BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Kapil Maheshwari Clark, NJ, Respondent.	DECISION Complaint No. 2017055608101 December 17, 2020

Respondent misused confidential information concerning a corporate acquisition. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Michael Rogal, Esq., Samir Ranade, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Robert Heim, Esq.

Decision

Kapil Maheshwari appeals a December 19, 2019 Hearing Panel decision. The Hearing Panel found that Maheshwari violated FINRA Rule 2010 because he misused confidential information concerning a corporate acquisition obtained during his employment with his former member firm. Specifically, the Hearing Panel found that Maheshwari purchased shares in the target corporation before the acquisition was announced to the public. For his misconduct, the Hearing Panel barred Maheshwari from associating with any FINRA member in any capacity. The Hearing Panel also ordered that he disgorge $2,760 in ill-gotten gains. After an independent review of the record, we affirm the Hearing Panel's findings and sanctions.

I. Factual Background

A. Maheshwari

Maheshwari entered the securities industry in 2014, when he joined Credit Suisse Securities (USA), LLC (the "Firm") as an investment banking representative. Maheshwari worked at the Firm until August 2017, although he remained registered with the Firm until

September 22, 2017, when the Firm filed a Uniform Termination Notice for Securities Industry Registration ("Form U5"). He is not currently employed in the securities industry.

As a junior investment banking representative at the Firm, Maheshwari performed financial analyses for mergers, acquisitions, and other corporate transactions. Maheshwari focused on the diversified industrial aerospace and defense sector. As part of Maheshwari's job, he often created "pitch" book materials and presentations for the Firm's investment banking clients.

B. The Firm's Policies and Training Concerning Confidential Information

1. Maheshwari's Employment and Confidentiality Agreements

Maheshwari's employment agreement with the Firm (the "Employment Agreement") provided that he "may from time to time acquire or otherwise be exposed to confidential and/or proprietary information of [the Firm] in written, verbal or electronic form ('Confidential and Proprietary Information')." Confidential and Proprietary Information included:

> [A]ny non-public, business or personal information about [the Firm] or its . . . clients, customers . . . or others to whom [the Firm] owes a duty of confidentiality . . . [and] any material, nonpublic price-sensitive, corporate or market information relating to [the Firm], its clients or customers or others, that is acquired in connection with [Maheshwari's] employment.[1]

Maheshwari's Employment Agreement further provided that, "[d]uring and after the term of your employment, you agree to refrain from disclosing or using in any way Confidential and Proprietary Information for any purpose except as expressly authorized by [the Firm]."

When Maheshwari began his employment, he also signed an Agreement Concerning Bank Confidential and Proprietary Information (the "Confidentiality Agreement"). Under the terms of the Confidentiality Agreement, Maheshwari agreed to use Confidential and Proprietary Information only in connection with his work for the Firm, and not for personal gain. Moreover, the Confidentiality Agreement provided that if Maheshwari left the Firm, he would not disclose or use the Firm's Confidential and Proprietary Information for any purpose. The Firm's policies also prohibited investment banking personnel from trading in the securities of any company involved in a transaction on which the employee had worked in the preceding six months.

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[1] Under the Employment Agreement, "'material' means information that if made public would likely have a significant impact on the issuer's security or information that a reasonable investor would consider important in deciding whether to purchase, hold, or sell the security."

2. The Firm's Training Regarding Confidential Information

The Firm conducted, and Maheshwari completed, annual compliance trainings from 2014 through August 2017. During these trainings, the Firm reminded Maheshwari that he "must not . . . [u]se confidential information to trade for your own or related accounts." The Firm identified a "proposed merger, acquisition, or divestiture" as a matter that may involve material, non-public information. In these trainings, the Firm emphasized to its employees that they "must **never** use inside information to . . . [t]rade or deal in the relevant securities or derivatives."

C. The Firm and Maheshwari Provide Investment Banking Services

In September 2016, Maheshwari was assigned to a team at the Firm to assist a publicly traded company (referred to herein as, "Globex") develop strategic options, including potential mergers and acquisitions.[2] Globex was a technology company focused on measuring, managing, and analyzing energy and water use. As part of the Firm's team assigned to assist Globex (the "Globex Team"), Maheshwari prepared materials for the Firm to present to Globex, including industry overviews and financial analyses.

In October 2016, Maheshwari and others on the Globex Team met with Globex's chief executive officer and senior management. Senior investment bankers on the Globex Team presented strategic options for the company, including potential acquisitions of various companies. The documents that the Globex Team presented in support of these options included materials that Maheshwari prepared.[3] After this presentation, Globex senior management invited the Globex Team to make a presentation to its board of directors.

Senior investment bankers on the Globex Team met with Globex's board of directors in December 2016. Maheshwari prepared materials for that meeting, although he did not attend. After the meeting, Globex asked the Globex Team to analyze a publicly traded technology firm that developed smart utility platforms (referred to herein as, "Acme"). Maheshwari generated for Globex a financial valuation of Acme that addressed the potential benefits of acquiring the company, which was included in materials sent to Globex's management. Globex's management subsequently informed the Globex Team that it believed that acquiring Acme would present substantial "synergies," and that it wanted to approach Acme's management to discuss a potential acquisition.[4]

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[2] Globex initially hired the Firm to provide general strategic advice and make a presentation to its board of directors, for which the Firm received a $100,000 fee. The Firm also received $3 million in fees after Globex consummated the transaction at issue, pursuant to a second engagement agreement dated August 21, 2017.

[3] At this stage, the Firm did not include among the potential targets for acquisition the company at issue in this matter.

[4] Another investment banking firm served as Globex's primary advisor on the Acme acquisition. Although Maheshwari argues that the Firm's role as secondary advisor caused the Firm to receive only the information that the primary advisor chose to share and the Firm

[Footnote continued on next page]

Maheshwari knew that Globex wanted to approach Acme about a potential acquisition, and that Globex believed that acquiring Acme would benefit the company. Around this time, the Globex Team and Globex began to refer to the potential acquisition of Acme using a code word to protect Acme's identity as a potential target. In February 2017, the Globex Team strategized with Globex and its primary advisor to approach Acme. Maheshwari informed a colleague that it "looks like this [Acme] thing is getting serious."

In March 2017, Maheshwari and other members of the Globex Team prepared an acquisition matrix for Globex's senior management. The matrix outlined various acquisition scenarios and potential investment banking fees for the Firm. In each of the scenarios, Globex would pay at least a 30% premium above Acme's market price per share to consummate the acquisition. In an email Maheshwari sent at the end of March 2017, he acknowledged that Globex's acquisition of Acme would "be a material acquisition for [Globex]."

