BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

In the Matter of the Application of

Christopher Peter Tranchina

For Review of Action Taken by

FINRA

Administrative Proceeding No. 3-21390

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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Hours after his former employer terminated him and told him not to return to the office, Christopher Tranchina drove to his old office, broke in, and removed files containing customers' non-public personal information. The state of New Jersey later charged Tranchina with theft, but Tranchina never disclosed the charge on his Uniform Application for Securities Industry Registration or Transfer ("Form U4").

FINRA's National Adjudicatory Council (the "NAC") found that, by breaking into his former employer's office and taking customer files, Tranchina acted unethically and demonstrated a shocking disregard for the securities industry's ethical standards. The NAC also found that Tranchina's conduct raised serious questions about his trustworthiness to handle investors' money and securities, and cast grave doubt on his ability to comply with the federal securities laws and FINRA's rules. Because of these concerns, the NAC barred Tranchina from associating with any FINRA member.

The NAC also found that Tranchina violated FINRA's By-Laws and rules by not disclosing the theft charge on his Form U4 in response to a question specifically asking whether

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he ever had been charged with a misdemeanor involving wrongful taking of property. The NAC, however, did not impose a sanction for this violation due to the bar it assessed for Tranchina's other violation.

The NAC further determined that Tranchina was subject to a statutory disqualification because his failure to disclose the theft charge on his Form U4 was willful. The NAC concluded that, under the circumstances, Tranchina was extremely reckless and must have known that, by not disclosing the charge on his Form U4, he was in danger of misleading regulators, employers, and investors. Additionally, the NAC concluded that, even assuming Tranchina was unsure about whether he had to disclose the theft charge, he still acted recklessly by making no effort to determine whether disclosure was required.

The NAC's findings are supported by the record and the sanctions it imposed and assessed are remedial and serve to protect the investing public. Tranchina has not shown any reason for the Commission to disturb any aspect of the NAC's decision. Accordingly, the Commission should dismiss the application for review.

I. Facts

A. Tranchina Begins Working at the Company

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"). RP 478-80.[1] Tranchina registered with HTK as an investment company and variable contracts products representative and was an insurance adviser for Penn Mutual. RP 478-80. Tranchina worked as an independent

[1] "RP __" refers to the page number in the certified record.

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contractor for HTK and Penn Mutual and executed separate agreements with each entity. RP 483-85, 495-96, 1259, 1289.

When Tranchina started at the Company, he worked with a more senior adviser, Jerry Goldberg. RP 480-81. Goldberg gave Tranchina leads on customers, and Tranchina and Goldberg shared the resulting commissions. RP 481-82, 1471. Tranchina also generated some business on his own by making cold calls and soliciting family members, friends, and referrals. RP 481-82, 1471.

After a few years, the relationship between Tranchina and Goldberg began to deteriorate. RP 1472. According to Tranchina, when Goldberg formed his own sales team, he changed the terms of the commission-sharing arrangement with Tranchina so that Goldberg received a larger commission on the business he referred to Tranchina. RP 1472. Goldberg also began requiring Tranchina to share commissions from business Tranchina generated independently. RP 1472. Over the next few years, Tranchina and Goldberg argued often about the working conditions on Goldberg's team, including the commission-sharing arrangement. RP 1472-76.

In early 2018, Tranchina quit Goldberg's sales team and formed his own, but that did not end his feuding with Goldberg. RP 1476-79. According to Tranchina, Goldberg 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 Goldberg's help. RP 1477. Tranchina thought this was unfair. RP 1477.

Tranchina's animosity towards Goldberg led him to make what he described as "the childish and regrettable decision" to divert business from Goldberg's sales team to his own. RP

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1479. Tranchina purchased two internet domain names containing the name of Goldberg's sales team. RP 1479. In April 2018, Tranchina instructed the internet domain host to redirect any traffic intended for the websites containing the name of Goldberg's sales team to his own team's website. RP 1479-80.

About one week later, the Company learned what Tranchina had done and suspended him. RP 1480. 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. RP 508, 863-64, 1480. Barrett revoked Tranchina's access to the Company's office by deactivating his electronic keycard. RP 508, 865-66. 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. RP 866.

B. The Company Terminates Tranchina

Eight days later, on Friday, April 27, 2018, the Company terminated Tranchina for attempting to divert business from Goldberg's sales team. RP 508-09, 1480. Barrett telephoned Tranchina that afternoon and gave him the news. RP 508-09, 866, 1480. 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 left in the office. RP 509-10, 514, 867, 1480-81. Barrett also instructed Tranchina to send back to the Company any Penn Mutual or HTK customer files and information in his possession. RP 867.

During the call, Tranchina asked Barrett whether the Company would provide to him any of the customer files that he kept in his personal office. RP 868. Barrett told Tranchina that the Company would give him the files for any customers that Tranchina did not share with Goldberg, "minus any Penn Mutual or HTK content," but would not provide any part of any file for any customer that Tranchina had shared with Goldberg. RP 540, 684-85, 1480. Tranchina

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found this "unacceptable" because he shared about 95 percent of his customers with Goldberg, even though, according to Tranchina, he had originated and serviced most of those customers without Goldberg's help. RP 510, 1480. 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." RP 1481.

