

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Market Regulation,

Complainant,

vs.

Matthew Joseph Sheerin
Manhasset, NY,

Respondent.

DECISION

Complaint No. 2011027926301

Dated: March 13, 2017

The Department of Market Regulation failed to satisfy its burden of proof with respect to allegations that the respondent tipped material, nonpublic information and thereby engaged in insider trading; violated his employer firm's supervisory and compliance procedures regarding insider trading; and disclosed confidential information in contravention of the employment agreement with his employer firm. Held, findings affirmed and complaint dismissed.

Appearances

For the Complainant: John Warshawsky, Esq., Lora Alexander, Esq., Carly M. Kostakos, Esq., James J. Nixon, Esq., Justin Chretien, Esq., Department of Market Regulation, Financial Industry Regulatory Authority

For the Respondent: Susan Necheles, Esq., Kathleen E. Cassidy, Esq.

Decision

FINRA's Department of Market Regulation, pursuant to FINRA Rule 9311, appeals the Hearing Panel's decision in this matter. The Hearing Panel found that Market Regulation failed to prove that Matthew Joseph Sheerin tipped material, nonpublic information, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. Market Regulation further failed to prove that Sheerin

violated his employer's supervisory and compliance procedures regarding insider trading or the nondisclosure provision of his employment agreement, in violation of FINRA Rule 2010. After a complete review of the record, we affirm the Hearing Panel's findings and dismiss in its entirety the complaint against Sheerin.

I. Background

Sheerin entered the securities industry in 1997 and has been associated with several member firms. Market Regulation's allegations against Sheerin stem from his conduct while he was employed by Angelo Gordon & Co., an investment management firm. Sheerin was registered as an equity trader and general securities representative with Angelo Gordon's affiliated broker-dealer, AG BD LLC.¹ At Angelo Gordon, Sheerin was the head trader for the firm's distressed securities group, which invested in distressed businesses.

In July 2011, Angelo Gordon permitted Sheerin to resign after he admitted he may have violated Angelo Gordon's policy regarding the treatment of confidential and proprietary information.² In response to Sheerin's disclosure, Angelo Gordon determined that no firm clients were harmed and did not find that Sheerin disclosed confidential information or violated "any law, rule, or regulation." Sheerin is currently registered with another FINRA member firm.

II. Facts

A. Angelo Gordon's Distressed Securities Group and Sheerin's Role

One of the investment strategies that the Angelo Gordon distressed securities group utilized was called "loan to own." Using this strategy, Angelo Gordon purchased a company's debt and then reorganized the business. The debt holding would be converted to a controlling equity position, and Angelo Gordon then would attempt to sell the reorganized company at a profit.

In addition to Sheerin, the distressed securities group employed a portfolio manager, several analysts, and another trader. As a trader, Sheerin bought and sold debt securities for large institutional clients. The portfolio manager determined which debt securities to buy or sell. The analysts identified and evaluated bonds trading below value and distressed companies that would be candidates for Angelo Gordon's investment. Sheerin's supervisor, Tom Fuller, was the portfolio manager and head of the distressed securities group.

Sheerin described his duties as "part trader" as well as "the eyes and ears to the market" for Fuller and the firm's analysts with whom he worked. As a result, Sheerin spent considerable time "on the phone all day long talking to other people in the marketplace," [to] "share ideas, get

¹ For purposes of this decision, we refer to Angelo Gordon & Co. and its affiliated broker-dealer, AG BD LLC, as "Angelo Gordon" or the "firm."

² The firm's filing of Sheerin's Uniform Termination Notice for Securities Industry Registration ("Form U5") led to FINRA's investigation and complaint in this matter.

information, [and] see what's going on in the marketplace." Sheerin provided analysts with "market color" by updating them on prices and the activities of other buyers and sellers and what he was hearing from other market participants. At any one time, Sheerin monitored as many as 100 companies and kept analysts advised of market developments affecting those businesses.

B. Angelo Gordon's Investment in C&D Technologies, Inc.

In 2010 and 2011, Angelo Gordon employed its loan-to-own strategy to obtain a controlling ownership interest in C&D Technologies, Inc. ("C&D"). C&D manufactured and marketed backup batteries for industrial, cellular, and data center power systems. Following a debt-for-equity exchange, Angelo Gordon became C&D's majority shareholder, with a 65 percent interest in the company. Todd Arden, an Angelo Gordon senior analyst and colleague of Sheerin's in the distressed securities group, was responsible for managing the investment for Angelo Gordon. Arden served on C&D's creditors' committee that arranged the reorganization and served as Angelo Gordon's representative on C&D's board of directors after the reorganization. Sheerin knew that Arden had served on C&D's creditors' committee and was "very, very involved with the company."

Sheerin's role in the acquisition and management of C&D was administrative. He handled paperwork for the convertible debt purchases and debt-for-equity exchange. Another trader, who was responsible for the convertible debt market in the distressed debt group, executed the trades. Once C&D was reorganized, Sheerin provided valuations of the investment on a weekly basis and kept Arden informed of the stock's trading activity. The C&D stock was illiquid and thinly traded on the OTC Bulletin Board,³ and Angelo Gordon treated C&D as a private equity investment.