On April 11, 2017, Globex asked the Globex Team to review its most recent financial analysis of the Acme acquisition. That analysis indicated that Globex would pay approximately $17 per share to acquire Acme (compared to Acme's then trading price of approximately $10 per share), and that the transaction would be consummated by the end of the third quarter 2017. After a meeting between Globex and Acme senior management, Acme requested that Globex send it a formal written offer. The offer was conveyed to the Globex Team, including Maheshwari, on April 18, 2017. On April 21, 2017, Maheshwari received a draft letter of interest, in which Globex proposed to purchase Acme for $15 to $16 per share.[5]

On April 24, 2017, Globex's board of directors approved a written proposal for Acme's acquisition, and one day later, Globex's chief executive officer sent a written indication of the company's interest in purchasing all of Acme's outstanding shares for $15 to $16 per share. The Globex Team, including Maheshwari, received a copy of Globex's letter of interest, along with a letter from a bank opining that it was "highly confident" that Globex could obtain financing for the acquisition. During a call between Globex's and Acme's chief

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acted "in a much reduced secondary role," the record shows that the Firm and Maheshwari received ample information about Globex's interest in Acme and information relevant to the progression of the acquisition.

[5] From approximately April 21, 2017, until the end of April 2017, Maheshwari was on "block leave" from the Firm. Maheshwari testified that each investment banking associate received yearly two weeks of block leave that they were required to take. During this time, Maheshwari stated that employees were not permitted to log into the Firm's system or review emails. Maheshwari further testified that he did not believe that, or could not remember whether, he reviewed the emails he received upon his return from leave. A senior investment banker and member of the Globex Team described the Firm's block leave policy as "any front office employee was required for one or two weeks to basically not be in the office and to not be responsive to work. You are basically required to not work for those two weeks." The senior investment banker, however, testified that there was "absolutely" an expectation for employees to review their emails upon their return.

executive officers, Acme's chief executive officer committed to presenting Globex's offer to his board of directors. A senior banker on the Globex Team informed the team, including Maheshwari, of this development.

Maheshwari testified that in late April 2017, he became much less involved with Globex's potential acquisition of Acme and worked on other projects. Further, in June 2017, he informed the Firm that he would be leaving. Maheshwari testified that during the last two months of his employment he focused on transitioning his projects. Nevertheless, he remained on the Globex Team. As part of the Globex Team, Maheshwari continued to regularly receive information concerning Globex's interest in acquiring Acme and the potential acquisition, and occasionally performed tasks in furtherance of the potential acquisition.

For example, in May 2017, after Acme sent Globex internal financial information, which was shared with the Globex Team (including Maheshwari), Globex sent Acme another written indication of interest. The letter of interest contained an offering price of $15 per share for Acme's stock, which was a 51% premium over Acme's then-current share price. The Globex Team, including Maheshwari, also received Globex's second letter of interest. In late June, a senior member of the Globex Team informed Maheshwari and others that Globex's board of directors was going to meet to discuss acquiring Acme and the board was "very interested and want[s] to get it done." In July 2017, the Globex Team, through a senior investment banker, recommended that Globex increase its offer price by 50 to 75 cents to reflect Acme's recent quarterly earnings, which exceeded expectations. Maheshwari was copied on the email with the recommendation, and by late July 2017, Maheshwari testified that the deal had entered the due diligence phase.[6]

Moreover, on August 15, 2017, Maheshwari emailed a profile and overview of the proposed Acme acquisition to the Firm employees replacing him on the Globex Team.[7] Maheshwari's email attached a presentation showing a potential acquisition price for Acme of $15 to $18 per share. These documents were to be used in connection with a presentation of Globex's acquisition of Acme to the Firm's Investment Banking Committee, which needed to vet and approve any proposed transaction before the Firm could issue an opinion that the

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[6] The Hearing Panel erroneously stated that Maheshwari testified that due diligence had entered its "final" stages. We find this error immaterial to our decision.

[7] Maheshwari asserts that the Hearing Panel improperly characterized these documents, and that the documents consisted primarily of a presentation that he originally created in January 2017. Maheshwari argues that he merely updated a one-page summary to reflect Acme's share price as of August 14, 2017, and that the document was based entirely on public information. On August 15, 2017, Maheshwari also received a financial model for the proposed acquisition of Acme. Maheshwari asserts that the financial model was from April 2017, had not incorporated information for the second quarter of 2017, and demonstrates that the acquisition was not imminent. Regardless of how these documents are characterized or whether information in the financial model was several months old and incomplete, they show that, at a minimum, the Globex Team continued to work on the proposed acquisition of Acme and that Maheshwari was aware of this fact.

transaction was fair from a financial standpoint.[8] In his email, Maheshwari observed that the information he sent "may come in handy for the [Investment Banking Committee] materials."

On August 16, 2017, Maheshwari was copied on an email with an agenda for Globex's August 23, 2017 board meeting, the purpose of which was to approve the Acme acquisition. He testified that although he received this email, he did not recall reviewing it.

D. Maheshwari Leaves the Firm and Buys Acme Shares

Maheshwari's last day as an active employee at the Firm was August 17, 2017, after which he no longer had access to Firm email and was no longer physically present in the Firm's offices.[9] Maheshwari testified that he began to concentrate on rebalancing his and his wife's personal investments after he left the Firm. He testified that, as part of that process, he researched potential investments and, in September and October 2017, Maheshwari traded in his and his wife's accounts in furtherance of this goal. Maheshwari purchased shares in several technology companies, sold shares in other technology companies, and purchased and sold exchange traded funds and mutual funds.

Of relevance to this matter, on September 11, 2017, Maheshwari purchased 400 Acme shares in his personal retirement account and another 400 shares in his wife's retirement account, both held at another broker-dealer, at a price per share of $12.65. In total, Maheshwari purchased $10,120 worth of Acme stock, and it is undisputed that Maheshwari's investments in Acme comprised a small percentage of his and his wife's overall portfolios. Maheshwari testified that "he was searching for investment ideas and [Acme] was a good investment idea." He stated that he based this assessment not on the knowledge he gained while working at the Firm, but on extensive, independent, post-employment research that he performed. Indeed, when Enforcement asked Maheshwari to confirm that his testimony was

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[8] One senior investment banker on the Globex Team testified that taking a proposed transaction to the Investment Banking Committee was a "critical juncture," and that it approved issuing a fairness opinion in connection with the Acme acquisition. He further testified that after the Investment Banking Committee's approval, "something strange would have had to happen for the deal not to happen." He elaborated that, at the stage they brought the Acme acquisition to the Investment Banking Committee, "90 percent plus" of the transactions go forward. Another senior investment banker on the Globex Team testified that some deals would be brought before the Investment Banking Committee at an earlier stage than others, and that he believed that when the Acme transaction was brought to the Investment Banking Committee, it was "more likely than not to have been consummated." He also recalled that the Acme transaction came before the Investment Banking Committee twice.