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 intending to enter and remove customer files. RP 514-17. Tranchina arrived at the office around 8:30 p.m., a time at which he knew everyone but the cleaning staff would be gone for the evening. RP 517-18. He entered the building and took the stairs to the Company's office on the third floor. RP 521. 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. RP 522-23. Tranchina then walked to his former personal office. RP 525. He tried opening the door, but his key did not work because the Company had changed the lock. RP 527, 870. Tranchina asked a member of the cleaning staff to open the door, but her key did not work, either. RP 527-28. 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. RP 528. While Tranchina was doing that, he broke at least one of the ceiling tiles, and pieces of it fell to the floor. RP 528-29. With the ceiling tiles out of the way, Tranchina was able to access his former office by climbing over the wall. RP 533. Once inside, he removed a stack of customer files.[2] RP 536-37.

[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. RP 691-93.

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Before leaving the Company's office that night, Tranchina stopped to clean up the mess from the broken ceiling tile. RP 534. Tranchina grabbed the cleaning staff's vacuum cleaner and began vacuuming up the debris. RP 534. While he was doing that, the cleaning staff's supervisor confronted him and asked his name. RP 534-35. Tranchina falsely stated that his name was "Mike," and he quickly left the building. RP 535-36. 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." RP 535-36.

Barrett learned about the break-in the following Monday and called the police on Tuesday.[3] RP 870. A police officer came to the Company's office, created a report, and told Barrett how to file a complaint. RP 875-78, 1461. 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. RP 578-79, 587.

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. RP 1299. The attorney warned Tranchina that if he failed to do so, the Company would pursue criminal charges against him. RP 1299. Four days later, on May 7, 2018, Tranchina hand-delivered a box of documents to the Company's office. RP 570-71. The Company, however, did not believe that Tranchina had returned everything he had taken.

[3] The cleaning staff reported the incident to the building's security guard the night it happened. RP 871-72. The cleaning staff identified Tranchina using a photograph he left in his former personal office. RP 871-72.

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On May 18, 2018, a different Penn Mutual attorney sent a letter to Tranchina's attorney, again demanding that Tranchina return everything he had removed from the Company's office.[4] RP 1307. 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]." RP 1307-08. 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. RP 1307-08.

On May 30, 2018, Tranchina's attorney mailed additional documents to the Company. RP 1311. 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." RP 1311. Tranchina also provided a signed statement certifying that he had returned "all policyholder data and other records" to the Company.[5] RP 1567.

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

[4] Tranchina testified that, by this time, he had hired the attorney to represent him in his employment dispute with the Company. RP 694-96.

[5] 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 employed by the Company. RP 696-97.

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> locked, former office without authorization, and removed items from the office without authorization.

RP 1588.

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. RP 604. 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." RP 1151. Tranchina signed a form promising 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[.]" RP 1507-08.

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. RP 879-83. After hearing Barrett's testimony, the judge found probable cause to issue a complaint-summons to Tranchina. RP 1465-66. The complaint-summons alleged that Tranchina entered the Company's office, without authorization, after normal business hours on April 27, 2018, and removed "business papers." RP 1465-66. 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." RP 1465-66. 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

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is titled "Theft by unlawful taking or disposition; movable property."[6] RP 1465-66. The court mailed the complaint-summons to Tranchina, and Tranchina received it in early August 2018. RP 632-33, 713.

Tranchina appeared in court twice to respond to the allegations against him—once in September and again in October 2018. RP 650-651. At both appearances, Tranchina was represented by a criminal-defense attorney he hired to represent him.[7] RP 651-52, 746.

During the October 2018 court appearance, Tranchina pleaded guilty to the three offenses charged in the complaint-summons, including "theft by unlawful taking or disposition." RP 652, 1469-70. The court, however, did not enter a judgment of conviction. Instead, the court placed Tranchina on "conditional dismissal." RP 657-68, 1467, 1571. 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.[8]

G. Tranchina Fails to Disclose the Theft Charge

Tranchina never disclosed the theft charge on his Form U4. RP 673. 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. RP 644-45, 651. When 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

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[6] The complaint-summons alleged that Tranchina also violated sections 2C:18-3 and 2C:17-3 of the New Jersey Code of Criminal Justice. RP 1465-66. Those sections are titled "Unlicensed entry of structures; defiant trespasser; peering into dwelling places; defenses," and "Criminal mischief," respectively.

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

[8] The court dismissed the complaint-summons in May 2020. RP 1470.

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misdemeanor involving wrongful taking of property. RP 663-64. Each time, he answered "no" to that question. RP 665-673, 1211, 1229, 1248-49.

Tranchina did not timely disclose the theft charge to Chelsea, either. RP 663-64. 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. RP 647-49.

II. Procedural History

In June 2020, Enforcement filed a three-cause complaint against Tranchina. RP 6. 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. RP 13. 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 HTK customer files after the Company had terminated him. RP 15. Under cause three, Enforcement alleged that Tranchina violated FINRA's By-Laws and FINRA Rules 1122 and 2010 by not disclosing the theft charge on his Form U4. RP 15.

Following a two-day hearing in January 2021, the Hearing Panel found Tranchina liable on all three causes of action. RP 1665, 1676-86. The Hearing Panel barred Tranchina from associating with any FINRA member in any capacity as a unitary sanction for his violations under causes one and two. RP 1686-88. 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. RP 1690-91. The Hearing Panel also found that Tranchina was statutorily disqualified because he willfully failed to disclose the theft charge on his Form U4. RP 1685-86. Tranchina appealed the Hearing Panel's decision. RP 1693.