C. C&D's Regulatory Filing History

In 2010, prior to Angelo Gordon's investment in C&D, C&D missed two regulatory deadlines for filing quarterly financial reports. Once Angelo Gordon restructured C&D, the company filed its next quarterly report on time in December 2010. The regulatory deadline for C&D to file its first post-restructuring financial statements for its fiscal year ending January 31, 2011, was May 2, 2011. Market Regulation concedes that the regulatory deadline was determinable from publicly available information and not a complicated matter to determine. C&D filed its financial statements timely on May 2, 2011.

D. MM's Relationship with Sheerin

³ "The OTC Bulletin Board (or OTCBB) is an interdealer quotation system that is used by subscribing FINRA members to reflect market making interest in OTCBB-eligible securities (as defined by FINRA Rule 6530)." *OTC Bulletin Board (OTCBB)* (Mar. 13, 2017), <http://www.finra.org/industry/otcbb/otc-bulletin-board-otcbb>.

MM was a close friend of Sheerin's. They had been friends since college and were roommates when they first worked on Wall Street. They often discussed investment ideas and sometimes traded on those ideas. Sheerin and MM spoke often about the equities markets. Sheerin found these conversations helpful to his duties at Angelo Gordon because they provided an additional source of market color for his responsibilities acting as "the eyes and ears to the market." In Sheerin's view, MM provided insight into "which way the market was going," because the equities market and high-yield bonds often traded similarly.

E. MM Discusses C&D with Sheerin and Purchases C&D Stock

In early 2011, MM began working as a proprietary equities trader at a firm called G-2 Trading LLC ("G-2").⁴ Shortly after he joined G-2, MM asked Sheerin which post-reorganization companies Angelo Gordon "liked." Sheerin named three of the companies in which Angelo Gordon invested, including C&D. This was publicly available information. MM began researching these three companies. MM reviewed all of C&D's SEC filings from at least the prior year and searched for any analyst research on the company. MM found a few articles that focused on energy storage and wrote specifically about C&D. Shortly thereafter, MM reported his excitement to Sheerin about C&D. MM thought the cloud computing and data storage sector of the market was "white hot," and he "kind of fell in love" with C&D's "story."

By the end of March 2011, MM had purchased 10,000 shares of C&D stock for G-2's proprietary account and 2,000 shares for his own account. MM wanted to buy more C&D stock for both accounts. But because C&D was an OTC Bulletin Board stock, MM's supervisor at G-2, David Abramson, directed MM not to purchase any more shares of C&D for the firm's proprietary account. MM, at that time, could not afford to purchase more shares for his personal account. MM expressed to Sheerin his frustration because he believed C&D was in a "white hot sector" that had growth potential.

On April 4, 2011, Sheerin received an email from another firm's trader advising Sheerin that he had a buyer who wanted to purchase 8,000 shares of C&D if Angelo Gordon was interested in selling. Sheerin forwarded the email to MM, whom he knew was interested in C&D.⁵ MM laughed and told Sheerin that he was that buyer.

F. MM's Additional Research of C&D and Conversations About the Company with Others

The record shows that MM sought further information and conducted additional research on C&D after his initial stock purchase. On April 18, 2011, MM forwarded an article about

⁴ G-2 is a member of the Nasdaq PHLX and not a FINRA member.

⁵ Market Regulation states that it "does not contend that Sheerin's providing information to [MM] before April 29, 2011[,] was actionable."

energy sector stocks to Sheerin. The article discussed C&D and noted the upcoming release of the company's earnings report. The article's author stated that C&D was a company that "intrigue[d]" him. The article explained that, "The picture won't be clear until they file their annual report later this month, but it looks like C&D has emerged from the restructuring in fine form and may offer significant opportunity to investors who are willing to spend some time digging." Sheerin forwarded this article to Arden, the senior analyst who was responsible for managing the C&D investment for Angelo Gordon and a member of C&D's board of directors, and Fuller, Sheerin's supervisor and the head of Angelo Gordon's distressed securities group.

On April 20, 2011, MM forwarded to Sheerin another article that discussed C&D. This article stated in relevant part, "Today it's beginning to look like grid-scale storage will rapidly eclipse all other potential markets. The universe of companies that can effectively respond to urgent global needs for large-scale storage is very limited. It includes . . . C&D Technologies" Sheerin forwarded this article to Arden and Fuller.

At some time in April, MM tried on multiple occasions to speak with someone at C&D. MM told Sheerin that he had called C&D repeatedly to obtain information directly from someone at the company, but his calls were not returned. Sheerin, who knew that Arden was deeply involved with C&D, asked Arden for help. Arden contacted C&D's chief executive and financial officers and asked them to respond to MM. MM thereafter received a call from someone at C&D who confirmed that C&D would file its annual earnings report on May 2, 2011.

