BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Shashishekhar Doni Forest Hills, NY, Respondent.	DECISION Complaint No. 2011027007901 Dated: December 21, 2017

Respondent converted computer source code belonging to his former employer firm and used it without authorization in his work at his new firm. Respondent also deleted the source code files after his firm discovered his misconduct. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Christopher Perrin, Esq., Michael J. Rogal, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Michael C. Farkas, Esq.

Decision

FINRA's Department of Enforcement ("Enforcement") appeals and Shashishekhar Doni cross-appeals an April 18, 2016 Hearing Panel decision pursuant to FINRA Rule 9311. The Hearing Panel found that Doni violated FINRA Rule 2010 by converting his former employer firm's computer source code for his use in his work at his new employer firm. The Hearing Panel also found that Doni violated FINRA Rule 2010 by deleting his old firm's computer source code from his new firm's system, contrary to his supervisor's explicit instructions. For the conversion, the Hearing Panel fined Doni $10,000 and suspended him from association with any FINRA member in all capacities for two years. For deleting the source code contrary to his supervisor's explicit instructions, the Hearing Panel fined Doni $2,500 and suspended him from association with any FINRA member in all capacities for six months, with the suspensions to run concurrently. After an independent review of the record, we affirm the Hearing Panel's findings of liability and sanctions.

I. Facts

A. Background

Doni never has been registered in the securities industry and is not currently employed with a FINRA member. He began working in the securities industry in 2006 as a software developer and has been associated with several FINRA members. Doni admits that FINRA has jurisdiction to bring this disciplinary proceeding against him.

B. Doni Worked on Confidential, Proprietary Computer Code for Credit Suisse's Dark Pool

From August 2006 to September 2010, Doni worked in a non-registered capacity at Credit Suisse Securities (USA) LLC ("Credit Suisse") as a senior developer analyst. Initially Doni worked as part of the high-frequency-trading group at Credit Suisse, and his primary focus was developing computer code concerning the connectivity between exchanges and market data. He later transitioned to the "Crossfinder" group, which was responsible for the software infrastructure for Credit Suisse's Crossfinder "dark pool" trading system.[1] Dark pools compete with other dark pools based on execution speed and reliability—factors that are affected by the way the underlying code is developed and written. During the relevant period, Crossfinder was the world's largest dark pool based on the daily number of shares traded in the system.

In developing computer code for Crossfinder, Doni and other Credit Suisse software developers used a confidential and proprietary library of computer code building blocks that Credits Suisse called "Cadre." These building blocks allowed for the fast development of applications.

The Cadre library consisted of hundreds of files and thousands of pages of code created by Credit Suisse. Some modules or blocks of code were dependent on each other. One file or block could "call" on code in another file to execute its task. Thus, the code was useful and valuable in the context of the aggregate and not so much as individual modules. Some of the building blocks were from approved open library sources, but others were developed in-house.

While working on Crossfinder, and using the Cadre library, Doni's main job was building "gateways."[2] Doni acknowledged at the hearing that the Cadre library had value because it could be used to avoid rewriting code and because, once written and tested, it is

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[1] A dark pool is a facility that matches and executes large buy and sell orders for institutional investors.

[2] A gateway is a piece of software or a process as part of the dark pool that accepts client orders via a protocol that passes orders along to an appropriate matching engine for execution. The communication from the gateway to the matching engine that maintains the book is done by

[Footnote continued on next page]

reliable. Doni's supervisor at Credit Suisse, Alex Roitgarts, testified that it could take years for a person to recreate the entire Cadre library, and that it might even be impossible to do. Roitgarts estimated that Crossfinder and the Cadre building blocks had an infrastructure cost of $4-6 million and development costs of $1-1.5 million per year. While reluctant to estimate the value of Cadre, Roitgarts described it as a "big reputational advantage" to Credit Suisse and as a "testament to [the] technical prowess" of the firm.

Crossfinder was trademarked, but the underlying computer code was not. Credit Suisse treated the code as a trade secret. Credit Suisse used a "source control system" to control access to the Cadre computer code. The system limited access to authorized personnel, and it tracked any changes made to it. Credit Suisse employees were prohibited from working on Cadre remotely other than through a secure Citrix access system. Through its use of Citrix, Credit Suisse ensured that the remote user connection with its internal system was secure, and it prevented its confidential proprietary information from leaking from its internal system onto the host computer the remote user was using. Employees also were prohibited from storing Credit Suisse information on unapproved systems, including personal equipment or remote storage devices (e.g., USB memory sticks), unless the employee obtained his supervisor's permission. Credit Suisse also did not permit employees to put Cadre computer code in a personal email.

Credit Suisse imposed on Doni a duty to protect the confidentiality of Credit Suisse's computer code. Doni acknowledged this duty multiple times throughout his employment at Credit Suisse. In his employment agreement, Doni agreed not to take, disclose, or use any confidential or proprietary information other than for the benefit of Credit Suisse. The employment agreement emphasized the confidential and proprietary nature of its information, including its trade secrets and "any other information that has been developed by or for the benefit" of Credit Suisse and its affiliates. The contract stated, "During and after the term of your employment with [Credit Suisse], you agree to refrain from disclosing directly or indirectly, or using in any way the Confidential Information." It warned that disclosure of confidential information in violation of the contract could cause material and irreparable harm to Credit Suisse. Doni signed the agreement in August 2006, but testified that he reviewed only the salary information before he signed it.

While at Credit Suisse, Doni also took mandatory training on handling confidential proprietary information, and signed certifications stating that he completed his 2008 and 2009 annual compliance training, which included information on handling confidential proprietary information. The training explicitly provided that processing or storing Credit Suisse information on personal equipment was prohibited. It further provided that a USB memory stick could only be used if a business need made it absolutely necessary and one's supervisor agreed.

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a messaging system. The faster the messaging system, the lower the latency or wait time to complete and confirm a transaction.