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In a March 2023 decision, FINRA's NAC affirmed, in part, the Hearing Panel's decision and modified the sanctions it imposed. RP 1883. The NAC affirmed the Hearing Panel's finding that Tranchina acted unethically, in violation of FINRA Rule 2010, when he gained unauthorized access to HTK's information by breaking into the Company's office and removing customer files. RP 1890. The NAC barred Tranchina for this violation. The NAC, however, dismissed the allegation that this conduct constituted conversion. RP 1891. The NAC declined to adjudicate this allegation because it implicated complex questions of state employment, contract, and intellectual property law that were not well suited for resolution in a disciplinary proceeding, and adjudicating the conversion allegation was not necessary to determine whether Tranchina's conduct was unethical. RP 19. The NAC affirmed the Hearing Panel's finding that Tranchina failed to timely amend his Form U4 to disclose the theft charge, in violation of FINRA's By-Laws and Rule 1122 and 2010. RP 1893. The NAC assessed a six-month suspension and a $10,000 fine as a sanction for this violation, but it did not impose the suspension or the fine because of the bar it imposed on Tranchina for his other violation. The NAC also affirmed the Hearing Panel's finding that Tranchina's failure to disclose the theft charge on his Form U4 was willful, and therefore Tranchina is subject to a statutory disqualification. RP 1897. Tranchina filed an application for review. RP 1935.

III. Argument

The Commission must dismiss Tranchina's application for review if (1) Tranchina engaged in the conduct the NAC found, (2) Tranchina's conduct violated the FINRA rules specified in the NAC's decision, and (3) those rules are, and were applied in a manner, consistent with the Securities Exchange Act of 1934 (the "Exchange Act"). 15 U.S.C. § 78s(e)(1).

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The record fully supports the NAC's findings that Tranchina acted unethically by breaking into the Company's office and removing customer files. The record also fully supports the NAC's findings that he violated FINRA's By-Laws and rules by not disclosing the related theft charge on his Form U4. The bar the NAC imposed on Tranchina is appropriately remedial because, by breaking into the Company's office and removing customer files after the Company terminated him, Tranchina showed that he cannot be trusted to comply with the fundamental legal and ethical obligations of a professional working in the securities industry. The NAC's finding that Tranchina is subject to a statutory disqualification also is well supported by the record. Tranchina provides no relevant or material basis on which the Commission should disturb the NAC's findings of violation or the sanctions it imposed. The Commission therefore should dismiss the application for review.

A. Tranchina Acted Unethically By Breaking Into the Company's Office and Removing 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."[9] The rule applies to all business-related conduct, regardless of whether it involves a security. *Richard Allen Riemer, Jr.*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022, at *17 (Oct. 31, 2018) (applying FINRA Rule 2010's predecessor, NASD Rule 2110). To establish a violation of FINRA Rule 2010 when there is no violation of any other FINRA rule or federal securities law, the record must show 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

[9] 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."

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conduct is defined as conduct "not in conformity with moral norms or standards of professional conduct." *Id.* at *21.

Tranchina's conduct was patently unethical. Tranchina knew the Company had terminated him and had prohibited him from entering its office. RP 509, 511-12, 514. He also knew the Company had claimed the exclusive right to possess most of the customer files Tranchina kept in his former office, and that the Company was refusing to turn over those files to him. RP 511-15, 1480-81. Tranchina was concerned this would hurt his business, and so he decided to take matters into his own hands. RP 512, 1480-81. After Barrett terminated him on the afternoon of April 27, 2018, Tranchina waited until after normal business hours, when he knew Barrett and the Company's other employees would be gone, drove to the Company's office, and broke in for the purpose of removing the customer files the Company was refusing to provide to him. RP 515-18. The record establishes that the customer files Tranchina removed from the Company's office that night contained non-public personal information about HTK's customers, such as their email addresses, telephone numbers, and social security numbers.[10] RP 555-56, 560-65, 1311-1456. The files also contained copies of the customers' HTK account statements showing their securities holdings. *See id.*

No reasonable person in Tranchina's position would have acted as he did; a reasonable person would have resolved his dispute with the Company through negotiation and, if necessary, litigation. 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.*,

[10] Enforcement did not introduce the actual customer files Tranchina removed on April 27, 2018. The NAC concluded, based on Tranchina's testimony about the contents of customer files in the ordinary course of business, and the contents of actual customer files that were introduced at the hearing, that the files Tranchina removed contained HTK customers' non-public personal information. RP 1890-91.

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Initial Decisions No. 349, 2008 SEC LEXIS 1393, at *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"). A reasonable person would have, and Tranchina should have, resolved his dispute with the Company in the appropriate forum.

Tranchina erroneously argues the NAC's finding of violation under cause two is inconsistent with its dismissal of the conversion allegation under cause one. Brief in Support of the Application for Review ("Brief") at 10. According to Tranchina, the NAC's dismissal of the conversion charge is "an admission that whether Tranchina had the right to these files was a matter of contract," and "[a]ssuming Tranchina had the right to the files in question," the Company's "denial of his access should not form the basis for a finding that Tranchina gained unauthorized access to HTK information." Tranchina misconstrues the NAC's reasoning. The NAC did not find that Tranchina had a contractual right to the information in the customer files he removed. Rather, the NAC found that, even if Tranchina had a contractual right to some of that information, as he claims he did, he gained unauthorized access to that information, and thereby acted unethically, by forcibly breaking into the Company's office, after the Company had terminated him, and removing the files. The NAC's reasoning is entirely consistent: regardless of Tranchina's purported contractual right to HTK customer information, his conduct still was inexcusable and highly unethical.[11]

[11] *See Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *16 (Sept. 3, 2015) ("[E]ven if [the applicant] had established that [her employer] owed her money, we would not offset such amounts against the $740.10 that she converted because . . . securities professionals are not entitled to self-help in this manner.").

