BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Denis William Kraemer, Jr. Charlotte, NC, Respondent.	DECISION Complaint No. 2006006192901 Dated: December 18, 2009

Respondent willfully failed to disclose material information concerning his criminal history on Forms U4. Held, findings and sanctions affirmed.

Appearances

For the Complainant: David M. Jaffe, Esq., Leo F. Orenstein, Esq., and Frank M. Weber, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Denis William Kraemer, Jr. appeals a December 15, 2008 Hearing Panel decision pursuant to NASD Rule 9311.[1] The Hearing Panel found that Kraemer violated NASD Rule 2110 and Membership and Registration Rules Interpretive Material ("IM") 1000-1 because he failed to disclose material information about his criminal history on Uniform Applications for Securities Industry Registration or Transfer ("Forms U4"). Specifically, the Hearing Panel found that Kraemer did not reveal that he had been charged with criminal possession of stolen property

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

and charged with, and convicted of, petit larceny – misdemeanors that involve the wrongful taking of property. The Hearing Panel concluded that Kraemer's failure to disclose the charges and conviction was willful, that the omitted information was material, and that Kraemer is statutorily disqualified. The Hearing Panel fined Kraemer $5,000, suspended him in all capacities for nine months, and assessed costs of $2,164.72. After a complete review of the record, we affirm the Hearing Panel's findings and sanctions.

I. Factual and Procedural Background

A. Kraemer

Kraemer entered the securities industry in August 1996 when he briefly associated with a former FINRA member firm. In August 1999, he associated with another member firm, which is where he first registered as a general securities representative. During the period relevant to the conduct in this case, March 2002 to September 2006, Kraemer associated with two FINRA member firms as a general securities representative – PHD Capital and J.H. Darbie & Co., Inc. ("J.H. Darbie"). Kraemer joined PHD Capital in March 2002 and remained associated with the firm until he left in August 2006. He then associated with J.H. Darbie in September 2006. Kraemer was registered with J.H. Darbie until he was permitted to resign in December 2008. Kraemer has not been registered with any FINRA member firm since December 2008.

B. Kraemer's Relevant Criminal History

On December 11, 2001, Kraemer was arrested for shoplifting in New York. He was charged with two misdemeanors: one count of petit larceny and one count of criminal possession of stolen property in the fifth degree.[2] The following day, Kraemer pled guilty to, and was convicted of, the count of petit larceny. Kraemer was sentenced to a one-year period of conditional discharge and ordered to complete two sessions of a drug treatment program. If Kraemer had failed to meet the court's conditions, he would have been imprisoned for 30 days.

Immediately after entering his guilty plea to petit larceny, Kraemer attempted to have the court vacate the plea agreement. Specifically, on the same afternoon of his allocution to the petit larceny conviction, Kraemer, through counsel, had the court recall his case. Kraemer informed the court that he had a "stock broker's license," that he currently was unemployed, and that he had concerns about the impact of the conviction on his license and employment opportunities. The court rejected Kraemer's application to vacate the plea and upheld the one-year period of conditional discharge and required drug treatment sessions. Kraemer successfully completed the

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[2] *See* NY CLS Penal § 155.25 ("A person is guilty of petit larceny when he steals property. Petit larceny is a class A misdemeanor."); NY CLS Penal § 165.40 ("A person is guilty of criminal possession of stolen property in the fifth degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof. Criminal possession of stolen property in the fifth degree is a class A misdemeanor.").

two drug treatment sessions. The period of conditional discharge expired without incident one year later on December 12, 2002.

C. Kraemer Seeks Employment and Completes Several Forms U4

In early March 2002, Kraemer began interviewing with several FINRA and New York Stock Exchange member firms to obtain employment as a general securities representative. One of Kraemer's first interviews was with a New York Stock Exchange member firm. The interview did not result in employment. The firm told Kraemer explicitly that they refused to hire him because he had a criminal record.