Credit Suisse also reminded its employees of their obligations to protect its confidential information every time that they logged in remotely to Credit Suisse's system using Citrix. After logging in, they saw a warning that provided that all information held in or generated by the system was proprietary and confidential. It prohibited any unauthorized access, disclosure, or use of the information.[3]

At some point in December 2009 or January 2010, Doni copied some of Credit Suisse's computer code onto a USB memory stick and transferred the files to his personal computer. Despite Credit Suisse's prohibition on copying its confidential proprietary code without a supervisor's permission, Doni did not obtain permission from his supervisor, Roitgarts. Doni testified that he did so because it was more convenient to review the files offline than log into Citrix remotely. Doni reviewed the computer code files but did not make any changes. He testified that he did not think he was doing anything wrong at the time because he was using the files in the normal course of his work, and he viewed his actions as the equivalent of taking home a hard copy to study, which he had done in the past.

C. Doni Uses Credit Suisse's Confidential, Proprietary Computer Code While Working for a Credit Suisse Competitor

In September 2010, Doni left Credit Suisse and began working in a non-registered capacity at Barclays Capital Inc. ("Barclays") as a software developer. Barclays hired Doni in connection with an effort to upgrade its own dark pool, known as "LX," which competed with Credit Suisse's Crossfinder. Barclays hoped to improve the speed at which messages and data were passed among the connected systems, which, in turn, would increase the capacity of the system to transact a higher volume of orders in the dark pool. Barclays sought to hire people with experience working on matching engines.

When Doni left Credit Suisse in September 2010, he signed a "Statement of Departing Employee" expressly representing, warranting, and agreeing that he would not use any of Credit Suisse's confidential or proprietary information for his own benefit or for the benefit of his new employer or any other third party. The document provided that Credit Suisse's intellectual property, whether patented or not, including computer programs and models, was confidential and proprietary. In the document, Doni acknowledged, "[Credit Suisse] has exclusive ownership rights with respect to any work I produced in the course of rendering services to [Credit Suisse], including computer programs and materials related thereto. Such work may not be used for any purpose other than the benefit of [Credit Suisse]." When Doni left Credit Suisse, he agreed that he would not retain, and that he would return, any confidential or proprietary information, including computer files.

Similarly, when Doni joined Barclays, the firm warned Doni not to bring with him any former employer's confidential information. Doni signed Barclays's confidentiality and

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[3] For a period of time while working at Credit Suisse, Doni worked remotely using Citrix.

intellectual property agreement as a condition of his employment, in which he acknowledged that he had been "directed by Barclays not to bring . . . any confidential or proprietary documents or other information . . . from any prior employer or to possess or use such information in violation of . . . obligations to a prior employer." Doni's supervisor at Barclays, David Jack, testified that Barclays tried to be very careful when they hired Doni because he was coming from a competitor.

When Doni started work at Barclays, he began working on a code programming project, initially known as "Project Carbon" and later known as "Project Monomer," relating to the firm's messaging software. Doni collaborated with programmers in Barclays's London office on the project. A few days after he began this work, Doni sent an email from his personal Gmail email account to his Barclays work email account transferring Credit Suisse Cadre files from his home computer to Barclays. Five separate times from September 16, 2010, to October 26, 2010, Doni emailed files containing Credit Suisse's code to himself at Barclays.[4] He loaded the files into a hidden network directory at Barclays that he created. Only Doni or a Barclays system administrator could see or access the hidden files.

Doni later created some Project Monomer code for Barclays using Credit Suisse's code. When doing so, Doni removed references to Cadre so the files did not contain information that would have identified it as Credit Suisse's code. In many instances, Doni's Project Monomer code was copied almost entirely from Credit Suisse's code. At the time, Doni viewed his use of Credit Suisse's code as a personal convenience that did no harm to Credit Suisse.[5]

D. Barclays Discovers Credit Suisse's Computer Code on Its System

On February 15, 2011, one of Doni's colleagues noticed code on Doni's desktop computer that was not Barclays's code and emailed his and Doni's supervisor, David Jack. The next day, Jack investigated and found non-Barclays code located on Doni's computer in a hidden directory.[6] Jack discovered that some of the code indicated that it had been created or last changed by Roitgarts, a Credit Suisse programmer and former co-worker of Doni whom Jack

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[4] On September 16, 2010, Doni emailed himself from his personal Gmail account to his Barclays email account a zip file containing 111 files of Credit Suisse's computer source code. Over the next few weeks, Doni sent himself other emails that attached zip files containing 470 source code files, 35 source code files, 394 source code files, and 118 source code files.

[5] Doni testified at his on-the-record interview that he thought of algorithms and high-frequency trading formulae and similar code as trade secrets, because money could be realized on them. In contrast, he thought of the Credit Suisse code he was using as somewhat generic. He said that the code he worked on consisted of simple pieces enabling one to connect to an exchange or to pass data from place to place.

[6] A system administrator had to access the hidden directory on behalf of Jack.

had tried to hire around the same time as Doni.[7] Jack quickly determined that Credit Suisse would consider the code proprietary and that it could relate to aspects of Credit Suisse's dark pool that would be "extremely sensitive."

Jack confronted Doni. Doni admitted that he had copied Credit Suisse's files onto a USB drive a year ago to use while he was working at home, and he emailed the files to himself to use at Barclays. Jack told Doni that his actions were a serious breach of Barclays's policies and explicitly instructed Doni not to delete from the network the computer code files that Doni had taken from Credit Suisse.[8] Despite Jack's explicit instructions to leave the code alone, Doni deleted Credit Suisse's code from the hidden directory either that same day or the following day.

The next day, on February 17, 2011, Barclays terminated Doni's employment for cause due to "the apparent unauthorized transfer of Credit Suisse . . . proprietary 'source code' technology onto a Barclays computer." This misconduct is the subject of this proceeding.[9]

E. No Evidence of Harm to Credit Suisse

Even before Barclays discovered Credit Suisse's code on its system, the Barclays London team rejected Doni's ideas involving Credit Suisse's code. After its discovery, Barclays went to great lengths to ensure that none of Credit Suisse's code was used in Barclays's dark pool software. Doni did not contribute to the building of Barclays's upgraded LX system, and there is no evidence that Barclays gained any competitive advantage from Doni's use of Credit Suisse's code or that Credit Suisse lost its competitive position as a result of Doni's misconduct.