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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. *See Jay Frederick Keeton*, 50 S.E.C. 1128, 1135 (1992) (finding that the applicant acted unethically because, "[i]nstead of trying to resolve his claim in an appropriate forum, he irresponsibly attempted to coerce payment . . . by threatening adverse publicity"); *Ahmed Gadelkareem*, Exchange Act Release No. 82879, 2018 SEC LEXIS 729, at *22-23 (Mar. 14, 2018) (finding the applicant acted unethically because he "engaged in a series of dishonest acts . . . designed to extract commissions he believed he was owed"). The Commission should affirm the NAC's finding of violation.

B. Tranchina Violated FINRA's By-Laws and Rules By Failing to Disclose the Theft Charge on His Form U4

Under FINRA's By-Laws, an applicant for registration must provide all 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 such filing after notice thereof."[12] *See Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *16 (Oct. 20, 2011).

[12] A violation of FINRA Rule 1122 is also a violation of FINRA Rule 2010. *See, e.g., Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *10 (Mar. 15, 2016), *aff'd*, 672 F. App'x 865 (10th Cir. 2016) (finding that the applicant's failure to amend his Form U4 violated FINRA Rules 1122 and 2010).

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Two questions on Form U4 are relevant here:

- 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)?"[13]

Tranchina answered "no" to question 14B(1)(b) when he joined Chelsea in July 2018, which apparently was accurate at the time, but he was required to change that answer to "yes" after he received the complaint-summons in August 2018.

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. 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." *Id.*

"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. For states like New Jersey that do not classify offenses as misdemeanors or felonies, FINRA provides the definitions of those terms in

[13] Form U4 directs the applicant to "[r]efer to the Explanation of Terms section of Form U4 Instructions for explanations of italicized terms." *See* RP 1151.

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the Form U4 Explanation of Terms.[14] 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."[15] 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."[16]

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 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) (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) (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

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14 To the extent necessary, the Commission may take official notice of the Explanation of Terms, which both parties cite in their briefs. *See, e.g.*, *Metatron, Inc.*, Exchange Act Release No. 88429, 2020 SEC LEXIS 761, at *2 n.5 (Mar. 19, 2020) (taking official notice of information published on the OTC Markets website).

15 *See* http://www.finra.org/registration-exams-ce/classic-crd/forms/explanation-of-terms.

16 *Id.*

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fourth degree may be fined up to $10,000).[17] Accordingly, "theft by unlawful taking or disposition" may be a felony for purposes of Form U4, but is always at least a misdemeanor.[18]

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 therefore violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010.

Tranchina argues that he was not required to disclose the theft charge on his Form U4 because he was not "charged" with a "crime," as the Explanation of Terms and New Jersey's Code of Criminal Justice, respectively, define those terms. *See* Brief at 12-14. Under New Jersey law, a "crime" is an offense for which the maximum sentence of imprisonment exceeds six months. *See* N.J. Rev. Stat. § 2C:1-4. Tranchina contends theft by unlawful property is not a "crime" under New Jersey law because, he asserts, the maximum sentence of imprisonment for the offense is six months.[19] Question 14B(1)(b) on Form U4 asks whether the applicant has ever been "charged." "Charged" is a defined term on Form U4, and the Explanation of Terms defines it as "being accused of a crime in a formal complaint, information, or indictment (or equivalent

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

[18] The complaint-summons did not specify the value of the customer files Tranchina removed.

[19] Tranchina is incorrect that theft by unlawful taking is never a "crime" under New Jersey law. As discussed above, the maximum sentence increases as the value of the property involved increases, and when the property is valued at more than $200, theft by unlawful taking is a "crime" under New Jersey law. *See* N.J. Rev. Stat. § 2C:20-2.b(3).

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formal charge)."[20] Tranchina contends, because theft by unlawful taking is not a "crime," as New Jersey defines that term, he was not "accused of a crime" in the complaint-summons, and therefore he could not have been "charged" with any offense. As a result, Tranchina argues, he was not required to answer "yes" to question 14B(1)(a). The Commission should reject Tranchina's attempt to manufacture ambiguity where none exists.

The NAC properly rejected Tranchina's assertion that New Jersey law governs when interpreting Form U4 and the definitions in the Explanation of Terms. *See* RP 1919-20. The NAC concluded that it was not bound by New Jersey's non-standard definition of "crime."[21] Instead, the NAC applied the "fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). As courts often do, the NAC looked to a dictionary for the ordinary meaning of the term "crime." *See id.*; *see also, e.g., Cascabel Cattle Co., L.L.C. v. United States*, 955 F.3d 445, 451 (5th Cir. 2020) ("We often look to dictionary definitions for help in discerning a word's ordinary meaning."). The Merriam-Webster Dictionary defines "crime" as "an illegal act for which someone can be punished by the government."[22] Based on that definition, the NAC concluded that Tranchina had been "accused of a crime" in the complaint-summons, and therefore he had been "charged" with an offense, because theft by unlawful taking was an act for which he could have been punished by the

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[20] *See* http://www.finra.org/registration-exams-ce/classic-crd/forms/explanation-of-terms.

[21] In similar contexts, federal courts have taken the same position. *See, e.g.*, *United States v. Dean*, 329 F. App'x 377, 379 n.1 (3d Cir. 2009) ("[W]e do not read the [state] 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.").

[22] This definition is in accord with the definitions applied by courts. *See, e.g., United States v. Cole*, No. 22-CR-98-JFH, 2022 U.S. Dist. LEXIS 233044, at *10 (E.D. Okla. Dec. 29, 2022) ("Consistent across these definitions is the rule that a crime is a prohibited act.").

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government. The NAC's interpretation of question 14B(1)(b) and the definitions in the Explanation of Terms adheres to the "prime directive in statutory interpretation," which "is to apply the meaning that a reasonable reader would derive from the text of the law." *Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1098 (D.C. Cir. 2017).

