

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF MARKET REGULATION,

Complainant,

v.

MATTHEW JOSEPH SHEERIN
(CRD No. 2859126),

Respondent.

Disciplinary Proceeding
No. 20110279263-01

Hearing Officer–MC

HEARING PANEL DECISION

May 18, 2015

Market Regulation did not prove, by a preponderance of the evidence, that Respondent: (1) “tipped” material non-public information, and engaged in insider trading, in violation of Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010; (2) violated the supervisory and compliance procedures regarding insider trading of the member firm through which he was registered, in violation of FINRA Rule 2010; and (3) disclosed confidential information in contravention of the confidentiality agreement he signed with his firm, in violation of FINRA Rule 2010. Accordingly, the Complaint is dismissed.

Appearances

Lora W. Alexander, Esq., and John Warshawsky, Esq., for the Department of Market Regulation.

Susan R. Necheles, Esq., John J. Esmay, Esq., and Kathleen E. Cassidy, Esq., for Respondent Matthew J. Sheerin.

DECISION

I. Introduction

On April 29, 2011, Respondent Matthew Joseph Sheerin, in the course of his employment at an investment firm, received a confidential “board level” email from the CEO of a company in which his employer held a majority ownership interest. The email disclosed that on the next business day, in conjunction with the filing of the company’s Form 10-K and the release of its year-end earnings report, the company would issue a press release announcing a large contract for the sale of the company’s products.

Later that day, Sheerin conversed by telephone with a close friend, MM. As they often did, Sheerin and his friend chatted about the market and discussed their investments. They had spoken about the company in a number of previous conversations. Sheerin knew that his friend was interested in the company and had purchased its stock for both his employer and himself. In the course of the conversation, Sheerin mentioned in passing that the company would be issuing its earnings report the next business day and that the “story should read well.”

Shortly after the call, MM attempted to persuade his supervisor to allow him to purchase additional shares in the employer’s account. MM told his supervisor that a friend at a hedge fund that owned a large share of the company had told him the company was about to release its quarterly earnings report and that it would read “really, really well.”

Approximately a month later, MM’s firm filed a Uniform Termination Notice for Securities Industry Registration (Form U5) disclosing that MM had been permitted to resign while under investigation for possibly trading the company’s stock prior to a news announcement.

The Form U5 led the Department of Market Regulation to investigate. On August 2, 2014, Market Regulation filed a three-cause Complaint against Sheerin. The gravamen of the Complaint is that Sheerin’s statement to MM was an improper “tip” of inside information. Cause One of the Complaint charges that Sheerin disclosed material non-public information to MM in violation of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. Cause Two of the Complaint charges that Sheerin violated his employer’s supervisory and compliance procedures regarding insider trading, and thereby FINRA Rule 2010. Cause Three alleges that Sheerin’s statement to MM violated the nondisclosure provision of Sheerin’s employment agreement, and thereby violated FINRA Rule 2010.

After considering the evidence adduced at the hearing, and the arguments and extensive post-hearing briefs of the parties, the Hearing Panel concludes that Market Regulation failed to prove, by a preponderance of the evidence, that Sheerin’s statement to MM disclosed material non-public information.¹ Accordingly, the Panel dismisses Cause One of the Complaint. Because Sheerin’s employer’s supervisory and compliance procedures on insider trading prohibited only the disclosure of material non-public information, Cause Two is also dismissed. Finally, the Panel concludes that Market Regulation failed to prove, by a preponderance of the evidence, that Sheerin violated the confidentiality agreement he signed with his employer firm and FINRA Rule 2010, and therefore dismisses Cause Three.

¹ A preponderance of the evidence is the standard of proof in FINRA disciplinary proceedings. *See Dep’t of Market Regulation v. Leighton*, No. CLG050021, 2010 FINRA Discip. LEXIS 3, at *34 n.15 (NAC Mar. 3, 2010) (citing *David M. Levine*, Exchange Act Release No. 48760, 2003 SEC LEXIS 2678, at *36 n.42 (Nov. 7, 2003).

II. Facts

A. Sheerin's Responsibilities at Angelo Gordon

Sheerin was registered with FINRA member firms from January 1997 until August 12, 2011. He held Series 7, Series 55, and Series 63 registrations. From September 2000 through July 2011, he was employed by Angelo, Gordon & Co. ("Angelo Gordon") and was registered through its affiliated FINRA member firm, AG BD LLC.² On August 12, 2011, AG BD filed a Form U5 terminating Sheerin's registration. Sheerin has not been registered through any FINRA member firm since that date.³

Sheerin described Angelo Gordon as an investment management firm with approximately \$20 billion in assets. Its employees were divided into four groups: real estate, convertible debt, risk arbitrage, and distressed debt.⁴ Sheerin was the head trader for the distressed debt group.⁵

The distressed debt group, with approximately \$5 billion in assets, invested in distressed businesses. One strategy Angelo Gordon employed is called "loan-to-own," by which the firm assumed control of a distressed business, purchased the firm's debt and induced a reorganization of the business. Angelo Gordon would exchange its debt holdings for a controlling equity position in the company. After the reorganization, Angelo Gordon would attempt to find a buyer for the reorganized company, and sell it for profit.⁶

Angelo Gordon's distressed debt group consisted of approximately ten persons, including a portfolio manager, a number of analysts, and two traders, one of whom was Sheerin.⁷ In 2010 and 2011, Sheerin worked with approximately eight senior analysts and two or three junior analysts.⁸ The analysts were responsible for identifying and evaluating bonds trading below

² Angelo Gordon was "predominantly an investment manager, but [Angelo Gordon] also had a small broker/dealer [AG BD] [which] was just mainly where [Angelo Gordon's employees] held [their] personal accounts." Hearing Transcript ("Tr.") 179.