Doni's initial copying of Credit Suisse's code to the USB drive also did not physically damage or otherwise corrupt the code.

II. Procedural History

On November 13, 2012, Enforcement filed a two-cause complaint against Doni. The complaint alleged that Doni emailed certain Credit Suisse confidential, proprietary code to his Barclays work email address and used it at Barclays, without Credit Suisse's permission or

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[7] Roitgarts never worked for Barclays.

[8] Jack said he had never been involved in something like this, and he wanted to wait for instructions from his supervisor.

[9] The New York District Attorney also criminally prosecuted Doni for his use of Credit Suisse's computer code at Barclays, charging him with computer trespass (a felony) and unauthorized use of a computer (a misdemeanor). In March 2012, Doni entered into a plea agreement that, after satisfaction of certain conditions, permitted him to withdraw his guilty plea as to the felony and be liable for the misdemeanor only. Doni was sentenced to three years' probation, which was terminated after two years in light of his good behavior.

knowledge and in violation of written agreements that he signed at both Credit Suisse and Barclays. The complaint further alleged that when Barclays personnel discovered that Doni had Credit Suisse computer code on his Barclays computer, Doni deleted the code in an attempt to hide his misconduct. The first cause of action, which addressed Doni's failure to return Credit Suisse's computer code to Credit Suisse and his use of the code at Barclays for his personal benefit, was titled "conversion" and alleged a violation of FINRA Rule 2010. The second cause of action alleged that Doni deleted Credit Suisse computer code at Barclays, after his supervisor told him not to, in an attempt to hide his misconduct, in violation of FINRA Rule 2010.

Doni did not file an answer to the complaint. Enforcement therefore filed a motion for a default decision, with a supporting declaration and nine exhibits, asking that the Hearing Officer make findings consistent with the allegations in the complaint and impose a bar. Doni did not file a response to Enforcement's motion.

On April 15, 2013, the Hearing Officer issued a default decision. The Hearing Officer found that, by failing to respond to the complaint, Doni defaulted. With respect to the first cause, the Hearing Officer found that it was "unclear that the [c]omplaint charges Respondent with conversion." At the same time, the Hearing Officer found that the complaint "clearly informs [Doni] of the conduct that allegedly violated FINRA rules" and "specifically charges that [Doni] acted inconsistently with high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010;" that conduct similar to the alleged misconduct "is widely held to violate the rights of others" including "misappropriation of trade secrets" and a "breach of confidence;" and that, regardless of how Doni's conduct is classified, it "was unquestionably unethical business-related conduct."

The Hearing Officer concluded that Doni was liable for "misappropriating computer code from Credit Suisse" in violation of FINRA Rule 2010. For that violation, the Hearing Officer suspended Doni for six months and fined him $5,000. With respect to the second cause of action, the Hearing Officer expressly made no liability findings. Instead, the Hearing Officer considered Doni's deletion of the computer code at Barclays when assessing sanctions for Doni's misappropriation of that code.

Enforcement appealed the default decision to the National Adjudicatory Council ("NAC"). Enforcement argued that cause one of the complaint alleged conversion and that the Hearing Officer erred in not addressing that allegation and in not finding that Doni converted the computer code in violation of FINRA Rule 2010. Enforcement further argued that the Hearing Officer erred in not finding as a separate violation of FINRA Rule 2010 that Doni deleted computer code in an attempt to hide misconduct, as alleged in cause two of the complaint. Enforcement also contended that a bar should be imposed for cause one, regardless of whether Doni's conduct is characterized as conversion or something else, and that Doni also should be barred for the conduct alleged in cause two. Doni, who filed an answering brief and appeared at oral argument, did not contest the findings of violations in the Hearing Officer's default decision and argued that the Hearing Officer's sanctions were appropriate.

The NAC vacated the Hearing Officer's findings and sanctions and remanded the matter for a hearing concerning both causes of action and permitted Doni to participate in the remand proceeding. In its remand order, the NAC found that the first cause of action in the complaint

alleged conversion but directed the Hearing Panel to consider on remand whether the taking of Credit Suisse's computer code constituted conversion. The NAC instructed the parties to address what effect, if any, intellectual property law has on conversion; explore whether Doni deprived Credit Suisse of its source code and address whether a showing of deprivation is required to demonstrate conversion; and to introduce evidence on remand concerning the value of the Credit Suisse computer source code at issue. The NAC explicitly offered no view on the relevance, or the weight to be given to, the evidence, if any. Finally, the NAC directed the Hearing Panel to address the second cause of action.

The parties participated in a two-day hearing before a Hearing Panel. Doni admitted to the facts underlying the charges and that his conduct violated FINRA Rule 2010. Doni also testified that he knew that serious sanctions would, and should, be imposed. After the hearing, the Hearing Panel issued its decision. It found that Doni violated FINRA Rule 2010 by converting Credit Suisse's computer source code for his personal benefit and convenience in his work at Barclays. The Hearing Panel also found that Doni violated FINRA Rule 2010 by deleting Credit Suisse's computer source code from Barclays's system, contrary to his supervisor's explicit instructions. For the conversion, the Hearing Panel fined Doni $10,000 and suspended him from association with any FINRA member in all capacities for two years. For deleting the source code contrary to his supervisor's explicit instructions, the Hearing Panel fined Doni $2,500 and suspended him from association with any FINRA member in all capacities for six months. The Hearing Panel imposed the suspensions concurrently.

Enforcement appealed to the NAC the decision with respect to the sanctions the Hearing Panel imposed for conversion, and Doni cross-appealed the decision with respect to the Hearing Panel's conclusion that Doni's conduct constituted conversion, whether conversion was the most appropriate theory of liability, and whether the conversion guidelines in the FINRA Sanction Guidelines (the "Guidelines") applied.

III. Discussion

Based on our independent review of the record, we affirm the Hearing Panel's liability findings.