Tranchina also argues in his brief, for the first time, that his failure to disclose the theft charge on his Form U4 was "moot from the date of expungement." Brief at 13-14. Tranchina cites no record evidence that the theft charge was, in fact, expunged.[23] The court dismissed the charge in May 2020. Even assuming for the sake of argument that the theft charge was expunged at the time it was dismissed, Tranchina still is liable for the violation found because he failed to disclose the theft charge on his Form U4 during the 21-month period between August 2018 and May 2020.

By not disclosing the theft charge on his Form U4, Tranchina violated FINRA's By-Laws and FINRA Rules 1122 and 2010. *See Allen Holeman*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *16-19 (July 31, 2019), *aff'd*, *Holeman v. S.E.C.*, 833 Fed. App'x 485 (D.C. Cir. 2021) (finding that the applicant's failure to disclose federal tax liens on his Form U4 violated FINRA's By-Laws and FINRA Rules 1122 and 2010). The Commission should affirm the NAC's finding of violation.

C. Tranchina Is Subject to a Statutory Disqualification

A person is subject to statutory disqualification under Section 3(a)(39) of the Exchange Act if, among other things, he "has willfully made or caused to be made" on Form U4 "any

[23] In his brief, Tranchina cites RX-7 (RP 1569-72) in support of his assertion that the theft charge was expunged. RX-7 is an electronic record from the court showing that the theft charge was conditionally dismissed in October 2018. RP 1571. It does not show that the theft charge was expunged. The court dismissed the theft charge in May 2020. RP 1470. The order of dismissal does not mention expungement. *See id.*

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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 McCune*, 2016 SEC LEXIS 1026, at *13-23. Tranchina is subject to a statutory disqualification 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. In other words, omitted facts on a Form U4 are material "when they would have assumed actual significance in the deliberations of the representative's employers, regulators, and investors." *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, *27 (Nov. 9, 2012). The materiality of information is "particularly evident" when its "disclosure should have been triggered by a specific question on the Form U4." *Id.* at *28. "Essentially all the information that is reportable on the Form U4 is material." *Id.*

The NAC found that the theft charge was material because a reasonable regulator, employer, or customer, would view any theft charge as significantly altering the total mix of information available. *See* RP 1921-22. The NAC reasoned that the theft charge casts doubt on Tranchina's judgment and his ability to comply with his legal and ethical obligations as a member of the securities industry. RP 1921. Indeed, the theft charge would have been particularly significant to any prospective employer because it involved Tranchina's alleged theft

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of customer files from his former employer. RP 1921. A reasonable employer would view the theft charge against Tranchina as extremely relevant when considering whether to hire him. RP 1921.

The NAC properly rejected Tranchina's argument that the theft charge was not material because the allegations relating to the theft were included on the U5 that HTK filed in 2018 and were publicly available through BrokerCheck®. RP 1921-22. As the NAC noted, there is a qualitative difference between a former employer's allegations about a registered person's conduct on a Form U5 and a criminal theft charge arising from that conduct. RP 1922. Tranchina's "no" response to question 14B(1)(b) could lead a reasonable regulator, employer, or customer to believe, erroneously, that HTK's allegation on Form U5 was exaggerated, disputed, or even untrue. The theft charge substantiates HTK's allegations; 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. *Cf. United States v. Contorinis*, 692 F.3d 136, 144 (2d Cir. 2012) ("A trier of fact may find that information obtained from a particular insider, even if it mirrors rumors or press reports, is sufficiently more reliable, and, therefore, is material and nonpublic, because the insider tip alters the mix by confirming the rumor or reports."). Any reasonable regulator, employer, or customer undoubtedly would consider the theft charge as significantly altering the total mix of information made available, and therefore it is material.

2. Tranchina Willfully Failed to Disclose the Theft Charge

In this context, "willfully" means intentionally committing the act which constitutes the violation. *Holeman*, 2019 SEC LEXIS 1903, at *37. "Willfulness" does not require awareness that one is violating the Exchange Act or any rule. *Id.* A person may be subject to a statutory

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disqualification as long as he intentionally submitted a Form U4, or failed to amend an existing Form U4, knowing that the Form U4 contained material, false information. *Id.* A person acts willfully when he acts with "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.

The NAC found that Tranchina was at least extremely reckless in not disclosing the theft charge on his Form U4. RP 1922-23. The record supports the NAC's finding because, under the circumstances, any reasonable person would have known, and Tranchina must have known, that by stating he had never been charged with a misdemeanor involving wrongful taking of property, he was in danger of providing material, false information on his Form U4. The judicial proceeding against Tranchina had the indicia of a criminal prosecution. The complaint-summons charged Tranchina with criminal offenses. *See* RP 1465-66. It is captioned "*The State of New Jersey v. Christopher P. Tranchina.*" *Id.* It alleged that Tranchina "attempted unlawful entry and trespass," and "commit[ed] the offense of theft by unlawfully taking or exercising control over certain moveable property." *Id.* Under the heading "original charge," it listed three sections of the New Jersey Criminal Code, including 2C:20-3.a, which is titled "Theft by unlawful taking or disposition; movable property." *Id.* At a minimum, the theft charge was punishable by up to six months imprisonment and/or a $1,000 fine, which made the offense a misdemeanor for purposes of Form U4. *See* N.J. Rev. Stat. §§ 2C:20-2.b.(4)(a), 2C:43-8, 2C:43-3.c. Tranchina was required to appear in court on the date specified to respond to the charge. *See* RP 1465. The complaint-summons stated that, if he failed to appear, "a warrant may be issued for [his] arrest." *Id.* After Tranchina pleaded guilty to the theft charge, the court

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conditionally dismissed the charges. RP 1467, 1469. Under the terms of the dismissal, the theft charge remained pending for one year, and if Tranchina had committed another offense during that period, the court could have entered a judgment of conviction on the theft charge and imposed punishment for it. *See* N.J. Rev. Stat. § 2C:43-13.4. Under these circumstances, Tranchina must have known that, by not disclosing the theft charge on Form U4, he was in danger of misleading regulators, employers, or investors about whether he ever had been charged with a misdemeanor involving wrongful taking of property.