[9] Maheshwari received two weeks of "garden leave" from the Firm, whereby he remained a Firm employee and continued to be paid for two weeks after his last day of active employment. One of the purposes of garden leave is to allow some time before an employee begins to work for a competitor so that any information that the former employee may possess is more likely to become stale. The Firm filed a Form U5 terminating Maheshwari's registration on September 22, 2017.

that the information he learned about Acme while working on the Globex Team did not factor at all into his decision to purchase Acme shares and had "zero percent" influence on that decision, Maheshwari confirmed that it did not. Maheshwari explained that his independent research included reviewing Acme's annual and quarterly Commission filings, press releases, research analyst reports, and various blogs. To further justify his Acme purchases, he testified that he determined that Acme's revenues and costs were trending positive, and Acme had a "blowout" second quarter of 2017.

One week after Maheshwari purchased Acme shares, Globex announced its acquisition of Acme for $16.25 per share (an approximately 25% premium to its then-current share price). In October 2017, Maheshwari attempted to sell his and his wife's Acme shares, but his broker declined to process the trades and alerted the Firm. When Globex's acquisition of Acme was finalized, Maheshwari and his wife received cash for their Acme shares ($16.25 per share), resulting in a total profit of $2,760.

The Firm discovered Maheshwari's Acme purchases during a routine review of trading by Firm personnel, and it investigated the matter.[10] Maheshwari, through his attorney, informed Firm personnel that he did not possess inside information concerning Acme at the time he purchased shares in the company, "never had any information related to whether [Acme] was engaging in acquisition talks nor did he ever have any information related to the timing or price of such an acquisition." Maheshwari claimed that he decided to invest in Acme based upon his independent research performed after he left the Firm. The Firm referred the matter to FINRA.

II. Procedural History

Enforcement filed a one-cause complaint against Maheshwari in February 2019, alleging that he violated FINRA Rule 2010 by misusing the Firm's Confidential and Proprietary Information in connection with his purchases of Acme shares. Enforcement alleged that Maheshwari acted unethically and in bad faith by breaching his duties under the Firm's policies and the Confidentiality Agreement, and breached his duty of loyalty to the Firm, Globex, and Acme.

The Hearing Panel conducted a four-day hearing, during which Maheshwari, two senior investment bankers on the Globex Team, and a FINRA investigator testified. The Hearing Panel issued its decision on December 19, 2019, finding that Maheshwari engaged in the alleged misconduct. The Hearing Panel also rejected numerous arguments raised by Maheshwari. For example, the Hearing Panel rejected Maheshwari's claim that he was not actively involved in Globex's efforts to acquire Acme. It also rejected his argument that his work on the Globex Team gave him no reason to believe that Globex would be successful in acquiring Acme. Finally, the Hearing Panel rejected Maheshwari's assertion that he did not

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[10] A senior investment banker on the Globex Team was the individual at the Firm responsible for reviewing trades. He testified that when he saw Maheshwari's purchases of Acme shares, "I spit out my coffee and I just couldn't believe that was done. And I instantly said no and called compliance and said we have a problem."

use any knowledge about the potential Acme acquisition that he learned while employed at the Firm to make his decision to invest in Acme, and that he independently determined—based upon his own post-employment research—that Acme was a good investment. The Hearing Panel rejected Maheshwari's testimony on this point as not credible.

For his misconduct, the Hearing Panel barred Maheshwari and ordered that he disgorge $2,760 in ill-gotten gains, plus interest. It also ordered that he pay $9,663 in hearing costs. Maheshwari appealed the Hearing Panel's decision.

III. Discussion

The Hearing Panel found that Maheshwari misused confidential information that he obtained while working at the Firm to purchase shares in Acme before Globex announced that it would acquire Acme, breached his obligations to the Firm and his duties to maintain client confidentiality, and acted unethically and in bad faith. The Hearing Panel therefore found that Maheshwari violated FINRA Rule 2010. After reviewing the record in its entirety, we affirm the Hearing Panel's findings and reject Maheshwari's arguments and defenses raised in this appeal.

A. The Legal Standard

FINRA Rule 2010 states that a broker-dealer, "in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[11] FINRA Rule 2010 is a general ethical standard that "is broader and provides more flexibility than prescriptive regulations and legal requirements." *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *21 n.20 (Feb. 13, 2015). It "protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation." *Id.* To determine whether conduct violates FINRA Rule 2010, we examine whether the misconduct "reflects on the associated person's capacity to comply with the regulatory requirements of the securities business and to fulfill [his or her] fiduciary duties in handling other people's money." *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *10 (Mar. 29, 2016) (quoting *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996)).

To be liable under FINRA Rule 2010, Maheshwari's conduct must be business-related and unethical or in bad faith. *See Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *20 (Jan. 9, 2015), *aff'd*, 641 F. App'x 27 (2d Cir. 2016). Unethical conduct is "conduct that is not in conformity with moral norms or standards of professional conduct." *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013). In analyzing whether Maheshwari's conduct is unethical, we must determine "whether the conduct implicates a generally recognized duty owed to clients or the

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

firm." *Dante J. DiFrancesco*, 2012 SEC LEXIS 54, at *19 (Jan. 6, 2012). Agency law principles are the foundation of this duty, and a broker's obligations may be reflected in a firm's policies and procedures. *See id.*; *Thomas W. Heath III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *18 (Jan. 9, 2009), *aff'd*, 586 F.3d 122 (2d Cir. 2009). To determine whether Maheshwari acted in bad faith, we must examine whether he acted with "dishonesty of belief or purpose." *Brokaw*, 2013 SEC LEXIS 3583, at *33.