³ Tr. 178-79; Complainant's Exhibit ("CX") 1. Although Sheerin is not currently associated with any FINRA member, he remains subject to FINRA jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because the Complaint was filed within two years after he ceased to be associated with a FINRA member, and the Complaint alleges misconduct committed while he was registered or associated with a FINRA member.

⁴ Tr. 179-80.

⁵ Tr. 182.

⁶ Tr. 191, 196, 409, 420-23.

⁷ Tr. 370-71.

⁸ Tr. 185-86.

value and distressed companies as candidates for investment.⁹ The traders were responsible for purchasing and selling debt securities as directed by the portfolio manager.¹⁰

Sheerin described his job as partly that of a trader, taking buy and sell orders from the portfolio manager, and partly serving as the “eyes and ears to the market” for the analysts and portfolio manager he worked for. The latter area of responsibility required him “to be on the phone all day long talking to other people in the marketplace,” to “share ideas, get information, [and] and see what’s going on in the marketplace.”¹¹ According to Sheerin and Todd Arden, a senior analyst he worked with, Sheerin spent most of his workday on the phone, monitoring the market and providing the analysts with “market color,” giving them updates on prices, what he was hearing from market participants, what Angelo Gordon competitors were buying, and the activities of buyers and sellers.¹² At any given time, Sheerin was monitoring as many as 100 firms in which Angelo Gordon held interests or that had been identified by the analysts as potential Angelo Gordon investments, and keeping analysts advised of market developments affecting those firms.¹³

B. Angelo Gordon’s Acquisition of C&D

In 2010 and early 2011, Angelo Gordon employed the loan-to-own strategy to obtain a controlling ownership interest in C&D Technologies, Inc., a distressed company manufacturing batteries for backup industrial, cellular, and data center power systems.¹⁴ First, Angelo Gordon purchased convertible debt issued by C&D. Then, Angelo Gordon participated in an informal creditors’ committee that arranged a reorganization of C&D through which the creditors, including Angelo Gordon, exchanged debt securities for stock. After the reorganization, Angelo Gordon was C&D’s largest shareholder, with a 65% interest in the company. Most of the remainder of C&D’s stock was held by its other former creditors, leaving only about 5% held by the investing public.¹⁵

Arden took the lead and oversaw Angelo Gordon’s acquisition of a controlling share of C&D. Arden served on the creditors’ committee that arranged the reorganization, and after the reorganization sat on C&D’s board of directors. Because Angelo Gordon’s strategy involved the acquisition of convertible debt, the other trader in the department who was responsible for the convertible debt market, not Sheerin, executed the trades through which Angelo Gordon obtained

⁹ Tr. 224, 370-71.

¹⁰ Tr. 182, 391.

¹¹ Tr. 182-83.

¹² Tr. 193-94, 398.

¹³ Tr. 378-79, 402-03.

¹⁴ Tr. 222, 373.

¹⁵ Tr. 190-91, 196, 222-27, 373-76, 406-07, 410, 415-16, 426, 436-38, 505; CX-30, at 2.

a controlling portion of C&D's convertible debt.¹⁶ Sheerin had only a limited role in the acquisition and subsequent management of C&D.¹⁷ Arden characterizes Sheerin's work on C&D as "strictly administrative" and "mechanical."¹⁸ He handled paperwork for the original purchases, and then for the debt for equity exchange.¹⁹ Afterward, Sheerin monitored C&D's price and followed market developments relating to C&D.²⁰ Weekly, Sheerin calculated the value of Angelo Gordon's interest in C&D and informed Arden about any trading activity in C&D stock, which was illiquid, thinly traded, and listed only on the OTC Bulletin Board.²¹

C. Sheerin's Relationship with MM

Sheerin and MM were long-time friends. They attended college together and were teammates on their college lacrosse team. After graduation, they roomed together as both began careers on Wall Street. They remained close friends through the period relevant to this case. They frequently discussed investments and traded on each other's investment ideas from time to time.²²

In February 2011, after a brief period of unemployment, MM obtained a position as a proprietary equities trader with G-2 Trading, LLC. G-2 Trading was a member of the Philadelphia Stock Exchange ("PHLX"), not a FINRA member, and traded only for its own proprietary accounts. MM's compensation was based solely on profits earned through his proprietary trading.²³ Aside from their friendship, Sheerin found it helpful to talk with someone "in the equity market to discuss market color or which way the market's going," because, in Sheerin's view, "high yield bonds often trade similar to the equity market."²⁴ Sheerin considered MM as an additional resource, a set of "eyes and ears" on the equities market during a volatile period, and "very helpful" to Angelo Gordon by providing market color and breaking news he acquired before it reached the fixed income market.²⁵

D. Sheerin's and MM's Discussions About C&D

In a conversation after MM began working at G-2 Trading, MM asked Sheerin what firms Angelo Gordon "liked." Sheerin gave MM the names of three firms in which Angelo

¹⁶ Tr. 223.

¹⁷ Tr. 294.

¹⁸ Tr. 413.

¹⁹ Tr. 225.

²⁰ Tr. 574.

²¹ Tr. 225-26, 284, 375-76, 379.

²² Tr. 236-38; JX-2, at 20, 25-28.

²³ Tr. 238-39, 304-06; JX-2, at 9, 12.

²⁴ Tr. 239-40.

²⁵ Tr. 547-49.

