary amendment is consistent with Exchange Act Section 15A(b)(8), which requires, among other things, that FINRA rules provide a fair procedure for the disciplining of members and persons associated with members. *Id.* at *14. In particular, the temporary amendment “strikes an appropriate balance, providing fair process and enabling FINRA to fulfill its statutory obligations to protect investors and maintain fair and orderly markets while taking into consideration the significant health and safety risks of in-person hearings stemming from the outbreak of COVID-19.” *Id.* at *17.

Tranchina does not identify any specific prejudice he suffered because of the hearing being held by videoconference, and none is apparent. The Commission has acknowledged that “disciplinary proceedings before a self-regulatory organization are civil proceedings that are conducted in an informal manner,” and that the “full panoply of rights due a defendant in a criminal action are not required.” *Howard Alweil*, 51 S.E.C. 14, 17 (1992). “In this context, due process does not necessitate a formalistic face-to-face evidentiary proceeding.” *Id.* Instead, fairness requires that respondents have an opportunity to present testimony, evidence, and argument. *See id.* Tranchina had the opportunity to do all those things.

³² FINRA disciplinary proceedings are not subject to the Constitution’s due process requirements. *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *51 (Jan. 30, 2009), *aff’d*, 416 F. App’x 142 (3d Cir. 2010). Rather, the Exchange Act requires FINRA to provide fair procedures for disciplining its members and their associated persons. 15 U.S.C. § 78o-3(b)(8).

Tranchina's argument that the hearing was unfair because he was not able to meet with his attorney face-to-face to prepare similarly is unpersuasive. Tranchina does not explain how he was prejudiced because of being "limited [in] his ability to prepare in person with his counsel." During the COVID-19 pandemic, many professionals were forced to adapt and do business by videoconference. Tranchina has cited no legal authority holding that an attorney cannot zealously advocate for his client by preparing for a hearing remotely or participating in a remote hearing. By contrast, several courts have held that hearings and trials can be conducted fairly by videoconference, even in cases more complex than this one.³³

Tranchina was afforded the fair process due him under the Exchange Act and FINRA rules, and therefore we deny his request that we remand the case for an in-person hearing before a new hearing panel.

IV. Sanctions

The Hearing Panel barred Tranchina as a unitary sanction for his violations under causes one and two. Under the third cause, the Hearing Panel assessed on Tranchina a six-month suspension and a \$10,000 fine. The Hearing Panel did not impose the suspension or the fine considering the bar it imposed for Tranchina's other violations. Because we do not decide whether Tranchina engaged in conversion, as the Hearing Panel found under cause one, we modify the sanctions the Hearing Panel imposed.

A. Tranchina Is Barred for Gaining Unauthorized Access to HTK Information by Breaking Into the Company's Office and Removing Customer Files

FINRA's Sanction Guidelines ("Guidelines") do not contain recommended sanctions for the specific misconduct at issue.³⁴ We therefore have considered the recommendations included in the Guidelines' General Principles Applicable to All Sanction Determinations ("General Principles") and the Principal Considerations in Determining Sanctions ("Principal Considerations"), as well as other relevant factors.³⁵

From a general perspective, Tranchina's misconduct is deeply disturbing. It demonstrates a shocking disregard for the law and for the securities industry's ethical standards. It raises serious questions about Tranchina's trustworthiness to handle investors' money and

³³ See, e.g., *Gould Elec. Inc. v. Livingston Cty. Rd. Comm'n*, No. 17-11130, 2020 U.S. Dist. LEXIS 118236, at *17 (E.D. Mich. June 30, 2020) (holding videoconference trial over plaintiff's objection despite "technical" and "scientific" nature of expert testimony); *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, No. 2:18CV94, 2020 U.S. Dist. LEXIS 110665 (E.D. Va. Apr. 23, 2020) (holding 23-day bench trial in complex patent infringement case by videoconference, over objection of defendant).

³⁴ See *FINRA Sanction Guidelines* (Mar. 2019), http://www.finra.org/sites/default/files/2020-10/2019_Sanctions_Guidelines.pdf [hereinafter, *Guidelines*].

³⁵ See *id.* at 2-6 (General Principles), 7-11 (Principal Considerations).

securities, and it casts grave doubt on his ability to comply with the securities laws and regulations and FINRA's rules.³⁶

Tranchina's misconduct also implicates several specific Principal Considerations. Tranchina's misconduct was premeditated and consisted of several intentional acts.³⁷ Barrett told Tranchina that he was not allowed to return to the Company's office.³⁸ Tranchina purposely waited several hours, until after the close of business, before returning to the Company's office because he knew that everyone but the cleaning staff would be gone. Tranchina drove approximately 30 minutes to the Company's office intending to break in and remove customer files. Although Tranchina knew that the Company had deactivated his electronic key card, he was able to gain entry by jiggling the broken doorknob in the stairwell. When he was unable to open the door to his personal office because the lock had been changed, he stood on a chair, used a broom handle to move ceiling tiles out of the way, and gained entry to his office by climbing over the wall. When the cleaning crew supervisor confronted him, Tranchina tried to conceal his misconduct by falsely stating that his name was Mike.³⁹ Each of these steps was knowing and intentional; Tranchina could have turned back after each one, but he did not. Last, Tranchina did not take any corrective action until the Company threatened to file criminal charges against him,⁴⁰ and his misconduct created the potential for monetary gain.⁴¹

Tranchina does not identify any mitigating factors, and none is apparent. Tranchina argues that there is no evidence that his misconduct caused harm to any customer or the Company, but absence of harm is not mitigating. *See Brokaw*, 2013 SEC LEXIS 3583, at *40. Tranchina also argues that he "returned the files promptly," and "did not use them for a business purpose." The record belies Tranchina's claim about the return of the customer files. Tranchina waited several days to return the customer files, and did so only in response to the threat of criminal charges. We do not find Tranchina's alleged non-use of the customer files mitigating.