The NAC properly deferred to the Hearing Panel's finding that Tranchina's proffered excuse for why he did not disclose the theft charge was implausible. RP 1923. At the hearing, Tranchina repeatedly testified that he did not think he had to disclose the theft charge because he thought it was "like a parking ticket." *See, e.g.*, RP 640, 987, 1007. After listening to Tranchina's testimony on this issue, the Hearing Panel concluded that it was not credible, and that, in reality, Tranchina intended to conceal the theft charge by not disclosing it on his Form U4. RP 1691 (stating that Tranchina's "testimony that he viewed the criminal charges like a 'parking ticket' is not credible"). The NAC deferred to the Hearing Panel's credibility finding, and Tranchina provides no basis for the Commission to disturb it. *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, as described above, the record amply shows that Tranchina must have known that he had been charged with at least a misdemeanor. The judicial proceedings against Tranchina manifestly constituted a criminal prosecution. Tranchina must have understood that it was a criminal prosecution because, in fact, he hired a criminal-defense attorney to represent him. RP 651-52, 746. Had Tranchina thought the charges against him were no more serious than a parking ticket, he would not have done so.

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The Commission should reject Tranchina's unsupported assertion that his failure to disclose the theft charge "was at most the result of negligence of the New Jersey criminal code as it applies to FINRA rules and terminology for U4 disclosure issues." Brief at 14. This is nothing more than an after-the-fact attempt to excuse his misconduct. Tranchina does not cite any evidence indicating that, at the time he failed to disclose the theft charge, he was confused about whether the theft charge was a "crime" or a "misdemeanor" for purposes of Form U4. *See, e.g., S.E.C. v. Obus*, 693 F.3d 276, 286 (2d Cir. 2012) (explaining scienter requirement as concerning defendant's state of mind "at the moment of" his alleged misconduct). Instead, Tranchina repeatedly testified, incredibly, that he decided not to disclose the theft charge because he thought the complaint-summons was like a "parking ticket" or a "traffic citation" that he had received in the mail. RP 640, 722, 987. The Commission should disregard Tranchina's effort to justify his conduct with a post hoc explanation that is unsupported by the record.[24]

To the extent Tranchina had any doubt about whether he was required to disclose the theft charge on his Form U4, he acted recklessly because he unquestionably failed to fulfill his "duty to determine whether disclosure was required." *See Neaton*, 2011 SEC LEXIS 3719, at *23; *see also Holeman*, 2019 SEC LEXIS 1903, *41 ("To the extent [the applicant] found Question 14M to be ambiguous, it was his duty to determine whether disclosure was required."). Tranchina admitted during the hearing that, at the time, he did not discuss the Form U4 disclosure with his attorney, nor did he discuss it with anyone at Chelsea. RP 644-45, 647-649, 651, 663-64. In fact, Tranchina did not tell Chelsea about the theft charge when he received the

[24] *See United States v. Thompson*, No. 92 CR 212, 1993 U.S. Dist. LEXIS 655, at *9 (N.D. Ill. Jan. 21, 1993) ("[A]n after the fact explanation by tax experts of the legitimacy of the alleged deductions has nothing to do with [the defendant's] state of mind at the time he filed his returns.").

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complaint-summons or after he pleaded guilty to it. *See id.* 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. *See id.* 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 such an extreme departure from the standard of ordinary care that the danger of misleading regulators, employers, or investors by not disclosing the theft charge was so obvious that Tranchina must have been aware of it. *See Holeman*, 2019 SEC LEXIS 1903, at *42 (finding that the applicant's "failure to take any steps to probe the liens or resolve his apparent confusion about whether the liens needed to be disclosed" on Form U4 "was such an extreme departure from the standards of ordinary care that the danger of misleading investors by not disclosing the liens was so obvious that he must have been aware of it."). Accordingly, Tranchina was extremely reckless in failing to make any inquiry into whether he was required to disclose the theft charge on his Form U4.

Tranchina willfully failed to disclose material information on his Form U4, and the Commission should affirm the NAC's finding that he is subject to a statutory disqualification.

D. The Sanctions Are Appropriately Remedial

The Commission must sustain a sanction imposed unless it finds the sanction is "excessive or oppressive" or imposes an unnecessary or inappropriate burden on competition.[25] 15 U.S.C. § 78s(e). In making this assessment, the Commission must consider any aggravating or mitigating factors and whether the sanctions are remedial and not punitive. *Gadelkareem*, 2018 SEC LEXIS 729, at *24-25. The Commission is not bound by FINRA's Sanction Guidelines ("Guidelines"), but they serve as a benchmark in the Commission's review. *Id.* at

[25] Tranchina does not assert that the sanction imposes an inappropriate burden on competition.

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*25. The record supports the NAC's finding that an all-capacities bar is appropriately remedial for Tranchina's unauthorized access to HTK information and that a six-month suspension and $10,000 fine is appropriately remedial for Tranchina's failure to disclose the theft charge.