On April 27, 2011, MM joined Sheerin and Arden for lunch. MM raised the topic of C&D to Arden. According to Arden, the two of them had a "high level" discussion of C&D's industry, C&D's products and its competitors' products, and C&D's future prospects. Arden notably opined to MM that C&D was a good investment that was going to do well. When Arden had this discussion with MM, Arden knew the earnings that C&D would be reporting the following week.⁶

G. Sheerin Receives Confidential Information About C&D from Arden

On April 29, 2011, Arden received an email from C&D's chief executive officer. Arden received the email as a member of C&D's board. The email discussed C&D's forthcoming earnings announcement, to be released on May 2, and advised the board that in conjunction with the earnings release, C&D would also announce its "award as the exclusive provider of batteries to the Agriculture Bank of China (ABC) for the next three years." The CEO further stated in the email, "This \$28 million exclusive contract is the largest single award I have been able to identify in our company's history." The email also attached a press release about this contract that C&D planned to issue on May 2, 2011. Neither the email nor the press release disclosed C&D's earnings.

⁶ Market Regulation has not alleged that Arden's conversation with MM was improper or that Arden disclosed material, nonpublic information.

Arden forwarded the email to Sheerin and Fuller. Arden testified that he forwarded the email to Sheerin because Sheerin was responsible for monitoring Angelo Gordon's investment in C&D. Sheerin testified that he received the email before he went to lunch with Arden and Fuller and spent no more than 30 seconds reading it. He stated that he "didn't give it any thought." Arden testified that he did not recall any discussion of C&D during lunch with Sheerin.

On his way back to the office after lunch, Sheerin ran into two college friends. As a result, Sheerin was away from his desk for more than an hour, which was longer than his usual lunch break. Upon returning to the office, Sheerin called MM to ask about any market developments that may have occurred while he was out for a longer lunch. Sheerin testified that it was a "very topical day in the overall market" as a result of the European debt crisis and the financial unrest in Greece. Sheerin had a large investment in gold and was also interested in how the gold market was faring. Sheerin testified unequivocally that these types of conversations were not unusual between him and MM, and he did not have Arden's email in mind when he called MM.⁷

Sheerin mentioned that C&D would be releasing its earnings report on May 2 and that "the story should read well." Sheerin testified that this statement was the extent of his and MM's conversation about C&D. Sheerin did not recall who brought up the topic of C&D during his call with MM. When asked at the hearing to explain what he meant by "the story," Sheerin explained he was referring to C&D's emergence from bankruptcy and the booming cloud computing sector.⁸ As the Hearing Panel noted, Market Regulation introduced no evidence that Sheerin knew what C&D's earnings would be, that he otherwise disclosed anything about C&D's earnings, or that he disclosed anything about the C&D's \$28 million contract with the Agriculture Bank of China discussed in the email.

H. MM's Actions on April 29, 2011

⁷ The evidence shows that it was part of Sheerin's job at Angelo Gordon to talk to others on Wall Street to collect information about what was happening in the market. With respect to MM in particular, Sheerin indicated that it was helpful to talk to MM because market news often would reach the equity market before it reached the high-yield bond market.

⁸ FINRA does not have jurisdiction over MM, and he did not testify during the hearing in this matter. FINRA, however, began investigating MM on behalf of Nasdaq PHLX as part of a Regulatory Services Agreement with the exchange. While FINRA does not have jurisdiction over MM to compel him to testify in FINRA proceedings, FINRA took MM's investigative testimony as part of the Nasdaq PHLX investigation. An excerpted transcript of that testimony was admitted as an exhibit in this proceeding. MM in his investigative testimony stated that Sheerin, after talking about his gold investments, told him "in passing" "something about C&D" and that "it should read well." When FINRA asked MM to explain the "it" to which Sheerin was referring, MM insisted that he neither knew nor cared what "it" was, but MM knew "numbers were coming out next week and [MM] believed they should read well." MM further explained that Sheerin could have meant the C&D earnings "press release [n]ot necessarily the numbers" specifically.

Several hours before MM spoke with Sheerin on April 29, MM had purchased 590 additional shares of C&D for his personal account. Approximately 10 or 15 minutes after MM and Sheerin's conversation, MM approached Abramson (his supervisor at G-2) and tried to persuade him to allow MM to buy more C&D shares for the firm's proprietary account. According to Abramson, MM told him that he had just spoken with a friend at a "hedge fund" that was the majority shareholder in C&D and that C&D's earnings report would be released on May 2 and would "read really, really well."⁹ Abramson declined MM's request, said that the firm now "had a problem," and directed MM to wait while he conferred with G-2's compliance officer. Upon returning to his desk, MM purchased 500 shares of C&D for his personal account. Later that day, Abramson told MM that G-2 would be liquidating its position in C&D and conducting an internal investigation.¹⁰

I. MM Resigns from G-2 and Sheerin Resigns from Angelo Gordon

Following the close of trading on May 2, 2011, C&D issued press releases announcing its earnings and its contract with the Agriculture Bank of China. That evening, MM informed Sheerin of his situation at G-2. MM told Sheerin that, after their April 29 conversation, he tried to obtain his boss's permission to increase G-2's position in C&D. MM explained to Sheerin that he told his boss that he learned from someone at Angelo Gordon that "the report's coming out Monday . . . [and] these guys are very smart and usually have good info." Sheerin corrected MM that all he said was "the story should read well." According to Sheerin, MM replied, "I know, I know . . . it was just a pitch to my boss to get my position limit increased." MM was concerned that he disobeyed Abramson on April 29 by buying more shares of C&D in his personal account, and he needed to resolve the matter with him. Sheerin asked MM if he had told his boss that MM had researched C&D on his own, called the company, and discussed C&D with Arden. In Sheerin's view, MM was "doing things that a normal investor would do to make a prudent investment," and MM failed to explain this to his boss at G-2.