A broker's breach of his duty to a customer may serve as a basis for a FINRA Rule 2010 violation.[12] *Cf. Heath*, 2009 SEC LEXIS 14, at *17 (finding that broker violated just and equitable principles of trade by disclosing confidential customer information), *aff'd*, 586 F.3d 122 (2d Cir. 2009). A "breach of confidentiality violate[s] one of the most basic duties of a securities professional, a duty that is grounded in fiduciary principles." *Heath*, 2009 SEC LEXIS 14, at *17. Fiduciary principles require securities professionals to "prioritize the interests of clients above their own interests." *Id.*

B. Maheshwari Violated FINRA Rule 2010 by Misusing Confidential Information

A preponderance of the evidence demonstrates that Maheshwari violated FINRA Rule 2010. He did so by unethically using confidential information concerning Globex's acquisition of Acme that he learned while working at the Firm to purchase Acme shares, by violating the Firm's policies prohibiting employees from using such information for their personal benefit, and by acting in bad faith.

1. The Information at Issue Was Confidential

First, we find that the information possessed by Maheshwari concerning Globex's interest in, and potential acquisition of, Acme was confidential. Maheshwari's Employment Agreement and the Confidentiality Agreement specified that Confidential and Proprietary Information included non-public, business information about the Firm's clients and material, non-public corporate information relating to the Firm's clients acquired in connection with Maheshwari's employment. The information possessed by Maheshwari squarely falls within the definition of Confidential and Proprietary Information, as both non-public business information about the Firm's client Globex and material, non-public corporate information related to Globex's proposed acquisition of Acme.

When Maheshwari purchased Acme shares, he possessed confidential information about Globex's potential acquisition of Acme. Maheshwari knew that Globex had been actively pursuing an acquisition of Acme since early 2017; Globex had sent two letters of interest to Acme and a bank had indicated that it was highly confident that Globex could

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[12] A broker's breach of his duty of loyalty to his firm may also serve as a basis for a FINRA Rule 2010 violation. *See John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *25-27 (Jun. 14, 2013) (finding respondent breached his duty of confidentiality to his customers and duty of loyalty to his firm, in violation of the predecessor to FINRA Rule 2010).

secure financing to consummate the acquisition; Acme was interested in being acquired by Globex; and Globex was willing to pay a premium to acquire Acme. He also knew that Globex was conducting due diligence, the Investment Banking Committee had been scheduled to meet to discuss the acquisition, and he had received an email that Globex's board intended to meet to discuss and approve the acquisition.

On appeal, Maheshwari argues that he lacked sufficient knowledge to conclude that Globex would likely acquire Acme. He asserts that no "material developments occur[red]" with the acquisition until after he left the Firm, including the Firm executing an engagement agreement with Globex related specifically to the Acme acquisition. He further asserts that the evidence shows that Globex's acquisition of Acme was uncertain and not close to conclusion when he left the Firm. In support, he points to, among other things, his claim that even in late July and August 2017, Firm personnel had not accessed a data room set up by Globex's primary advisor in connection with the potential acquisition. He also argues that an email from senior bankers on the Globex Team (attempting to justify a higher proposed fee and "struggling to come up with compelling points" because they had been "continually pushed aside" by the primary investment banking firm) shows the uncertainty surrounding the deal.

We reject these arguments. Although the record shows that Maheshwari's role on the Globex Team diminished beginning in April 2017, it also conclusively shows that Maheshwari continued to be copied on internal emails as a member of the Globex Team until he departed the Firm in mid-August 2017.[13] When he purchased Acme shares, he knew that, at a minimum, Globex was actively seeking to acquire Acme, it was willing to pay a substantial premium to acquire Acme, and Acme was also interested in the potential acquisition. The senior investment bankers on the Globex Team testified that Globex's acquisition of Acme was likely to occur, and the potential acquisition had progressed to the point of review by the Investment Banking Committee and Globex's board of directors.[14] Maheshwari's claim that the senior investment bankers had more information than he did concerning the likelihood that Globex would consummate the acquisition is undercut by the record and ignores that what the senior investment bankers knew is irrelevant in this context; what is relevant is what Maheshwari knew at the time he purchased Acme shares. To the extent that Maheshwari argues that Globex's potential acquisition of Acme was not material information, we flatly reject the claim. *See, e.g.*, *Basic v. Levinson*, 485 U.S. 224, 239 (1988) (holding that in

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[13] The testifying senior investment bankers on the Globex Team both stated that they had no reason to believe that Maheshwari was not reading emails he received up until the time he left the Firm.

[14] Similarly, Maheshwari argues that whatever confidential knowledge he possessed concerning the transaction was stale by the time he purchased Acme shares. The information in Maheshwari's possession was not "stale" on September 11, 2017, the day he purchased Acme stock. Indeed, just before Maheshwari left the Firm, he knew that the Globex Team was preparing to take the proposed acquisition to the Firm's Investment Banking Committee, and he had received an email that Globex's board was going to meet to discuss and approve the acquisition.

connection with a potential merger, materiality "will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of company activity").

2. Maheshwari Used Confidential Information to Purchase Acme Shares

Second, we find that Maheshwari used the confidential information learned while working on the Globex Team when he purchased Acme shares. In making this determination, we look to authorities addressing whether an individual has used material, non-public information in his possession in the context of fraudulent insider trading cases. While not binding on our analysis of whether Maheshwari misused confidential information in violation of FINRA Rule 2010, these authorities concerning the improper use of material, non-public information are instructive.

Certain adjudicators have held that, when determining whether an individual is liable for fraudulent insider trading under federal securities laws, the Commission must demonstrate that the individual used material, non-public information. *See, e.g.*, *SEC v. Adler*, 137 F.3d 1325, 1342 (11th Cir. 1998); *Invs. Mgmt. Co.*, 44 S.E.C. 633, 646-47 (1971); *cf. U.S. v. O'Hagan*, 521 U.S. 642, 649 n.1 (1997) (holding that attorney working for law firm representing a company that planned to make a tender offer for another company could properly be charged for violating Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 10b-5 when he purchased stock in the other company under the "misappropriation" theory, but stating that consideration of the sufficiency of evidence that he traded on the basis of non-public information misappropriated from his law firm remained open on remand). Although these authorities require that the Commission prove use of the information, trading while in possession of material, non-public information creates an inference of use that may be rebutted. *See Adler*, 137 F.3d at 1342 (holding that trading while in possession of such information creates a strong inference of use); *Invs. Mgmt. Co.*, 44 S.E.C. at 646-47 (holding that, in connection with an allegedly fraudulent insider trade, where a recipient of material non-public information trades while in possession of that information before it is public, an inference arises that the information was a factor in his investment decision).