1. Kraemer's First Form U4

In mid-March 2002, Kraemer sought employment with PHD Capital as a general securities representative. PHD Capital hired Kraemer on March 13, 2002. That same day, Kraemer completed a Form U4 as part of PHD Capital's employment process. During the interview process, Kraemer disclosed to a PHD Capital compliance officer that he had several misdemeanor charges and convictions, including a recent arrest.[3] Before the Hearing Panel in this case, Kraemer testified that he generally told the compliance officer about his prior charges and convictions, but that he could not recall the charge or conviction date for any specific incident during that conversation. Kraemer testified that the compliance officer assured him that PHD Capital had access to his entire criminal history, that he would obtain Kraemer's criminal record, and that the firm would use the information from that record to complete Kraemer's Form U4. The compliance officer then generated a report that contained information about Kraemer's criminal background. Based on the information in that report, Kraemer completed his Form U4 with PHD Capital.

Kraemer completed the March 13, 2002 Form U4 by hand. He completed the personal information, residential history, and employment history sections of the form. Kraemer also answered the criminal disclosure questions on the Form U4. Questions 23B.(1)(a) and (b) of the criminal disclosure section read as follows:

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[3] Kraemer's criminal record contained information on several events that occurred prior to the charges and conviction in December 2001. The only criminal incident that was present on Kraemer's record, and required disclosure, was a charge and conviction for petit larceny from 1992. Because the 1992 charge and conviction was a misdemeanor that involved the wrongful taking of property, Kraemer had to disclose the event. Kraemer consistently disclosed the 1992 charge and conviction for petit larceny on his Forms U4, thus, the 1992 charge and conviction are not at issue in this case.

23B. (1) Have you ever:

(a) been convicted of or pled guilty or 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?

(b) been *charged* with a *misdemeanor* specified in 23B(1)(a)?

Kraemer filled in the "yes" bubbles in response to questions 23B.(1)(a) and (b) on the March 13 Form U4. He also circled the "no" bubbles to those same questions on that same form. He completed a disclosure reporting page, as required, to provide further information about his affirmative responses to the criminal disclosure questions. Kraemer's disclosure reporting page provided information on three misdemeanors – the 1992 charge and conviction for petit larceny and two additional misdemeanors that did not require disclosure. However, Kraemer did not identify the December 2001 charges or conviction on the disclosure reporting page or anywhere else on the Form U4.

PHD Capital did not submit Kraemer's March 13 Form U4 to FINRA's Central Registration Depository ("CRD"®). In March 2002, CRD implemented a revised version of the Form U4. Kraemer's March 13 Form U4 was completed on the outdated version of the form, thus, PHD Capital had Kraemer complete and sign an updated version of the Form U4 on March 27, 2002. Kraemer's March 27 Form U4 was the first form that PHD Capital submitted to CRD on behalf of Kraemer.

All of the information contained in Kraemer's March 27 Form U4 was filled in electronically. Kraemer signed the form. Kraemer responded to the criminal disclosure questions, which were identical to questions 23B.(1)(a) and (b) on the March 13 Form U4, but renumbered 14B.(1)(a) and (b), on the March 27 form. Kraemer responded "no" to the criminal disclosure questions on the March 27 Form U4, indicating that he had not been charged with or convicted of any of the enumerated misdemeanors. Kraemer's negative responses to the criminal disclosure questions on the March 27 Form U4 were incorrect. Despite his negative responses to the questions, Kraemer submitted a criminal disclosure reporting page with the March 27 form. The criminal disclosure reporting page identified only the 1992 charge and conviction for petit larceny. Kraemer's March 27, 2002 Form U4 did not disclose the December 2001 charges or conviction.

