FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. SHASHISHEKHAR DONI (CRD No. 5095109), Respondent.	Disciplinary Proceeding No. 2011027007901 Hearing Officer—LOM April 18, 2016

Respondent intentionally took computer source code belonging to his former employer and used it without authorization for his own benefit in his work at his new firm, unethical conduct constituting conversion. For this misconduct, Respondent is suspended in all capacities for two years and fined $10,000.

After discovery of his misconduct and the launch of an investigation into it, Respondent deleted the source code from the file where he kept it at his new firm, contrary to his supervisor's express instruction. For this misconduct, Respondent is suspended for six months (to run concurrently with the first suspension) and fined $2,500.

Respondent is also ordered to pay costs.

Appearances

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

For the Respondent: Michael C. Farkas, Esq.

I. Introduction

While Respondent Shashishekhar Doni ("Respondent" or "Doni") was an associated person and software developer at Credit Suisse Securities (USA) LLC ("Credit Suisse"), he copied some of Credit Suisse's confidential and proprietary computer source code to his personal computer in order to work more easily from home. The computer source code consisted of a library of software building blocks used by Credit Suisse in creating the software infrastructure for its "dark pool" trading execution facility.

Doni later changed jobs and began working for Barclays Capital Inc. ("Barclays"), which has its own proprietary "dark pool." Shortly after joining Barclays, Doni emailed copies of some of the Credit Suisse code from his home computer to himself at Barclays. He placed the code in a hidden file that his supervisor and colleagues could not see. He then used the Credit Suisse code in his software development work for Barclays. At the time, he viewed his use of the Credit Suisse code as a personal convenience that did no harm to Credit Suisse.

Both Credit Suisse and Barclays prohibited Doni from using Credit Suisse's code at Barclays. When Barclays accidentally discovered the Credit Suisse code on its system, it terminated Doni's employment.

In the First Cause of Action, the Department of Enforcement charges that Doni violated FINRA Rule 2010,[1] and that his conduct constituted conversion. Because FINRA's Sanction Guidelines specify that a bar is the "standard" sanction for the conversion of funds and securities, Enforcement argues that a bar is the appropriate sanction here for the conversion of computer code. This is the first time in a FINRA disciplinary proceeding that a misappropriation of computer code has been characterized as conversion.

Doni admits that his conduct was unethical and violated FINRA Rule 2010. He denies, however, that it constituted conversion and argues that a lesser sanction than a bar would be more appropriate and sufficiently remedial.

The Hearing Panel concludes that Doni's conduct falls squarely within the definition of conversion set forth in FINRA's Sanction Guidelines. The intentional unauthorized taking of property—any property, including computer source code—by one who does not own it or have a right to possess it, and its use for one's own benefit, as though one did have a right of ownership or possession, is conversion for purposes of a FINRA disciplinary proceeding.

Our conclusion, however, does not foreclose or predetermine the sanction analysis here. The Sanction Guidelines discuss the appropriate sanctions for conversion in substantially different circumstances than our case, where funds or securities are converted—not computer code. The Sanction Guidelines instruct that sanctions should be tailored to the particulars of the case, making the automatic application of a bar in this case of first impression inappropriate. Because the misappropriation of computer code has never before been charged as conversion, there are no precedents.

In the particular circumstances of this case, we conclude that a two-year suspension and $10,000 fine are sufficiently remedial sanctions. Doni deliberately took a copy of the code and used it for his own convenience, but not for the purpose of realizing a financial gain. Doni was not conscious of harming Credit Suisse. We conclude that Doni was grossly negligent and careless of his duties to protect the confidentiality of the computer code and not to use it for anyone's benefit except its owner, Credit Suisse. But his culpability is different than that of a person who engages in flagrant dishonesty by taking the property of another for the purpose of

[1] FINRA's Rules (including NASD Rules) are available at www.finra.org/industry/finra-rules.

realizing a financial benefit, and Doni represents a different kind of risk in the future than such a person. The suspension and fine are sufficiently remedial, furthermore, because Doni acknowledges and condemns his misconduct, expressing credible remorse.

Doni also violated Rule 2010 after his conversion of the Credit Suisse code was discovered, as alleged in the Second Cause of Action, by deleting the Credit Suisse code from Barclays' computer systems, in direct contravention of instructions from his supervisor to touch nothing while Barclays investigated the matter. For this misconduct, Doni is suspended for six months, to run concurrently with the first suspension, and fined an additional $2,500.

II. Findings Of Fact

A. Respondent And Jurisdiction

Doni graduated in 1997 from a university in India with a degree in polymer science and technology. He then came to the United States to obtain a master's degree in polymer engineering. While working on that master's degree, he also enrolled in a master's program in mathematics and computer science. He finished the course work for the second master's degree, but not his thesis. Instead, he took a job as a software developer in 2002. His first firm was not a broker-dealer.[2]

Doni later worked for securities broker-dealers in a non-registered capacity as a software developer. He first joined a FINRA member firm in January 2006, but shortly afterward, he left that firm to join Credit Suisse, where he worked between August 2006 and September 2010. From September 2010 to February 2011, he worked for Barclays. From June through December 2011, he worked for a fourth FINRA member firm. He has not worked for any other FINRA member firm since then.[3] Doni admits that FINRA has jurisdiction to bring this disciplinary proceeding against him as an associated person.[4]

B. Proceeding

1. Default

Enforcement initiated this disciplinary proceeding by filing a Complaint with the Office of Hearing Officers on November 13, 2012. Initially, Doni did not file an Answer or otherwise respond to the Complaint. On April 15, 2013, the Hearing Officer originally assigned to this case issued a default decision against Doni.

The original Hearing Officer found Doni liable for misappropriating Credit Suisse's computer code in violation of FINRA Rule 2010. The Hearing Officer did not address in the

[2] Hearing Tr. 320-23, 480-81 (Doni).

[3] Hearing Tr. 322-25 (Doni); JX-1, at 3-4; JX-3, at 1-2.

[4] Answer ¶ 3.

default decision whether Doni's misconduct amounted to conversion. The Hearing Officer also did not determine whether Doni's deletion of the computer code after being instructed not to delete it was itself a violation of FINRA Rule 2010, but rather treated that action as an aggravating factor for purposes of determining sanctions for the misappropriation violation. The Hearing Officer suspended Doni for six months and fined him $5,000.

2. Appeal And Remand Order

Enforcement appealed the Hearing Officer's decision to the National Adjudicatory Council ("NAC"). Doni participated (*pro se*) in the appeal.

Enforcement argued on appeal that the Hearing Officer should have held Doni liable for conversion and therefore barred him from associating with any member firm. In the alternative, Enforcement requested that the proceeding be remanded for a hearing.

On July 25, 2014, the NAC remanded the matter to the Office of Hearing Officers for a hearing on both Causes of Action. The NAC expressly stated that the previous Hearing Officer "had properly issued a default decision." However, the NAC concluded that the Hearing Officer had failed to address the allegation of conversion and the allegation that concealing the misconduct was a separate violation of FINRA Rule 2010.

The NAC declared that the allegation of conversion would benefit from a fully developed record. It noted that the matter involves important issues of first impression that are likely to arise again in future cases. The NAC expressly stated that Doni would be allowed to participate in the remand proceeding despite his earlier default.

The NAC provided a non-exhaustive list of questions that it thought that the Hearing Panel on remand should address. The Hearing Panel has addressed those issues in this decision. In summary, our conclusions with regard to those questions are as follows:

First, the NAC directed the Hearing Panel to consider on remand whether the taking of Credit Suisse's computer code constituted conversion. The NAC noted that Enforcement had not identified any FINRA cases where findings of conversion involved computer source code or anything similar. The Hearing Panel concludes that Doni's intentional unauthorized taking of Credit Suisse's computer code and his use of it for his own benefit falls within the definition of conversion in FINRA's Sanction Guidelines. For purposes of a FINRA disciplinary proceeding, property does not have to be tangible to be the subject of conversion.

The Sanction Guidelines do not address the appropriate sanction for conversion of computer code or anything like it. For that reason, to tailor a remedial sanction appropriate to the specific misconduct, the Hearing Panel has analyzed the facts and circumstances of this case, and has not simply imposed a bar. We have determined that, in the particular circumstances of this case, other sanctions are sufficiently remedial.

Second, the NAC noted that the parties did not address whether the Credit Suisse code was covered by a branch of intellectual property law or what effect, if any, intellectual property law has on conversion. It said that the "parties shall address these factual and legal issues during the remand proceeding."

The Credit Suisse code was not trademarked or copyright protected and, therefore, those intellectual property laws are irrelevant here. Credit Suisse did consider the code a trade secret, but it is unclear whether and how state trade secret law might apply. In any case, even if those intellectual property laws were to apply here and they were to provide Credit Suisse with remedies for the misappropriation of the code, we do not believe that they would preempt this FINRA disciplinary proceeding. The circumstances justifying preemption do not exist here. This disciplinary proceeding does not duplicate the claims and remedies created for the protection of the owner of intellectual property. Nor does this proceeding interfere or conflict with the operation of intellectual property laws.

Third, the NAC directed that the parties should "explore whether Doni deprived Credit Suisse of its source code and whether a showing of deprivation is required to demonstrate conversion as an offense under FINRA Rule 2010." In a FINRA disciplinary proceeding for conversion, neither intent to deprive the owner of his or her property nor actual deprivation is required to prove conversion. Particularly with respect to the conversion of an intangible such as computer code, which can be converted by copying, without depriving the true owner of the original, it would make no sense to require intent to deprive or actual deprivation.

Fourth, the NAC directed that the parties should "introduce evidence" on the value of the source code itself and any harm suffered by Credit Suisse arising from Doni's actions. The computer code had value, but that value was not easily quantifiable. Barclays did not incorporate the code Doni employed in his Barclays work into Barclays' "dark pool" infrastructure, and there was no evidence that Credit Suisse's competitive position was damaged by Doni's misconduct. It is clear, however, that Doni's misconduct impinged on Credit Suisse's right to protect the confidentiality of its code and its right to exclusive use. Exclusive use is a critical element of Credit Suisse's property interest in the code.

Fifth, the NAC directed the Hearing Panel to address the Second Cause of Action, which alleges that Doni attempted to conceal his misconduct by deleting the Credit Suisse computer code from the file where he kept it at Barclays. Doni argues that he was not trying to conceal his misconduct because it had already been discovered and he had admitted what he did. He asserts that he was trying to protect Credit Suisse's code from further improper disclosure. Regardless of Doni's motive, we conclude that his deletion of the code in the circumstances of this case and in direct contravention of his supervisor's instruction was a separate violation of FINRA Rule 2010.