On May 4, 2011, Sheerin learned from a mutual friend that G-2 "fired" MM for disobeying his boss by trading against his orders. Sheerin called Fuller (his Angelo Gordon supervisor) at home that evening. Sheerin told Fuller "the whole story about [MM] and C&D Technologies and how [MM] traded after his boss told him not to." Fuller advised Sheerin that he "did nothing wrong, [he] didn't have inside information, you're allowed to say you like the company."

On May 26, 2011, G-2 filed a Form U5 for MM. The Form U5 stated that MM was "permitted to resign" while "under internal review by the firm to determine whether he may have

⁹ Abramson submitted a letter to FINRA staff in May 2012 as part of FINRA's investigation in this matter, which detailed the April 29, 2011 conversation between Abramson and MM. Abramson also testified at the hearing in this matter where he acknowledged that the letter reflected a more contemporaneous recollection of his conversation with MM.

¹⁰ MM liquidated 1,100 C&D shares in his personal account on April 29 and sold the remainder of his C&D position on May 4 and 5, 2011, all at a loss. MM subsequently resigned from G-2, and the firm's investigation of him was never completed.

improperly traded C&D Technologies' securities before a news announcement." Sheerin heard from a mutual friend that MM's Form U5 included language concerning insider trading and promptly informed Fuller. Sheerin asked Fuller whether they should report it to Angelo Gordon's compliance counsel. A few days later, Fuller directed Sheerin to speak with the firm's internal counsel. Sheerin explained that he may have failed to follow the firm's "rule of thumb" from compliance training and say "no comment . . . if a company has nonpublic information." Angelo Gordon ultimately hired outside counsel to conduct an investigation and placed Sheerin on administrative leave.

Upon concluding its investigation, Angelo Gordon determined that Sheerin had not disclosed material, nonpublic or confidential information. Indeed, Angelo Gordon made no finding that Sheerin gave out any actual information to MM. Sheerin's employment with Angelo Gordon nonetheless terminated on July 31, 2011. Sheerin's Form U5 filing disclosed the following:

The Firm permitted Mr. Sheerin to resign after he voluntarily admitted that he may have violated the Firm's policy regarding the proper treatment of confidential and proprietary information. The Firm determined that no clients were harmed in connection with this matter and did not find that Mr. Sheerin violated any law, rule or regulation.

When asked at the hearing to explain why Angelo Gordon essentially fired Sheerin and included this language in his Form U5 despite making no findings that he violated the firm's internal policies or violated any laws, rules, or regulations, Sheerin explained that he believed it was based on the language in MM's Form U5. "[MM's] U5 was pretty damaging. . . . [MM's] U5 had some negative language. And I think Angelo Gordon in one way or another thought it would be cleaner just to send me on my way."

III. Procedural History

Market Regulation filed a three-cause complaint against Sheerin in August 2013. Cause one alleged that Sheerin disclosed material, nonpublic information to MM during their April 29, 2011 telephone conversation when he confirmed C&D's earnings release date and stated, "the story should read well," in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. Cause two alleged that Sheerin violated Angelo Gordon's supervisory and compliance procedures regarding insider trading, in contravention of FINRA Rule 2010. Cause three alleged that Sheerin violated the confidentiality provision in his employment agreement with Angelo Gordon, in contravention of FINRA Rule 2010. After a two-day hearing, which featured Sheerin's extensive testimony as well as the testimony of Arden, the Hearing Panel dismissed Market Regulation's complaint. This appeal followed.

IV. Discussion

We affirm the Hearing Panel's findings that Market Regulation failed to prove by a preponderance of the evidence that Sheerin engaged in the alleged misconduct. Accordingly,

Market Regulation's complaint is dismissed in its entirety. We discuss the allegations in detail below.

A. Market Regulation Failed to Prove that Sheerin Engaged in Insider Trading

The Hearing Panel determined that Market Regulation failed to prove that the limited information that Sheerin provided to MM—C&D's earning release date and "the story should read well"—was material and nonpublic and dismissed cause one of the complaint on this basis. We agree with the Hearing Panel's findings.