2. Kraemer's Second, Third, and Fourth Forms U4

Kraemer submitted three amendments to his Form U4 while associated with PHD Capital – on April 2, 2002, October 4, 2004, and December 12, 2005. Each of the amendments updated Kraemer's residential or employment history. The April 2 amendment also corrected Kraemer's

previously negative responses to the criminal disclosure questions on the March 27 Form U4. Kraemer's April 2 Form U4 amendment changed the "no" responses for questions 14B.(1)(a) and (b) to "yes," responding affirmatively to the questions regarding whether Kraemer was charged with or convicted of any of the specified misdemeanors. The criminal disclosure reporting page submitted with the amendments, however, disclosed only the 1992 charge and conviction for petit larceny, not the recent charges and conviction from December 2001. Kraemer left PHD Capital in August 2006.

3. Kraemer's Fifth Form U4

In September 2006, Kraemer sought and obtained employment with J.H. Darbie. During the interview process, Kraemer noted that he had several arrests, but provided no specific information about any charge or conviction. Kraemer completed a Form U4 on September 1, 2006, to transfer his association from PHD Capital to J.H. Darbie. Kraemer responded to questions 14B.(1)(a) and (b), the criminal disclosure questions, on the September 1 Form U4. Kraemer correctly responded "yes" to the criminal disclosure questions and submitted a criminal disclosure reporting page with the form. The criminal disclosure reporting page disclosed the 1992 charge and conviction for petit larceny, but not the December 2001 charges or conviction.

J.H. Darbie submitted Kraemer's September 1 Form U4 to CRD. FINRA submitted the fingerprint card that accompanied that Form U4 to the FBI. The FBI issued a criminal history report, which included information about Kraemer's December 2001 charges and conviction. FINRA flagged the discrepancy between the FBI's report and the information contained in Kraemer's September 1 Form U4. FINRA reported the matter to J.H. Darbie for resolution. Kraemer amended his Form U4 on September 25, 2006, to list the December 2001 charges and conviction. Kraemer's Form U4 on September 25, 2006, was his first disclosure of the charges and conviction from December 2001.

D. Procedural Background

FINRA's Department of Enforcement filed a one-cause complaint against Kraemer on April 21, 2008, alleging that he violated FINRA's rules because he willfully failed to disclose material facts on Forms U4 completed in connection with his registrations with PHD Capital and J.H. Darbie. Kraemer filed an answer to the complaint on May 23, 2008. He admitted that he failed to disclose the December 2001 charges and conviction on the Forms U4, but denied that the failure was willful.

Following a hearing, the Hearing Panel issued a decision in which it found that Kraemer's failure to disclose his criminal history on the Forms U4 he completed while associated with PHD Capital and J.H. Darbie violated NASD Rule 2110 and IM-1000-1. The Hearing Panel also concluded that Kraemer's criminal history was material information, that his failure to disclose the information was willful, and that he was statutorily disqualified as a result. The Hearing Panel fined Kraemer $5,000, suspended him in all capacities for nine months, and assessed costs. This appeal followed.

II. Discussion

A. Kraemer's Failure to Disclose His Criminal History Violated NASD Rule 2110 and IM-1000-1

We affirm the Hearing Panel's finding of violation. NASD Rule 2110 and IM-1000-1 obligate associated persons to disclose accurately and fully the information required on the Form U4 and to observe the high standards of commercial honor and just and equitable principles of trade.[4] Self-regulatory organizations, such as FINRA, as well as state regulators, and broker-dealers use the Form U4 to determine and monitor the fitness of professionals to participate in the securities industry. *See Rosario R. Ruggiero*, 52 S.E.C. 725, 728 (1996). Thus, the candor and forthrightness of the individuals making these Forms U4 is critical to the effectiveness of this screening process. *See id.* The failure of an applicant for FINRA registration to fully and accurately disclose all information required on the Form U4, including criminal history, violates NASD Rule 2110 and IM-1000-1. *See Dep't of Enforcement v. Zdzieblowski*, Complaint No. C8A030062, 2005 NASD Discip. LEXIS 3, at *13-14 (NASD NAC May 3, 2005) (finding that respondent's failure to disclose that he was charged with misdemeanor larceny violated FINRA's rules).