3. Proceeding On Remand

After being granted multiple extensions of time and eventually obtaining representation, Doni filed an Answer on October 27, 2014. The hearing was originally scheduled for three days

in mid-June 2015. In March 2015, the Parties agreed to new hearing dates in mid-October 2015 to accommodate Doni's counsel, who had a conflicting trial schedule.

The hearing took place on October 13-14, 2015. The record includes testimony,[5] exhibits,[6] and stipulations.[7] After an extension of time to accommodate scheduling conflicts, the Parties filed simultaneous post-hearing briefs on December 23, 2015, and simultaneous response briefs on January 20, 2016.[8]

C. The Misconduct

As discussed below, Doni took a copy of Credit Suisse's confidential and proprietary computer source code and used it for his own benefit in his work at Barclays when he had no right to do so.

1. Doni Works On Confidential, Proprietary Computer Code For The Credit Suisse "Dark Pool"

Doni joined Credit Suisse in August 2006 as a software developer. Initially, he worked in a group that supported the trading application and system infrastructure of a high-frequency trading desk.[9]

About three years later, in July 2009, Doni began working with another group that was responsible for the software infrastructure for Credit Suisse's "dark pool," known as "Crossfinder." A dark pool is an execution facility akin to an exchange, but it does not publish the prices of its book to the outside world, which is why it is called "dark."[10] Orders are placed into the dark pool and matched appropriately. Dark pools mostly compete on the metric of the number of shares executed. They also compete in terms of speed of execution, reliability, and quality of execution. These competitive aspects of a dark pool depend on the way a dark pool's system is developed and written.[11] During the relevant time period, and still today, the Credit

---

[5] In addition to Doni, the following persons testified at the hearing: Alex Roitgarts ("Roitgarts"), Doni's supervisor at Credit Suisse; David Andrew Jack ("Jack"), Doni's supervisor at Barclays; and Nicholas Moor ("Moor"), a FINRA forensic investigator, Senior Specialist.

[6] At the hearing, the parties introduced into evidence 45 Joint Exhibits that are referred to here with the prefix "JX" and an identifying number, as in "JX-1." Respondent also introduced a separate exhibit, which is referred to as "RX-1." The record was left open to permit limited investigation into certain telephone records. After the hearing, three additional Respondent's exhibits were admitted into the record: RX-2, RX-3, and RX-4.

[7] The parties filed stipulations that covered both the admissibility of documents and certain facts relating to the events at issue. The stipulations are referred to here by the abbreviation "Stip." and the relevant paragraph number, as in "Stip. ¶ 2."

[8] The post-hearing briefs are referred to as follows: ("Enf. PH Br."); ("Resp. PH Br."); ("Enf. Reply"); and ("Resp. Reply").

[9] JX-3, at 1-2.

[10] Hearing Tr. 67 (Roitgarts).

[11] Hearing Tr. 70-71 (Roitgarts).

Suisse dark pool is probably the largest dark pool in the world in terms of the daily number of shares traded within the system.[12]

In support of its dark pool, Credit Suisse software developers created (and continue to modify and use) a library of computer code building blocks that Credit Suisse calls "Cadre." Credit Suisse owns the Cadre code and considers it confidential, proprietary, and a competitive advantage to the firm.[13] Credit Suisse defines computer source code as confidential information that is the firm's intellectual property.[14]

The Cadre building blocks allow for the fast development of applications. They are the foundation on which the rest of the systems are built.[15] Some of the building blocks are from approved open library sources, but others are developed in-house. Doni acknowledged at the hearing that the Cadre library has value because it can be used to avoid rewriting code and because, once written and tested, it is reliable. It is a quick way of developing an application.[16]

The Cadre library has several hundred files in it with thousands of lines of code.[17] The modules or blocks of code are somewhat dependent on each other. One file or block may "call" on code in another file in order to execute its task. Thus, the code is useful and valuable in the context of the aggregate and not so much as individual modules.[18]

Doni's supervisor at Credit Suisse, Alex Roitgarts, testified that it would take a long time for any single individual to recreate the entire Cadre library, perhaps years, and that it might even be impossible to do.[19] It took four people about a year to create the first usable version of the library.[20] 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.[21] 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.[22]

---

[12] Hearing Tr. 67-68 (Roitgarts); JX-15.

[13] Hearing Tr. 69-70, 73-75, 79-80, 90-92, 98-101 (Roitgarts).

[14] Hearing Tr. 90-92, 98-99 (Roitgarts); JX-10.

[15] Hearing Tr. 98 (Roitgarts).

[16] Hearing Tr. 336-37 (Doni).

[17] Hearing Tr. 79-80, 108-09 (Roitgarts).

[18] Hearing Tr. 108-09 (Roitgarts).

[19] Hearing Tr. 108 (Roitgarts); Hearing Tr. 265-67, 272-73 (Moor). Roitgarts acknowledged that it would have taken a shorter period of time to recreate a small portion of the library of code. Hearing Tr. 120 (Roitgarts).

[20] Hearing Tr. 98-99 (Roitgarts).

[21] Hearing Tr. 99 (Roitgarts).

[22] Hearing Tr. 99-102 (Roitgarts).

Doni had access to this internally developed, confidential, and proprietary computer code.[23] Although the code was not trademarked or copyright protected, Credit Suisse treated it as a trade secret.[24]

While working on Crossfinder and using the Cadre building block code, Doni's main job was building "gateways." 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 a messaging system.[25] The faster the messaging system, the lower the latency or wait time to complete and confirm a transaction.[26]

2. Doni Acknowledges A Duty To Keep The Credit Suisse Code Confidential

Doni had a duty to protect the confidentiality of the Credit Suisse code and not to use it in any way other than for the benefit of Credit Suisse. In multiple ways, Credit Suisse imposed that duty on Doni and reminded him of it, securing his written acknowledgement and agreement to comply with that duty.

First, when Doni began his employment at Credit Suisse in 2006, he signed an agreement not to take, disclose, or use any confidential or proprietary information other than for the benefit of Credit Suisse.[27] Doni's contract with Credit Suisse strongly 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…."[28] It warned that disclosure of confidential information in violation of the contract could cause material and irreparable harm to Credit Suisse.[29]

Second, Credit Suisse limited access to the code and implemented other policies and procedures to protect its confidentiality. For example, the firm used a source control system as a

---

[23] JX-3, at 2.

[24] Hearing Tr. 284-85 (Moor); JX-41 at 11. Crossfinder, the product, was trademarked, but the code itself was not. Hearing Tr. 284-85 (Moor).

[25] Hearing Tr. 75, 122-23, 134-35 (Roitgarts).

[26] Hearing Tr. 146-47 (Jack).

[27] Hearing Tr. 329-31 (Doni); Stip. ¶ 2.

[28] JX-12, at 2-3. Just as Credit Suisse expected Doni to protect its confidential proprietary information, it made plain its expectation that he would protect his previous employer's confidential proprietary information. In his contract, he represented and warranted that he had not taken any confidential and proprietary information from his former employer and would not use any such information in violation of his duties to that employer. JX-12, at 4.

[29] JX-12, at 3; Hearing Tr. 331 (Doni).

repository for the code and limited access to the code in the source control system. Only authorized users with passwords could log in to the system.[30]

Credit Suisse also prohibited users from accessing its code from a remote location except by means of a system known as Citrix, which protects against copying and unauthorized access. The firm used Citrix for two reasons: first to make sure the connection between its internal systems and the remote user was secure; and second to make sure that confidential proprietary information did not "leak" from its internal systems into the host computer the remote user was using. In simple terms, you could not cut and paste from the office computer to the computer where Citrix was running.[31]

Credit Suisse reminded its employees of their obligations to protect its confidential information every time that they signed in to their computers using Citrix. After logging in, they saw a warning. The warning declared 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.[32] Doni was aware of the warning because, for a period of time, he had worked remotely from India using Citrix.[33]

Credit Suisse did not permit an employee to put Cadre computer code into a personal email.[34] It also prohibited its employees from processing or storing Credit Suisse information on an unapproved system, including personal equipment. Accordingly, an employee was not authorized to copy any information from the firm's computers onto a USB stick or to bring personal computer equipment to work and plug it into the Credit Suisse network unless the employee obtained his or her supervisor's permission.[35]

Third, while Doni worked at Credit Suisse the firm took steps to train employees regarding its policies and procedures for protecting its code. He received mandatory training on handling confidential proprietary information,[36] and signed certifications stating that he completed his 2008 and 2009 annual compliance training, which included information on handling confidential proprietary information.[37] The training specified that processing or storing Credit Suisse information on personal equipment was prohibited. It further specified that a USB memory stick could only be used if a business need made it absolutely necessary and one's

[30] Hearing Tr. 76-79 (Roitgarts).

[31] Hearing Tr. 92-97 (Roitgarts); JX-11.

[32] JX-11.

[33] Hearing Tr. 339-40 (Doni); Hearing Tr. 94 (Roitgarts).

[34] Hearing Tr. 97 (Roitgarts).

[35] Hearing Tr. 87-89 (Roitgarts); JX-7, at 15; JX-9.

[36] Hearing Tr. 81-82 (Roitgarts).

[37] Hearing Tr. 83-84 (Roitgarts); JX-4; JX-5; JX-6; JX-7; JX-8.

supervisor agreed.[38] The training emphasized that Credit Suisse employees had an obligation to protect the bank's assets.[39]

Fourth, and finally, when Doni left Credit Suisse, it reiterated his responsibility not to use its confidential proprietary information for anyone else's benefit. The firm had him sign 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 expressly provided that Credit Suisse's intellectual property, whether patented or not, including computer programs and models, was confidential and proprietary.[40] 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]."[41] When Doni left Credit Suisse, he agreed that he would return and not retain any confidential or proprietary information, including computer files.[42]

3. Doni Copies Code Onto His Personal Computer In The Course Of His Work At Credit Suisse

Despite Credit Suisse's prohibition on copying its confidential proprietary code without a supervisor's permission, at some point around December 2009 or January 2010, Doni copied some of Credit Suisse's computer code onto a USB stick and installed the files on his home computer.[43] He did not obtain permission from his supervisor, Roitgarts.[44]

Doni testified that he did so because it was more convenient to review the files off-line than to sign into the Citrix system that would have connected him to his Credit Suisse desktop. Since he only reviewed the files and did not attempt to make changes, he did not need to be on-line.[45] Doni 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.[46] He viewed what he was doing as the equivalent of taking home a hard copy to study, which he had done in the past.[47]

---

[38] Hearing Tr. 87-89 (Roitgarts); JX-7, at 15.