1. Theories of Insider Trading

Section 10(b) of the Exchange Act makes it "unlawful for any person . . . to use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Exchange Act Rule 10b-5 prohibits the use, "in connection with the purchase or sale of any security," of "any device, scheme, or artifice to defraud" or any other "act, practice, or course of business" that "operates . . . as a fraud or deceit."¹¹ 17 C.F.R. § 240.10b-5. Insider trading, the unlawful trading in securities based on material, nonpublic information, is a well-established violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. *See Dirks v. SEC*, 463 U.S. 646, 653-54 (1983); *Chiarella v. United States*, 445 U.S. 222, 226-30 (1980). Under the classical theory of insider trading, corporate insiders with knowledge of material, nonpublic information have a duty to shareholders to either disclose that information or refrain from using it in the purchase or sale of securities. *Chiarella*, 445 U.S. at 228-29. A second theory of insider trading, the misappropriation theory, "targets persons who are not corporate insiders but to whom material non-public information has been entrusted in confidence and who breach a fiduciary duty to the source of the information to gain personal profit in the securities market." *SEC v. Obus*, 693 F.3d 276, 284 (2d Cir. 2012) (citing *United States v. O'Hagan*, 521 U.S. 642, 652 (1997)). While the classical theory of insider trading is based on the existence of a fiduciary duty of loyalty owed by classic and temporary insiders to shareholders with whom they trade, the misappropriation theory focuses on a duty of trust and confidence owed to an entity or person in rightful possession of material, nonpublic information. *Compare Chiarella*, 445 U.S. at 228 (discussing classical theory), *with O'Hagan*, 521 U.S. at 652 (discussing misappropriation theory).

Market Regulation alleged that Sheerin breached a fiduciary duty to Angelo Gordon and violated the antifraud provisions of the securities laws and FINRA rules under the misappropriation theory of insider trading when he relayed material, nonpublic information to MM. Under the misappropriation theory, persons in possession of nonpublic information may

¹¹ FINRA Rule 2020 is FINRA's antifraud rule. Rule 2020 is similar to, yet broader than, Section 10(b) and Rule 10b-5. *See Dep't of Enforcement v. Fillet*, Complaint No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *38 & n.11 (FINRA NAC Oct. 2, 2013) (applying NASD Rule 2120, the predecessor to Rule 2020), *aff'd in relevant part*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *1 (May 27, 2015).

breach a duty to the source of nonpublic information if they relay the information to or “tip” another person for an improper purpose regardless of whether they themselves trade. *Obus*, 693 F.3d at 285. A “tipper” is liable under Rule 10b-5 if he breached a fiduciary duty by tipping material, nonpublic information, had the requisite scienter when he gave the tip, and personally benefited from the tip. *Dirks*, 463 U.S. at 660-62.

It is undisputed that Sheerin, an employee of Angelo Gordon, owed Angelo Gordon a fiduciary duty to not misappropriate the company’s confidential information. *See O’Hagan*, 521 U.S. at 654 (holding that a company’s confidential information “qualifies as property” and “undisclosed misappropriation of such information” by an employee “violate[s] a fiduciary duty”). This case turns on whether the information that Sheerin disclosed to MM was nonpublic and material and, therefore, such disclosure was in violation of that duty.

2. Market Regulation Failed to Prove that Sheerin’s Confirmation of C&D’s Earnings Release Date to MM Was Material, Nonpublic Information

Market Regulation contended below that Sheerin told MM that C&D’s earnings report would be released on May 2, 2011, and that confirmation of this information was improper. The Hearing Panel rejected Market Regulation’s contention that this confirmation was material, nonpublic information and therefore actionable. The Hearing Panel determined, and Market Regulation’s analyst conceded, that the filing date was determinable from publicly available information. In addition, the evidence showed that MM knew from a representative of C&D, prior to his April 29, 2011 conversation with Sheerin, that C&D’s annual report would be filed by May 2 and therefore timely.

The Supreme Court has explained that information is material if there is a “substantial likelihood that a reasonable” investor “would consider it important in” making an investment decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)). “To be material, the information need not be such that a reasonable investor would necessarily change his investment decision based on the information, as long as a reasonable investor would have viewed it as significantly altering the ‘total mix’ of information available.” *SEC v. Mayhew*, 121 F.3d 44, 52 (2d Cir. 1997) (quoting *TSC Indus.*, 426 U.S. at 449).

A reasonable investor following the company would have expected C&D to meet the May 2 filing deadline because C&D had filed timely since Angelo Gordon acquired its majority interest. As Arden testified, “Any prudent analyst would know that these earnings were coming . . . on time” on May 2. *Cf. Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 166 (2d Cir. 1980) (concluding a disclosure consisting of confirmation that sales were slowing was not material because the company had publicly stated a decline in sales was expected and “confirmation of these facts, which were fairly obvious to all who followed the stock and were not accompanied by any quantification of the downturns”). Moreover, “information may be considered public for Section 10(b) purposes even though there has been no public announcement and only a small number of people know of it.” *U.S. v. Libera*, 989 F.2d 596, 601 (2d Cir. 1993) (explaining that “[o]nce the information is fully impounded in price, such information can no longer be misused by trading because no further profit can be made”). Arden explained that “it would be very rare

for a company to come out of reorganization where the balance sheet has been made very healthy and liquid, with a new board of directors, with a relatively responsible financial institution in control, to have a late filing, it would be very rare.” Arden further testified that the date of the earnings release was not confidential information, and he would not have been surprised if Sheerin disclosed the earnings release date to others.