Tranchina also argues that a bar is too severe, and that we should impose a lesser sanction that is in line with the sanctions imposed in other cases in which a respondent improperly removed customer information from his firm. Tranchina cites a number of cases, both litigated and settled, in which respondents were suspended and fined for this misconduct rather than

³⁶ *See Dep't of Enf't v. Olson*, Complaint No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at *12 n.13 (FINRA Bd. of Governors May 9, 2014) (stating that respondent's "deliberate self-help and conscious unwillingness to follow proper reimbursement channels within her firm reflect negatively on her ability to comply with basic regulatory requirements").

³⁷ *See Guidelines*, at 7-8 (Principal Considerations, Nos. 8 and 13).

³⁸ *See id.* at 8 (Principal Considerations, No. 14).

³⁹ *See id.* (Principal Considerations, No. 10).

⁴⁰ *See id.* at 7 (Principal Considerations, No. 2).

⁴¹ *See id.* at 8 (Principal Considerations, No. 16).

barred. Tranchina's argument is unpersuasive. It is well established that "the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases." *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *41 (Sept. 16, 2011). Additionally, Tranchina's reliance on settled cases is misplaced "because pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement such as the avoidance of time-and-manpower-consuming adversary proceedings." *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *33 (Feb. 20, 2014).

Comparisons to the sanctions imposed in other cases are particularly inappropriate here. This case involves uniquely aggravating facts and circumstances. In none of the cases Tranchina cites did the respondent return to the firm's office, after the firm had terminated him, and forcibly break in for the purpose of removing customer files. Tranchina's intentional and deliberate post-termination breaking-and-entering is extraordinarily aggravating, and it sets his case apart from those he cites in his brief. Tranchina contends that, in determining the appropriate sanction, we should not consider "how [he] accessed the files," i.e., the breaking and entering, but instead should focus "on the underlying conduct itself." We strongly disagree. Tranchina's post-termination breaking-and-entering is central to his ethical violation, and we consider it highly relevant in determining the appropriate sanction.

Considering all of these factors, we conclude that a bar is appropriately remedial for Tranchina's violation of FINRA Rule 2010. Tranchina's misconduct was egregious. It demonstrated astonishingly poor judgment, and it showed that he cannot be trusted to comply with the law or the securities industry's most fundamental ethical obligations. We therefore find that barring Tranchina is necessary to protect investors and other participants in the securities industry. See *John M.E. Saad*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216, at *7 (Aug. 3, 2019) ("A FINRA bar may be imposed, not as punishment, but as a means of protecting investors."), *aff'd*, 980 F.3d 103 (D.C. Cir. 2020). Accordingly, we bar Tranchina from associating with any FINRA member in any capacity.

B. Tranchina Is Suspended for Six Months and Fined \$10,000 for Failing to Disclose the Theft Charge on His Form U4

For an individual respondent's failure to amend Form U4, or filing of a false or misleading Form U4, the Guidelines recommend a fine of \$2,500 to \$39,000, and, when there are aggravating factors, a suspension in all capacities for a period of ten business days to six months.⁴² When aggravating factors predominate, the Guidelines suggest a longer suspension, up to two years.⁴³ The Specific Considerations include: (1) the nature and significance of the information at issue; (2) the number and nature of the disclosable events at issue; (3) whether the omission was an intentional effort to conceal information; (4) the duration of the delinquency;

⁴² *Guidelines*, at 71.

⁴³ *Id.*

and (5) whether the misconduct resulted directly or indirectly in injury to other parties, including the investing public, and, if so, the nature and extent of the injury.⁴⁴

There are aggravating factors here. Tranchina was charged with theft of property. A theft charge is significant information for the investing public and members of the securities industry. As of the hearing, Tranchina was still working in the securities industry but had not disclosed the charge on Form U4, around 21 months after he received the complaint-summons.

Balancing these factors, we agree with the Hearing Panel that an appropriately remedial sanction for Tranchina's failure to disclose the theft charge on his Form U4 would be a suspension of six months from association with any FINRA member firm in any capacity and a fine of \$10,000. We do not impose this sanction, however, because of the bar we impose separately for Tranchina's violation under cause two.

V. Conclusion

We find that Tranchina violated FINRA Rule 2010 when he gained unauthorized access to HTK's information by breaking into the Company's office and removing customer files. For this misconduct, Tranchina is barred from associating with any FINRA member in any capacity. The bar is effective immediately upon issuance of this decision. We also find that Tranchina violated FINRA's By-Laws and FINRA Rules 1122 and 2010 by failing to disclose on his Form U4 that he had been charged with a misdemeanor involving wrongful taking of property. For this misconduct, we assess on Tranchina a six-month suspension in all capacities and a \$10,000 fine. Because of the bar we impose for Tranchina's other violation, we do not impose either the suspension or the fine. Last, we find that Tranchina is subject to statutory disqualification for willfully failing to disclose material information on his Form U4. We affirm the Hearing Panel's order that Tranchina pay hearing costs of \$4,977.43, and we impose appeal costs of \$1,504.66.

On behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

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Id.