[39] JX-8.

[40] JX-13, at 1-2.

[41] JX-13, at 1.

[42] Stip. ¶ 2.

[43] Stip. ¶ 1.

[44] Hearing Tr. 346-47 (Doni); Hearing Tr. 97, 121-22 (Roitgarts).

[45] Hearing Tr. 446, 473-76 (Doni).

[46] Hearing Tr. 346-47, 414, 467 (Doni).

[47] Hearing Tr. 349-51 (Doni).

When confronted with evidence that he should have known that he violated Credit Suisse's policies regarding the protection of its confidential information, Doni explained—and criticized—his thinking at the time. He testified that he had not paid attention to the instructions he had received that prohibited him from copying the firm's code onto unauthorized equipment because he thought that he already knew what was right and what was wrong, and what was confidential and what was not.[48] With respect to the employment agreement he signed when he joined Credit Suisse, Doni testified that he only looked at the compensation information. He viewed the rest of that document and others as boilerplate or something he already knew.[49] With respect to the training sessions that he certified that he completed, he testified that his main objective was to finish the training task as quickly as possible.[50] Doni testified that at the time he joined Credit Suisse he did not appreciate the difference between the broker-dealer firm and his prior employer, a non-broker-dealer company.[51]

Doni testified in his on-the-record interview ("OTR"), which became part of the record, that he thought of algorithms and high-frequency trading formulae and the like as trade secrets, because money could be realized on them. In contrast, he thought of the 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.[52]

Doni now characterizes his former self as arrogant, negligent, and wrong. He stresses that he is a different man today.[53] He also says that his view of what is confidential or proprietary information is now different from what it was before.[54]

4. Doni Leaves Credit Suisse To Join Barclays, A Credit Suisse Competitor

Barclays has its own dark pool, known as LX, which competes with the Credit Suisse dark pool.[55] In summer 2010, Barclays hired Doni in connection with an effort to upgrade LX.[56] Barclays hoped to improve the speed at which messages and data were passed among the connected systems, which, in turn, would increase the volume that could be processed. Barclays sought to hire people with experience working on matching engines.[57]

---

[48] Hearing Tr. 328 (Doni).

[49] Hearing Tr. 327-28, 357, 362 (Doni).

[50] Hearing Tr. 342-43 (Doni).

[51] Hearing Tr. 323 (Doni).

[52] JX-47, at 47-49.

[53] Hearing Tr. 328, 498-500 (Doni).

[54] Hearing Tr. 328 (Doni).

[55] JX-16.

[56] Hearing Tr. 144-50 (Jack); Stip. ¶ 3.

[57] Hearing Tr. 149-50 (Jack).

5. Barclays Warns Doni Not To Bring Any Former Employer's Confidential Information To Barclays

When Doni joined Barclays, the firm warned him not to bring with him any former employer's confidential information. Barclays had him sign a confidentiality and intellectual property agreement as a condition of his employment. In that document 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…."[58] Doni's supervisor at Barclays, David Jack, testified that they tried to be very careful when they hired Doni because he was coming from a competitor. Jack did not expect Doni to bring Credit Suisse code with him to Barclays.[59]

In his employment contract, Doni also made promises to Barclays similar to the promises he had made to Credit Suisse. He promised Barclays that he would not use or disclose its confidential information except as necessary in connection with his work for Barclays. He acknowledged that this obligation would continue after he left his employment with Barclays.[60]

Barclays, like Credit Suisse, took steps to protect its code. It permitted software developers to work at home, but only through Citrix, the mechanism that permitted a person to log into his or her own desktop and protected against copying or "leaking" of confidential proprietary information. Barclays, like Credit Suisse, did not permit the copying of its code to a removable device.[61] Barclays, like Credit Suisse, used a source control system to keep track of changes made to its code.[62]

6. Software Developers Generally Are Not Allowed To Take Code With Them

In general, when software developers change jobs they are not entitled to take anything with them but their experience and knowledge. They are not allowed to take with them any goods, electronics, or files.[63] Doni's supervisor at Credit Suisse, Alex Roitgarts, testified that he thought everyone on his team, including Doni, understood that.[64] He said that, when he later

[58] Hearing Tr. 158-60 (Jack); JX-14, at 7; Stip. ¶ 4. According to Barclays' later reconstruction of events, Doni's supervisor at Barclays, Jack, advised Doni at the outset of his employment with Barclays that no Credit Suisse information could be used in his work on LX because LX was competing technology. Jack explained to Doni that any use of Credit Suisse information could result in termination. JX-38, at 2-3.

[59] Hearing Tr. 152-56 (Jack).

[60] JX-14, at 7; Hearing Tr. 156-60 (Jack).

[61] Hearing Tr. 154 (Jack).

[62] Hearing Tr. 165-66 (Jack).

[63] Hearing Tr. 102 (Roitgarts).

[64] Hearing Tr. 102-03 (Roitgarts).

learned that Doni had copied and taken some of the Credit Suisse code, he felt "a mixture of first disbelief, and then anger to a degree."[65] He described Doni's actions as a "theft."[66]

David Jack similarly testified that he did not expect Doni to bring any computer code from Credit Suisse with him because computer code would be considered intellectual property confidential to the firm for which it was created. He said that Barclays had policies against taking code from it and he thought other firms would have similar policies. He noted that in 2009, 2010, and 2011 there had been a number of high profile cases in the industry. He thought that software developers would have been aware of those cases.[67]

7. Doni Uses Credit Suisse Code In His Barclays Work For His Own Benefit

Despite the numerous warnings he had received that he should not use Credit Suisse code in his work at Barclays, Doni installed copies of Credit Suisse code onto Barclays' system and used it in his Barclays work. He did so to benefit himself, although not financially. His actions were deliberate, and he took steps to conceal the Credit Suisse code that he installed on Barclays' system by putting the code in a file that was hidden from ordinary view.

A few days after he started at Barclays, Doni began transferring files related to Cadre, the Credit Suisse library of computer code, from his home computer to Barclays. Five separate times from September 16, 2010, to October 26, 2010, Doni emailed files containing Credit Suisse code from his home computer to himself at Barclays.[68] He loaded the files as sub-files into a hidden directory that he created for himself. No one but Doni or an administrator could see that the hidden files existed or access them. In so doing, Doni concealed the Credit Suisse code from his colleagues and supervisor at Barclays.[69]

The amount of Credit Suisse code Doni put into the hidden files was substantial. There were 111 files of source code in the first email that Doni sent to himself only a few days after he began working at Barclays.[70] Over the next few weeks, Doni sent himself other emails that

[65] Hearing Tr. 109 (Roitgarts).

[66] Hearing Tr. 109 (Roitgarts).

[67] Hearing Tr. 153-54, 194 (Jack).

[68] JX-22; JX-24; JX-25; JX-26; and JX-27.

[69] Hearing Tr. 255-68, 293-97 (Moor). The bulk of the files clearly indicated that they were associated with Crossfinder. Hearing Tr. 260 (Moor).

[70] Hearing Tr. 255-57 (Moor); JX-22.

attached zip files containing 470 source code files,[71] 35 source code files,[72] 394 source code files,[73] and 118 source code files.[74]

A substantial amount of code was required for the Credit Suisse code to be useful to Doni because the files Doni sent to himself at Barclays were interlinked. As noted above, one Cadre file or operation might "call" another. If the file or files being "called" were not available, then the first file might be inoperable.[75]

Although Doni's primary job when he began at Barclays was to evaluate vendors, not to develop code,[76] Doni began working with a team in London that was working on the system to be used in Europe. He worked with them not only on how to send messages between systems but also on how to encode the data of each message efficiently.[77]

It was in his work with the London team that Doni used some of the Credit Suisse code.[78] He made proposals to the London team, showing them prototype coding using the Credit Suisse code but without information that would have identified it as Credit Suisse code.[79] Essentially, he substituted a new name for the name Cadre. Forensic investigation later revealed that he made few changes to the Credit Suisse code that he shared with his Barclays colleagues.[80]

Doni testified that at the time of the events at issue he did not think he was going to hurt Credit Suisse by retaining and using the code at Barclays. He thought he was just saving himself some time, because he did not have to write the code from scratch.[81] Doni testified that he now understands how mistaken this view was.[82]

---

[71] Hearing Tr. 266-67 (Moor).

[72] Hearing Tr. 262-63 (Moor); JX-26.

[73] Hearing Tr. 266-67 (Moor); JX-24.

[74] Hearing Tr. 267 (Moor); JX-27.

[75] Hearing Tr. 264-67 (Moor).

[76] Hearing Tr. 205-08 (Jack). Doni did not start working at Barclays as early as expected, and, for that reason his supervisor at Barclays, Jack, had someone else begin the coding project he had originally intended to assign to Doni. Hearing Tr. 160-63 (Jack).

[77] Hearing Tr. 163-65, 208 (Jack).

[78] Hearing Tr. 385-96 (Doni); Hearing Tr. 163-65 (Jack); Stip. ¶ 5.

[79] Hearing Tr. 165-76 (Jack).

[80] Hearing Tr. 279-83 (Moor).

[81] Hearing Tr. 396-97, 414-15 (Doni).

[82] Hearing Tr. 416 (Doni).