On appeal, Market Regulation concedes that a representative of C&D also had confirmed to MM the company’s intention to file its annual earnings report timely on May 2, a conversation that took place before Sheerin’s April 29 phone call with MM. We agree with the Hearing Panel’s findings that Market Regulation failed to prove that Sheerin’s confirmation of the May 2 filing date was material, nonpublic information.

3. Market Regulation Failed to Prove that Sheerin’s Statement to MM that “The Story Should Read Well” Conveyed Material Information

We turn to whether Sheerin’s disclosure to MM of “the story should read well” was a material disclosure. Central to the issue of materiality is “whether the tipped information, if divulged to the public, would have been likely to affect the decision of potential buyers and sellers.” *Elkind*, 635 F.2d at 166. A violation of the securities laws will not be found where “the disclosed information is so general that the recipient thereof is still undertaking a substantial economic risk that his tempting target will prove to be a white elephant.” *SEC v. Monarch Fund*, 608 F.2d 938, 942 (2d Cir. 1979) (internal quotation marks omitted).

We determine that the information that Sheerin disclosed to MM lacked specificity and was similar in nature to what Arden already told MM during their lunch on April 27, two days prior to Sheerin’s alleged tip. *See, e.g., SEC v. Anton*, Civil Action No. 06-2274, 2009 U.S. Dist. LEXIS 34889, at *29-32 (E.D. Pa. Apr. 23, 2009) (finding a statement that an issuer was increasing its loss reserves, without specific information as to the extent of the reserves, was immaterial because that statement lacked specificity). Arden testified that during his lunch on April 27 with MM and Sheerin, Arden discussed with MM the future prospects of C&D and, specifically, that C&D was a good investment that was going to do well. Arden made these statements to MM when Arden, in fact, knew the earnings that C&D would be reporting the following week. Sheerin, in essence, was repeating to MM what he already heard Arden—a C&D board member and member of C&D’s creditor’s committee—tell MM a few days earlier. And unlike Arden, the evidence does not reflect that Sheerin actually knew C&D’s earnings when he spoke with MM on April 29. Sheerin testified that by “story” he meant the successful reorganization of C&D, which he expected to be described in C&D’s press release when it released its earnings. Sheerin made no revelations of any underling facts concerning the upcoming earnings or the press release related to the contract with the Agriculture Bank of China. Rather, Sheerin’s statement was a restatement of Arden’s.

Furthermore, “[a] generalized confirmation of an event that is ‘fairly obvious’ to every market participant who was knowledgeable about the company or the particular instrument at issue is not material information.” *SEC v. Rorech*, 720 F. Supp. 2d 367, 410 (S.D.N.Y. 2010) (internal citation omitted); *see also SEC v. Bausch & Lomb, Inc.*, 565 F.2d 8, 17 (2d Cir. 1977). As Arden’s testimony supports, it was common knowledge in the investment community

following C&D that Angelo Gordon had reorganized C&D and eliminated its debts to better position the company going forward. Arden stated,

“[W]hat was out there was that this was a company that was in severe distress and trouble for at least two years. And it was also very well known that we came into the situation. We equitized virtually all of the debt securities of this business allowing for . . . the cash flow of this company to then get redeployed for investing purposes.”

In addition, the press covering C&D had highlighted the expected positive news on C&D. The article that MM forwarded to Sheerin on April 18, 2011, discussed C&D and its upcoming earnings report. The article described C&D as an “intriguing” company and one that “has emerged from the restructuring in fine form and may offer significant opportunity to investors who are willing to spend some time digging.” Thus, a positive-reading “story” about the company was not unexpected, and “[t]he facts leading to this conclusion were public.”¹² *See Bausch & Lomb, Inc.*, 565 F.2d at 17.

We find that Sheerin’s positive, but nonspecific statement was simply confirmation of a fact “fairly obvious to all who followed the stock.” *See Elkind*, 635 F.2d at 166. Based on the Hearing Panel’s findings, Market Regulation failed to prove that Sheerin’s statement was important. We agree that the statement did not “alter the total mix of information” available to MM. We therefore conclude that it was not substantially likely that a reasonable investor would consider it important in making an investment decision. *See id.*

4. Market Regulation Failed to Prove that Sheerin Disclosed Confidential Information from the Press Release

Market Regulation shifts its focus on appeal to Sheerin’s purported disclosure to MM of C&D’s contract with the Agriculture Bank of China. At the hearing, Sheerin denied that he told MM or anyone else about the contract or that he forwarded the email about the contract to anyone.

The Hearing Panel credited Sheerin’s testimony that during their April 29 conversation he told MM only that C&D’s earnings would be released on May 2, 2011, and that “the story should read well.” After hearing all of the evidence in this case, the Hearing Panel found that

¹² Market Regulation argues that Sheerin’s statement that “the story should read well” amounted to encouragement to MM to buy C&D stock and thus the materiality is underscored by MM’s purchase of that stock. We agree with the Hearing Panel that, in the context of the facts here, Market Regulation failed to prove that Sheerin’s statement amounted to a “coded message” to MM. Sheerin’s statement, while encouraging, is ambiguous and without specific information. MM’s purchases moreover were consistent with his past investment practices and trading history.

there was “no evidence, direct or circumstantial, that Sheerin disclosed anything else.” Market Regulation conceded as much at the hearing when in response to a question from the Hearing Officer, counsel for Market Regulation stated: “We have no evidence that [Sheerin] disclosed anything more than saying ‘the story should read well.’” Nonetheless, Market Regulation in its post-hearing briefs before the Hearing Panel and arguments before the NAC pivots by asserting that, based on circumstantial evidence, Sheerin may have disclosed more to MM than he admitted.