1. The Bar Imposed for Tranchina's Unethical Conduct Is Necessary to Protect Investors and the Public Interest

The Guidelines do not contain recommended sanctions for the specific misconduct at issue.[26] The NAC therefore 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. *See* RP 1925.

The NAC found that, from a general perspective, Tranchina's conduct in breaking into the Company's office and removing customer files was deeply disturbing and demonstrated a shocking disregard for the law and for the securities industry's ethical standards.[27] *See* RP 1925-26. The NAC also found that this conduct raised serious questions about Tranchina's trustworthiness to handle investors' money and securities and his ability to comply with the federal securities laws and FINRA's rules.[28] *Id.*

The NAC further determined that Tranchina's conduct implicated several specific aggravating factors. *See* RP 1926. Tranchina was warned by Barrett not to return to the

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

[27] *See Mayer A. Amsel*, 52 S.E.C. 761, 768 (1996) (affirming a bar where the applicant "exhibited a disturbing disregard for the standards that govern the securities industry, a business that is rife with opportunities for abuse").

[28] *See John M.E. Saad*, Exchange Act Release No. 62178, 2010 SEC LEXIS 1761, at *30 (May 26, 2010), *aff'd*, 980 F.3d 103 (D.C. Cir. 2020) (affirming a bar where the applicant "engaged in highly troubling conduct that raises serious doubts about his fitness to work in the securities industry").

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Company's office to retrieve the customer files, but he did so anyway.[29] RP 509, 511-12, 514. Tranchina's conduct was premeditated and consisted of a series of intentional acts.[30] After Barrett terminated him, Tranchina waited several hours before returning to the Company's office because he knew that everyone but the cleaning staff would be gone by that time. RP 515-18. Tranchina drove approximately 30 minutes to the Company's office intending to break in and remove customer files. RP 515-18. 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. RP 522-23. When he was unable to open the door to his personal office because the Company had changed the lock, 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. RP 527-28, 870. Then, when the cleaning crew supervisor confronted him, Tranchina tried to conceal his misconduct by falsely stating that his name was "Mike."[31] RP 535-36. 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, and his misconduct created the potential for monetary gain.[32] RP 57-71, 1299, 1307-08, 1311, 1567.

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29 *See Guidelines*, at 8 (Principal Considerations, No. 14).

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

31 *See Olsen*, 2015 SEC LEXIS 3629, at *12 (finding that the applicant's effort to conceal her misconduct was aggravating); *see also Guidelines*, at 8 (Principal Considerations, No. 10).

32 *See Olsen*, 2015 SEC LEXIS 3629, at *14-15 (finding it aggravating that the applicant's misconduct resulted in harm to her employer and monetary gain to herself); *see also Guidelines* at 8 (Principal Considerations, No. 16).

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Tranchina argues that the NAC erred by finding that his conduct was premeditated and consisted of several intentional acts because, he argues, his conduct was "the result of duress and was not planned in any meaningful way." Brief at 10. Tranchina's argument has no merit. As discussed above, the record establishes that Tranchina's breaking-and-entering of the Company's office was, in fact, premeditated. The record does not show that Tranchina's actions were the result of duress. "Duress" is "a threat of harm made to compel a person to do something against his or her will or judgment." *United States v. Truley*, No. 21-14352, 2022 U.S. App. LEXIS 31249, at *10 (11th Cir. Nov. 10, 2022) (quoting Black's Law Dictionary (11th ed. 2019)). The Company's actions on April 27, 2018, did not compel Tranchina to drive to the Company's office, break in, and remove customer files against his will. As Tranchina acknowledges in his brief, his disagreement with the Company over the customer files was, at bottom, a contract dispute. *See* Brief at 10, 11. Tranchina has maintained throughout this proceeding, and continues to argue in his Brief, that he had a contractual right to the customer files he removed from the Company's office. *See* RP 10. Tranchina therefore had a legal (and ethical) way to remedy the perceived injustice done to him by the Company: he could have filed an arbitration claim and asserted his purported contractual right to the customer files.[33] Tranchina consciously chose not to do that. Instead, he chose immediate self-help. Tranchina's conduct might have been the result of his impatience, but it certainly was not the result of duress, and the Commission should reject Tranchina's attempt to mitigate his misconduct on this basis.

[33] *Cf. United States v. Bailey*, 444 U.S. 394, 410 (1980) ("Under any definition of [the defenses of duress and necessity] one principle remains constant: if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defenses will fail.").

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Tranchina also argues that the NAC erred by imposing a bar because it "disregarded similar enforcement actions where the underlying conduct was substantially the same." Brief at 7. In support of his argument, Tranchina cites one litigated case and several settled cases. Tranchina's reliance on the sanctions imposed in other cases is misplaced because it is well established "that the appropriateness of the sanctions imposed depends on the facts and circumstances of each particular case and cannot be determined precisely by comparison with action taken in other cases." *See, e.g.*, *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *41 (Sept. 16, 2011). Tranchina's comparison of the sanction imposed in this case with the sanctions imposed in settled cases is particularly inappropriate because, as the Commission has acknowledged, "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. 71589A, 2014 SEC LEXIS 4611, at *33-34 (Feb. 20, 2014). In any event, the cases Tranchina cites did not involve conduct similar to his: in none of those cases did the applicant or respondent forcibly break into his former employer's office, after being terminated and told to stay away, and remove customer files. *See Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *7 (Jan. 6, 2012) (applicant copied customer information while still employed); *Gabriel Schulman*, Letter of Acceptance, Waiver and Consent No. 2011026449801 (Oct. 25, 2013) (respondent moved customer-related documents from his office to home while still employed). As the NAC found, Tranchina's intentional and deliberate post-termination breaking-and-entering is extraordinarily aggravating, and it distinguishes his case from all of the others he cites.