8. Barclays Discovers The Credit Suisse Code On Its System And Decides To Fire Doni

On February 15, 2011, two Barclays software developers were talking when one of them, MP, noticed some code on Doni's desktop that was not Barclays' LX code. MP emailed their supervisor, David Jack, suggesting that Jack might want to talk to Doni about it. It was evening when Jack saw the email, so he waited until the next morning to talk to MP about what he had seen.[83] On February 16, 2011, Jack talked to MP and attempted to examine the code in Doni's files.[84]

Two things made the code suspicious. First, MP had indicated that he saw pricing code, which would not be open source code or Barclays' code. Second, Jack discovered that he could not access the code. It was located in files that were hidden from ordinary view. The path where the code was saved led to a file that could only be accessed by the owner of the file, Doni, or a Barclays system administrator. Doni had used a naming convention that programmers use to prevent a file from even appearing in an ordinary search of files.[85]

Jack gained access to the hidden file by going to a system administrator who could access the files in Doni's directory. Jack had been a software developer for years, and he knew the language in which the hidden file code was written. He saw that some of the code indicated that it had been created or last changed by VR, a Credit Suisse programmer Jack had tried, but failed, to hire around the same time as Doni. VR never worked for Barclays.[86] In a little more than ten minutes, Jack 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."[87] He did not go through the code any further after that.[88]

Jack went to see his manager and told him what he had found.[89] Jack was concerned because code from a direct competitor could be considered a serious problem and Doni may have violated Barclays' policies. Jack and his manager agreed that Jack would talk to Doni and ask him for an explanation.[90]

Jack then called Doni into an empty office to talk to him. He told Doni that there appeared to be foreign code in his home directory and asked Doni how it got there. Jack did not explain how the code had been discovered. Doni told Jack that he had copied the files onto a

[83] Hearing Tr. 177-79 (Jack); JX-36; JX-37; JX-39.

[84] JX-37 (containing timeline).

[85] Hearing Tr. 179-82 (Jack); Stip. ¶ 6; JX-20, at 14-16; JX-37.

[86] Hearing Tr. 182-85 (Jack).

[87] JX-37, at 2.

[88] JX-37, at 2.

[89] Hearing Tr. 183-84 (Jack).

[90] Hearing Tr. 186 (Jack).

thumb drive years ago when he was at Credit Suisse to use when working at home. Then, when he started at Barclays, Doni said that he had emailed the code to Barclays.[91]

Jack told Doni not to change anything. He told Doni that what he had done was a serious breach of Barclays' policies. He said he had never been involved in something like this and he wanted to wait for instructions. He explicitly told Doni not to delete the computer code files that Doni had taken from Credit Suisse.[92]

Jack returned to his manager and told him that Doni had admitted that the code came from Credit Suisse. They agreed that they would next go to human resources about the problem.[93]

Later that day, Barclays determined that it would terminate Doni. Barclays considered Doni's misconduct a fireable offense.[94]

9. Prior To Being Fired, Doni Deletes The Credit Suisse Code From Barclays' System, Contrary To His Supervisor's Instruction

Prior to Barclays communicating to Doni its decision to terminate him, Doni deleted the Credit Suisse code from the hidden file. He did so in violation of his supervisor's explicit instruction to leave everything as it was.

Doni testified that he was in shock after his conversation with Jack about the Credit Suisse code. He went home and talked to his wife, who has a computer programming background. Doni did not know how the Credit Suisse code had been discovered, and he and his wife were concerned that the code might fall into the hands of someone else who should not have it. Doni's theory was that it was fine for him to look at the files because he had worked on them, but it was not fine for someone else who had not worked on them to see them. He believed that Barclays could still retrieve the files through a backup system or other means, if necessary, but that deletion of the files would protect against disclosure more generally. Sometime between his conversation with Jack and the next morning, Doni deleted the Credit Suisse code from his hidden file.[95]

While Doni admits that deleting the files was wrong, he asserts that his purpose in deleting the code was not to conceal that he had improperly brought it with him from Credit Suisse. He points out that he had already admitted emailing the Credit Suisse code from his home equipment to Barclays. He also points out that he did not hide the code's origin. All the emails were identified as coming from his own home email account. Finally, as noted above,

---

[91] Hearing Tr. 187, 214-15 (Jack).

[92] Hearing Tr. 187, 189 (Jack); JX-37, at 1; Stip. ¶ 8.

[93] Hearing Tr. 188 (Jack).

[94] Hearing Tr. 188 (Jack).

[95] Hearing Tr. 402-07, 456-57, 462, 476-80, 496 (Doni).

Doni knew that the code would reside elsewhere in Barclays systems where he could not delete it. Doni reasons that concealment was impossible and, therefore, concealment could not have been the motive for deleting the hidden files.[96]

10. Barclays Fires Doni

The next day, on February 17, 2011, Barclays fired Doni.[97] Doni did not tell his supervisor at Barclays that he had deleted the Credit Suisse code from his hidden file. Afterward, however, his supervisor discovered the deletion and requested that the deleted files be restored from a backup tape, which they were.[98]

D. The District Attorney Charges Doni Criminally For His Misconduct

Subsequently, the New York District Attorney criminally prosecuted Doni for his use of the Credit Suisse computer source code at Barclays. A two-count information charged him with computer trespass, a felony, and unauthorized use of a computer, a misdemeanor. Doni then entered into a plea agreement that, after satisfaction of certain conditions and restrictions, permitted him to withdraw his guilty plea as to the felony and be sentenced on the misdemeanor count in full satisfaction of the information. Doni satisfied the conditions and was sentenced for the misdemeanor to three years on probation, which was terminated after two years in light of his good behavior.[99]

E. Evidence Regarding Harm To Credit Suisse

As events unfolded, the London team rejected Doni's ideas even before Barclays discovered the Credit Suisse code on its system. After the discovery of the Credit Suisse code, Barclays went to great lengths to ensure that no Credit Suisse code was used in Barclays' dark pool software.[100] Doni did not contribute to the building of Barclays' upgraded LX system,[101] and there is no evidence that Barclays gained any competitive advantage from Doni's use of the

[96] Hearing Tr. 476-80 (Doni); Hearing Tr. 214-17 (Jack); Hearing Tr. 302 (Moor).

[97] Hearing Tr. 407-08 (Doni).

[98] Hearing Tr. 189-90 (Jack).

[99] Hearing Tr. 408-13 (Doni); JX-42; JX-43; JX-44; JX-45. In addition to the criminal charges against him, Doni suffered other consequences from his misconduct. He lost a substantial bonus Barclays was about to pay him, as well as stock options from Credit Suisse. Since leaving the securities industry, he has been unable to find another steady job and has been working on small consulting projects. Hearing Tr. 493-99 (Doni).

[100] The London team thought that Doni's code was "clumsy." So they developed and implemented a different solution. The Credit Suisse code was not included. Hearing Tr. 488-89 (Doni). After Barclays terminated Doni, the code that he wrote was in Barclays' system as a draft or prototype, but it was never put into production or used in any of Barclays' trading systems. Barclays abandoned the project he was working on. There was a concern that some of the work had been tainted. Hearing Tr. 192-94 (Jack).

[101] Hearing Tr. 225 (Jack).

Credit Suisse code or that Credit Suisse lost its competitive position as a result of Doni's misconduct.[102]

Doni's initial copying of the code to use in his work at Credit Suisse did not physically damage the code. The original code was not corrupted or modified in any noticeable way.[103]

F. Doni's Credibility And Remorse

Doni admits the facts underlying the charges. He also admits that his conduct violated the ethical standard set out in FINRA Rule 2010. He recognizes that a serious sanction will and should be imposed, and understands that, as a result, he may never work in the securities industry again. However, he views a bar as categorically different from other sanctions; he views it as removing any opportunity to redeem himself. Doni gives assurances that he would not engage in misconduct in the future, and he speaks movingly of a desire to serve as a role model to his young family.[104]

The Hearing Panel finds Doni's testimony regarding his misconduct credible, although his failure to read agreements and to pay attention to the training he received regarding the confidential and proprietary nature of the Credit Suisse code was grossly negligent and inexcusable. Doni testified in a straightforward way. He did not obfuscate. His explanations for why he did the things he did were consistent, although the explanations reveal poor judgment. Doni's credibility also was bolstered when his testimony and the testimony of his supervisor at Credit Suisse differed on a point, and telephone records later proved that Doni had testified truthfully.[105]

The Hearing Panel further finds that Doni's unflinching self-criticism reflects true remorse. 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

---

[102] Hearing Tr. 123 (Roitgarts).

[103] Hearing Tr. 135-36 (Roitgarts).

[104] Hearing Tr. 498-503 (Doni). Doni testified, "I have to prove something to myself. That's – what I did was wrong and I have to rebuild my family life. I do have a young family, I have children who look up to me, and I have to be a role model to them, I have to represent something to them. And that is what I'm trying to do." *Id*. at 502.

Regarding the difference between a lengthy suspension and a bar from the industry, Doni testified, "A bar to me is like a – it's like a life sentence that I have. I'm being put away forever. I don't even have a chance. I do understand that the road ahead is very difficult and I may never actually work in this industry. But ... I do need this second chance. If you give me another option – I mean, ... I may never work, I may work, but at least I have the hope and keep trying." Hearing Tr. 502-03 (Doni). If suspended rather than barred, Doni pledges to create a track record that would allow him to be trusted again. Hearing Tr. 503 (Doni).

[105] Hearing Tr. 125-26, 129 (Roitgarts); Hearing Tr. 423-45 (Doni testimony, colloquy of counsel, ruling); Hearing Tr. 508-09 (Hearing Officer's instructions); Order dated December 2, 2015.

the proceeding, Doni acknowledged the grave nature of his misconduct.[106] Doni did not hedge or qualify his admissions as to the wrongful nature of his conduct. In just one example, Doni called his installation of the Credit Suisse code on Barclays' system "certainly wrong."[107] He further condemned his misconduct, saying, "[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."[108]

III. Conclusions Of Law

A. Doni Violated FINRA Rule 2010 By Converting The Credit Suisse Computer Code To His Own Benefit

1. Conversion Is A Violation Of FINRA Rule 2010

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."[109] Rule 2010 is a broad and generalized ethical provision that applies to any unethical business-related conduct whenever the "misconduct reflects on [an] associated person's ability to comply with the regulatory requirements of the securities business."[110]

Conversion has long been recognized as conduct that violates FINRA Rule 2010, and FINRA's Sanction Guidelines provide that a bar is the "standard" sanction for the conversion of funds or securities.[111] That is because conversion of funds or securities is fundamentally a dishonest act that reflects negatively on a person's ability to comply with regulatory

---

[106] The Hearing Panel's observations relate to Doni's testimony and demeanor. Doni's counsel also stressed throughout the proceeding that his arguments on Doni's behalf should not be viewed as an attempt by Doni to deny or diminish the seriousness of the misconduct. Hearing Tr. 33-34, 37 (remarks of counsel).

[107] Hearing Tr. 418 (Doni).

[108] *Id*. *See also* Hearing Tr. 498-99 (Doni) for yet another example. Doni testified, "I was negligent, stupid or casual, or whatever you may call it. I thought I knew, I assumed I wasn't doing the wrong things, or that my view of things was right…. So I used to be on that end of the spectrum, being casual, negligent. Now I've moved to the other end of the spectrum where I think many, many times before I do anything now. This one trouble has been enough." Doni testified that he now reads carefully contracts, certifications, and anything else he signs related to his employment to make sure that he understands what is written and how to comply with the requirements. Hearing Tr. 499-500 (Doni).