While Sheerin received the confidential email from Arden that referenced C&D’s forthcoming earnings press release and Form 10-K filing and attached the press release about C&D’s contract with the Agriculture Bank of China, the Hearing Panel found no evidence from which to infer that Sheerin actually communicated any of it to MM. We agree with the Hearing Panel’s findings: “[T]here is no factual basis for inferring that Sheerin disclosed C&D’s earnings. . . . [T]here is no evidence that Sheerin disclosed the press release or any non-public information regarding the contract to MM.” The Hearing Panel credited Sheerin’s version of events and found that Market Regulation failed to prove that Sheerin disclosed any information about what C&D’s earnings would be, the press release, or the contract. The initial fact-finder’s credibility determinations are entitled to considerable deference, which may only be overcome by substantial evidence. *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *7 (July 1, 2008). We will not disturb the Hearing Panel’s findings here where the record contains no substantial contrary evidence. Irrespective of what Market Regulation would like for us to infer, it has not proven that Sheerin disclosed more.

We affirm the Hearing Panel’s findings that Market Regulation has not met its burden to show by a preponderance of the evidence that Sheerin’s statements to MM during the April 29, 2011 telephone call disclosed material, nonpublic information. Accordingly, we dismiss cause one of the complaint.

B. Market Regulation Failed to Prove that Sheerin Violated Angelo Gordon’s Supervisory and Compliance Procedures

Market Regulation alleged that Sheerin violated FINRA Rule 2010 as a result of violating Angelo Gordon’s supervisory and compliance procedures related to insider trading. Angelo Gordon’s supervisory and compliance procedures provided in relevant part:

The prohibition against insider trading includes the following: if you are in possession of material non-public information about a company or the market for a company’s securities, you must either publicly disclose the information to the marketplace or refrain from trading. Generally, disclosure is not an option and the effect is to require an individual to refrain from trading. You also may not communicate inside information to a second person who has no official need to know the information.

Market Regulation acknowledges that Angelo Gordon’s procedures define materiality and nonpublic information consistently with those definitions used in the securities laws. Market

Regulation therefore conceded below that if the adjudicator “were to find that Sheerin did not tip material nonpublic information to [MM], it should find for Sheerin as to [c]ause [t]wo” because both causes one and two depend upon the same alleged disclosure of material, nonpublic information. Because we find, like the Hearing Panel did, that Market Regulation did not prove that Sheerin disclosed material, nonpublic information as alleged in cause one of the complaint (as discussed in Part IV.A), we dismiss cause two.

C. Market Regulation Failed to Prove that Sheerin Violated Angelo Gordon’s Confidentiality Agreement

Market Regulation further alleged that Sheerin’s statement to MM that “the story should read well” also violated the confidentiality provisions of Sheerin’s employment agreement with Angelo Gordon and, in turn, FINRA Rule 2010. We agree with the Hearing Panel’s determination that Market Regulation failed to prove a violation under the facts of this case.

FINRA Rule 2010 requires that members and associated persons observe high standards of commercial honor and just and equitable principles of trade. “It sets forth a standard that encompasses a wide variety of conduct that may operate as an injustice to investors or other participants in the securities markets.” *Dep’t of Enforcement v. Olson*, Complaint No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at *6 (FINRA Bd. of Governors May 9, 2014) (internal quotation marks omitted), *aff’d*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 (Sept. 3, 2015). A violation of firm policy can also serve to violate just and equitable principles of trade. *See Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *20 (Dec. 11, 2014), *aff’d*, 637 F. App’x 49 (2d Cir. 2016); *see also Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *17-23 (Jan. 6, 2012) (determining that respondent breached his duty of confidentiality in his firm’s code of conduct in violation of FINRA Rule 2010); *Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *18 (Jan. 9, 2009) (“[W]e have looked to internal firm compliance policies to inform our determination of whether applicants’ conduct, like Heath’s, violated the professional standards of ethics covered by the J&E Rule.”), *aff’d*, 586 F.3d 122 (2d Cir. 2009); *Dan Adlai Druz*, 52 S.E.C. 416, 424-25 (1995) (finding that the respondent violated just and equitable principles of trade by settling customer complaints without notifying the legal department when such action violated firm policy), *aff’d*, 103 F.3d 112 (3d Cir. 1996) (table); *Thomas P. Garrity*, 48 S.E.C. 880, 884 (1987) (determining that failure to adhere to limits on trading of options under the firm’s compliance policy violated just and equitable principles of trade).¹³ In determining whether a respondent’s conduct violates FINRA Rule 2010, “we look to whether the conduct implicates a generally recognized duty owed to either customers or the firm.” *Tomlinson*, 2014 SEC LEXIS 4908, at *20.