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Tranchina makes several other arguments, none of which has merit. Tranchina asserts that the NAC was "unduly influenced" by the filing of the criminal charges, but he does not explain how. *See* Brief at 9. He claims that the NAC "gave far too much weight to [his] conduct," but does not explain why the NAC should not consider his conduct in determining the appropriate sanction. *See* Brief at 9. Tranchina asserts that the NAC "failed to take account" that the charges were dismissed (Brief at 9), but the NAC explicitly acknowledged the dismissal of the charges in its decision. *See* RP 1912. Moreover, the dismissal of the charges does not mitigate Tranchina's misconduct; the court dismissed the charges because Tranchina qualified for a conditional dismissal, not because he did not engage in the wrongdoing alleged.[34]

None of the other factors Tranchina cites in his brief is mitigating. *See* Brief at 10. Lack of a prior disciplinary history is not mitigating. *Michael Pino*, Exchange Act Release No. 74903, 2015 SEC LEXIS 1811, at *39 (May 7, 2015). The absence of customer complaints is not mitigating. *Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *27 (Nov. 4, 2009), *pet. for review denied*, 416 F. App'x 95 (2d Cir. 2011). The absence of customer harm is not mitigating. *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *44-45 (Sept. 24, 2015). Tranchina's compliance with FINRA's investigation is not mitigating.[35] *Glodek*, 2009 SEC LEXIS 3936, at *28. And, as the NAC found, Tranchina's return of the customer files to the Company is not mitigating because Tranchina returned the files only after the Company threatened him with criminal charges. *See Olson*, 2015 SEC LEXIS 3629, at *28 ("[V]oluntary repayment is only considered mitigating under the Guidelines

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[34] Tranchina also claims the charges were expunged. As discussed above, however, there is no evidence of expungement in the record.

[35] Tranchina could not deny to FINRA that he entered the Company's office and removed customer files. There were eyewitnesses who saw him do it, and he pleaded guilty to the charges in the complaint-summons.

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when made prior to detection and intervention."); *Guidelines* at 7 (Principal Considerations, No. 3) (stating that corrective action is mitigating only if it is taken "prior to detection or intervention by the firm"). Because none of the factors Tranchina cites in his brief is mitigating, the NAC properly did not consider them in determining the appropriate sanction.

The bar imposed on Tranchina is appropriately remedial for Tranchina's egregious misconduct. Tranchina demonstrated astonishingly poor judgment and showed that he cannot be trusted to comply with the law or the securities industry's most fundamental ethical obligations. Barring Tranchina therefore 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. 2000). Accordingly, the Commission should sustain the bar the NAC imposed on Tranchina.

2. The Fine and Suspension Assessed for Tranchina's Failure to Disclose the Theft Charge are Appropriately Remedial

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. *Guidelines*, at 71. When aggravating factors predominate, the Guidelines suggest a longer suspension, up to two years. *Id.* 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; 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. *Id.*

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For Tranchina's violation of FINRA's By-Laws and FINRA Rules 1122 and 2010, the NAC assessed, but did not impose, a six-month suspension and a $10,000 fine. RP 1927-28. In assessing this sanction, the NAC identified several aggravating factors. *See* RP 1928. 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 still was working in the securities industry but had not disclosed the theft charge on his Form U4—around 21 months after he received the complaint-summons. The sanction the NAC assessed for this violation is within the Guidelines and, under the circumstances, is appropriately remedial for the violation. Accordingly, the Commission should sustain it.[36]

IV. Conclusion

The NAC's findings of violation are supported by the record. Tranchina acted unethically by breaking into the Company's office and removing customer files after the Company terminated him, and violated FINRA's By-Laws and rules when he willfully failed to amend his Form U4 to disclose the related theft charge. The NAC correctly found that Tranchina's misconduct in removing the customer files was egregious and demonstrated that a bar was necessary to protect investors and other participants in the securities industry. The

[36] Tranchina mentions the $10,000 fine once in his brief (*see* Brief at 2), but otherwise does not address it or the six-month suspension. *See* Brief at 2. The Commission therefore should find that he has waived his exception to it. *See Consolidated Arbitration Applications*, Exchange Act Release No. 97248, 2023 SEC LEXIS 868, at *14 n.39 (Apr. 4, 2023) (finding that the applicants waived an issue they did not address in their brief); *see also* Rule of Practice 420(c) ("Any exception to a determination not supported in an opening brief that complies with [Rule of Practice] 450(b) may, at the discretion of the Commission, be deemed to have been waived by the applicant."). Moreover, because the NAC did not impose the fine or the suspension, the Commission should not review the sanction. *See William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *44 n.68 (Mar. 31, 2016) ("Because FINRA did not impose sanctions for the . . . violations, we do not make findings as to whether the sanctions FINRA would have imposed (absent the bars) were excessive or oppressive.").

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Commission should sustain the NAC's decision in all respects and dismiss the application for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Michael M. Smith, certify that:

(1) this brief complies with SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 10,438 words; and

(2) FINRA's Brief in Opposition to the Application for Review complies with SEC Rule of Practice 151(e) because it omits or redacts any sensitive personal information.

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CERTIFICATE OF SERVICE

I, Michael M. Smith, certify that on this 2nd day of August, 2023, I caused a copy of the foregoing FINRA's Brief in Opposition to the Applicant for Review, in the matter of the *Application for Review of Christopher Peter Tranchina*, Administrative Proceeding File No. 3-21390, to be filed through the SEC's eFAP system and served by electronic mail on:

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