[109] FINRA Rule 0140(a) imposes the same obligation on persons associated with a member firm. Rule 0140(a) provides that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules."

[110] *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). *See also John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *28-29 (Feb. 10, 2012) (collecting cases).

[111] FINRA Sanction Guidelines (2015) ("Guidelines") at 36, http://www.finra.org/industry/sanction-guidelines. *See, e.g., Keilen Dimone* Wiley, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952, at *15 (Dec. 4, 2015) (quoting Guidelines at 36 & n.2 (2013)); *Mullins*, 2012 SEC LEXIS 464, at *33 (quoting Guidelines at 38 (2007)).

requirements and raises concerns that the person is a risk to investors, firms, and the integrity of the securities markets.[112]

2. Doni's Misconduct Was Conversion

Neither the NAC in its remand order nor the parties in briefing identified a single FINRA proceeding in which computer code was the subject of a conversion charge. For that reason, although we have started with the definition of conversion contained in FINRA's Sanction Guidelines, which we find clear and unambiguous, we also have considered the issues raised in the NAC remand order, various arguments raised by the parties, and whether it is consistent with the purposes of a FINRA disciplinary proceeding to hold that Doni's copying of the Credit Suisse computer source code to use for his own benefit was conversion.

(a) Doni's Misconduct Fits FINRA's Definition Of Conversion

Doni's deliberate unauthorized use of the Credit Suisse computer source code for his own benefit in his work at Barclays meets the definition of conversion in FINRA's Sanction Guidelines. 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.

Simply put, conversion occurs when a person uses property belonging to another without authorization for his or her own benefit. Instead of benefiting the rightful owner, the property has been "converted" to the benefit of the wrongdoer. That is exactly what Doni did; without authorization, he converted the computer source code belonging to Credit Suisse to his own benefit.

All the elements of the definition of conversion in the Guidelines are satisfied by Doni's misconduct.

- *First*, Doni's conduct was intentional, meaning that he intentionally emailed the code to himself at Barclays to use in his work there. There was nothing inadvertent or mistaken about his placing the Credit Suisse code into a hidden file on Barclays' system or his use of the code after changing the identifying information that would reveal it as belonging to Credit Suisse.

- *Second*, Doni's conduct was unauthorized. Credit Suisse prohibited him from copying its code and from using it in any way except for its benefit. Barclays also prohibited him from bringing the Credit Suisse code with him to Barclays.

[112] *Dep't of Enforcement v. Grivas*, No. 2012032997201, 2015 FINRA Discip. LEXIS 16, at *14 (NAC July 16, 2015), *aff'd*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173 (Mar. 29, 2016); *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22 (Aug. 22, 2008).

- *Third*, the code was Credit Suisse's property. Credit Suisse had a right to exclusive use of it, which it went to great lengths to protect.

- *Fourth*, Doni took possession of the Credit Suisse code by making a copy of it, and he exercised ownership of the code by using it at Barclays for his own benefit.

- *Fifth*, Doni did not own the Credit Suisse code and had no right to possess it.

(b) Tangibility Is Not A Required Element Of Conversion

Doni contends—relying on the common law definition of the tort of conversion—that the Hearing Panel cannot find that he converted the Credit Suisse computer source code because it is not tangible property.[113] Doni's argument is misplaced. The definition of conversion in the Guidelines is not limited to tangible property. The Guidelines define conversion as the taking of property of any kind. The Guidelines do not distinguish between tangible and intangible property. Doni also fails to acknowledge fully that courts now generally recognize the importance of protecting intangible property such as computer source code and thus permit claims for the conversion of such property.

Intangible confidential business information has been long recognized as property.[114] As the U.S. Supreme Court explained in *Carpenter*, a case involving the misappropriation of the Wall Street Journal's pre-publication business information, confidential business information is a species of property, and the firm to which it belongs has the exclusive right to use it and benefit from it.[115] The Court said, "The confidential information was generated from the business, and the business had a right to decide how to use it … it is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter."[116] The Court said that the "intangible nature [of the Journal's confidential business information] does not make it any less 'property' protected by the mail and wire fraud statutes."[117]

[113] Resp. PH Brief at 18-24.

[114] *Carpenter v. United States*, 484 U.S. 19, 26 (1987).

[115] *Id*. In *Carpenter* the Court held that the intangible nature of the Wall Street Journal's pre-publication private confidential business information did not rob it of the protection of the federal mail and wire fraud statutes. *Id*. at 25.

[116] *Id*. at 26-27.

[117] *Id*. at 25.

Tangibility is an issue only because of the common law history of the tort of conversion. As Judge Kozynski of the Ninth Circuit summarized

> Conversion originated in the fifteenth century as a remedy against one who found a plaintiff's lost goods and put them to his own use. Because of this pedigree, the tort became encrusted … with legal rules that assumed the property taken was tangible …. This limitation was harmless enough when people's worldly goods consisted of livestock and farm tools, but today it's a relic.[118]

Judge Kozynski noted that the *Restatement (Second) of Torts* and some states still cling to "the dated distinction between tangibles and intangibles," but he further observed that many courts have rejected the distinction, extending conversion to intangibles as well as tangibles.[119] He later declared when the case returned to the Ninth Circuit, "Conversion was originally a remedy for the wrongful taking of another's lost goods, so it applied only to tangible property. Virtually every jurisdiction, however, has discarded this rigid limitation to some degree."[120] Thus, the modern trend is to permit a claim for the conversion of intangible property.[121]

---

[118] *Kremen v. Cohen*, 325 F.3d 1035, 1045 (2003) (citations and quotations omitted). Judge Kozynski was dissenting from an order certifying to the California Supreme Court the question of whether under California law intangibles may only be the subject of a conversion claim if "merged" into a tangible document. He believed that the California Supreme Court had, years before, ruled that any type of property, including intangible property, could be the subject of conversion. Pursuant to the certification procedure, the California Supreme Court declined to address the question. The case then returned to the Ninth Circuit, where Judge Kozynski wrote for the panel, holding that the owner of internet domain names had a viable cause of action under California law for conversion. *Kremen v. Cohen*, 337 F.3d 1024, 1029-36 (2003).

See also Integrated Direct Marketing, LLC v. May, 2015 U.S. Dist. LEXIS 150096, at *7-28 (Nov. 3, 2015) (collecting cases showing the range of approaches to the issue of tangibility).

[119] *Kremen v. Cohen*, 325 F.3d at 1045.

[120] *Kremen v. Cohen*, 337 F.3d at 1031.

[121] For example, in New York, where Doni's misconduct occurred, the New York Court of Appeals, New York's highest court, has declared that a conversion claim can be based on the unauthorized taking of electronic computer records and data. *Thyroff v. Nationwide Mutual Ins. Co*., 864 N.E.2d 1272, 1278 (N.Y. 2007). While not binding on FINRA, the *Thyroff* case is instructive. In that case, the New York Court, like Judge Kozynski, took the view that the traditional definition of conversion is outmoded. The New York Court declared, "The hand of history lies heavy on the tort of conversion," quoting from Prosser, *The Nature of Conversion*, 42 Cornell LQ 168, 169 (1957). *Id*. at 1274. After summarizing the evolution of the tort of conversion from the time of the Norman Conquest of England in 1066, the Court concluded that the time had arrived to expand the concept of conversion to meet the commonsense needs of modern society. *Id*. at 1274-77. The New York Court noted that "society's reliance on computers and electronic data is substantial, if not essential." *Id*. at 1277. The Court observed that in the past intangible property interests could be converted only by exercising dominion of the paper document that represented that interest. The Court contrasted that era with the present, when "electronic documents and records stored on a computer can also be converted by simply pressing the delete button." *Id*. The Court then noted that "it generally is not the physical nature of a document that determines its worth, it is the information memorialized in the document that has intrinsic value." *Id*. at 1278. That value should be equally protected whether it resides in a computer or on paper. *Id*. The Court concluded, "[T]he tort of conversion must keep pace with contemporary realities of widespread computer use." *Id*.

Nonetheless, Doni argues that the modern trend is a "small minority" view, and that FINRA adheres to the "traditional" definition of conversion. He bases the argument mainly on two decisions, *Paratore* and *Westberry*,[122] which he contends are binding precedent for applying the "traditional" definition of conversion in FINRA proceedings. In particular, he notes that *Paratore* cites the *Restatement*, and that the *Restatement* declares that conversion involves chattels, a tangible form of property.[123]

But *Paratore* and *Westberry*, do not bear the weight that Doni places on them. Both cases involve an unauthorized taking of customer funds—a tangible type of property. Thus, the appellate body (the NAC in *Paratore*; the National Business Conduct Committee ("NBCC") in *Westberry*) had no reason in either case to address whether the definition in the Guidelines covers intangible property. Nor does either case hold that FINRA is bound by common law principles or the *Restatement*.[124]

Even if FINRA were to choose to be guided by one of the state common law approaches to the tort of conversion—which it has not—Doni offers no rational reason that FINRA should choose the "traditional" approach. Doni's argument promotes a rigid, technical, and outmoded definition of the tort of conversion in place of the broad definition of conversion contained in FINRA's own Guidelines. Even the *Restatement*, when it was published in 1965, declared that some types of intangible property are subject to conversion, and that "[t]he law is evidently undergoing a process of expansion, the ultimate limits of which cannot be determined."[125] As one district court explained,

---

See also Astroworks, Inc. v. Astroexhibit, Inc., 257 F. Supp. 2d 609, 618 (S.D.N.Y. 2003) (allowing a conversion claim for a copyrighted and trademarked website embodying plaintiff's idea); *Eysoldt v. ProScan Imaging*, 194 Ohio App. 3d 630, 638 (Ohio Ct. App. 2011) (finding that "the law has changed" to allow claims for conversion of "identifiable intangible property rights" including domain names and email accounts); *Warshall v. Price*, 629 So. 2d 903, 904-05 (Fla. Dist. Ct. App. 1993) (allowing a claim for conversion of a patient list when the defendant copied the list and used it to solicit patients because those actions denied the plaintiff "the benefit of his confidential patient list" even though plaintiff never lost access to the list); *Conant v. Karris*, 165 Ill. App. 3d 783, 792 (Ill. App. Ct. 1987) (finding that allegations that defendants disclosed and used confidential information "contained in a computer printout" were sufficient to state a claim for conversion because "the original owner would be deprived of the benefit of the information" through such disclosure and use (internal quotation marks omitted)).