The confidentiality provision contained within Angelo Gordon’s employment agreement titled “Confidentiality, Noncompetition and Non-Solicitation Agreement and Agreement to Arbitrate” provided that Sheerin:

¹³ We note that the confidentiality provision at issue in cause three was not contained within Angelo Gordon’s compliance procedures, but within an employment agreement with Sheerin.

acknowledge[d] that during the course of his/her employment, [Angelo Gordon] has disclosed and/or will disclose to Employee certain non-public, confidential, and proprietary information pertaining to the business of the Company and to the Company's partners, employees, investors and clients. . . . Employee acknowledges that . . . the disclosure of such information to third parties would cause grave and irreparable harm to the Company.

The employment agreement defined "confidential information" as that which includes "all non-public information, whether or not created or maintained in written form, which constitutes, relates to, or refers to the Company or its business." The employment agreement listed examples of confidential information which included financial data, commercial data, trade secrets, product-development information, marketing plans, training manuals, computer programs, client lists, and trading methods and strategies among others. The agreement noted that the list was illustrative and not limited to those examples. Arden testified that the confidentiality provision in the employment agreement was "boilerplate" language in Angelo Gordon's non-compete, non-solicit agreement, and the document that related to Angelo Gordon's rules governing the treatment of confidential information was in the firm's supervisory and compliance procedures—not the employment agreement.

Market Regulation argues that Sheerin's statement to MM that "the story should read well" was in breach of Sheerin's employment agreement. As evidence, Market Regulation cites Sheerin's statement in his Form U5 that he "may have" violated Angelo Gordon's confidentiality policy, as well as his statement at the hearing that he should have followed the "rule of thumb" of saying "no comment" when asked about a company in which Angelo Gordon had an interest.¹⁴

Violations of firm confidentiality policies are serious in nature. As the Commission explained, the disclosure of confidential client information violates "one of the most fundamental ethical standards in the securities industry." *Heath*, 2009 SEC LEXIS 14, at *10; *see, e.g., DiFrancesco*, 2012 SEC LEXIS 54, at *8, 21-22 (finding that registered representative breached his duty of confidentiality when he downloaded 36,000 customers' confidential nonpublic information, including account numbers and net worth figures, and transmitted that information to his future branch manager at a competing firm). The Commission stated in *Heath* that "[t]he duty to maintain the confidentiality of client information is grounded in fundamental fiduciary principles, and [was] . . . codified in the [firm's] Code of Conduct." 2009 SEC LEXIS 14, at *10. In *Heath*, a former investment banker and managing director, Heath, at an NYSE member firm disclosed material, nonpublic information about the pending acquisition of a client to a future colleague at a competitor firm. The Commission held that, although Heath did not act in bad faith, his disclosure constituted unethical conduct in violation of the NYSE's just and

¹⁴ Sheerin's testimony was in response to questions about the disclosures in his Form U5 when he resigned from Angelo Gordon. Sheerin testified that the Form U5 disclosure referred to his statement that he may have failed to observe a firm "rule of thumb, a safeguard" that was mentioned in Angelo Gordon's compliance training, which was saying "no comment" when asked about a company in which Angelo Gordon had an interest.

equitable principles of trade rule because the disclosure violated the firm's Code of Conduct, which expressly prohibited the disclosure of material, nonpublic information "to anyone outside the firm unless . . . authorized to do so." *Id.*

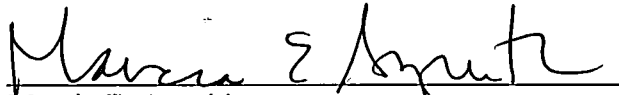
Here, Market Regulation has not proven that Sheerin's statement of "the story should read well" disclosed confidential information to MM in violation of his employment agreement. *Compare id.* at *11 (finding violation of ethical rule where respondent favored his own interest in establishing a collegial relationship with a future colleague over his client's interest in the confidentiality of its material, nonpublic information). The Hearing Panel credited Sheerin's testimony that he did not disclose any confidential or proprietary information and that the statement reflected in his Form U5 was merely a concession that he failed to follow a best practice of his firm. In addition, Angelo Gordon did not find that Sheerin disclosed confidential information or that he violated its policies or harmed its clients.¹⁵ Under these facts, we find that Market Regulation has failed to prove by a preponderance of the evidence that Sheerin breached his employment agreement with Angelo Gordon, in violation of FINRA Rule 2010.

¹⁵ We do not suggest that client harm is a necessary predicate to finding violations of just and equitable principles of trade. It is not. *See Heath*, 2009 SEC LEXIS 14, at *40 ("The ethical prohibition on the disclosure of confidential client information is not contingent upon future harm.").

V. Conclusion

We affirm the Hearing Panel's findings that Market Regulation failed to prove the allegations in the complaint against Sheerin. Accordingly, we dismiss the complaint in its entirety.

On Behalf of the National Adjudicatory Council,

A handwritten signature in black ink, appearing to read "Marcia E. Asquith", written over a horizontal line.

Marcia E. Asquith
Executive Vice President and Corporate Secretary