On December 11, 2001, Kraemer was charged with petit larceny and criminal possession of stolen property, which are misdemeanors that involve the wrongful taking of property. Kraemer also pled guilty to petit larceny, a misdemeanor involving the wrongful taking of property. The criminal disclosure questions on the Form U4 were unambiguous and required that Kraemer respond affirmatively to those questions and that he supplement any affirmative response with complete information regarding all applicable charges and convictions. Kraemer did not do that; instead, he knowingly omitted information about the December 2001 charges and conviction from the five Forms U4 he submitted between March 2002 and September 2006. His omissions violated NASD Rule 2110 and IM-1000-1. *See Dep't of Enforcement v. Craig*, Complaint No. E8A2004095901, 2007 FINRA Discip. LEXIS 16, at *10-11 (FINRA NAC Dec. 27, 2007) (finding that the respondent's disclosure of only one felony charge, when he was charged with five felonies, violated NASD Rule 2110 and IM-1000-1), *aff'd*, Exchange Act Rel. No. 59137, 2008 SEC LEXIS 2844, at *1 (Dec. 22, 2008).

B. Kraemer Is Statutorily Disqualified Because He Willfully Failed to Disclose Material Information on His Forms U4

Kraemer admits that his failure to disclose the charges and conviction on the Forms U4 violated FINRA's rules. Kraemer, however, disputes that his failure to disclose was willful. A

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[4] IM-1000-1 states that, "[t]he filing . . . of information with respect to membership or registration . . . which is incomplete or inaccurate so as to be misleading . . . may be deemed to be conduct inconsistent with just and equitable principles of trade [in violation of NASD Rule 2110] and when discovered may be sufficient cause for appropriate disciplinary action." NASD Rule 0115 subjects associated persons to the same duties as FINRA member firms, which include the obligations imposed under NASD Rule 2110 and IM-1000-1.

finding of willfulness in the context of Kraemer's Form U4 violation has significant collateral consequences because it, coupled with a finding that the criminal history was material information, results in Kraemer's statutory disqualification. We find that the record amply supports that Kraemer's failure to disclose the December 2001 charges and conviction was willful, and that the omitted information was material.[5]

Kraemer willfully failed to disclose the December 2001 charges and conviction on each of the five Forms U4 he completed between March 2002 and September 2006. Section 3(a)(39)(F) of the Securities Exchange Act of 1934 ("Exchange Act") states that a person who files an application for association with a member of a self-regulatory organization, and who "willfully" omits any material fact in that application, is statutorily disqualified from participating in the securities industry. *See* 15 U.S.C. § 78c(39)(F); *see also* NASD By-Laws Art. III, Sec. 4(f).

We need not find that Kraemer intended to violate FINRA's rules to determine that his conduct was willful. *See Zdzieblowski*, 2005 NASD Discip. LEXIS 3, at *14. Rather, we need only to find that Kraemer voluntarily committed the act that constituted the violation, i.e., that he voluntarily omitted his criminal history from the Forms U4. *See Craig*, 2008 SEC LEXIS 2844, at *13. The evidence demonstrates that Kraemer acted voluntarily when he omitted his criminal history from the Forms U4. He therefore willfully violated NASD Rule 2110 and IM-1000-1. Kraemer is statutorily disqualified.

C. Kraemer's Factual Arguments that His Misconduct Was Not Willful Are Meritless

Kraemer argues that his misconduct was not willful because he thought that the December 2001 charges and conviction were "squashed" or expunged. Kraemer testified that he had a prior incident involving a conditional discharge, which resulted in the removal of certain charges and convictions from his criminal record. He stated that this prior experience led him to believe that the conditional discharge connected to the December 2001 charges and conviction would result in expungement as well. Kraemer offered no evidence to support his claim that the prior charges and convictions were expunged through conditional discharge. Moreover, nothing in the court's order concerning the December 2001 charges and convictions suggested that successful completion of the period of conditional discharge would result in expungement of that incident. The terms of the conditional discharge were clear. Kraemer could *either* remain free of criminal events for one year and complete two days of a drug treatment program *or* be imprisoned for 30 days. Neither condition of the discharge implied that the December 2001