[122] *Dep't of Enforcement v. Paratore*, No. 2005002570601, 2008 FINRA Discip. LEXIS 1 (NAC Mar. 7, 2008); *Dist. Bus. Conduct Comm. v. Westberry*, No. C07940021, 1995 NASD Discip. LEXIS 225 (NBCC Aug. 11, 1995).

[123] Resp. PH Brief at 18-20, 24-26. Respondent does not argue that state law regarding conversion directly applies to a FINRA disciplinary proceeding. The NAC has rejected the argument that state law applies in a FINRA disciplinary proceeding for conversion (*Grivas*, 2015 FINRA Discip. LEXIS 16, at *14 n.19 (citing *Mullins*, 2012 SEC LEXIS 464, at *28-29)), and the SEC has analyzed allegations of conversion using the definition of conversion contained in FINRA's Sanction Guidelines (*Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173 (Mar. 29, 2016)). In so doing, the SEC noted, "We have previously held … that the 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." *Id*. at slip op. 7 n.19.

[124] *Paratore*, 2008 FINRA Discip. LEXIS 1, at *10.

[125] *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 2011 U.S. Dist. LEXIS 113702, at *12 (E.D. Va. Oct. 3, 2011).

> The purpose of the tort of conversion is to protect individuals from those who interfere with their property rights in a way that is inconsistent with the full exercise of those rights. In this technology-driven world, the value of intangible property cannot be disputed, and a decision to limit conversion to tangible property or intangible property merged in a document symbolizing ownership would leave domain name users, satellite programmers, owners of telephone networks and internet servers, and others similarly situated unable to use an action for conversion for substantial interference with their rights.[126]

Importing a centuries-old and outmoded definition of conversion into a FINRA disciplinary proceeding would not be in the public interest. FINRA brings disciplinary charges for conversion where there is concern about a person's trustworthiness. That concern is the same, whether the property involved is tangible or intangible.

(c) Deprivation Is Not A Required Element Of Conversion

In a FINRA disciplinary proceeding, conversion does not require either intent to deprive the true owner of the property or actual deprivation. The definition of conversion in the Guidelines contains no such requirement.

On occasion in FINRA disciplinary proceedings, however, adjudicators have distinguished "improper use" of a customer's funds or securities from conversion on the basis that, where the wrongdoer intends to permanently deprive the rightful owner of the property, the misconduct rises to the level of conversion. In contrast, improper use may be found where the wrongdoer applies a customer's funds or securities in a manner different from the customer's instructions, without intending to deprive the rightful owner of the property and its benefits.[127]

While intent to deprive the rightful owner of his or her property has been viewed as sufficient to demonstrate conversion (as opposed to misuse),[128] no FINRA adjudicator has squarely held that intent to deprive the rightful owner of his or her property, or actual

---

[126] *Id*. at *16.

[127] *See generally Dep't of Enforcement v. Barnes*, No. 2010024271001, 2013 FINRA Discip. LEXIS 27, at *17-18 & nn.34-36 (OHO July 18, 2013). *See also Westberry*, 1995 NASD Discip. LEXIS 225, at *19 & n.16 (conversion "generally" requires a showing of intent to deprive the true owner of his or her property.

[128] *Dep't of Enforcement v. Tucker*, No. 2009016764901, 2013 FINRA Discip. LEXIS 45, at *13-14 (NAC Dec. 31, 2013).

deprivation, is a *necessary element* of conversion.[129] In fact, two FINRA hearing panels have rejected the argument that intent to deprive is required to show conversion.[130]

Like the argument that only tangible property may be converted, the argument that conversion requires intent to deprive or actual deprivation reflects an unduly restrictive and outmoded view of conversion. An unauthorized taking and use of tangible property for one's own benefit instead of the owner's benefit almost by definition involves depriving the rightful owner of possession and ownership. The physical property cannot be in two places at the same time.[131]

Intangible property like computer code, however, may be stolen by copying without depriving the owner of the original code. In such a case, regardless of whether the owner retains possession and use of the computer code, the wrongdoer has converted the property for the wrongdoer's benefit. That is the essence of conversion.

In any event, the unauthorized copying and use of intangible property deprives the owner of an important aspect of his or her property rights—the right to exclusive use and confidentiality—even if the owner also retains use of the property. As the Supreme Court noted in *Carpenter*, exclusivity is an important aspect of confidential business information.[132] The Court made the same point in *Ruckelshaus v. Monsanto Co.*, where it said, "The right to exclude others is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[133] The unauthorized taking and use of intangible property for the benefit of someone other than the owner is an act of "dominion" inconsistent with the true owner's rights.[134]

---

[129] *Dep't of Enforcement v. Waldock*, No. 2012031142101, 2014 FINRA Discip. LEXIS 19, at *26 & n.69 (OHO May 8, 2014) (collecting cases).

[130] *Id*. at *25. *See also Dep't of Enforcement v. Argomaniz*, No. C07990013, 1999 NASD Discip. LEXIS 49, at *16-31 (OHO Oct. 18, 1999), which explained that misuse falls generally into the category of negligence, but conversion involves an intentional taking and use for the associated person's own benefit. The hearing panel in that case expressly ruled that conversion does not require a finding that a respondent intended to permanently deprive the true owner of the property.

[131] The point is illustrated in *Mullins*, 2012 SEC LEXIS 464, at *32-42, where the respondent made unauthorized personal use of gift certificates and wine that he had purchased with the funds of a foundation for which he was a fiduciary. Respondent's personal consumption of the gift certificates and wine necessarily deprived the owner of that property.

[132] *Carpenter*, 484 U.S. at 26-27.

[133] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-12 (1984).

[134] *See Kolon*, 2011 U.S. Dist. LEXIS 113702, at *7 (the defendant's use of copies of confidential business information was an act of "dominion" inconsistent with the plaintiff's property rights, even though the plaintiff still had the originals).

(d) Intellectual Property Law Does Not Preempt This FINRA Disciplinary Proceeding

As noted above, Credit Suisse's computer source code was not trademarked or copyright protected. Accordingly, the law protecting intellectual property by trademark or copyright is irrelevant to this proceeding.

Credit Suisse does consider its computer source code a trade secret. The firm treats the code as confidential and proprietary and goes to great lengths to protect it from disclosure. Many states have enacted the Uniform Trade Secrets Act ("UTSA") to assist in the protection of trade secrets from misappropriation. Doni argues that state laws regarding the protection of trade secrets laws consistently preempt conversion claims.[135] It is unclear which state law regarding trade secrets, if any, might apply to the Credit Suisse code.[136]

Even if the code had been protected by copyright law or was covered by a version of the UTSA, this FINRA disciplinary proceeding would not be preempted. Preemption generally is a mechanism for addressing two concerns: (i) to avoid duplication of claims or recoveries when enforcing rights, and (ii) to resolve a conflict between legal requirements. For example, Section 301 of the Copyright Act expressly provides that federal copyright law preempts state law when a claim asserted under state law is the "equivalent" of a copyright claim.[137] Copyright law also may have a preemptive effect under the more general analysis referred to as "conflict preemption," which considers whether state law stands as an obstacle to Congress's objectives in the copyright law.[138] State law versions of the UTSA, similarly, preempt conversion claims where they cover the same rights and remedies as a claim under the trade secrets law.[139]

Neither basis for preemption exists here. A FINRA disciplinary proceeding is not the equivalent of a claim by the property owner under intellectual property law. Nor is there a conflict between the private enforcement of the victim's rights and a FINRA disciplinary proceeding. Regardless of whether an injured party can and does obtain relief by asserting intellectual property rights, FINRA has authority to determine whether the person who invaded those rights is fit to continue working in the securities industry.

---

[135] Resp. PH Br. 36-38.

[136] Enforcement points out that New York, the state where Doni's misconduct took place, has not adopted the UTSA. Enf. Reply 6 & n.24.

[137] 17 U.S.C. 301. *See generally Harris v. Lexjet Corp.*, 2009 U.S. Dist. LEXIS 113284, at *11-13 (E.D. Va. Dec. 3, 2009) (copyright law preempts a state law claim for conversion if it is not qualitatively different from a copyright infringement claim).

[138] *See generally* 1 *Nimmer on Copyright* § 1.01.

[139] Matthew Bender, 3-26[8], Business Torts § 26.09 (2016). *See* Resp. PH Br. 36-38.

(e) Prior Charging Decisions In Other Cases Do Not Foreclose Enforcement From Charging Conversion In This Case

Doni's chief argument is that Enforcement did not charge conversion in other disciplinary cases involving the unauthorized copying of computerized information. He contends that this demonstrates that it is inappropriate in this case to charge him with conversion.[140] Enforcement counters that the charges in other cases are irrelevant, because charging decisions in other cases have no bearing on the charging decision in a different case.[141]

Enforcement is correct that its decision to charge Doni with conversion is not limited by prior cases where it did not charge conversion. As the NAC said in *Olson*, "Enforcement's decision to charge [respondent] with conversion, and to seek her bar from the securities industry under the conversion Guideline, is entitled to deference."[142] Indeed, the NAC remanded this matter because the Hearing Officer originally assigned to the case did not address Enforcement's conversion charge.[143] Enforcement, like a criminal prosecutor, has broad discretion in determining what charges to file. Courts generally do not interfere with a criminal prosecutor's charging decision,[144] and we do not second-guess Enforcement's decision to charge conversion here.

B. Doni Violated FINRA Rule 2010 By Disobeying His Supervisor's Instruction

After Barclays discovered the Credit Suisse computer code on its system and confronted Doni, Doni's supervisor told him to leave everything as it was while Barclays considered what should be done. Doni disobeyed that express instruction when he deleted the file with the Credit Suisse code from his own Barclays files.

Enforcement argues that Doni was attempting to conceal his misconduct and that this attempt to conceal violated the high standard of commercial honor imposed by FINRA Rule 2010. Enforcement argues that Doni was in a panic and was not thinking clearly about the other places in Barclays' computer systems where the code would also be found.[145]

---

[140] Resp. PH Br. 38-45. *See Stephen Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908 (Dec. 11, 2014), *aff'd*, 2016 U.S. App. LEXIS 4367 (Mar. 9, 2016); *Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54 (Jan. 6, 2012).