Gordon held investments, including C&D. The fact that Angelo Gordon had invested in those companies was public information.²⁶

A short time later, MM “came back ... all excited about C&D.” MM, who was familiar with the background of developments in stocks of companies involved in cloud computing and data storage, “kind of fell in love” with C&D’s “story.”²⁷ They discussed this whole “white hot” sector of the market.²⁸

In March 2011, MM told Sheerin that he had purchased C&D stock for his own account as well as for his G-2 Trading proprietary account.²⁹ But when David Abramson, MM’s supervisor, learned that MM had bought 10,000 shares for G-2 Trading, he directed MM not to purchase any more of the stock for the firm because the firm tended “to frown upon trading in bulletin board or pink sheet securities.”³⁰ MM told Sheerin that he was frustrated by his inability to purchase more C&D stock for G-2 Trading and, because of his limited funds, for himself.³¹

Thereafter, C&D came up in other conversations. On two occasions, MM sent Sheerin articles that referred to C&D; Sheerin forwarded them to Arden and to Tom Fuller, the head of Angelo Gordon’s distressed securities group.³² Fuller also knew MM; neither Arden nor Fuller told Sheerin that he should not discuss C&D with MM.³³ In April 2011, Sheerin informed MM when a salesperson at another firm said that he had a buyer who wanted to purchase some C&D stock. Sheerin considered this “sharing trading color” with MM, whom he knew was interested in C&D.³⁴ Market Regulation does not allege that this discussion was improper.

Also during April, MM sent Sheerin an article from an online news source about companies developing energy storage products that mentioned C&D, among other companies. In turn, Sheerin forwarded the article to Arden. About C&D, the article stated: “The picture won’t be clear until they file their annual report later this month, but it looks like C&D has emerged

²⁶ Tr. 241-43; JX-2, at 29.

²⁷ Tr. 247-48.

²⁸ Tr. 595.

²⁹ Tr. 290-91.

³⁰ Tr. 291, 307.

³¹ Tr. 291. In accordance with Angelo Gordon’s standard procedures, once Arden became a member of the creditors’ committee with potential access to material non-public information, C&D was placed on Angelo Gordon’s restricted list, and neither Angelo Gordon nor its employees were allowed to purchase additional C&D stock. Tr. 204-205. Indeed, all securities transactions by Angelo Gordon employees had to be approved by the firm, even if the trades did not relate to a security on Angelo Gordon’s restricted list. Tr. 206-07, 399.

³² Tr. 370-71, 524, 577.

³³ Tr. 577-78.

³⁴ Tr. 517-18; CX-12.

from the restructuring in fine form and may offer significant opportunity to investors who are willing to spend some time digging.”³⁵

At some point in early to mid-April, MM informed Sheerin that he had called C&D repeatedly to obtain information directly from someone at the company, and on two occasions left messages, but his calls were not returned.³⁶ Sheerin asked Arden to help. Arden contacted C&D’s chief executive and chief financial officers and asked them to respond to MM’s inquiry.³⁷ Later, Sheerin testified, MM said that someone from C&D had returned his call, and told him that the company would file its report on May 2.³⁸ Market Regulation does not contend that these conversations and actions were improper.

Later, on April 27, 2011, Sheerin, MM, and Arden had lunch together. MM brought up the topic of C&D to Arden, and they engaged in what Arden described as a “high-level” conversation about the industry, touching on the batteries C&D and its competitors produced, their applications, the prospects of C&D and other companies, and Arden’s opinion that C&D was a good investment that was going to do well.³⁹ Market Regulation does not allege that Arden’s lunch discussion disclosed material non-public information to MM or was improper.

E. C&D’s May 2, 2011 Annual Form 10-K

The regulatory deadline for C&D to file its annual Form 10-K containing its 2010 financial statements for its fiscal year ending January 31, 2011, was May 2, 2011. The date was determinable from publicly available information.⁴⁰

In 2010, while C&D was in distress and prior to the restructuring, the company missed two regulatory deadlines for filing quarterly financial reports. However, after Angelo Gordon’s takeover and the reorganization, C&D filed its quarterly report on time in December 2010.⁴¹ According to Arden, “Any prudent analyst would know that these earnings were coming” out as scheduled on May 2, 2011; C&D “was always going to file on time”; and “it would be very rare for a company to come out of a reorganization where the balance sheet has been made very

³⁵ CX-15.

³⁶ Tr. 288, 531-32. MM produced a document to Market Regulation that contains undated text messages between MM and Sheerin, in which MM complains about unsuccessfully calling C&D, and Sheerin mentions that he “heard from analyst” that the company’s Form 10-K, its annual financial report, was coming out the first week of May; MM responds, “yea, the 10k.” Tr. 85-86; CX-16.

³⁷ Tr. 468-69.

³⁸ Tr. 288-89. Sheerin testified at an on-the-record interview that MM texted him the information; at the hearing, Sheerin said he had not seen the text and perhaps MM had called him, but he insisted that MM had told him about C&D’s response. Tr. 289.

³⁹ Tr. 461-67.

⁴⁰ Tr. 385-86, 434. Market Regulation’s analyst conceded that she knew the report was due on May 2, 2011, and that it was not a complicated matter to determine when it was due. Tr. 156-57.

⁴¹ Tr. 157-61, 289-90, 436-38; CX-28; CX-29.