Other adjudicators have utilized a "knowing possession" standard for fraudulent insider trading. Under this approach, a violation occurs if an individual trades securities while in knowing possession of material, non-public information. *See, e.g.*, *United States v. Rajaratnam*, 719 F.3d 139, 159 (2d Cir. 2013) (affirming conviction in criminal insider trading case where jury instruction properly reflected the knowing possession standard), *cert. denied*, 573 U.S. 916 (2014); *United States. v. Teicher*, 987 F.2d 112, 120 (2d Cir. 1993) (stating that "one who trades while knowingly possessing material inside information has an informational advantage over other traders. Because the advantage is in the form of information, it exists in the mind of the trader. Unlike a loaded weapon which may stand ready but unused, material information cannot lay idle in the human brain."), *cert. denied*, 510 U.S. 976 (1993); *cf. Dep't of Mkt. Reg. v. Geraci*, Complaint No. CMS020143, 2004 NASD Discip. LEXIS 19, at *40 (NASD NAC Dec. 9, 2004) (stating that a "tippee" is liable for

fraudulent insider trading if, among other things, he traded the corporation's securities while in possession of material, non-public information provided by the tipper and rejecting as not credible respondent's alleged independent reasons for trades). Moreover, in 2000 the Commission promulgated Exchange Act Rule 10b5-1, which provides that a person "trades on the basis of" material, non-public information "if the person making the purchase or sale was aware of the material nonpublic information when the person makes the purchase or sale." *See* 17 C.F.R. § 240.10b5-1; *see also SEC v. Moshayedi*, 2013 U.S. Dist. LEXIS 143624, at *44 (C.D. Cal. Sept. 13, 2013) (deferring to the SEC's definition in Rule 10b5-1 to determine whether defendant traded on the basis of non-public, material information).

Applying any of these standards to the facts and circumstances of this case, we find that Maheshwari misused confidential information to purchase Acme shares, in violation of FINRA Rule 2010. As described above, when Maheshwari purchased the Acme shares, he possessed and was aware of information that he knew, or should have known, was confidential. On appeal, Maheshwari asserts that he provided innocent and unrebutted explanations for his Acme purchases (i.e., that his independent research of Acme, conducted during the process of rebalancing his investments after leaving the Firm, was the sole reason behind his investment). He argues that these explanations are sufficient to show that he did not use confidential information in connection with his Acme purchases.

We disagree. Indeed, the Hearing Panel rejected as not credible Maheshwari's explanation that he did not use confidential information when he purchased Acme shares. It found Maheshwari's testimony—that he based his purchases of Acme solely on information other than Globex's potential acquisition—to be "disingenuous" and as "elaborate as it was bogus." The Hearing Panel explained that:

> Maheshwari claimed to take into account every conceivable piece of financial information about [Acme]—except, of course, the information he learned while employed by [the Firm] that [Acme] would soon be acquired at a substantial premium above any value that could have been gleaned from his 'research.'

The Hearing Panel did not believe that the analyst reports with future price predictions for Acme "were more significant to Maheshwari than his first-hand knowledge that [Globex] was presently offering $15 per share for [Acme] and was willing to pay even more to consummate a deal." It also found that, while Maheshwari asserted that his independent research included review of Globex's Commission filings, he had already reviewed those filings (other than the most recent quarterly report) through his work on the Globex Team.

It strains the bounds of plausibility for Maheshwari to assert that Globex's potential acquisition of Acme, at a substantial premium to Acme's then-market price, did not factor into his decision to purchase Acme shares. And, on appeal, Maheshwari has presented no persuasive reason to disturb the Hearing Panel's credibility findings on this point.[15] *See*

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[15] We also note that other than Maheshwari's testimony, nothing in the record corroborates that after he left the Firm, he reviewed the documents and information that he claimed to have reviewed and relied upon to make his investment decision.

Daniel D. Manoff, 55 S.E.C. 1155, 1162 n.6 (2002) (holding that "[c]redibility determinations by a fact-finder deserve special weight" and can be overcome only when "substantial evidence" exists for doing so); *cf. Geraci*, 2004 NASD Discip. LEXIS 19, at *40 (finding that respondent engaged in fraudulent insider trading and rejecting as not credible respondent's stated reasons for his trading "as a fabrication to conceal insider trading").[16]

Maheshwari also argues that we should not give deference to the Hearing Panel's credibility findings because these "findings were clearly biased as a result of Respondent's decision to contest [Enforcement's] charges and defend himself at the hearing." We disagree. After observing Maheshwari testify for several days, the Hearing Panel flatly rejected his purported innocent explanation for purchasing Acme shares. Describing Maheshwari's testimony as "bogus" and "disingenuous" does not, as Maheshwari argues, demonstrate the Hearing Panel's animus towards him; rather, it is an appropriate assessment of the credibility of his testimony. *See Dep't of Enforcement v. Braeger*, Complaint No. 2015045456401, 2019 FINRA Discip. LEXIS 55, at *23-24 (FINRA NAC Dec. 16, 2019) (rejecting respondent's claim that the hearing panel was biased based upon its adverse credibility findings against him and stating that it is the hearing panel's responsibility to make credibility determinations based upon its observations of a witness' demeanor); *see also Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, *62 (Jan. 30, 2019) (holding that "bias by a hearing officer is disqualifying only when it stems from an extrajudicial source and results in a decision on the merits based on matters other than those gleaned from participation in a case"), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

3. Maheshwari's Misuse of Confidential Information Violated FINRA Rule 2010

Third, we find that Maheshwari misused confidential information in the conduct of his business by acting unethically and in bad faith, in violation of FINRA Rule 2010. Maheshwari's Employment Agreement prohibited him from using in any way Confidential or Proprietary Information, unless expressly authorized by the Firm. Similarly, the Confidentiality Agreement prohibited Maheshwari from using such confidential information for personal gain. Both agreements prohibited Maheshwari from using Confidential or Proprietary Information even after he left the Firm. Moreover, the Firm continually reminded Maheshwari, through annual trainings, that he could not use confidential information (which included information concerning a potential acquisition) to trade for his own accounts. The

[16] The fact that Maheshwari may have been rebalancing his and his wife's investments, including purchasing stock in three technology companies prior to purchasing Acme shares and additional purchases after he acquired Acme shares, neither undermines, nor is inconsistent with, the Hearing Panel's credibility findings and its finding that he used confidential information concerning Globex's potential acquisition of Acme when he purchased Acme shares. *Cf. U.S. v. Henke*, 222 F.3d 633, 639 (9th Cir. 2000) (holding that the evidence was sufficient to support a jury verdict that the defendant engaged in fraudulent insider trading and rejecting claim that defendant's preexisting pattern of trading negated any inference that he acted with scienter where the "'preexisting pattern' of trading consisted of only two stock sales").