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[5] Criminal history is material information. *See Craig*, 2007 FINRA Discip. LEXIS 16, at *11 n.9; *Dep't of Enforcement v. Knight*, Complaint No. C10020060, 2004 NASD Discip. LEXIS 5, at *13-14 (NASD NAC Apr. 27, 2004) ("Because of the importance that the industry places on full and accurate disclosure of information required by the Form U4, we presume that essentially all the information that is reportable on the Form U4 is material.").

charges or conviction would be removed from Kraemer's criminal record if the one-year period expired without incident.[6]

Kraemer also had no reasonable basis to conclude that the December 2001 charges and conviction were expunged when he completed the relevant Forms U4. Kraemer was sentenced to a one-year period of conditional discharge, running from December 12, 2001, until December 12, 2002. Kraemer completed his initial Form U4 at PHD Capital on March 27, 2002 – a mere three months into the one-year duration of the conditional discharge. Thus, the period of the conditional discharge did not elapse for any potential expungement to attach. "[T]he question presented is the status of [the] conviction on the date . . . the representations on the Form U4 [are made]." *Thomas R. Alton*, 52 S.E.C. 380, 383 n.8 (1995) (holding that vacated conviction three weeks after filing of Form U4 was irrelevant). The December 2001 charges and conviction were present on Kraemer's criminal record when he completed each of the five relevant Forms U4. He therefore had an obligation to disclose them. Kraemer's claims of expungement of the December 2001 charges and conviction are unavailing.

Kraemer also suggests that his omission was not willful because the personnel at PHD Capital and J.H. Darbie provided him with the information he used to complete the criminal disclosures on the Forms U4. Kraemer testified that he generally discussed his criminal record with a compliance officer at PHD Capital and managers at J.H. Darbie. He explained that he thought that the individuals at PHD Capital and J.H. Darbie had access to his entire criminal record, and that their staff would have provided him with information about the December 2001 charges and conviction if the information needed to be disclosed. Kraemer stated that, when PHD Capital's and J.H. Darbie's staff did not provide him with any information on the incident, he thought that he was not obligated to disclose it. Kraemer was mistaken. It was Kraemer's responsibility to make the requisite disclosures on *his* Forms U4. *See Dep't of Enforcement v. Mathis*, Complaint No. C10040052, 2008 FINRA Discip. LEXIS 49, at *23 (FINRA NAC Dec. 12, 2008), *appeal pending*, No. 3-13335 (SEC filed Jan. 12, 2009). He may not simply shift his responsibility for maintaining a complete and accurate Form U4 to the staff of his member firms, and then cite the staff's failure to provide him with the necessary information as grounds for shifting blame.

Kraemer argues finally that the questions on the Form U4 confused him. He attributes this confusion to his drug abuse. Kraemer states that it was difficult for him to understand all the questions on the Form U4 at that particular time in his life because he was "very foggy". Kraemer's alleged confusion does not alleviate his misconduct. "[I]gnorance of the NASD's rules is no excuse for their violation." *Richard J. Lanigan*, 52 S.E.C. 375, 378 (1995) (*citing David A. Gingras*, 50 S.E.C. 1286, 1291 n.12 (1992)). "Participants in the securities industry must take responsibility for compliance and cannot be excused for lack of knowledge,

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[6] *See* NY CLS Penal § 60.01(2)(b) (explaining that "[a] revocable sentence [including a sentence of conditional discharge] shall be deemed a tentative one to the extent that it may be altered or revoked in accordance with the provisions of the article under which it was imposed, but for all other purposes *shall be deemed to be a final judgment of conviction.*") (emphasis added).

understanding or appreciation of these requirements." *Id.* at 378 (*citing Kirk A. Knapp*, 51 S.E.C. 115, 134 (1992)).