A. Doni Converted Credit Suisse's Computer Code in Violation of FINRA Rule 2010

FINRA Rule 2010 states that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[10] The rule sets forth a standard that encompasses "'a wide variety of conduct that may operate as an injustice to

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

investors or other participants'" in the securities markets. *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12 (NASD NAC June 2, 2000) (quoting *Daniel Joseph Alderman*, 52 S.E.C. 366, 369 (1995), *aff'd*, 104 F.3d 285 (9th Cir. 1997)). In FINRA disciplinary proceedings, "[t]he analysis that is employed [under the rule] is a flexible evaluation of the surrounding circumstances with attention to the ethical nature of the conduct." *Shvarts*, 2000 NASD Discip. LEXIS 6, at *15. FINRA's authority to pursue discipline for violations of FINRA Rule 2010 is sufficiently broad to encompass any unethical, business-related misconduct, regardless of whether it involves a security. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) ("We . . . have concluded that [NASD] Rule 2110 applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money.").

1. Doni's Misconduct Constitutes Conversion Under FINRA Rules and the Guidelines

The Hearing Panel found, and Doni does not dispute, that he failed to abide by the ethical requirements imposed on him as a person associated with a FINRA member. Doni asserts, however, that his conduct, while violative of FINRA Rule 2010, does not amount to conversion as the term is defined and applied by FINRA precedent. Doni further argues that the NAC should reject conversion as the theory of liability and "apply a more suitable and well-established theory." We disagree.

It is an issue of first impression whether the misappropriation of computer code constitutes conversion in a FINRA disciplinary proceeding. The Guidelines define conversion broadly: "Conversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it." *FINRA Sanction Guidelines* 36 (2015) [hereinafter *Guidelines*].[11] The conversion guideline does not distinguish between tangible and intangible property. We review Doni's conduct in relation to the elements of the Guideline's definition of conversion:

- Doni's conduct was intentional. He intentionally emailed Credit Suisse's code to himself at Barclays to use in his work there. He purposely stored the code in a hidden file on Barclays's system and changed the identifying information of the code that would reveal it belonged to Credit Suisse.

[11] We typically apply the version of Guidelines in effect at the time of the decision. In this instance, however, the conversion guideline itself was an issue of controversy before the Hearing Panel and the NAC. The Hearing Panel used the 2015 Guidelines in its analysis, and the parties briefed the 2015 Guidelines on appeal before the NAC. Therefore, we apply the 2015 Guidelines. We note that the conversion guideline did not change during the intervening period between the Hearing Panel's decision and our decision.

- Doni's conduct was unauthorized. Credit Suisse prohibited him from using its code in any way except for its benefit. Barclays also prohibited him from bringing Credit Suisse's code with him to Barclays.

- The code belonged to Credit Suisse, and Credit Suisse had a right to exclusive use of it. Credit Suisse considered the code a trade secret, treated it as its confidential and proprietary property, and took steps to protect it.

- Despite having no right to possess it, Doni took possession of Credit Suisse's code by making a copy of it, and he exercised ownership of the code by using it at Barclays for his own benefit.

Doni's misconduct satisfies each of the elements of the Guideline's broad definition.

a. Associated Persons Can Convert Intangible Property

Relying on the common law definition of the tort of conversion and the Restatement (Second) of Torts, Doni contends, as he did before the Hearing Panel, that his conduct "does not amount to conversion under FINRA precedent" because the computer code was intangible. We, like the Hearing Panel, reject this argument.

Under the traditional common law definition of the tort of conversion, conversion was limited to tangible property only. *See* Prosser and Keeton on the Law of Torts § 15, at 89, 91 (W. Page Keeton ed., 5th ed. 1984). The Restatement (Second) of Torts extends conversion to intangible rights "merged" in a document symbolizing ownership to accommodate commercial reality. Restatement (Second) of Torts 242 (1965). Whereas many states adhere to the common law definition, with the Restatement's extension, other states have rejected the distinction and extend the definition of conversion to intangible property without regard to the Restatement "merger" test.[12] *See, e.g.*, *Thyroff v. Nationwide Mut. Ins. Co.*, 864 N.E.2d 1272, 1278 (N.Y. 2007) (certifying to the United States Court of Appeals for the Second Circuit that electronic records that were stored on a computer and were indistinguishable from printed documents were subject to a claim of conversion in New York, noting that the "tort of conversion must keep pace with the contemporary realities of widespread computer use").[13]

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[12] Alabama, Arkansas, California, District of Columbia, Florida, Indiana, Massachusetts, Maine, Nebraska, Pennsylvania, among others, are states which recognize that conversion protects intangible property even in cases where no document symbolizing ownership exists. *See* Courtney W. Franks, *Comment*: *Analyzing the Urge to Merge: Conversion of Intangible Property and the Merger Doctrine in the Wake of Kremen v. Cohen*, 42 Hous. L. Rev. 489, 517-519, nn.197, 205 (2005).

[13] In the development of property law, intangible property has been analyzed as property, and courts have long recognized that it can be misappropriated. *See, e.g., Int'l News Serv. v.*

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Doni asserts that the NAC has recognized the common law, as embodied by the Restatement of Torts, as the basis for the tort of conversion. In support, Doni relies on the NAC's remand order, in which we stated that "[t]he NAC . . . has occasionally analyzed allegations of conversion looking to tort law principles" and cited NAC decisions, *Dep't of Enforcement v. Paratore* and *Dist. Bus. Conduct Comm. v. Westberry*. According to Doni, the NAC should apply the common law definition of conversion because "FINRA's precedent applies the common law in this area." We disagree.

Doni's reliance on *Paratore* and *Westberry* is misplaced. Neither decision holds that FINRA is bound by the common law of torts or the Restatement with respect to the definition of conversion. In both cases, the NAC (and the predecessor to the NAC) found that the respondent converted customer funds—i.e., tangible property—and defined conversion in otherwise uncontroversial instances. *See Dep't of Enforcement v. Paratore*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *10 (FINRA NAC Mar. 7, 2008) (referring to the Restatement (Second) of Torts to define conversion and for the premise that checks may be subject to conversion); *Dist. Bus. Conduct Comm. v. Westberry*, Complaint No. C07940021, 1995 NASD Discip. LEXIS 225, at *18 n.16 (NASD NBCC Aug. 11, 1995) (citing Prosser and Keeton on The Law of Torts for a generic definition of conversion). These decisions do not address whether the definition of conversion under the Guidelines, or in FINRA proceedings, includes intangible property, which is an issue of first impression that we address here. The fact that the NAC previously referred to the Restatement or a torts treatise in these uncontroversial instances does not control our analysis.