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.”⁴² Furthermore, the testimony at the hearing was that ordinarily the date of a company’s earnings announcement is not considered by persons in the securities business to be privileged information and is accessible publicly.⁴³

F. The Confidential, Non-Public Email and Sheerin’s Call to MM

On the morning of Friday, April 29, 2011, Arden received an email from C&D’s chief executive officer, sent to all of the members of C&D’s board of directors. Arden forwarded it to Sheerin and two other Angelo Gordon employees.⁴⁴ The email stated that on the next working day, Monday, May 2, “in conjunction with [its] earnings press release and 10-k filing,” C&D would “announce [its] award as the exclusive provider of batteries to the Agriculture Bank of China (ABC) for the next three years.” The CEO wrote, “This \$28 million exclusive contract is the largest single award I have been able to identify in our company’s history.” He attached a press release that C&D planned to issue on May 2 about the China contract.⁴⁵

Sheerin received the email before noon, read it, but testified that he “didn’t give it any thought.”⁴⁶ He estimated that he spent no more than 30 seconds looking at the email.⁴⁷ As described above, both he and MM had known the date of the filing for some time.⁴⁸

After receiving the email, Sheerin went to lunch with Arden, Fuller, and another person. Arden does not recall any discussion of C&D at lunch. After lunch, Sheerin encountered two college friends and spent time talking with them. His time away from the desk, an hour and a half to an hour and 45 minutes, was longer than normal.⁴⁹

After returning to his office, Sheerin called MM to ask about market news developments while he had been away from his desk. It was a slow day at Angelo Gordon and Sheerin was doing no trading, but there was much developing market news to discuss with MM, some of it related to the European debt crisis, the price of gold, and Sheerin’s significant gold

⁴² Tr. 434-38.

⁴³ Tr. 156-57, 289, 386.

⁴⁴ CX-17. Sheerin testified that he did not know that Arden was on C&D’s board, but he knew that Arden had served on the creditors’ committee and knew that Arden “was very, very involved with the company.” Tr. 233.

⁴⁵ CX-17.

⁴⁶ Tr. 534.

⁴⁷ Tr. 597.

⁴⁸ Tr. 537.

⁴⁹ Tr. 454-55, 596-97.

investments.⁵⁰ Sheerin testified that this was not an unusual conversation between them, and that he did not have the email in mind when he called MM.⁵¹

In their conversation, Sheerin and MM touched on a number of subjects, including their investments and their expectations for developments in the upcoming week.⁵² During the call, the topic of C&D came up briefly. Sheerin does not recall who broached it.⁵³ Sheerin mentioned that C&D would be releasing its earnings report on May 2 and that “the story should read well.”⁵⁴ Sheerin testified that after he made that one statement, the discussion of C&D was over.⁵⁵ Sheerin did not otherwise disclose anything about C&D’s earnings—indeed, Market Regulation introduced no evidence that Sheerin knew what those earnings would be—or about the contract discussed in the email.⁵⁶

G. MM’s Actions

On April 29, before Sheerin called him, MM had purchased 590 shares of C&D stock in his personal account.⁵⁷ Ten or fifteen minutes after Sheerin called, MM went to Abramson.⁵⁸ Although about three weeks earlier Abramson had directed MM not to purchase any more C&D stock in his proprietary account on behalf of G-2 Trading,⁵⁹ MM wanted to persuade Abramson to permit him to buy more.⁶⁰

According to Abramson, MM said he had just learned from a friend at a hedge fund that was the “largest holder in the name” that C&D would be releasing its earnings report on May 2

⁵⁰ Tr. 534-37.

⁵¹ Tr. 597.

⁵² Tr. 536-37.

⁵³ Tr. 534.

⁵⁴ Tr. 534-537, 597-598; JX-2, at 66-68.

⁵⁵ Tr. 534-35.

⁵⁶ Tr. 255, 611.

⁵⁷ Tr. 134-35; JX-2, at 74-75.

⁵⁸ JX-2, at 73.

⁵⁹ Tr. 306-07; CX-26.

⁶⁰ During his investigative testimony, MM stated that he sought permission to buy additional C&D stock in his G-2 Trading proprietary account on April 29 because “through my extensive research, I had always wanted to add to the position.” JX-2, at 56.

and that “it was going to read really, really well. Please, you have to let me buy more of this name.”⁶¹

MM did not testify at the hearing but, in investigative testimony that was introduced in evidence at the hearing,⁶² MM stated that he told Abramson: “I just talked to my friend at Angelo Gordon and they’re the top shareholder. And he said something like ... we should be good. ... And, you know, [I] really would like the opportunity to get bigger in the name.”⁶³ MM also stated in his investigative testimony, however, that what Sheerin actually told him, “in passing,”⁶⁴ after “talking about his gold stocks,” was “something about” C&D and that “it should read well.”⁶⁵ MM denied that Sheerin had ever provided him with any information that MM considered confidential.⁶⁶

Abramson told MM he could not purchase additional shares of C&D in his proprietary account. He told MM, “we have a problem,” and that he would not let MM “add to the name,” and then directed him to wait while he conferred with other G-2 Trading senior managers.⁶⁷ While waiting, MM purchased another 500 shares of C&D in his personal account.⁶⁸ When Abramson returned, he told MM that G-2 Trading was liquidating its position in C&D that day and would be conducting an internal investigation.⁶⁹

⁶¹ CX-26 (letter from Abramson to Market Regulation staff dated May 3, 2012). Abramson made notes of his conversation with MM shortly after it occurred, but destroyed those notes after he prepared the letter. He asserted that the letter, prepared approximately one year later, was based on the notes. Tr. 324. Abramson offered a somewhat different version of his conversation with MM at the hearing, but on cross-examination acknowledged that the letter set forth a more contemporaneous recollection of the conversation and was likely to be more accurate than his hearing testimony. Tr. 309-10, 327-28.

