BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

        Complainant,

vs.

Shashishekhar Doni
Forest Hills, NY,

        Respondent.

REMAND ORDER

Complaint No. 2011027007901

Dated: July 25, 2014

Enforcement alleged that respondent converted computer source code and later engaged in an attempt to hide his misconduct. <u>Held</u>, findings and sanctions vacated, proceeding remanded.

Appearances

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

For the Respondent: Pro Se

Order

        Pursuant to FINRA Rule 9311, the Department of Enforcement ("Enforcement") appealed an April 15, 2013 default decision. The Hearing Officer found that Shashishekhar Doni ("Doni") engaged in unethical business-related misconduct by misappropriating computer code from his employer, in violation of FINRA Rule 2010.[1] For this violation, the Hearing Officer suspended Doni for six months and fined him $5,000.

        On appeal, Enforcement argues that the Hearing Officer failed to address the allegation in cause one of the complaint that Doni converted the computer code in violation of FINRA Rule 2010, or the allegation in cause two of the complaint that Doni attempted to hide his misconduct in violation of FINRA Rule 2010. Enforcement argues that the record demonstrates each of

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[1]   The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

these violations and that Doni should be barred from associating with any member firm in any capacity. In the alternative, Enforcement requests that the proceeding be remanded for a hearing.

We agree with Enforcement that the Hearing Officer did not address the allegations in cause one that Doni converted computer code or the allegations in cause two that Doni attempted to hide his misconduct. As explained in this order, we remand this disciplinary proceeding for a hearing on both causes of action.

I.   Standards for Reviewing Default Decisions

This appeal is a review of a default decision against Doni. FINRA Rule 9269(a)(2) provides that if the defaulting party is the respondent, the Hearing Officer may deem the allegations against that respondent admitted. As the NAC has previously noted, however, "[t]he SEC has indicated that when a default decision is appealed, the record should contain sufficient independent evidence to support the findings of violation to enable the SEC to discharge its review function under Section 19 of the Securities Exchange Act of 1934." *Dep't of Enforcement v. Merhi*, Complaint No. E072004044201, 2007 NASD Discip. LEXIS 9, at *15 (NASD NAC Feb. 16, 2007) (citing *James M. Russen, Jr.*, 51 S.E.C. 675, 678 & n.12 (1993), and *Troy A. Wetter*, 51 S.E.C. 763, 767-68 (1993)). Thus, although the NAC can deem the allegations of the complaint admitted, the NAC is not doing so in this case.

II.   Background

Doni has been associated, but not registered, with several member firms. From August 2006 to September 2010, he was employed in a non-registered capacity by Credit Suisse Securities (USA) LLC ("Credit Suisse") as a senior developer analyst in one of that firm's information technology departments, and he held the title of vice president. From September 2010 to February 2011, Doni was employed in a non-registered capacity by Barclays Capital Inc. ("Barclays") as a software developer, and his title was director. On February 19, 2011, Barclays terminated Doni's employment for cause due to, "among other things, the apparent unauthorized transfer of Credit Suisse . . . proprietary 'source code' technology onto a Barclays computer." Doni is not currently employed with a member firm.

III.   Procedural History

        A.   Complaint

On November 13, 2012, Enforcement filed a two-cause complaint against Doni. The complaint alleges that from July 2009 to September 2010, when Doni worked at Credit Suisse, he worked on developing the computer code for Credit Suisse's "Crossfinder" dark pool trading system. The complaint alleges that, around December 2009 or January 2010, Doni copied certain confidential and proprietary "building block" Credit Suisse computer code and installed the files on his home computer. The complaint alleges that, while Doni was associated with Credit Suisse, Doni was recruited to work for Barclays. The complaint alleges that, when Doni left Credit Suisse to work for Barclays, he was required to return the Credit Suisse code that he had installed on his home computer to Credit Suisse, but he did not do so. It further alleges that he e-mailed certain Credit Suisse proprietary computer code to his Barclays work email address and later used it at Barclays, without Credit Suisse's permission or knowledge and in violation of written agreements that he signed at both Credit Suisse and Barclays. Finally, the complaint

alleges that when Barclays personnel discovered that Doni had Credit Suisse computer code on his Barclays computer, Doni deleted the code in an attempt to hide his misconduct.

The first cause, which addressed Doni's failing to return Credit Suisse's computer code to Credit Suisse and his use of the code at Barclays for his personal benefit, was titled "conversion" and alleged a violation of FINRA Rule 2010. The second cause alleged that Doni deleted Credit Suisse computer code at Barclays in an attempt to hide his misconduct, in violation of FINRA Rule 2010.