Kraemer's claims of confusion are also at odds with the evidence in the record. The record demonstrates that Kraemer was sufficiently competent to know that he needed to earn money, and then to take the necessary steps to be rehired as a registered representative. Kraemer also was able to perform the tasks associated with the position – he contacted customers, recommended and explained stocks that may be in line with their investment interests, and managed and effected trades in customers' brokerage accounts. Kraemer also was sufficiently competent to complete and sign the Form U4, knowing that completion of the Form U4 marked the beginning of his employment with PHD Capital and J.H. Darbie. Kraemer's claims of confusion have no merit.

To the contrary, the record establishes that Kraemer not only knew that he had the December 2001 charges and conviction, he also knew that he had an obligation to disclose them. Kraemer was no novice when it came to completing the Form U4. He was intimately familiar with the Form U4 and FINRA's registration process, having associated with five FINRA member firms and completed at least four Forms U4 prior to the period at issue here. Kraemer also understood the criminal disclosure requirements and could make the required disclosures. In 1992, Kraemer was charged with, and convicted of, petit larceny – a separate misdemeanor charge and conviction than the one at issue in this case. The 1992 charge and conviction were disclosable events on Kraemer's Form U4, and he consistently disclosed them. Kraemer had sufficient wherewithal to disclose the 1992 charge and conviction on each of the Forms U4 he completed during the relevant period, yet he now claims ignorance of the disclosure requirements for his more recent charges and conviction – despite the fact that they involve the same crime.[7]

Moreover, when Kraemer entered his guilty plea for petit larceny in court, he raised concerns about the effect of the conviction on his securities registration. Once Kraemer began searching for employment, he was denied a position with a New York Stock Exchange member firm because of his criminal record. This denial took place one week before Kraemer applied for employment with PHD Capital. And finally, when Kraemer did interview with PHD Capital and J.H. Darbie, he took care to provide no specific information about the December 2001 charges

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[7] Kraemer asserts that his disclosure of the 1992 charge and conviction for petit larceny demonstrates that his conduct was not willful. He argues that he had no motive to conceal the December 2001 charges and conviction because he had reported the 1992 charge and conviction, and any negative employment-related impact already would be present. We interpret Kraemer's disclosure of the 1992 charge and conviction differently. We conclude that Kraemer properly disclosed the 1992 charge and conviction for petit larceny, and as a result, he should have known that he had an obligation to disclose the December 2001 charges and conviction, particularly when we consider that both the 1992 and 2001 charges and convictions involved petit larceny.

and conviction.[8] Instead, he vaguely noted that he had "numerous arrests". Kraemer's open-court inquiry, prior employment denial, and vague interview responses demonstrate that his failure to disclose the December 2001 charges and conviction was not the result of confusion or mistake. *See Henry Irvin Judy*, 52 S.E.C. 1252, 1256 (1997) (submitting information to a member firm that is "doctored to delete unfavorable information in order to gain employment is serious misconduct."); *Zdzieblowski*, 2005 NASD Discip. LEXIS 3, at *15.[9]

D. Sanctions

For filing a false Form U4, FINRA's Sanction Guidelines ("Guidelines") recommend fines ranging from $2,500 to $50,000, and the consideration of a suspension in any or all capacities for five to 30 business days.[10] In egregious cases, such as those involving repeated failures to file or false filings, the Guidelines suggest a longer suspension of up to two years, or possibly, a bar.[11] The Guidelines also provide three specific considerations to determine the appropriate sanctions for submitting a false Form U4: (1) whether the information at issue was significant and the nature of that information; (2) whether the respondent's failure to disclose the information resulted in a statutorily disqualified individual associating with a firm; and (3) whether the respondent's misconduct resulted in harm to a registered person, another member firm, or any other person or entity.[12] These specific considerations are in addition to the

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8 Kraemer asserts, for the first time in these proceedings, that he specifically told PHD Capital's compliance officer about the December 2001 charges and conviction. Kraemer's belated claim of disclosure, however, is contrary to his prior testimony and finds no support in the record. We therefore give this argument no weight. Kraemer also attacks the credibility of the FINRA examiner who testified at the hearing, but the evidence, upon which we rely, comes from Kraemer's own testimony, agreed upon stipulations, and undisputed documentary evidence in the record.