⁶² As a result of G-2 Trading’s Form U5 filing regarding MM, FINRA began an investigation of MM on behalf of the PHLX and took MM’s investigative testimony in the course of that investigation. FINRA has the authority under the Regulatory Service Agreement to conduct investigations on behalf of the PHLX and compel persons registered with a PHLX member firm, as MM was at the time, to testify. However, since G-2 Trading is not a FINRA member and MM is not registered with FINRA, FINRA lacks jurisdiction to compel MM to testify in a FINRA proceeding. Tr. 66-68.

⁶³ JX-2, at 57.

⁶⁴ JX-2, at 40, 64.

⁶⁵ JX-2, at 59-60. During MM’s investigative testimony, when pressed regarding what the “it” was that “should read well,” MM insisted that he neither knew nor cared what Sheerin was referring to, but noted: “The ‘it’ could have been the press release. Not necessarily the numbers. Like I said, when you go through these restructurings the first quarter they come out they paint a rosy picture. They paint a very rosy picture.” JX-2, at 66-69, 72-73.

⁶⁶ JX-2, at 44, 74.

⁶⁷ Tr. 309-10; CX-26.

⁶⁸ CX-26, at 74.

⁶⁹ Tr. 311. G-2 Trading liquidated its existing position in C&D stock in MM’s proprietary account on April 29. MM sold 1,100 shares of the C&D stock in his personal account on April 29 and sold the rest on May 4 and May 5, 2011. After selling, both G-2 Trading and MM personally incurred losses on their C&D investments. Tr. 135-39.

H. MM's Termination and Its Aftermath

On the evening of May 2, 2011, MM went to Sheerin's home to discuss his situation at G-2 Trading. Sheerin testified that MM told him that, after their phone call on April 29, he went to his boss's office to obtain permission to increase his proprietary position in C&D. According to Sheerin, MM told his boss he had learned from "guys [who are] very smart and ... usually have good info" that the report was coming out the following Monday. Sheerin said he told MM, "whoa"—that all he had said was "the story should read well." According to Sheerin, MM replied, "I know, I know ... it was just a pitch to my boss, I was just trying to pitch my boss to get my position limit increased."⁷⁰

Sheerin then became concerned that MM's boss would think Sheerin had told MM to buy C&D and that MM, in response, "did it." So Sheerin reminded MM that he had done his own research and had discussed C&D with Arden. Sheerin asked MM if he had told his boss that he had personally called the company.⁷¹

Sheerin testified that MM did not mention the possibility that he could be fired; rather, he said he was in trouble for disobeying his boss's order not to trade in C&D on April 29 by buying 500 more shares in his personal account and that he needed to clear up the matter with his boss.⁷²

However, on May 4, 2011, MM's employment with G-2 Trading ended. That day, a mutual friend told Sheerin that MM said that G-2 Trading had fired MM for disobeying his boss by purchasing shares of C&D.⁷³ That night, Sheerin called his boss, Fuller, at home and disclosed "the whole story about [MM] and [C&D] and how [MM] traded after his boss told him not to." Fuller advised Sheerin that he had nothing to worry about because it was permissible to tell MM that he liked C&D.⁷⁴

Approximately a month later, G-2 Trading filed the Form U5 stating that MM was "permitted to resign" while "under internal review by the firm to determine whether he may have improperly traded C&D Technologies securities before a news announcement."⁷⁵ The day G-2 Trading filed the Form U5, Sheerin and MM's mutual friend called Sheerin to report that G-2 Trading had essentially accused MM of insider trading. When he heard this, Sheerin informed Fuller that MM's Form U5 had "some pretty bad language" in it concerning insider trading and asked Fuller if they should report it to Angelo Gordon's internal compliance counsel. Fuller

⁷⁰ Tr. 527-28.

⁷¹ Tr. 524-25, 529.

⁷² Tr. 249, 563-64.

⁷³ Tr. 249, 564-65.

⁷⁴ Tr. 250-51, 565, 570.

⁷⁵ Tr. 310-12, 317.

initially said he wanted to think it over for a couple of days, then told Sheerin they should speak to internal counsel. Sheerin did so.⁷⁶

Angelo Gordon then hired outside counsel to conduct an investigation. Angelo Gordon did not conclude that Sheerin had been guilty of insider trading. Nonetheless, Sheerin's employment with Angelo Gordon terminated on July 31, 2011. According to the Form U5 filed by AG BD:

The Firm permitted Mr. Sheerin to resign after he voluntarily admitted that he may have violated [Angelo Gordon'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.⁷⁷

Based on this Form U5 filing, FINRA's New York District Office initiated an investigation into Sheerin, which was then transferred to the Office of Fraud Detection and Market Intelligence ("OFDMI"). After completing the investigation, OFDMI referred the matter to Market Regulation, which filed the Complaint.⁷⁸

III. Discussion

A. Cause One—Insider Trading

Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 thereunder prohibit the use of "manipulative or deceptive devices" in the purchase or sale of a security. FINRA Rule 2020 parallels the antifraud provisions of Section 10(b) and Rule 10b-5, and conduct that violates Section 10(b), Rule 10b-5, and Rule 2020 also violates Rule 2010.⁷⁹

"Insider trading" is well recognized as a deceptive device that violates Section 10(b), Rule 10b-5 and FINRA Rules 2020 and 2110.⁸⁰ One form of insider trading is "tipping." "To be held liable, a tipper must (1) tip (2) material non-public information (3) in breach of a fiduciary duty of confidentiality owed to shareholders (classical theory) or the source of the information (misappropriation theory) (4) for personal benefit to the tipper."⁸¹ Market Regulation brought this case under the misappropriation theory,⁸² requiring proof that Sheerin acted deliberately or

⁷⁶ Tr. 251-52.