Firm's policies also prohibited Maheshwari, as an investment banking employee, from trading in the securities of any company involved in a transaction that he had worked on in the preceding six months. These agreements and Firm policies reflected the duty of confidentiality Maheshwari owed to the Firm and its clients.

Despite these obligations, Maheshwari purchased Acme shares just several weeks after his last day in the office, while he was still registered with the Firm, and just days prior to Globex's public announcement that it was acquiring Acme. Maheshwari used the information he learned while on the Globex Team when he purchased Acme shares, and breached his duty to refrain from using this confidential information for his own personal use, as reflected in his agreements with the Firm and the Firm's policies and procedures. In doing so, he acted unethically. *See DiFrancesco*, 2012 SEC LEXIS 54, at *19; *Heath*, 2009 SEC LEXIS 14, at *18. We also find that Maheshwari acted in bad faith when he purchased Acme shares using the confidential information he acquired while working on the Globex Team. He understood Globex was pursuing an acquisition of Acme, that the potential acquisition had progressed throughout 2017, and that Globex was willing to pay a substantial premium for Acme. Maheshwari used this knowledge for his own personal financial gain to purchase Acme shares several weeks after leaving the Firm and just prior to the public announcement of the acquisition. By misusing this information, Maheshwari put his own personal interests ahead of the interests of his Firm and its client. *See Brokaw*, 2013 SEC LEXIS 3583, at *31 (finding that respondent engaged in bad faith when he actively engaged in a scheme to manipulate a stock price).

In making this determination, we reject Maheshwari's argument that the relatively small amounts of his Acme purchases, when compared to the overall size of his other investments, precludes a finding that he misused confidential information. We also reject his assertion that he did not intend to misuse confidential information, and acted in good faith, because he waited to purchase Acme shares until after his garden leave and waited to sell his Acme shares for several weeks. The size of Maheshwari's Acme purchases has no bearing on our determination that he misused confidential information, in violation of his obligation under FINRA Rule 2010 to conduct himself ethically and in accordance with high standards of commercial honor and just and equitable principles of trade. Similarly, we give no weight to the fact that Maheshwari waited several weeks after leaving the Firm to purchase Acme shares and held the shares for several weeks before attempting to sell them (which efforts were unsuccessful because his broker declined to process the trades and alerted the Firm).

Maheshwari also argues that the Firm did not inform him, including at his August 17, 2017 exit interview, that he could not trade in Acme once his two-week garden leave had expired, or that he needed to obtain the Firm's approval before purchasing Acme shares. What the Firm told, or did not tell, Maheshwari at his exit interview has no bearing on whether he violated FINRA Rule 2010's requirement that he conduct himself ethically. As a registered investment banker, Maheshwari should have known that it was highly inappropriate to purchase shares in a company that he knew was an active acquisition target by virtue of his work as an investment banker for the acquiring company. Maheshwari's Employment Agreement, the Confidentiality Agreement, and the Firm's policies and procedures (conveyed through numerous trainings) all underscored this fundamental principle.

In conclusion, we find Maheshwari misused confidential information concerning the Acme acquisition, which he obtained through his employment at the Firm, when he purchased Acme shares for his own personal financial gain. In so doing, Maheshwari breached his duties of confidentiality and loyalty to the Firm and Globex. Maheshwari's conduct violated FINRA Rule 2010.

IV. Sanctions

The Hearing Panel barred Maheshwari from associating with any FINRA member in any capacity, and ordered that he disgorge $2,760, plus interest, in ill-gotten gains that he earned by trading Acme shares. We affirm the Hearing Panel's sanctions.

A. A Bar Is Appropriate for Maheshwari's Misconduct

The FINRA Sanction Guidelines ("Guidelines") do not specifically address misusing confidential information in violation of FINRA Rule 2010.[17] The Guidelines, however, encourage adjudicators to seek guidance from Guidelines involving analogous misconduct.[18] In determining sanctions, the Hearing Panel considered the Guidelines applicable to fraud and conversion, finding them analogous to Maheshwari's misconduct.

Maheshwari argues that the Hearing Panel erred in considering the Guidelines for fraud and conversion for his violation of FINRA Rule 2010. We find no such error, and agree with the Hearing Panel that these Guidelines are most analogous to Maheshwari's misuse of confidential information.[19] Although Maheshwari was not charged with insider trading in violation of the antifraud provisions of the Exchange Act and FINRA's rules, his misuse of

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[17] *See FINRA Sanction Guidelines* (March 2019), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter "Guidelines"].

[18] *See Guidelines*, at 1; *see also Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *44 (Aug. 12, 2016) (agreeing with FINRA's use of analogous Guidelines when misconduct at issue is not specifically addressed in Guidelines), *aff'd*, 719 F. App'x 724 (9th Cir. 2018).

[19] The Guidelines for intentional or reckless fraudulent misconduct recommend that the adjudicator "[s]trongly consider" barring an individual, and direct adjudicators to consider the Principal Considerations in Determining Sanctions in assessing sanctions. *See Guidelines*, at 89. When mitigating factors predominate, the Guidelines recommend suspending an individual in any or all capacities for a period of six months to two years. *Id.* For conversion of securities or funds, the Guidelines recommend that the adjudicator bar the respondent regardless of the amount converted. *Id.* at 36. When the misuse resulted from a respondent's misunderstanding of his customer's intended use of the funds or securities, or other mitigation exists, the Guidelines recommend that we consider suspending the respondent for a period of six months or two years. *Id.* Like the Guidelines for fraudulent misconduct, the Guidelines for conversion do not list any specific factors for determining sanctions, but instead refer to the Principal Considerations in Determining Sanctions. *Id.*

confidential corporate information for his own personal benefit resembles this type of misconduct.[20] And we agree with the Hearing Panel that Maheshwari took valuable, intangible property in the form of confidential information for his own personal gain, which is misconduct that resembles conversion.

Irrespective of whether we look to analogous Guidelines or solely to the Principal Considerations and General Principles Governing All Sanction Determinations,[21] we find that a bar is the only appropriately remedial sanction for Maheshwari's serious breach of his fundamental duties of confidentiality as an investment banker. Indeed, the Commission has held that a "breach of confidentiality violate[s] one of the most basic duties of a securities professional, a duty that is grounded in fiduciary principles." *Heath*, 2009 SEC LEXIS 14, at *17. Maheshwari's wanton disregard for this duty and the duty he owed to the Firm is contrary to and undermines basic expectations underpinning the investment banking industry and is completely at odds with his obligations under FINRA Rule 2010. A bar is necessary to remediate Maheshwari's misconduct and to make clear to him and others the importance to the securities industry of maintaining confidences. And, several factors aggravate Maheshwari's misconduct.