9 The Hearing Panel found that Kraemer's misconduct was willful only as to his Forms U4 at PHD Capital. The Hearing Panel concluded that this misconduct, standing alone, resulted in Kraemer's statutory disqualification, and did not require a determination of whether Kraemer's omissions on the Forms U4 made at J.H. Darbie also were willful. The record, however, demonstrates that Kraemer willfully failed to disclose the December 2001 charges and conviction on the Forms U4 he completed at PHD Capital and J.H. Darbie. As discussed above, our analysis of willfulness covers the entire period at issue in this case, and contemplates the circumstances of Kraemer's completion of the Forms U4 at both PHD Capital and J.H. Darbie.

10 *See FINRA Sanction Guidelines* 73 (2007), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

11 *See id.* at 74.

12 *See id.* at 73.

Principal Considerations in Determining Sanctions that must be consulted in every disciplinary case.[13]

The Hearing Panel applied the specific and general considerations applicable to Kraemer's misconduct, and fined him $5,000, suspended him in all capacities for nine months, and assessed costs. The sanctions that the Hearing Panel imposed strike an appropriate balance between assessing sanctions that are commensurate with Kraemer's rule violation and remediating his specific misconduct; thus, we affirm the sanctions imposed.

Information regarding Kraemer's criminal history was significant. The December 2001 charges and conviction occurred three months before Kraemer began working at PHD Capital. The recent charges and conviction coupled with the 1992 charge and conviction suggested a pattern of conduct that a single conviction, occurring more than 10 years earlier, would not have indicated. Kraemer's recent criminal activity also would be significant to the investing public and PHD Capital and J.H. Darbie. If Kraemer had disclosed the December 2001 charges and conviction, as he was required to do, his customers and employers could have scrutinized him more closely. His customers could have determined whether they wanted to utilize his services, and his employers could decide whether they wanted to hire him, even with the recent criminal activity. Kraemer deprived his customers and employers of that opportunity.[14] Kraemer's disclosure also would have enabled his employers, if they hired him, to determine what sort of heightened supervision might be appropriate for him, considering that the misdemeanor charges and conviction involved theft. *See Dist. Bus. Conduct Comm. v. Perez*, Complaint No. C10950077, 1996 NASD Discip. LEXIS 51, at *7 (NASD NBCC Nov. 12, 1996) ("[F]ull and accurate disclosures on a Form U4 are critical to the securities industry because member firms must be able to assess properly whether an individual should be employed, and, if so, subject to enhanced supervision."). Kraemer's criminal background was significant and serves to aggravate his misconduct.

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13 *See id.* at 6-7.

14 Kraemer suggests that the lack of customer harm should be considered a mitigating factor. We reject his suggestion. As an initial matter, we conclude that Kraemer's nondisclosure deprived his customers of the opportunity to review his background and to determine for themselves whether they wanted to engage him even with a criminal record. In addition, we have previously held that the absence of customer harm is not a mitigating factor. *See Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (NASD NAC Dec. 21, 2004) ("[T]here is no authority for the proposition that the absence of harm to customers is mitigating."), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005). We see no reason to depart from that rule here, particularly when we consider that Kraemer's criminal history would be highly significant to potential investors and employers.