B.   Service of the Complaint

Consistent with FINRA Rule 9134(a)(2) and (b)(1), Enforcement served a copy of the complaint and notice of complaint on Doni via certified mail and first-class mail at Doni's residential address, which Enforcement located using a public records search.[2] Rogal declared that a "Track & Confirm" page from the United States Postal Service (USPS) website shows that the complaint and notice of complaint sent by certified mail were delivered on November 21, 2012, and that the certified mail return receipt card was returned with an illegible signature. Rogal also declared that the notice of complaint and complaint that were sent by first-class mail were not returned.

Doni did not file an answer. On December 13, 2012, Enforcement filed a second notice of complaint. Consistent with FINRA Rule 9134(a)(2) and (b)(1), Enforcement served on Doni the complaint and a second notice of complaint via certified mail and first-class mail at the same residential address where the first notice of complaint and complaint were served. The second notice of complaint informed Doni that a failure to submit a timely answer would allow the Hearing Officer to treat the allegations of the complaint as admitted by Doni and to enter a default decision against him. Rogal declared that a "Track & Confirm" page from the USPS website shows that the second notice of complaint and complaint sent by certified mail were delivered on December 31, 2012, and that the first-class mailing had not been returned.[3] Doni again failed to file an answer.

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[2]   Doni's CRD record does not reflect his residential address. In a declaration, Enforcement attorney Michael J. Rogal ("Rogal") declared that Enforcement obtained Doni's residential address from a Lexis-Nexis public records search. Enforcement submitted a public records search results page, dated February 1, 2013, showing Doni's residential address from June 2004 to December 2012. Enforcement served Doni with a copy of the complaint and a notice of complaint at that address, but it used a hyphenated street address number. When the non-hyphenated version of the street address number that was retrieved through the public records search is entered into Google Maps, the hyphenated version of the street address number displays as the mapped result.

[3]   Enforcement did not receive the certified mail return receipt.

C.   Motion for Default Decision

On February 8, 2013, Enforcement filed a motion for default decision, with a supporting declaration and nine exhibits, asking that the Hearing Officer make findings consistent with the allegations in the complaint and impose a bar. Enforcement served a copy of its motion on Doni by sending it by first-class mail and certified mail to the same residential address used in all previous mailings.[4] Doni did not file a response to Enforcement's motion. On March 19, 2013, Enforcement, in response to a Hearing Officer order directing it to provide additional information, filed an additional submission, a supplemental declaration, and four additional exhibits.

D.   Default Decision

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

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

E.   Appeal Proceeding

This appeal followed. Before us, Enforcement argues that cause one of the complaint alleged conversion and that the Hearing Officer erred in not addressing that allegation and in not finding that Doni converted the computer code in violation of FINRA Rule 2010. It further argues that the Hearing Officer erred in not finding as a separate violation of FINRA Rule 2010 that Doni deleted computer code in an attempt to hide misconduct, as alleged in cause two of the complaint. Enforcement also contends that a bar should be imposed for cause one, regardless of

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[4]   During the proceedings below, and in this appeal proceeding, the hyphenated residential address described above was used as Doni's service address. Doni demonstrated awareness of notices and briefs that were sent to that address during this appeal. Moreover, in his answering brief filed on appeal, Doni did not contend that he lacked notice of the complaint, the motion for a default decision, or any other notices or pleadings.

whether Doni's conduct is characterized as conversion or something else, and that Doni also should be barred for the conduct alleged in cause two. Doni, who filed an answering brief and appeared at oral argument, does not contest the findings of violations in the Hearing Officer's default decision and argues that the Hearing Officer's sanctions were appropriate.

During our consideration of this appeal proceeding, we directed Enforcement to submit additional evidence supporting the allegations of the complaint. On March 28, 2014, Enforcement filed 28 exhibits, a written submission setting forth its position on how that evidence supports the allegations in the complaint, and a supporting declaration. In its written submission, Enforcement argues that the evidence is sufficient to demonstrate that Doni committed conversion and deleted the Credit Suisse computer code at Barclays in an attempt to hide misconduct. At the same time, Enforcement notes that its investigative record "does not encompass evidence that [it] would have presented had the case gone to a hearing" and requests that we "consider remanding the matter for a full hearing on the merits" "[i]n light of the fact that the evidentiary record . . . has not been fully developed."