⁷⁷ CX-1, at 3, 6-10.

⁷⁸ Tr. 63-64, 71-72.

⁷⁹ See *Dep't of Enforcement v. Becerril*, No. 2009018944001, 2012 FINRA Discip. LEXIS 4, at *16-17 & n.58 (OHO Feb. 23, 2012).

⁸⁰ See, e.g., *Dep't of Market Regulation v. Geraci*, No. CMS020143, 2004 NASD Discip. LEXIS 19, at *19-20 (NAC Dec. 9, 2004).

⁸¹ *SEC v. Obus*, 693 F.3d 276, 286 (2d Cir. 2012).

⁸² Market Regulation's Pre-Hr'g Br. at 10-11.

recklessly, not negligently; knew that the information was material and non-public, or recklessly disregarded the nature of the information; and knew or recklessly disregarded that the disclosure violated a fiduciary obligation.⁸³ The principal issue in this case concerns the second element; that is, did Sheerin disclose material non-public information to MM during their April 29, 2011 phone call?

1. Sheerin's Limited Disclosure to MM

The Complaint alleges, and the evidence establishes, that Sheerin told MM that C&D's earnings report would be released on Monday, May 2, 2011, and that "the story should read well." Sheerin agrees that he said so to MM during their April 29 phone call. During its closing argument, in response to a question from the Panel, Market Regulation conceded: "We have no evidence that [Sheerin] disclosed anything more than [the date of the earnings release and] saying 'the story should read well.'"⁸⁴

Nevertheless, in its Post-Hearing Brief, Market Regulation asserted that it "has not conceded that Sheerin said nothing more to [MM]," arguing that the "Panel may find Sheerin disclosed more to [MM] than he has admitted, based on circumstantial evidence."⁸⁵

There may well be cases in which it is appropriate to infer the substance of communications based on circumstantial evidence. But here, prior to filing its Post-Hearing Brief, Market Regulation's premise had been that Sheerin disclosed only the upcoming date for release of C&D's earnings report and that the "story should read well." There is no evidence, direct or circumstantial, that Sheerin disclosed anything else. Market Regulation's post-hearing argument, without evidentiary support, is insufficient to support a finding based on Market Regulation's revised theory of the case.

We stress that Market Regulation produced no evidence to support this argument. For example, there is no factual basis for inferring that Sheerin disclosed C&D's earnings. And while Sheerin did have access to information about the press release that C&D planned to issue regarding the contract it had entered into, there is no evidence that Sheerin disclosed the press release or any non-public information regarding the contract to MM.

Market Regulation places great emphasis on MM's actions after his April 29 conversation with Sheerin. Market Regulation points to MM's attempt on April 29 to obtain his supervisor's approval to purchase more C&D stock in his G-2 Trading proprietary account, and his purchase of additional C&D stock in his personal account, as evidence supporting its inference that Sheerin conveyed more specific inside information to MM. Such an inference might be reasonable if MM's actions represented a departure from his prior actions regarding

⁸³ *Id.*

⁸⁴ Tr. 648.

⁸⁵ Market Regulation's Post-Hr'g Br. at 18.

C&D, but that was not the case.⁸⁶ Well before April 29, MM had expressed his desire to purchase more C&D stock in his G-2 Trading proprietary account and his frustration at being barred from doing so. And on April 29, *before* speaking with Sheerin, therefore unprompted by any alleged inside tip, MM had already purchased 590 additional shares of C&D stock in his personal account. MM's actions and statements to his supervisor after the phone call with Sheerin, therefore, were consistent with him either deliberately exaggerating the significance of Sheerin's statements in an effort to obtain authority to purchase more C&D stock, or misinterpreting the significance of Sheerin's statements because of his desire to obtain such authority. In any event, the Panel is unwilling to speculate that Sheerin conveyed information to MM beyond the upcoming date of C&D's earnings report and that "the story should read well."

2. The Nature of the Disclosed Information

To find that Sheerin engaged in insider trading requires the Panel to conclude that the information he provided to MM was material and non-public. The evidence does not permit us to do so.

It is undisputed that May 2 was the regulatory deadline for C&D to file its Form 10-K, including its year-end financial statements, with the SEC. Thus, on April 29, any interested person could find out that C&D would have to either release its earnings report on May 2 or violate its regulatory obligations. Arden, the Angelo Gordon analyst who served on C&D's board of directors and who forwarded the email from C&D's CEO to Sheerin on April 29, testified that the date of the earnings statement release was not confidential information and that he would not have been surprised if Sheerin discussed the date with others.⁸⁷

Furthermore, the date on which a company will issue an earnings statement (as opposed to the content of the earnings statement) is generally not considered material information. Information is material if a reasonable investor would view it as significantly altering "the 'total mix' of information made available."⁸⁸ That is, "a relevant question in determining materiality in a case of alleged tipping ... is whether the tipped information, if divulged to the public, would have been likely to affect the decision of potential buyers and sellers."⁸⁹ In this case, the date on

⁸⁶ *Cf. Sydney C. Eng*, 53 S.E.C. 709 (1998), where the SEC noted: "Eng had never bought Pioneer stock before December 14, 1992, nor had he purchased an equity interest in any company in many years before his Pioneer stock purchases. Eng's first purchase of Pioneer stock occurred at the market opening on the first business day after Wong learned from Yao that a Pioneer-First Hawaiian merger was under discussion. This is compelling circumstantial evidence that Eng's purchases of Pioneer stock were made based on a 'tip' from Wong." *Id.* at 716-17.