We find that Kraemer's failure to disclose was intentional.[15] In so holding, we reject the Hearing Panel's finding that Kraemer's misconduct was reckless. The Hearing Panel provided no basis for its determination that Kraemer acted recklessly, and we conclude that the record overwhelmingly demonstrates that Kraemer intentionally omitted the information about his criminal background from the Forms U4. The record shows that Kraemer was familiar with the Form U4 and his disclosure requirements. Kraemer had completed four Forms U4 prior to the period at issue in this case, and on each form, made the requisite disclosure of his charge and conviction for petit larceny from 1992. These prior disclosures reinforce the intentional nature of Kraemer's misconduct because the 1992 charge and conviction involved the same crime at issue here. The record also demonstrates that Kraemer knew that the more recent criminal activity harmed his prospective employment. He admitted as much in court when he sought to vacate his guilty plea, citing his concerns about the effect of the plea on his securities registration. Moreover, Kraemer witnessed the effects of disclosing the more recent charges and conviction firsthand when he interviewed with a New York Stock Exchange firm the week before he interviewed with PHD Capital. Kraemer was denied employment with the New York Stock Exchange firm when he disclosed the December 2001 charges and conviction. The record proves that Kraemer appreciated the consequences of the December 2001 charges and conviction, and did not disclose them to avoid facing the impact of those consequences. Kraemer's failure to disclose the charges and conviction was intentional, and presents an aggravating factor in this case.

We find it aggravating that Kraemer omitted the unfavorable information apparently to gain employment. *See Judy*, 52 S.E.C. at 1256. Complete, truthful responses to the questions on the Form U4 are essential to a meaningful system of self-regulation. *See Craig*, 2007 FINRA Discip. LEXIS 16, at *25. Kraemer's nondisclosure only served to frustrate that critical investigatory process. *See id.* Kraemer's misconduct also does not represent a mere lapse of judgment – the criminal activity occurred only three months before he completed the Form U4 at PHD Capital, but he nevertheless withheld the information for nearly five years.[16] Although Kraemer attempts to depreciate the significance of his misconduct, characterizing it as a "minor infraction," we conclude that Kraemer's omission calls into question whether he is fit to be involved in the securities industry. Because full and accurate disclosure on the Form U4 is vital to determining the fitness of an applicant for registration as a securities professional, we find that Kraemer's nondisclosure is egregious and warrants a serious sanction. *See Craig*, 2008 SEC LEXIS 2844, at *26-27 (affirming bar where respondent failed to provide information about his criminal record on a Form U4).

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15 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13) (considering whether the misconduct was the result of an intentional act or recklessness).

16 *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 9) (considering whether the respondent engaged in the misconduct over an extended period of time).

We consider that Kraemer's misdemeanor conviction did not result in a statutorily disqualified individual associating with a FINRA member firm.[17] Kraemer's willful failure to disclose the December 2001 charges and conviction on his Forms U4 results in his statutory disqualification, but the underlying shoplifting conviction, standing alone, is not a disqualifying event. *See* 15 U.S.C. § 78c(39)(F); 15 U.S.C. § 78c(15)(b)(4)(B)(iii) (stating that misdemeanor theft *of funds or securities* is a disqualifying event) (emphasis added); NASD By-Laws Article III, Sec. 4(f).

Although our analysis of the record identifies more aggravating factors than those highlighted by the Hearing Panel, and finds that Kraemer acted intentionally instead of recklessly, we nevertheless conclude that the sanctions that the Hearing Panel imposed – a $5,000 fine and nine-month suspension in all capacities – are appropriate sanctions under the circumstances presented. We also determine that these sanctions, when coupled with Kraemer's status as a disqualified person, strike an appropriate balance between redressing Kraemer's misconduct and assessing sanctions that are proportional to that misconduct. We therefore fine Kraemer $5,000 and suspend him for nine months for failing to disclose his criminal history on Forms U4.

III. Conclusion

Kraemer failed to disclose his criminal history on Forms U4, in violation of NASD Rule 2110 and IM-1000-1. For this violation, we fine him $5,000, suspend him in all capacities for nine months, and order him to pay hearing costs of $2,164.72.[18] Kraemer's failure to disclose was willful and the omitted information was material; thus, Kraemer also is statutorily disqualified. We have considered, and reject without discussion, all other arguments of the parties.

On behalf of the National Adjudicatory Council,

Marcia E. Asquith

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

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17 *See Guidelines*, at 73.

18 Pursuant to FINRA Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.