FINRA disciplinary proceedings are distinct from civil actions alleging the tort of conversion.[14] *See Dep't of Enforcement v. Grivas*, Complaint No. 2012032997201, 2015 FINRA Discip. LEXIS 16, at *14 n.19 (FINRA NAC July 16, 2015) ("[T]he standards for conversion under a state's laws are not applicable in cases, such as this one, where a respondent has been charged with violating the high standards of commercial honor prescribed by FINRA Rule 2010."), *aff'd*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173 (Mar. 29, 2016). The plain language of the Guidelines does not limit conversion to tangible property and does not reference the common law or the Restatement in its definition. We decline to limit the broad definition of conversion as written in the Guidelines by importing the strict common law

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Associated Press, 248 U.S. 215 (1918) (enunciating the misappropriation doctrine of federal intellectual property common law).

[14] A FINRA disciplinary proceeding also is not the equivalent of a civil claim by the property owner under tort law or intellectual property law. Regardless of whether an injured party can obtain relief from the wrongdoer in a civil action by alleging conversion or asserting intellectual property rights, FINRA has authority to determine whether the wrongdoer who converted property is fit to continue working in the securities industry.

definition into FINRA disciplinary proceedings. Given that Doni used Credit Suisse's computer source code in his work at Barclays, we decline to adopt a rigid and technical definition of conversion, particularly one that does not reflect the contemporary realities of widespread technology in the securities industry.

b. Conversion Does Not Require Deprivation of the Property Converted

Doni also contends on appeal that his conduct did not constitute conversion because his use of the computer code at Barclays did not deprive Credit Suisse of its use. We, like the Hearing Panel, reject this argument.

The plain language of the definition of conversion in the Guidelines does not require the respondent to deprive the owner of the property to constitute conversion. Rather, the Guidelines require "an intentional and unauthorized taking of and/or exercise of ownership over property." There also are no FINRA decisions holding that an element of conversion is the intent to permanently deprive the rightful owner of his property.[15] As with tangibility, we decline to import into the Guidelines the common law definition of conversion, or the Restatement, and its requirement of deprivation to make a finding of conversion.[16] As with the requirement for tangibility, requiring proof of deprivation in FINRA disciplinary proceedings is not in the public interest and does not reflect the contemporary realities of widespread technology in the securities industry. Certain intangible property, like computer code, may be stolen for the respondent's benefit without depriving the rightful owner of its property. In such cases, regardless of whether the owner retains possession and use of its intangible property, the respondent took the property for the respondent's benefit.

Further, as explained by the Hearing Panel, Credit Suisse was deprived of its exclusive use of its confidential and proprietary business information when Doni used the computer code for his personal benefit in his work at Barclays. On appeal, Doni argues that he did not deprive Credit Suisse of any "right to exclusive use and confidentiality" because Credit Suisse "took no steps to restrict the dissemination of the substance of the [computer code]" by requiring Doni to

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[15] There are, however, a few FINRA decisions that found that a respondent's deprivation was a factor in finding him liable for conversion as opposed to a misuse of customer funds because the respondent intentionally sought to permanently deprive the rightful owner of property. Doni's reliance on these decisions, and others which refer to the tort law or the Restatement for general principles, is misplaced because none of them alters the proof for establishing conversion in FINRA disciplinary cases.

[16] The fact that various states "recognize the significance of [deprivation]" in similar cases, as argued by Doni, is immaterial for our purposes. *See Grivas*, 2015 FINRA Discip. LEXIS 16, at *14 n.19 (holding that the standards for conversion under a state's laws are not applicable in FINRA disciplinary cases).

be subject to a non-compete agreement or any other restrictive measure concerning working for a competitor. Doni's argument is unpersuasive. The complaint alleges, and we find, that Doni converted Credit Suisse's computer code by emailing an electronic copy of it to himself and uploading it onto Barclays's system. The allegation is not that Doni converted Credit Suisse's code by painstakingly recoding it while at Barclays by memory.[17] That Doni could have theoretically recreated Credit Suisse's code years later has no bearing on our finding that Doni's actions—i.e., emailing himself a copy of the code and uploading it onto his new firm's system—constitutes conversion under the Guidelines.

Moreover, Credit Suisse did take steps to restrict the dissemination of its computer code and imposed on Doni a duty to protect its confidentiality. Doni acknowledged this duty multiple times throughout his employment. Doni also agreed in writing when he left Credit Suisse's employ that he would not use any of Credit Suisse's confidential or proprietary information for his own benefit. Doni neglected this duty, and deprived Credit Suisse of its exclusive use of its confidential and proprietary business information, through his misconduct.

2. The NAC Cannot Alter the Theory of Liability Upon Which Enforcement Based Its Allegations

While Doni admits that his misconduct was violative of FINRA Rule 2010, he argues that there are "more suitable and well-established theor[ies] of liability that [have] historically addressed this identical misconduct" other than conversion. Specifically, Doni contends that FINRA adjudicators have "discretion to identify multiple theories of liability within a single cause of action for violating Rule 2010, and then [can] choose the theory that most appropriately establishes the violation." Doni is mistaken. The NAC does not have the authority to alter the theory of liability upon which Enforcement based its allegations.[18] Indeed, the Securities Exchange Act of 1934 requires that FINRA provide fair procedures in disciplinary matters, including without limitation notice to the respondent of the specific charges against him. *See* 15 U.S.C. § 78o-3(b)(8), (h)(1).

Doni's reliance on the NAC's decision in *Dep't of Enforcement v. DiFrancesco* to support his argument is misplaced. In that matter, Enforcement alleged two theories of liability under a single cause of action alleging that DiFrancesco violated the just and equitable principles of trade. *Dep't of Enforcement v. DiFrancesco*, Complaint No. 2007009848801, 2010 FINRA

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[17] Doni's Credit Suisse supervisor testified that it would take "perhaps years" for any single individual to recreate the entire Cadre library and that it might even be impossible to do.