[141] Enf. PH Br. 21-22.

[142] *Dep't of Enforcement v. Olson*, No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at *15-16 (Bd. of Governors May 9, 2014), *aff'd*, Exchange Act Release No. 75868, 2015 SEC LEXIS 3629 (Sept. 3, 2015) (citations omitted). We reject Doni's argument that Enforcement's charging decision in *Olson* was entitled to deference only because it involved the type of property that has long been recognized as subject to conversion, funds. That argument is inconsistent with our holding that conversion in a FINRA disciplinary proceeding includes the conversion of intangible property.

[143] *Dep't of Enforcement v. Doni*, No. 2011027007901 (NAC July 25, 2014) at 6.

[144] *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 976-77 (9th Cir. 2000).

[145] Hearing Tr. 522-24 (closing).

Doni testified that he was in shock when his boss confronted him about the Credit Suisse code. However, he asserts that when he deleted the files in which he had placed the Credit Suisse code he was not trying to conceal what he had done. He had already confessed that he brought the Credit Suisse code with him to Barclays. He testified that he deleted the file from his computer in an effort to protect the Credit Suisse code—an effort he now recognizes was misguided and wrong.

We do not have to divine what exactly motivated Doni to delete the file in order to conclude that he violated the high ethical standard set by FINRA Rule 2010. Regardless of motive, Doni impeded Barclays' internal investigation when he deliberately violated his supervisor's express instruction not to change anything in his computer files. His supervisor gave him that instruction in the context of an investigation of serious misconduct. Doni's purported motive to protect the Credit Suisse code does not alter the improper nature of his action. Such conduct undermines the ability to supervise and regulate behavior in the industry. We conclude that Doni engaged in conduct inconsistent with the ethical norms of professional conduct.[146]

IV. Sanctions

A. Conversion

1. The Sanction Should Be Tailored To The Particular Circumstances Of The Case

It is well established that the appropriate sanction "depends on the facts and circumstances of each particular case."[147] The Guidelines instruct FINRA adjudicators to analyze the particular circumstances of a case and to tailor the sanction to the particular misconduct. The Guidelines are not fixed sanctions and are not intended to be absolute. Adjudicators may impose sanctions outside the range recommended by the Guidelines, depending on the facts and circumstances of the particular case.[148]

We further note that although a bar is the standard sanction in cases involving the conversion of funds or securities, a bar is not mandatory. The word "standard" is frequently defined as common, usual, or customary—it is not the same as mandatory.[149] We also note that Securities and Exchange Commission ("SEC") precedents state that a bar is standard for

[146] A FINRA Rule 2010 violation requires either bad faith or a breach of ethical norms in the industry. *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013).

[147] *Carl M. Birkelbach*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *115-16 (July 2, 2013), *pet. denied sub nom., Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

[148] Overview, Guidelines at 1; General Principle 3, Guidelines at 3.

[149] See synonyms for the word "standard" when used as an adjective, as provided by Oxford Dictionaries: http://www.oxforddictionaries.com/us/definition/american_english/standard. *See also Dep't of Enforcement v. Lee*, No. C10980070, 1999 NASD Discip. LEXIS 55, at *5 (OHO June 18, 1999) (noting that the "standard" bar for failing to respond to a requests for information pursuant to Rule 8210 is not "mandatory," and imposing a fine, one-year suspension, and requirement to requalify).

conversion "absent mitigating factors."[150] By acknowledging that circumstances might exist where a bar would not be the appropriate sanction in a conversion case, the precedents provide for some flexibility—albeit limited—in the imposition of sanctions for conversion.[151]

Because this is acknowledged to be a case of first impression—unauthorized taking of computer code has never before been charged as conversion—we believe that it is particularly important to analyze the sanction appropriate in the circumstances of this case. We also believe that it is only fair to conduct that particularized analysis, rather than automatically applying the "standard" sanction for conversion. This is particularly so where the sanction that otherwise would be imposed—a bar from the industry—has been described as "the securities industry equivalent of capital punishment."[152]

2. In This Case, A Suspension And Fine Are Sufficiently Remedial

In conducting our analysis, we have considered relevant factors set forth in the Sanction Guidelines and addressed other factors typically considered in assessing sanctions in disciplinary proceedings. These include, among others, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, and the respondent's recognition of the wrongful nature of the conduct.[153]

(a) The Level Of Culpability

A bar is the standard sanction in the context of the conversion of funds and securities, because the level of culpability is high.[154] Where a person intentionally takes funds or securities for his or her own benefit without authorization, the wrongful quality of the action is clear. Conversion of funds has been described as "flagrant dishonesty."[155] Such misconduct raises a concern that the person lacks integrity and poses a "continuing danger to investors and other

---

[150] *Olson*, 2015 SEC LEXIS 3629, at *9 & n.14.

[151] At least once, the NAC has imposed less than a bar in a conversion case. In *Dep't of Enforcement v. Foran*, No. C8A990017, 2000 NASD Discip. LEXIS 8 (NAC Sept. 1, 2000), the NAC reduced the bar imposed by the hearing panel, and, instead, imposed a two-year suspension with a requirement to requalify. However, as the SEC said in *Olson*, 2015 SEC LEXIS 3629, at *39, the justification for the reduced sanction was "vague" and "conclusory" and provides little guidance.

[152] *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (*citing PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007) ("PAZ I")). *See also Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *53-54 (Dec. 7, 2010) ("A bar and expulsion are severe sanctions. Applicants' demonstrated lack of fitness to be in the securities industry, however, supports the remedial purpose to be served by such sanctions. Applicants represent a clear danger to the investing public if they remain in the securities industry ….").

[153] *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[154] Principal Consideration 13, Guidelines at 7. The degree of culpability associated with misconduct should always be considered in determining the appropriate sanction. Principal Consideration 13 provides that an adjudicator should consider whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence.

[155] *Grivas*, 2015 FINRA Discip. LEXIS 16, at *25.

securities industry participants (including would-be employers)." A bar is remedial in that context because it addresses the continuing danger the dishonest person would pose if permitted to continue in the industry.[156] In imposing a bar, adjudicators often focus on the future risk the respondent poses, not merely on the respondent's past misconduct.[157]

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.[158]

Here, however, there is no evidence that Doni took the Credit Suisse code in order to realize a monetary benefit. There is no evidence that he intended to sell the code, no evidence that he was hired because he would bring the code with him, and no evidence that he received a bonus or other financial incentive because his use of the code enhanced his value to Barclays. Also there is no evidence that Doni could not have done his job at Barclays without the Credit Suisse code. The record is that Doni used of the code in his work at Barclays merely as a personal convenience.

(b) Respondent's Remorse

Doni is truly remorseful. We find his remorse mitigating. The SEC has said that remorse is hardly a guarantee of changed behavior, particularly when it only happens as a result of the misconduct having been discovered.[159] However, in this particular case, where the Respondent has been consistently respectful of regulatory concerns, has not denied his misconduct, and has

---

[156] *Olson*, 2015 SEC LEXIS 3629, at *18-19, *40.

[157] The purpose of disciplinary sanctions in a FINRA proceeding is to protect investors, other member firms and associated persons, and to promote the public interest. The sanctions are intended to be remedial. Overview, Guidelines at 1. *See also North Woodward Financial Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *38 n.44 (May 8, 2015). Sanctions imposed in a FINRA disciplinary proceeding are not intended to be punitive. *Alfred P. Reeves*, Exchange Act Release No. 76376, 2015 SEC LEXIS 4568, at *13 & n.13 (Nov. 5, 2015) citing *PAZ I*, 494 F.3d at 1065.

A bar is the standard sanction for only three types of rule violations (out of approximately 80 specific rule violations). *Mullins*, 2012 SEC LEXIS 464, at *73-74. In connection with those three rule violations, the level of culpability is high, and the risk posed by the wrongdoer is correspondingly high. The judgment has been made that, absent mitigating factors, a bar is necessary in order to protect investors and other industry professionals from someone who is not fit to be in the industry. A bar is standard for conversion of funds or securities, for cheating on an examination, and for failing to provide information requested pursuant to FINRA Rule 8210. Guidelines at 33 (failure to respond or failure to respond truthfully to Rule 8210 request), 36 (conversion of funds or securities), and 40 (cheating on an examination). *See also Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *22 n.27 (Nov. 8, 2007).

[158] Principal Consideration 17, Guidelines at 7. Whether misconduct resulted in potential monetary gain is a consideration in tailoring a sanction.

[159] *Olson*, 2015 SEC LEXIS 3629, at *19 & n.29.

acknowledged the serious nature of his wrongdoing, we credit his representation that he is today a different man. Even if he only learned that what he did was wrong after discovery of the misconduct, we believe that he nevertheless has learned the lesson.[160]

We contrast Doni's remorse with the attitude of other respondents who deny the wrongful nature of their conduct or are cavalier about it. In such cases, the likelihood of a recurrence of misconduct is high and the respondent poses a clear risk of future misconduct. Then a bar is a remedial sanction and is not punitive.[161]

This case is different. Although there is always a risk that misconduct may be repeated, Doni does not represent the same risk of future misconduct as those who continue throughout the proceeding to deny their wrongdoing or who shrug off the seriousness of it.[162]

(c) Other Aggravating And Mitigating Factors

Doni argues as a mitigating factor that Credit Suisse was not harmed by his misconduct because it retained the use of its code without alteration, and there was no evidence that it suffered a monetary loss or a loss of competitive position. As discussed above, Credit Suisse was harmed—it was deprived of its right to exclusive use of its confidential, proprietary computer source code. More importantly, however, harm is not required to impose a bar, and lack of harm is not mitigating. Regardless of harm, the nature of the misconduct may be sufficient to conclude that a person is unfit to be in the industry.[163] Furthermore, if Doni's misconduct had not been discovered within a matter of months of his joining Barclays, Credit Suisse could have suffered more visible harm.[164]

---

[160] The Guidelines indicate that where a respondent accepts responsibility for misconduct prior to detection it is mitigating. Principal Consideration 2, Guidelines at 6. But, even if remorse only comes as a result of discovery of the misconduct, if it is genuine, it does diminish to some degree the likelihood that the remorseful respondent will engage in misconduct in the future.

[161] For example, in *Grivas*, 2015 FINRA Discip. LEXIS 16, at *26, the NAC concluded that a bar was necessary in part because the respondent had not acknowledged his misconduct and did not provide assurances that he would not engage in similar conduct in the future. *See also Mullins*, 2012 SEC LEXIS 464, at *32-42; *Mission Sec.*, 2010 SEC LEXIS 4053, at *53-54 & n.49 (citing cases).