First, Maheshwari acted intentionally (or, at a minimum, recklessly) when he used the confidential information concerning Globex's acquisition of Acme to purchase shares in Acme before the public announcement of the acquisition.[22] Maheshwari's Employment Agreement, the Confidentiality Agreement, and periodic Firm trainings (including one he completed just before he left the Firm and approximately one month prior to purchasing Acme shares) reinforced the importance of refraining from using confidential information. Yet, he purchased Acme shares almost immediately after he left the Firm and just before Globex announced its acquisition. These facts support that Maheshwari acted, at a minimum, recklessly.

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[20] We reject Maheshwari's claims that the Hearing Panel's use of analogous Guidelines to assess sanctions was unfair because he was not charged with fraudulent insider trading or conversion, he had no opportunity to contest elements of fraud (such as intentional or reckless conduct and materiality), and he had no opportunity to introduce evidence on these points. The use of analogous Guidelines had no impact on Maheshwari's ability to present a defense to the misconduct at issue—misusing confidential information in violation of FINRA Rule 2010—or whether he acted intentionally or recklessly for purposes of sanctions. We similarly reject his assertion that the Hearing Panel should have permitted his proposed expert to testify concerning the materiality of the information regarding Globex's acquisition. *See Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *79 (Sept. 28, 2017) (holding that FINRA has the expertise to evaluate the materiality of evidence without expert testimony). Regardless, as stated herein, we find that a bar is appropriate for Maheshwari's misuse of confidential information regardless of whether we look to analogous Guidelines.

[21] *See Guidelines*, at 2-8.

[22] *See Guidelines*, at 8 (Principal Considerations in Determining Sanctions, No. 13).

Second, Maheshwari personally benefited from his misconduct, earning $2,760 from his Acme purchases. Although Maheshwari downplays these profits and argues that they are small compared to the overall size of his and his wife's portfolios, it is undisputed that he benefited financially from his Acme purchases. The relatively small size of Maheshwari's profits is not mitigating here. *Cf. Geraci*, 2004 NASD Discip. LEXIS 19 (barring respondent for fraudulent insider trading when he realized profits of $1,875); *cf. also Mark E. O'Leary*, 43 S.E.C. 842, 850 (1968) ("[T]he fact that a customer may have suffered no loss or made money does not excuse the serious fraud shown."), *aff'd*, 424 F.2d 908 (D.C. Cir. 1970). Further, it is not mitigating that Maheshwari could have made more money on his trades, as he suggests, by purchasing more Acme shares or using margin. By misusing confidential information, Maheshwari harmed the market and its participants and, more directly, the parties he purchased his Acme shares from.[23]

Third, Maheshwari has not taken responsibility for his misconduct, and instead continues to blame others.[24] On appeal, Maheshwari argues that he did take responsibility, but the Hearing Panel incorrectly failed to credit his testimony on this point. In support, Maheshwari asserts that because he grew up in another country, English is not his first language, and he did not understand the Hearing Panel's expectations with respect to what constitutes a statement accepting responsibility for his misconduct. The record, however, shows that at least since 2002, Maheshwari has lived in the United States. During that time, he earned two masters degrees and worked at three different technology companies. A review of the record also demonstrates that he had no difficulty understanding or answering any

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[23] *See Guidelines*, at 8 (Principal Considerations in Determining Sanctions, Nos. 11, 16). Maheshwari argues that the Hearing Panel, without any evidence, stated that he purchased small amounts of Acme to evade detection, whereas Maheshwari points to the size of the transactions as demonstrating his lack of culpability or, alternatively, mitigating. Although we place no weight on the Hearing Panel's conclusion regarding the size of Maheshwari's Acme purchases as demonstrating that he attempted to conceal his misuse of confidential information, we also do not credit Maheshwari's arguments.

[24] *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 2). Maheshwari argues that he took responsibility by, among other things, reaching out to the Firm in November 2017 to provide it with information in connection with its investigation. However, as described herein, Maheshwari falsely informed the Firm that he did not possess any inside information concerning Acme and did not have any information about whether Acme was engaging in acquisition talks. Maheshwari's false denials to the Firm do not constitute taking responsibility for his misconduct.

questions posed to him at the hearing. Moreover, his testimony undercuts his claim that he accepted responsibility.[25]

Fourth, after his improper purchases of Acme stock, Maheshwari attempted to conceal his misconduct from his Firm. He did so by falsely informing the Firm that he never possessed inside information concerning Acme at the time he purchased shares and "never had any information related to whether [Acme] was engaging in acquisition talks nor did he ever have any information related to the timing or price of such an acquisition."[26] We reject his claim that he should receive mitigation credit for assisting the Firm with its investigation, when in fact he provided it with inaccurate and misleading information.

Fifth, we find aggravating, as did the Hearing Panel, that Maheshwari further concealed his misconduct by testifying that he reviewed and considered numerous pieces of information in connection with his Acme purchases, but did not consider the information he

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[25] For example, when asked by his counsel if he would do something similar in the future, Maheshwari answered:

> Look, I don't think I violated any rules here specifically. But I understand how this could be misconstrued because I worked on some pitch materials and there was some work going around in the background. I think with all that has happened in the last two years over this and in the last few days here, I would certainly not engage in anything which would be misconstrued as – even if it does not, even if it is not wrong but I would just certainly not do it so it gives an impression that there is something wrong.

Further, although he later reiterated that he had "gained a better understanding of how things can be viewed" and would "apply more judgment" in the future, Maheshwari then stated:

> I truly did not use any – when I made the investment, I truly did not use any of the information or impact that when I made the investment with the purchase of [Acme]. It was not, I was not trying to trade and make short term profits here or anything like that. The amounts are so miniscule, like it never came – I never thought about that I could, that this would affect my career at this point. This was not my objective. My objective was just, I was simply thinking let's rebalance the portfolio.