[18] Enforcement's discretion to charge Doni with conversion also is not curtailed by its decisions in prior cases to not charge conversion for similar misconduct. *Cf. Dep't of Enforcement v. Olson*, Complaint No. 201002349601, 2014 FINRA Discip. LEXIS 7, at *15-16 (FINRA Bd. of Governors May 9, 2014) ("Enforcement's decision to charge Olson with conversion . . . is entitled to deference."), *aff'd*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 (Sept. 3, 2015).

Discip. LEXIS 37, at *12-17 (FINRA NAC Dec. 17, 2010), *aff'd*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54 (Jan. 6, 2012). The NAC found that DiFrancesco was liable under NASD Rule 2110 (predecessor to FINRA Rule 2010) based on his taking and using customer information that constituted nonpublic personal information under Regulation S-P, but declined to find him liable based on his misuse of customer information that his firm classified as confidential and proprietary. *Id.* Thus, the NAC did not identify its own theory of liability but rather addressed both theories of liability that Enforcement pleaded, and the parties had litigated, and based its findings on one of those theories while dismissing the other.

Doni also misinterprets the "true intent" of our remand in order to support his argument. To be clear, we were not seeking input as to whether conversion was the "most appropriate theory" of liability by raising various issues related to intellectual property law in other settings. We explicitly stated that the first cause of action alleged conversion and that "we do not intend to suggest that we hold a particular view on the scope of the offense of *conversion* where the property at issue is covered by a branch of intellectual property law."

We disagree with Doni's contention that federal intellectual property law preemption in non-FINRA proceedings indirectly supports the premise that conversion is an improper, or less appropriate, theory of liability in FINRA proceedings. This is a regulatory disciplinary proceeding: the purpose is not to litigate anyone's property rights but rather to determine Doni's fitness to act as an associated person in the securities industry. The incentives of the forums are inapposite.

In sum, we find that Doni's deliberate, unauthorized use of Credit Suisse's computer source code for his own benefit in his work at Barclays defied the high standards of commercial honor and just and equitable principles of trade by which all securities industry participants must abide and constituted conversion in violation of FINRA Rule 2010. *Cf. John Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *42 (Feb. 10, 2012) (finding that the respondent's personal use of gift certificates and wine, purchased with the funds of a charitable foundation, constituted conversion and violated just and equitable principles of trade); *Dep't of Enforcement v. Smith*, Complaint No. 2011029152401, 2014 FINRA Discip. LEXIS 2, at *14-15 (FINRA NAC Feb. 21, 2014) (finding that the respondent converted life insurance proceeds belonging to a customer, in violation of just and equitable principles of trade, when he used the funds to support his financially distressed business).

B. Doni Impeded His Firm's Investigation of His Conduct in Violation of FINRA Rule 2010

The second cause alleged that Doni deleted Credit Suisse's computer code from Barclays's system, after his supervisor instructed him not to, in an attempt to hide his misconduct, in violation of FINRA Rule 2010. We, like the Hearing Panel, find that Doni, regardless of his motive at the time, exhibited conduct that was inconsistent with the ethical

norms of professional conduct in violation of FINRA Rule 2010.[19] By deleting the computer source code from Barclays's network, Doni impeded his firm's investigation. Neither party challenges this finding, and it is well supported by the record. We therefore affirm this finding.

IV. Sanctions

For the totality of his misconduct, the Hearing Panel fined Doni $12,500 and suspended him from associating with any FINRA member in any capacity for two years. After an independent review of the record, we affirm these sanctions.

A. Conversion

For converting Credit Suisse's computer code for his own benefit for his work at Barclays, the Hearing Panel fined Doni $10,000 and suspended him from associating with any FINRA member in any capacity for two years. Enforcement argues that Doni should be barred—the standard sanction for conversion under the Guidelines—for his misconduct. Doni, on the other hand, does not object to the sanctions imposed by the Hearing Panel or its analysis of the mitigating factors, but argues that the conversion guideline is inapplicable to his misconduct. Doni argues that if the NAC chooses to disturb the Hearing Panel's sanctions, it should decrease the sanctions to conform to the true nature of Doni's misconduct. After reviewing the record and fully considering the issues presented on appeal, we affirm the Hearing Panel's use of the conversion guideline and its imposed sanctions.

As an initial matter, we address whether the conversion guideline is the proper guideline to consider when deciding upon the fitting sanction to impose for Doni's misconduct.[20] The "Conversion or Improper Use of Funds or Securities" guideline recommends that adjudicators "[b]ar the respondent regardless of [the] amount converted."[21] Doni argues that the guideline is applicable only to the conversion of funds or securities, not the conversion of other tangible or intangible property. We disagree. The definition of conversion contained in the guideline refers to "property" without limitation, not specifically funds or securities. Additionally, the "amount converted" phrase in the guideline does not necessarily mean the amount of funds or securities. The fact that the conversion guideline is contained in Section VI of the Guidelines, which is entitled "Improper Use of Funds/Forgery," is not problematic either: the section nomenclature in

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[19] Doni testified that he was in a panic when his supervisor confronted him. He testified that, when he deleted the files containing Credit Suisse's code, he was not trying to conceal what he had done because he had already confessed to his actions. He testified that he deleted the files from his computer in an effort to protect and guard against dissemination of Credit Suisse's code—an effort he now recognizes was misguided and wrong.

[20] *Guidelines*, at 36.

[21] Because a bar is standard, the Guidelines for conversion do not recommend a fine. *Id.*

the Guidelines is provided to assist the user but does not modify the Guidelines themselves.[22] So the conversion guideline is the appropriate guideline to reference in this matter.