IV.   Discussion

    A.   Default

As an initial matter, the Hearing Officer properly issued a default decision. FINRA Rule 9269(a)(1) provides that the Hearing Officer may issue a default decision against a respondent who, among other things, fails to answer the complaint within the time afforded under FINRA rules. FINRA staff twice served Doni with a copy of the complaint, and Doni never filed an answer. Although the address that FINRA staff used to serve Doni differed slightly from the residential address that FINRA staff found using a public records search, notice was proper because there was no material difference between the two addresses. Indeed, Doni does not claim on appeal that he lacked notice of the complaint.

    B.   Motion to Strike

At the oral argument in this appeal proceeding, Doni's wife, CL, appeared and sought to make a statement in support of her husband. Enforcement objected, but the NAC subcommittee that considered this matter ("Subcommittee") permitted CL to make a statement. Subsequently, Enforcement filed a motion to strike CL's comments from the record. We grant Enforcement's motion to strike CL's statement. There is nothing that indicates that CL is a lawyer permitted to represent others in FINRA proceedings. *Cf.* FINRA Rule 9141(b) (providing that a person may be represented in a disciplinary proceeding by an attorney). Moreover, to the extent that CL's statements were an attempt to testify, Doni did not obtain leave to introduce that testimony. Accordingly, we strike CL's statements from the record.

    C.   Cause One of the Complaint

The Hearing Officer found that it was unclear whether the complaint charged Doni with conversion and found instead that the complaint "clearly informs Respondent of the conduct that allegedly violated FINRA's Rules, and . . . specifically charges that [Doni] acted inconsistently with high standards of commercial honor and just and equitable principles of trade." Enforcement argues, however, that its complaint charged Doni with conversion.

We agree with Enforcement that the first cause of action alleges conversion. "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."[5] That definition of conversion is in line with the plain language of the complaint's first cause of action. The first cause of action is titled "Conversion (FINRA Rule 2010)." It alleges that Doni "took Credit Suisse proprietary computer code without authorization and thereafter used the code for his personal benefit at Barclays." It further alleges that Doni signed documents acknowledging that the code "was Credit Suisse's, and not Doni's, property." It further alleges that "[b]y taking and using the Credit Suisse computer code, Doni stole Credit Suisse intellectual property" and, "[b]y doing this, . . . committed conversion by intentionally or recklessly exercising ownership over the code he did not own nor was entitled to possess while working at Barclays." Given the text and substance of Enforcement's claims, the first cause of action clearly alleges that Doni engaged in conversion in violation of FINRA Rule 2010.[6]

Enforcement contends that the evidence it has submitted supports a finding of conversion but requests in the alternative that the proceeding be remanded for a hearing. We believe that a remand for a hearing is the appropriate course of action. We hold no view concerning Enforcement's allegations of conversion, any other allegations contained in cause one of the complaint, or the appropriate sanctions for any violations that are ultimately demonstrated. We do, however, offer the following guidance concerning certain issues that should be explored on remand. Our guidance is not intended to be an exhaustive list of issues that should be addressed.

First, whether the offense of conversion covers the Credit Suisse source code requires further factual development and additional legal argument. Enforcement has not identified any FINRA cases, nor are we aware of any, where findings of conversion involved source code or anything like it. The NAC, however, has occasionally analyzed allegations of conversion by looking to tort law principles.[7] "Typically, 'ideas' that meet certain requirements are protected through the various branches of intellectual property law such as patent law, copyright law, trademark law, and trade secret law." 3-26 *Business Torts* § 26.09[07] (Matthew Bender & Co., 2013). Indeed, many courts considering allegations of conversion of source code have found

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[5] *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012) (citing the definition of conversion used in the FINRA Sanction Guidelines).

[6] In finding that it was unclear that conversion was charged, the Hearing Officer noted that the complaint "variously describe[s] [Doni's] misconduct as 'theft,' 'stealing,' and 'conversion.'" In our view, however, the complaint's use of other words in addition to "conversion" to describe Doni's conduct did not create uncertainty concerning whether the complaint was alleging conversion.

[7] *Dep't of Enforcement v. Paratore*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *10 (FINRA NAC Mar. 7, 2008) (supporting findings of conversion with citations to the Restatement (2d) of Torts); *Dist. Bus. Conduct Comm. v. Westberry*, Complaint No. C07940021, 1995 NASD Discip. LEXIS 225, at *19 n.16 (NASD NBCC Aug. 11, 1995) (looking to tort law when analyzing allegations of conversion).

such allegations to be preempted or superseded by copyright law or trade secrets law.[8] To date, the parties have not addressed what effect, if any, intellectual property law has on conversion, as a distinct violation of FINRA Rule 2010, when the property at issue is covered by a branch of intellectual property law. There also is no evidence or allegations concerning whether the Credit Suisse code is, or is not, a property that is covered by a branch of intellectual property law. The parties shall address these factual and legal issues during the remand proceeding. To be clear, in raising these issues we do not to intend to suggest that we hold a particular view on the scope of the offense of conversion where the property at issue is covered by a branch of intellectual property law. Rather, our intent is only to draw attention to factual and legal issues that we believe would benefit from additional exploration during the remand proceeding.