⁸⁷ Tr. 494-95. Information that is public does not become non-public merely because it is included in a confidential email.

⁸⁸ *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32, 234 (1988).

⁸⁹ *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 166 (2d Cir. 1980).

which C&D was to release its earnings, by itself, was not material information under this standard.⁹⁰

Market Regulation asserts that it “has never contended simply that Sheerin improperly disclosed the due date for C&D’s Form 10-K filing with the SEC or that the investing public lacked the ability to make such a determination. Rather, Sheerin is charged with improperly confirming to [MM] both that C&D would release its earnings *on time* and that the story should read well.”⁹¹ The insider trading charge is grounded on Market Regulation’s assumption that it “was not publicly known and was material” that C&D would meet the filing deadline, “given that C&D had missed earnings reporting deadlines twice in the preceding year,” and that C&D would issue the statement timely therefore “was material ... and was important to investors like [MM] for evaluating whether C&D was on the path to becoming a more liquid exchange-listed stock.”⁹² The evidence does not support this assumption.

Rather, the evidence suggests that a reasonable investor would have expected C&D to meet the filing deadline. The previous late filings occurred when C&D was in financial distress, before Angelo Gordon acquired its majority interest. According to Arden, there was no reasonable likelihood that C&D was going to miss the May 2 deadline. He testified:

My sense is that having gone through the restructuring, which was very public and was well-known and well-documented, anybody following the industry and following the company would have anticipated an on-time earnings release.⁹³

Market Regulation introduced no evidence that any reasonable investor would have been concerned that C&D would miss the May 2 deadline under those circumstances.⁹⁴

Indeed, there is evidence that MM expected C&D to meet the deadline before he spoke with Sheerin on April 29. In his investigative testimony, MM stated that he knew prior to April

⁹⁰ Market Regulation relies on *SEC v. Tang*, 2012 U.S. Dist. LEXIS 157, at *42, 76-77 (N.D. Cal. Jan. 3, 2012). In a ruling denying summary judgment, the court in *Tang* rejected the argument that, as a matter of law, information that a company was about to make an announcement, without disclosing the content of the announcement, was not material. The court did not hold, however, that the information *was* material; rather, it left that issue to be resolved based on the evidence adduced at a trial on the merits. The Panel does not read *Tang* as requiring us to conclude that the May 2 release date for C&D’s earnings statement was material non-public information. Here, based on the evidence presented at the hearing, the Panel has concluded that the date that C&D would release its earnings report was not material non-public information.

⁹¹ Market Regulation’s Post-Hr’g Reply Br. at 1 (footnote omitted) (emphasis in original).

⁹² *Id.* at 1, n.3.

⁹³ Tr. 485.

⁹⁴ The email from C&D’s chief executive officer to the board that was forwarded to Sheerin on April 29 did not purport to alert the board that C&D’s Form 10-K and earnings statement would be filed on May 2. Rather, the CEO was alerting them that “in conjunction with [its] earnings press release and 10-k filing,” the company would issue a press release regarding its China contract. The email, therefore, consistent with Arden’s testimony that there was never any doubt that C&D would meet the May 2 regulatory deadline.

29 that the report would be filed timely. MM stated that he believed the date of the earnings report was “general knowledge.”⁹⁵ He testified that the article he sent to Sheerin and information on a Yahoo! message board indicated when the report was coming out.⁹⁶ MM also said that Sheerin had told him prior to April 29 that an Angelo Gordon analyst had identified the date the statement would be released.⁹⁷ And Sheerin testified that MM told him, after speaking to a representative of C&D, that the representative said that the report would be issued May 2.⁹⁸

Furthermore, MM testified that his research, independent of conversations with Sheerin, led him to anticipate that the earnings report would be positive. He stated that before his April 29 conversation he expected that the annual report would “read well.”⁹⁹ MM based his optimistic expectations for C&D in part on the company’s restructuring, his reading of SEC filings, press releases, and a December 2010 forecast by C&D’s chief executive officer for the May 2 earnings report.¹⁰⁰

Sheerin’s statement to MM that “the story should read well” was encouraging but nonspecific. Sheerin testified that by “story” he meant the successful reorganization of C&D, which he expected would be described in the press release that would accompany C&D’s earnings statement. Arden, based on his experience serving on the boards of companies that went through bankruptcy or reorganization, confirmed that such companies typically issue positive press releases that explain that the company has gotten rid of its debts, is better positioned to go forward, and expects to do well in the future, which could be described as the company’s “story.” As Arden testified:

[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.¹⁰¹

And Arden confirmed that, in fact, C&D did issue a general, positive press release on May 2, 2011, in addition to the press release regarding the company’s new Bank of China contract, along with its earnings. Arden explained, with regard to C&D’s general press release:

Any time a company like this goes through a significant de-levering [sic], they’re looking to manage their customers, they’re looking to manage their employees,

⁹⁵ JX-2, at 46.

⁹⁶ JX-2, at 46-47.

⁹⁷ JX-2, at 61.

⁹⁸ Tr. 288-89.

⁹⁹ JX-2, at 83-85.

¹⁰⁰ JX-2, at 49-50.