The fact that the NAC has never applied the conversion guideline to a conversion of something other than funds or securities is not dispositive. As we have repeatedly emphasized, this matter is an issue of first impression. And contrary to Doni's assertions, FINRA has not "consciously avoided" or "deliberately avoided" finding that property other than funds or securities may be the subject of conversion. The only case cited by Doni, *Dep't of Enforcement v. Canjar*, offers no support for his premise. In this default decision, the Hearing Officer found that Canjar, an unregistered employee of Credit Suisse, converted $96 million through fraudulent wire transfers and $41,000 by changing the name of the payee on checks to herself. While it is true that the Hearing Officer did not find that Canjar converted "the password and username information," as argued by Doni, the complaint did not allege conversion of these intangible items. Rather, the complaint described the means by which Canjar effected the fraudulent wire transfers, referring to her misappropriation of the password and username information. *See Dep't of Enforcement v. Canjar*, Complaint No. 2011029074301 (FINRA Hearing Panel Dec. 27, 2013), available at www.finra.org/sites/default/files/fda_documents/2011029074301_ fda_TX127412.pdf. Thus, the Hearing Officer did not avoid making a finding about the conversion of intangible property.

Having determined that the conversion guideline is the proper guideline, we now address the relevant factors to determine the appropriate sanction. The recommended bar for conversion in the Guidelines "reflects the reasonable judgment that, in the absence of mitigating factors warranting a different conclusion, the risk to investors and the markets posed by those who commit such violations justifies barring them from the securities industry." *See Grivas*, 2015 FINRA Discip. LEXIS 16, at *25 (internal quotations omitted). The Guidelines, however, "do not prescribe fixed sanctions for particular violations" and "are not intended to be absolute."[23] They "merely provide a 'starting point' in the determination of remedial sanctions." *Hattier, Sanford & Reynoir*, 53 S.E.C. 426, 433 n.17 (1998) (quoting *Peter C. Bucchieri*, 52 S.E.C. 800, 806 (1996), *aff'd*, 989 F.2d 907 (7th Cir. 1993)), *aff'd*, 163 F.3d 1356 (5th Cir. 1998). "[E]ach case must be considered on its own facts."[24] *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005). Our responsibility therefore is to "tailor sanctions to respond to the *misconduct* at

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[22] *See id*. at ii (Table of Contents).

[23] *Guidelines*, at 1 (Overview).

[24] "Depending on the facts and circumstances of a case, Adjudicators may determine that no remedial purpose is served by imposing a sanction within the range recommended in the applicable guideline; *i.e.*, that a sanction below the recommended range, or no sanction at all, is appropriate." *Guidelines*, at 3 (General Principles Applicable to All Sanction Determinations, No. 3).

issue."[25] Here, the conversion at issue, which involves intellectual property, presents an unique context in comparison to other conversion matters we previously have considered.

There are no principal considerations specific to the conversion guideline, so we review the relevant Principal Considerations and General Principles Applicable to All Violations.[26] Numerous aggravating factors exist. First, we note that Doni intentionally took Credit Suisse's code and emailed it to himself for use in his work at Barclays, which we find aggravating.[27] He emailed himself copies of Credit Suisse's code on five separate instances for the purposes of using it in his work at Barclays. He then took the additional steps of saving the code in a hidden directory he created and altered the code so it did not reflect its origins.[28] These numerous acts, each with intention, and the attempts to conceal over the course of four months further serve to aggravate his misconduct.[29]

We next address the relevant mitigating factors. We considered that Barclays fired Doni for the same misconduct at issue here.[30] We find that Doni's termination offers some mitigation, but it alone does not sufficiently remediate his misconduct.[31] *Cf. Olson*, 2015 SEC LEXIS 3629, at *18 (finding applicant's termination by her firm, while mitigating, was no guarantee of changed behavior and insufficient to overcome the concern that she poses a continuing danger to the securities industry).

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[25] *Guidelines*, at 3 (General Principles Applicable to All Sanction Determinations, No. 3) (emphasis added).

[26] *Id.* at 2-7.

[27] *See id*. at 7 (Principal Considerations in Determining Sanctions, No. 13). The Hearing Panel found that "Doni was grossly negligent and careless of his duties to protect the confidentiality of [Credit Suisse's] computer code." We find that his acts that constituted conversion were intentional.

[28] We agree with the Hearing Panel that Doni's acts of concealment demonstrate an understanding that the code did not belong on Barclays's system.

[29] *See id*. at 6 (Principal Considerations in Determining Sanctions, Nos. 8-10).

[30] *See id*. at 7 (Principal Considerations in Determining Sanctions, No. 14).

[31] Not only was Doni terminated as a result of his misconduct, but he also was sentenced to three years' probation for the same misconduct after he pleaded guilty to misdemeanor criminal computer trespass in violation of New York law. Doni's lengthy probationary period, which was reduced due to good behavior, and permanent criminal record reflect the serious nature of his misconduct and provide measurable consequences for him in the future. FINRA's regard for the public interest and the protection of investors, however, is not the same as a state's motivation when imposing a criminal sentence.

We, like the Hearing Panel, award some mitigation because Doni did not seek to realize a "monetary benefit" by converting Credit Suisse's code. As explained by the Hearing Panel:

> Where computer code is taken without authorization for the purpose of realizing, directly or indirectly, a monetary benefit, the wrongful quality of that conduct is obvious. The intentional unauthorized taking of computer code for the purpose of realizing a monetary benefit, like the intentional unauthorized taking of funds or securities, involves a high level of culpability—flagrant dishonesty. Absent mitigating circumstances, such a wrongdoer would pose a grave risk in the future and give rise to the same concerns as with the conversion of funds or securities.

Doni, on the other hand, did not take Credit Suisse's code to realize a monetary benefit. *Cf. Olson*, 2015 SEC LEXIS 3629, at *15-16 (holding that applicant's misconduct that resulted in her monetary gain was aggravating for the purposes of sanctions). The record is devoid of any evidence that he intended to sell the code, that he was hired because he would bring the code with him, or that he received a bonus or other financial incentive because his use of the code enhanced his value to Barclays. Rather, Doni used the code for a prohibited purpose in his work at Barclays, but his use did not directly affect Credit Suisse's use of the code. Considering the unique nature of the converted property (i.e., computer code), we award minimal mitigation in this instance.