Second, the remand proceeding shall 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. Although Doni retained a copy of the Credit Suisse source code when his employment with Credit Suisse terminated, the parties have submitted no evidence showing whether or not Credit Suisse continued to have access to its original code. We take no position at this time concerning whether a showing of deprivation is required to prove conversion under FINRA Rule 2010 in this case.

Third, the parties shall introduce evidence on remand concerning the value of the source code itself, including the value to Credit Suisse and to Doni, and the harm, if any, to Credit Suisse from Doni's actions. We hold no view at this time, however, concerning the relevance of, or weight to be given to, this evidence, if any.

D.   Cause Two of the Complaint

The complaint's second cause of action alleged that Doni deleted the Credit Suisse computer code in an attempt to hide misconduct in violation of FINRA Rule 2010. The Hearing Officer made no liability findings concerning the second cause of action. Instead, the Hearing Officer found that, for purposes of the sanctions imposed for cause one, Doni's deletion of the Credit Suisse computer code from a Barclays directory, after his Barclays supervisor instructed him not to delete it, was an aggravating factor.

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[8]   *See, e.g.*, *WJ Global LLC v. Farrell*, 941 F. Supp. 2d 688, 692 (E.D.N.C. 2013) (finding that allegations that source code had been converted were preempted by the Copyright Act); *Custom Hardware Eng'g & Consulting, Inc. v. Dowell*, 918 F. Supp. 2d 916, 939 (E.D. Mo. 2013) (finding that allegation that source code had been converted was preempted by state trade secrets law); *Quantlab Technologies, Ltd. v. Godlevsky*, 719 F. Supp. 2d 766, 779 (S.D. Tex. 2010) (holding that allegations that source code was converted were preempted by Copyright Act); *Silvaco Data Sys. v. Intel Corp.*, 109 Cal. Rptr. 3d 27, 51 (Cal. Ct. App. 2010) (holding that allegation that source code was converted was superseded by state trade secret law); *CA, Inc. v. Rocket Software, Inc.*, 579 F. Supp. 2d 355, 366-67 (E.D.N.Y. 2008) (finding that claim of conversion of source code was preempted by copyright law).

Enforcement argues that the second cause of action alleged a stand-alone violation of FINRA Rule 2010 that the Hearing Officer should have addressed. We agree. The deletion of the code was a separate act that occurred after Doni's possession of the code had been discovered by his supervisor. For these reasons, the hearing on remand should also address the allegations in cause two. We take no view at this time, however, concerning the legal or factual sufficiency of the allegations or the appropriate sanctions for any violations that are demonstrated.

E. Remand Proceeding

Doni shall be permitted to fully participate in the remand proceeding, notwithstanding that he defaulted and has not shown good cause for his failure to participate below. This disciplinary proceeding presents a unique set of circumstances that weigh in favor of allowing Doni to participate. The analysis of Enforcement's allegations of conversion would benefit from a fully developed record, considering that they appear to involve important issues of first impression that are likely to arise again in future cases and that FINRA's Sanction Guidelines recommend a bar as the standard sanction for conversion. Moreover, Doni appeared during this appeal proceeding, and Enforcement has suggested that he be permitted to participate in any remand proceeding. Considering this unusual set of circumstances, we permit Doni to participate in the remand proceeding despite his earlier default.[9] Likewise, our granting of Enforcement's motion to strike CL's statements from the record is without prejudice to Doni, and he may seek to call CL as a witness during the remand proceeding.

V. Conclusion

Accordingly, we vacate the Hearing Officer's findings and sanctions and remand for a hearing concerning both causes in the complaint. Except as otherwise specifically stated herein, nothing in this remand order shall be interpreted to limit the Hearing Officer's authority provided by FINRA Rule 9235 during the remand proceeding.

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith
Senior Vice President and Corporate Secretary

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[9] For purposes of future cases, we emphasize that our allowing Doni to participate notwithstanding his default and his failure to show good cause for that default is highly unusual and driven by the specific facts and circumstances involved in this proceeding.