¹⁰¹ Tr. 504-05.

obviously they're looking to manage the marketplace of their securities. All of this is critical as the company comes through a reorganization like this, and it's highlighted here¹⁰²

3. Market Regulation's "Coded Message" Argument

Market Regulation argues that Sheerin's statement that the "story should read well" should be viewed as a coded message to MM. Market Regulation does not provide any evidentiary basis for doing so. Market Regulation simply points to MM's subsequent actions, when he sought permission from his supervisor to buy additional C&D stock in his proprietary account and purchased additional stock in his personal account. As discussed above, however, MM had previously purchased C&D stock in both his G-2 Trading proprietary account and in his personal account; had expressed frustration at not being able to buy more stock in his proprietary account; and had purchased additional C&D stock on April 29 prior to his call with Sheerin. The Panel, therefore, is unwilling to infer from MM's actions that Sheerin's general statement that the "story should read well" was some form of coded message to MM.¹⁰³

The Hearing Panel concludes that Market Regulation did not prove by a preponderance of the evidence that Sheerin's statements to MM during their April 29 phone call disclosed material non-public information. Accordingly, we dismiss the insider trading charge in Cause One of the Complaint.

B. Cause Two—Supervisory Procedures

The Second Cause of the Complaint alleges that by disclosing material non-public information in his April 29 phone conversation with MM, Sheerin violated the following supervisory and compliance procedures of AG BD concerning insider trading:

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*

¹⁰² Tr. 446-53; CX-20.

¹⁰³ Sheerin argues that even if his statements could somehow be construed as disclosing that C&D would be announcing the China contract, that information would not be material given the description of the contract in the press release, including that the contract was only for a total of \$28 million in sales over a period of three years, a small percentage of C&D's sales. Respondent Matthew J. Sheerin's Post-Hr'g Br. at 18-19. Indeed, Arden testified that one could not determine from the information in the press release whether the contract would have any material impact on C&D's future earnings, or even whether the contract would be profitable for C&D. Tr. 456-58. Because the Panel concludes that Market Regulation failed to prove that Sheerin disclosed information about the press release or the contract, the Panel finds it unnecessary to determine whether the information regarding the China contract in the press release was material information.

*communicate inside information to a second person who has no official need to know the information.*¹⁰⁴

The procedures define materiality and non-public information in a manner that is consistent with the definitions of those terms under the securities laws.¹⁰⁵ As a result, Market Regulation acknowledges that “[i]f the Panel were to find that Sheerin did not tip material non-public information to [MM], it should find for Sheerin as to Cause Two”¹⁰⁶

For the reasons set forth above, the Panel has concluded that Market Regulation did not prove by a preponderance of the evidence that Sheerin conveyed material non-public information to MM. Accordingly, the charges in Cause Two also are dismissed.

C. Cause Three—Confidentiality Agreement

Cause Three of the Complaint alleges that the information Sheerin disclosed to MM in the April 29 phone call violated the nondisclosure provision of his employment agreement with Angelo Gordon. It is undisputed that Sheerin signed the most recent version of his employment agreement with Angelo Gordon in February 2010. That agreement contained a “Confidentiality” section in which, among other things, 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.¹⁰⁷

The agreement defined “confidential information” to “include 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”¹⁰⁸

Market Regulation argues that Sheerin’s statement to MM that C&D would release its earnings statement on May 2 and that the “story should read well” violated the non-disclosure provision of his employment agreement. Market Regulation contends that by making the

¹⁰⁴ CX-4A, at 23 (emphasis added). Market Regulation introduced two versions of AG BD’s supervisory and compliance procedure into evidence. CX-4 is dated June 2011, after the events at issue in this proceeding, while CX-4A is dated November 4, 2010. It appears, therefore, that CX-4A contains the provisions applicable to this proceeding, but there are no material differences between the relevant provisions of CX-4 and CX-4A. Tr. 79-85.

¹⁰⁵ Market Regulation’s Post-Hr’g Br. at 24.

¹⁰⁶ *Id.* at 23.

¹⁰⁷ CX-3, at 1.

¹⁰⁸ CX-3, at 1.

statement Sheerin violated the high standards of commercial honor and just and equitable principles of trade required by FINRA Rule 2010.

As noted above, on the Form U5 AG BD issued upon Sheerin's resignation, the firm stated that Sheerin was permitted to resign after he "voluntarily admitted that he may have violated [Angelo Gordon's] policy regarding the proper treatment of confidential and proprietary information."¹⁰⁹ At the hearing, when asked to explain what he did wrong, Sheerin noted that the firm did not conclude that he had disclosed confidential information in violation of firm policy. Sheerin testified that he did not believe he had done anything wrong. At worst, Sheerin said, he unwisely failed to observe a "rule of thumb" or "safeguard" mentioned in firm compliance training. Although "it wasn't a rule," Sheerin understood he should simply say "no comment" when asked anything about a company in which the firm had an interest.¹¹⁰

Concluding that Sheerin did not disclose any confidential or proprietary information in violation of his firm's policy, and did not provide MM with a tip of confidential, material non-public information, the Panel finds that Sheerin's concession that he failed to follow a "rule of thumb" given at compliance training is an insufficient basis for sustaining the charge that he violated FINRA Rule 2010. The Panel finds that Market Regulation has not proven by a preponderance of the evidence that Sheerin's statement to MM violated his employer's non-disclosure provision. We therefore dismiss Cause Three of the Complaint.¹¹¹

IV. Order

The Complaint against Matthew J. Sheerin is dismissed.

HEARING PANEL

Andrew H. Perkins¹¹²
Chief Hearing Officer

¹⁰⁹ CX-1, at 3.

¹¹⁰ Tr. 559.

¹¹¹ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.

¹¹² Pursuant to Rule 9235(b) the Chief Hearing Officer signs this Decision in Hearing Officer Campbell's absence.