[162] *See Dep't of Enforcement v. Leopold*, No. 2007011489301, 2012 FINRA Discip. LEXIS 2 (NAC Feb. 24, 2012) (bar reduced to a $25,000 fine and one-year suspension because respondent admitted his misconduct from the outset to his firm's investigators, demonstrated credible remorse, recognized the significance of his misconduct, accepted responsibility for his actions, acknowledged that a serious sanction was in order, and vowed that similar misconduct would not recur).

[163] *Olson*, 2015 SEC LEXIS 3629 (sustaining bar for conversion even though respondent reimbursed her firm for false expenses and even though the sum of money she converted was a relatively small amount); *Mission Sec.*, 2010 SEC LEXIS 4053, at *21-22 & nn.11-12.

[164] We note that it also would have been aggravating if Doni had damaged or corrupted Credit Suisse's code. Inflicting that kind of harm on the owner of the property would demonstrate a higher level of culpability. *See also Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *45 (Jan. 9, 2015). Principal Consideration 11, Guidelines at 6.

Enforcement argues that Doni's misconduct was egregious, an aggravating factor that may warrant imposing a more stringent sanction.[165] We reserve the term egregious for cases of flagrant dishonesty, as where a respondent converts computer code for the purpose of realizing a monetary benefit. We do find Doni's misconduct serious, however, for two reasons. First, in training and employment agreements, he was repeatedly reminded of his duty to protect the Credit Suisse code and not to use it for the benefit of anyone else but Credit Suisse. His testimony regarding his lack of care to understand and comply with his duty reveals that he was grossly negligent, which we find aggravating. Second, when Doni brought the Credit Suisse code to Barclays, he concealed it by putting it into a hidden file. This demonstrates an understanding that the code did not belong on Barclays' system. We find this attempt to conceal the code when he brought it to Barclays aggravating.[166]

Enforcement argues that it would "send the wrong message to the industry" to do anything other than bar Doni. This argument focuses on whether the sanction imposed here will deter others from such misconduct.[167] While general deterrence is appropriate to consider and serves the purpose of strengthening market integrity, that concern cannot by itself justify a sanction.[168] To impose a sanction for the purpose of deterring others, regardless of whether it would be remedial as to the particular respondent, would be punitive to the particular respondent. FINRA's sanctions in disciplinary proceedings are designed to be remedial.[169] Because of the particular circumstances of this case, including Doni's remorse, we believe the sanctions we impose on Doni, although less than a bar, are sufficient to deter both Doni and others from similar misconduct.

Finally, Enforcement argues that it is aggravating that Doni was charged with computer crimes under New York State law. In the circumstances of this case, we disagree. The fact that Doni was later criminally charged does contribute to the conclusion that he should have been aware at the time he left Credit Suisse that taking the code with him was wrong. On the other hand, aspects of the criminal proceeding could be seen as mitigating. Doni has already been punished and that may mean that his likelihood of future wrongdoing is less, not more. Also the

[165] General Principle 3, Guidelines at 3-4.

[166] Principal Consideration 10, Guidelines at 6.

[167] Enf. PH Br. 3; Enf. Reply 1.

[168] *Grivas*, 2015 FINRA Discip. LEXIS 16, at *29-30 (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005))("Although general deterrence is not, by itself, sufficient justification for expulsion or suspension, we recognize that it may be considered as part of the overall remedial inquiry.").

[169] General Principle 3, Guidelines at 3.

fact that his term of probation was shortened for good behavior encourages us to believe that he is more trustworthy now than he was when he engaged in the misconduct.[170]

(d) Comparison To Other Cases

Doni argues that a bar would be a disproportionately harsh sanction to impose here because lesser sanctions have been imposed in other cases involving what Doni characterizes as similar misconduct.[171] Doni relies primarily on two adjudicated cases, *DiFrancesco*[172]and *Tomlinson*,[173]and a half dozen settled cases in which the respondents took without authorization computerized information regarding customers, proprietary software, or confidential computer models.[174]

It is well established that the appropriateness of a disciplinary sanction depends on the facts and circumstances of the particular case and cannot be precisely determined by comparison with action taken in another proceeding. This is especially true with regard to settled cases, where pragmatic factors may result in lesser sanctions.[175] Enforcement did not charge conversion in any of the cases Doni cites as comparisons. Accordingly, they are not relevant to the determination here of the appropriate sanction for conversion of computer code.

(e) Conclusion

We conclude that Doni's lower level of culpability and sincere remorse outweigh the aggravating factors relating to his misconduct. In these circumstances, we conclude that it is sufficiently remedial to suspend Doni from associating with any FINRA member in any capacity for two years and to fine him $10,000.

---

[170] We do not mean to say that the collateral consequences suffered by Doni as a result of his misconduct are mitigating. The loss of his bonus and his job at Barclays, his criminal prosecution, and his inability to get another job are all a result of his own misconduct. *Olson*, 2015 SEC LEXIS 3629, at *19 & n.29. However, we believe that these events have had an impact on Doni, and that he would behave differently in the future.

We acknowledge that the SEC drew a different conclusion in *Olson*. Even though the respondent in that case repeatedly admitted her misconduct, expressed remorse, and promised not to repeat the misconduct, and even though those were mitigating factors, the SEC concluded that they were not enough to outweigh the concern that she presented a continuing threat to investors. *Olson*, 2015 SEC LEXIS 3629, at *40.

A distinction is that Olson's misconduct, unlike Doni's, involved the highest level of culpability. She falsified expense reports in order to obtain a monetary benefit for herself. She converted funds through deception and with scienter. *Id*.

[171] Doni contends that other respondents who engaged in similar misconduct have not been charged with conversion and, therefore, have not been barred. Although the argument is framed as an argument about the theory or charge, it actually is an argument about the appropriate sanction. Resp. PH Br. 38-45.

[172] *DiFrancesco*, 2012 SEC LEXIS 54.

[173] *Tomlinson*, 2014 SEC LEXIS 4908.

[174] Resp. PH Br. 38-45.

[175] *Saad*, 2010 SEC LEXIS 1761, at *22 & nn.18-19; *Olson*, 2014 FINRA Discip. LEXIS 7, at*15-16 (citations omitted); *Dep't of Enforcement v. Keyes*, No. C02040016, 2005 NASD Discip. LEXIS 9, at *26-27 (NAC Dec. 28, 2005) (citations omitted).

B. Disobeying Supervisor's Express Instruction Not To Delete File

The Sanction Guidelines contain no specific guidance for Doni's deletion of the computer code during Barclays' investigation of his misconduct, although the Guidelines do address something similar in the Principal Considerations applicable in all cases. The Guidelines provide that adjudicators should consider whether a respondent engaged in the misconduct at issue despite a supervisor's prior warning that it was a violation.[176] It is an aggravating factor if a respondent ignores such a warning.

Regardless of Doni's motivation, his deletion of the hidden file after his supervisor expressly instructed him not to touch the file constituted a serious violation of the requirement to observe high standards of commercial honor and just and equitable principles of trade. It was an intentional act in contravention of his supervisor's instruction.[177] Furthermore, Doni deleted the file when he knew that Barclays was launching an investigation of his conduct in placing Credit Suisse code in the hidden file. This was not a minor or ordinary administrative instruction. It was in aid of an investigation into potential serious wrongdoing. If an associated person cannot be trusted to follow a direct order in this context, the integrity of the regulatory framework is at risk.

We consider Doni's flagrant disobedience in the face of his supervisor's clear instruction analogous to impeding regulatory investigations. The Guidelines address impediments that deprive regulators of information in support of their regulatory function, and Doni's deletion of the hidden file, while it did not completely deprive Barclays of information about what was in the file, imposed an additional burden on Barclays in pursuing its investigation. Barclays had to reconstruct what had been in the file from its backup system. Doni's deletion of the hidden file thus can be viewed as impeding and increasing the difficulty of Barclays' investigation of Doni's misconduct.

The Guidelines for impediments to regulatory investigations encompass a broad range of sanctions depending on the degree of impediment. For settling with a customer in return for an agreement not to cooperate with regulatory authorities, the Guidelines recommend a suspension for one month to two years and a fine of $2,500 to $73,000. For a complete failure to respond to a Rule 8210 request, the Guidelines recommend a bar, but a suspension for up to two years may be appropriate where there are mitigating circumstances or a respondent shows partial but substantial compliance with the request. The range of fines differs in varying circumstances, with the lowest recommended of $2,500 and the highest at $73,000. For settling customer complaints away from the respondent's firm, the Guidelines recommend a suspension for up to two years and a fine of $2,500 to $73,000.[178]

The evidence here is that Doni had already explained to his supervisor at Barclays what he had done and that Barclays had on its system the information it needed to investigate his

[176] Principal Consideration 15, Guidelines at 7.

[177] Principal Consideration 13, Guidelines at 7.

[178] Guidelines at 32-34.

misconduct, despite his deletion of the hidden file. Accordingly, the deletion of the file was not the same as a complete failure to provide information. His misconduct impeded the investigation by requiring Barclays to reconstruct the hidden file from its backup system, but it did not prevent Barclays from discovering or understanding the misconduct.

For disobeying his supervisor's clear instruction in aid of his firm's investigation into serious misconduct, we impose a six-month suspension, to run concurrently with the suspension imposed above, and fine Doni an additional $2,500. We have taken into account Doni's sincere remorse and acceptance of responsibility for the misconduct.[179]

V. Order

For violating FINRA Rule 2010 by converting his former employer's computer source code for his personal benefit and convenience, Respondent Shasishekhar Doni is suspended from associating with any FINRA member in any capacity for two years and fined $10,000.

For violating FINRA Rule 2010 by deleting his old firm's code from his new firm's system, contrary to his supervisor's explicit instruction, Respondent Doni is suspended for an additional six months, to run concurrently with the first suspension, and fined an additional $2,500.

Respondent is also ordered to pay costs, which amount to $5275.09, including a $750 administrative fee and the cost of the transcript. The fine and assessed costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding. If this decision becomes FINRA's final disciplinary action, Doni's suspension shall commence at the opening of business on June 6, 2016.

_____

Lucinda O. McConathy
Hearing Officer
For the Hearing Panel

[179] The Hearing Panel has considered and rejects without discussion any other arguments made by the parties that are inconsistent with this decision.