Moreover, even if Maheshwari's hearing testimony demonstrates that he accepted responsibility (which it does not), "an acceptance of responsibility is only mitigating if it occurs before detection and intervention by a firm or a regulator." *See Dep't of Enforcement v. Elgart*, Complaint No. 2013035211801, 2017 FINRA Discip. LEXIS 9, at *37 n.19 (FINRA NAC Mar. 16, 2017), *aff'd*, Exchange Act Release No. 81779, 2017 SEC LEXIS 3097 (Sept. 29, 2017), *aff'd*, 750 F. App'x 821 (11th Cir. 2018).

[26] *See id.* (Principal Considerations in Determining Sanctions, No. 10) (directing adjudicators to consider whether respondent attempted to conceal his misconduct).

learned while working at the Firm concerning Globex's potential acquisition of Acme at a substantial premium. Maheshwari argues that the Hearing Panel used the fact that he testified in his defense to explain why he purchased Acme shares against him. We disagree. The Hearing Panel properly considered Maheshwari's testimony as an aggravating factor in assessing sanctions. *See Geraci*, 2004 NASD Discip. LEXIS 19, at *53 (holding that a bar was necessary for respondent's insider trading and lack of candor when testifying about his alleged reasons for purchasing securities, including his independent research on the securities at issue, and affirming findings that respondent was not credible); *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 SEC LEXIS 2684, at *37 (Feb. 7, 2020) (affirming bar and finding that applicant's "lack of candor in testifying before FINRA is an aggravating factor that supports the need to bar her in order to protect the public"), *appeal docketed*, No. 20-1092 (D.C. Cir. Mar. 27, 2020); *cf. SEC v. Moran*, 922 F. Supp. 867, 893 n.20 (S.D.N.Y. 1996) (acknowledging that individuals trading on inside information often manufacture cover stories to conceal their insider trading); *N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *44 (May 8, 2015) (explaining that respondent is "entitled to present a vigorous defense" but the denial that conduct was wrongful demonstrated either a misunderstanding or a lack of recognition of his duties as a professional and of his regulatory obligations), *aff'd sub nom., Troszak v. SEC*, 2016 U.S. App. LEXIS 24259 (6th Cir. June 29, 2016).

Maheshwari argues that he has no disciplinary history, and the misconduct at issue is not reflective of his historical compliance with FINRA's rules and the Firm's policies and procedures. A respondent's lack of disciplinary history and previous compliance are not mitigating. *See Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *32 (Sept. 3, 2015) (rejecting argument that lack of disciplinary history is mitigating "because an associated person should not be rewarded for acting in accordance with her duties as a securities professional"); *Keith D. Geary*, Exchange Act Release No. 80322, 2017 SEC LEXIS 995, at *32 (Mar. 28, 2017) (rejecting argument that lack of prior compliance issues is mitigating).

We similarly reject Maheshwari's argument that he should receive mitigation credit because he fully cooperated by participating in a phone interview with FINRA, produced documents, and appeared at an on-the-record interview. *See Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631 at *23 (Nov. 8, 2006) (rejecting applicant's argument that he should have received mitigation credit for cooperating with FINRA's investigation and testifying at an on-the-record interview and holding that compliance with obligations to abide by FINRA's rules is not mitigating). And, although we acknowledge that Maheshwari's misconduct involved purchasing Acme shares on a single day, we find this instance of misconduct is sufficiently serious to warrant a bar, especially when coupled with the numerous other aggravating factors described herein.

Maheshwari also argues that in assessing sanctions, we should consider that he did not receive from FINRA, his supervisor, or the Firm at his exit interview prior warnings that he could not purchase Acme shares. The Firm, however, repeatedly informed employees such as Maheshwari that they could not use confidential information for their personal gain. Indeed, Maheshwari's Employment Agreement, the Confidentiality Agreement, and Firm trainings

emphasized this point. In any event, the absence of prior warnings is not mitigating. *See Elgart*, 2017 FINRA Discip. LEXIS 9, at *40; *see also Guidelines*, at 7 (stating that "some considerations have the potential to be only aggravating or only mitigating. For instance, the presence of certain factors may be aggravating, but their absence does not draw an inference of mitigation").

Finally, Maheshwari repeatedly argues that the bar imposed by the Hearing Panel exceeded Enforcement's recommended sanction of a suspension of no less than 18 months, which purportedly shows that the bar is excessive. We reject this argument. *See, e.g.*, *Wedbush Sec.*, 2016 SEC LEXIS 2794, at *40-41 (holding that FINRA hearing panels have broad discretion to assess sanctions and that "the ultimate decision as to an appropriate sanction was not up to FINRA Enforcement"). Likewise, we reject Maheshwari's comparison of his bar to the sanctions imposed in other cases. It is well settled that "the appropriateness of a sanction depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action [taken] in other proceedings." *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *115-16 (July 2, 2013), *aff'd sub nom.*, *Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

B. Disgorgement

We also order Maheshwari to disgorge the ill-gotten gains he earned on his purchases of Acme shares. The Guidelines provide that, when a respondent has obtained a financial benefit from his misconduct, we should consider ordering disgorgement of his ill-gotten gains when determining appropriate sanctions.[27] Here, it is undisputed that Maheshwari earned $2,760 in net profits on his trades of Acme shares in his and his wife's accounts. We find that disgorgement of these profits will serve to remediate his misconduct by eliminating the financial benefit directly resulting from it. Further, it will deter others from engaging in similar misconduct. We therefore order that Maheshwari disgorge $2,760, plus interest from September 11, 2017 (the date he purchased Acme shares) until paid.

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[27] *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6); *see also Dep't of Enforcement v. Akindemowo*, Complaint No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *50-51 (FINRA NAC Dec. 29, 2015) (ordering disgorgement and stating that "[d]isgorgement seeks to prevent a respondent's unjust enrichment"), *aff'd*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016). Here, the harm inflicted by Maheshwari was on the markets and the individuals who traded in Acme shares in the time between his purchases and Globex's announcement of the acquisition. Under the circumstances, identifying a specific party to whom we could order restitution or distribution of disgorged funds for Maheshwari's misconduct is impractical. Instead, any funds collected from Maheshwari will be distributed to FINRA's Investor Education Foundation, for the general benefit of the investing public. *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6).

V. Conclusion

We affirm the Hearing Panel's findings that Maheshwari misused confidential information, in violation of FINRA Rule 2010. For this misconduct, we bar Maheshwari in all capacities and order that he disgorge $2,760 (plus interest).[28] Maheshwari is also ordered to pay $9,663 in hearing costs and $1,619.72 in appellate costs.

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary

[28] Interest shall accrue from September 11, 2017, until paid. The prejudgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). *See Guidelines*, at 9 (Technical Matters). The bar is effective as of the date of this decision.