Finally, we considered the true remorse expressed by Doni, since his initial questioning by his Barclays's supervisor up to and throughout these proceedings, that was explicitly credited by the Hearing Panel. While the Guidelines do not address these factors, the Commission has consistently sustained FINRA's decision to consider them mitigating in other circumstances. *See, e.g.*, *DiFrancesco*, 2012 SEC LEXIS 54, at *34 (sustaining FINRA's sanctions assessment, including that "it provide[d] some measure of mitigation that DiFrancesco ha[d] been forthcoming in admitting throughout these proceedings that he" committed the alleged misconduct); *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 58951, 2008 SEC LEXIS 3142, at *43 (Nov. 14, 2008) ("NASD also gave only little mitigative value to the Gebharts' professed remorse, which NASD found to be 'dampened' by the Gebharts' attempts to shift blame to others involved . . . . We conclude that NASD appropriately weighed the aggravating and mitigating factors relevant to imposing sanctions for fraud under its Sanction Guidelines."), *aff'd*, 595 F.3d 1034 (9th Cir. 2010); *cf. Olson*, 2015 SEC LEXIS 3629, at *21-22 (holding that FINRA should have considered as mitigating that Olson repeatedly admitted her misconduct and expressed remorse).

We considered that the Hearing Panel found Doni's testimony credible and was meaningfully influenced by it, as evidenced by its decision. According to the Hearing Panel, Doni testified in a straightforward, consistent manner. He immediately accepted responsibility when he was confronted by his supervisor, and never attempted to justify his misconduct or blame others. The Hearing Panel explained:

> Although Doni explained why he failed to appreciate his duty to keep Credit Suisse's code confidential and not to use it in his work at Barclays, he did not attempt to excuse or justify his misconduct. Nor did he attempt to diminish the serious nature of his misconduct. Throughout the proceeding, Doni acknowledged the grave nature of his misconduct. Doni did not hedge or qualify his admissions as to the wrongful nature of his conduct.

Doni said that his view of what is confidential or proprietary information is now different from what it was before. He characterized his former self as arrogant, negligent, and wrong.[32]

The Hearing Panel found "Doni's testimony regarding his misconduct credible" and that "[his] unflinching self-criticism reflects true remorse." The Hearing Panel also found that Doni's assurances against future violations or misconduct were sincere. These findings are entitled to deference. *See Dane S. Faber*, Exchange Act Release No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004) ("Credibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference."). Based on these particular facts, and the detailed, well-documented credibility findings by the Hearing Panel, we assign mitigation for Doni's expressions of remorse.

While we are aware that the Guidelines state that a bar is standard for conversion, our weighing of the relevant factors for this case leads us to conclude that a lengthy suspension is the appropriate sanction. To validate barring Doni as a remedial sanction, our foremost consideration must be whether doing so protects the public from further harm.[33] *McCarthy*, 406 F.3d at 188; *see also PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007) ("[T]he Commission was obliged – but failed – to review the sanction imposed by the NASD with 'due regard for the public interest and the protection of investors.'"). Under these particular facts and circumstances, we find that a bar does not serve the public interest.[34] *Cf. Olson*, 2015 SEC LEXIS 3629, at *21 (affirming bar for conversion) ("Nonetheless, given the circumstances of Olson's deceit for her own profit, we find that Olson's admissions, expressions of remorse, and assurances do not outweigh our concern that she presents a continuing threat to investors.").

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[32] Doni testified, "[S]ince then I have come to the conclusion that my viewpoint [at the time of the misconduct] and my perception of things and my assumptions [we]re completely wrong . . . . [I]t certainly seems very, very wrong now."

[33] General deterrence alone is insufficient to justify an expulsion, but it may be considered as part of the overall remedial remedy. *Id.*

[34] Our conclusion that a bar is not warranted in this instance should not be read as overlooking the seriousness of Doni's misconduct, which we find wholly improper and unfit for associated persons, but rather as distinguishing between the levels of severity of malfeasance.

On balance, we conclude that the sanctions imposed by the Hearing Panel—a $10,000 fine and a two-year suspension in all capacities—will best serve to remediate Doni's misconduct.

B. Impeding Firm's Investigation

For impeding his firm's investigation, the Hearing Panel fined Doni $2,500 and suspended him from associating with any FINRA member in any capacity for six months, which suspension was to run concurrently with the two-year suspension imposed for his conversion. Neither party challenges these sanctions before the NAC. We find that the sanctions are well supported by the record and affirm.

The Guidelines contain no specific guidance for this misconduct, so the Hearing Panel considered the Principal Considerations and General Principles Applicable to All Violations[35] and, more generally, the three guidelines related to impeding a regulatory investigation.[36] We agree with this approach.

We agree with the Hearing Panel that it is aggravating that Doni deleted the computer source code despite his supervisor's prior warning.[37] Regardless of Doni's motivation at the time, his act of deleting the file was intentional, which we also find is aggravating.[38] While Doni's actions did not completely deprive Barclays of information about what was in the hidden file, his misconduct nonetheless affected Barclays's investigation of serious misconduct because the firm had to reconstruct what had been in the file from its backup system.

We agree with the Hearing Panel that a $2,500 fine and a six-month concurrent suspension in all capacities is sufficiently remedial for Doni's misconduct.

V. Conclusion

Doni converted his firm's computer source code and deleted the code after discovery of his misconduct, in violation of FINRA Rule 2010. For converting his firm's computer source code, we fine Doni $10,000 and suspend him from associating with any FINRA member in any capacity for two years. For deleting his former firm's computer source code from his new firm's system and impeding his firm's investigation of his misconduct, we fine Doni $2,500 and

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35 *Guidelines*, at 2-7.

36 *Id*. at 32-34. Doni's supervisor's instruction was made in connection to his firm's investigation of serious misconduct, so we, like the Hearing Panel, find Doni's misconduct is somewhat analogous to impeding regulatory investigations.

37 *See id*. at 7 (Principal Considerations in Determining Sanctions, No. 15).

38 *See id*. (Principal Considerations in Determining Sanctions, No. 13).

suspend him from associating with any FINRA member in any capacity for six months. The suspensions are to run concurrently. We also order that Doni pay hearing costs of $5,275.09.[39]

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary

[39] Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.