SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 99596 / February 23, 2024

Admin. Proc. File No. 3-20646

In the Matter of the Application of

THOMAS LEE JOHNSON

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDING

Associated person of FINRA member firm converted funds mistakenly placed in his personal account. *Held*, FINRA's findings of violation and sanction are *sustained*.

APPEARANCES:

*Jon-Jorge Aras*, of Levan Legal LLC, for Thomas Lee Johnson.

*Alan Lawhead*, *Ashley Martin*, and *Colleen E. Durbin* for FINRA.

Appeal filed: November 2, 2021
Last brief received: March 14, 2022

Thomas Lee Johnson, formerly associated with RBC Capital Markets, LLC ("RBC"), a FINRA member, seeks review of disciplinary action.[1] FINRA found that Johnson violated FINRA Rule 2010 by converting over $1 million that had been mistakenly placed in his personal brokerage account by RBC, his then-employer, in November 2017. FINRA barred Johnson from association with any FINRA member.[2] Based on our independent review of the record, we sustain FINRA's findings of violation and the sanction it imposed.[3]

## I. Background

### A. Johnson inherited Doosan securities and RBC subsequently liquidated them.

In November 2016, Johnson inherited from his father 60 shares (the "Shares") of stock in a South Korean company, Doosan Heavy Industries and Construction. Johnson purchased the Shares for his father at his father's request and, when his father died, he chose to inherit them in lieu of cash. The Shares were transferred to the personal brokerage account that Johnson and his wife held at RBC (the "RBC Account") on December 14, 2016, at a price of $22.673 per share, making the Shares worth a total of $1,360.36.

Johnson was aware of the stock's price at that time and admittedly followed it on a monthly basis through October 2017. Indeed, Johnson had his RBC Account in front of him every day. The account was, he testified, "the first thing that came up on [his] screen" once he logged on to the RBC systems. According to Johnson's undisputed testimony, "Doosan never would price on [his] screen. It typically just came on once a month on the statement [and] didn't fluctuate daily. . . ." Johnson further testified that he and his wife regularly reviewed the total value of the RBC Account when they received the monthly statements in order "to see . . . how [they] were doing."

On August 30, 2017, RBC notified Johnson that it would no longer be able to provide custody for the Shares. As a result, it informed Johnson that, if he did not liquate or transfer the Shares by late October 2017, RBC would liquidate them. RBC repeated this warning a month later, by which time Johnson had also received a distribution of 10 warrants (collectively, with

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[1] *Dep't of Enf't v. Johnson*, Complaint No. 2018056848101, 2021 WL 4909888 (NAC Oct. 6, 2021).

[2] FINRA also ordered Johnson to pay hearing and appeal costs in the amount of $3,068.30 and $1,710.30, respectively. Although Johnson's application for review asserts that he is appealing FINRA's order to pay hearing and appeal costs, his briefs advance no arguments in support, and we deem that aspect of his appeal forfeited. *See* Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (requiring briefs to raise and argue "[e]ach exception to the findings or conclusions"); *Newport Coast Sec.*, Exchange Act Release No. 88548, 2020 WL 1659292, at *3 (Apr. 3, 2020) (finding that arguments not raised to the NAC or Commission were forfeited).

[3] Because we have determined that it would not "significantly aid[]" the decisional process, Johnson's request for oral argument is denied. Rule of Practice 451(a), 17 C.F.R. § 201.451(a).

the Shares, the "Securities") to purchase additional Doosan stock.[4] Johnson testified that he was aware that RBC would liquidate the Securities if he did nothing, and that he chose to leave them in his RBC Account and have RBC liquidate them. By October 31, 2017, Doosan's stock price had fallen to $15.655 per share, valuing Johnson's total Doosan holdings at $967.34.[5] Johnson does not contest that he was aware of the price of his Doosan stock and the total value of the Doosan securities at that time.

Two weeks later, on November 14, 2017, when the Securities were finally liquidated, a currency conversion error occurred that caused the Securities to be mistakenly valued in U.S. dollars rather than South Korean won (the currency Doosan stock was quoted in),[6] erroneously inflating the value of the Securities by more than 100,000% of their actual value.[7] As a result, RBC erroneously deposited $1,059,544.98 into the RBC Account.[8]

Johnson, who entered the securities industry in 1983, acknowledged that, when he logged onto the RBC Account that morning, he was "quite surprised" by the extra $1 million that RBC had credited him, assuming that the amount "was probably not correct" and would be corrected by the next day. When he realized that the unexpectedly large credit was due to the liquidation of the Securities, he admittedly told his assistant that did not "make any sense."[9]

Johnson testified during the hearing that, soon after learning of the credit, he used the office's Bloomberg terminal to ascertain the actual value of the Securities. During the investigation, however, Johnson testified that he had asked his assistants to check the price of Doosan on Bloomberg. But at the hearing, the first assistant did not remember the specific events from that day, while the second could not recall Johnson asking her to check Doosan's stock price—although the second assistant acknowledged at the hearing that she looked at Johnson's RBC Account and saw the account balance because he asked her to look at it.

In any event, Johnson claimed that he learned that the number quoted on Bloomberg was "17,000" per share, which matched the price that was displayed in the RBC Account, except that, in the RBC Account, the number was preceded by a dollar sign, while on Bloomberg, according

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[4] Johnson received the warrants in September 2017 as a result of a Doosan spinoff. When he received the warrants, each was valued at $2.721.

[5] This amount includes the value of the warrants Johnson had received, the price of which at that point was $2.804 per warrant.

[6] The record is not clear about how the pricing error occurred or who was responsible.

[7] This erroneous increase equates to an approximately 118% daily appreciation on each of the nine business days between October 31 and November 14.

[8] RBC calculated that amount using a price of $17,184.58 per share and $2,849.40 per warrant.

[9] Regarding his awareness of the value of the Securities at the time of the liquidation, Johnson testified that, while he was "not sure" he had followed the value of the Securities on a regular basis as it declined during the time he held them at RBC, he acknowledged that he "knew it wasn't worth" what he had been credited.

to Johnson, he did not notice any currency indicator.[10] He also testified that, shortly thereafter, he "Googled" Doosan and the company's investor-relations page listed the price of the stock as, again, "17,000" per share and, again, according to Johnson, he did not notice any currency denominator.[11]

Although Johnson purportedly sought to verify the price he was paid for the Securities, he admittedly made no effort to determine if there had been any significant developments affecting Doosan that would explain such a rapid price increase (and the record does not indicate that there were any such developments). Nor did he or his assistants ever ask anyone else at RBC to verify that the liquidation amount he had been paid for the Securities was correct, explaining that he "didn't feel like [he] needed to." When, on the day following the Securities' liquidation, there had been no correction to the credited amount, Johnson purportedly "started to believe that it was accurate," despite admittedly telling his brother that same day that it did not "make sense."

**B. Johnson moved the Doosan proceeds out of his RBC account.**

Approximately a week after the Securities' liquidation, Johnson was talking to his accountant about an unrelated matter when he told the accountant what had happened and acknowledged to the accountant that "there was a possibility maybe down the line that it could possibly be a mistake." In response, according to Johnson, the accountant told him that, "if it was him, he would take the money out of RBC, but don't spend it just in case they ask for it back." The accountant, who was not a lawyer, did not testify or otherwise provide evidence about their conversation. Johnson's brother testified that, after Johnson had deposited the excess funds back into the RBC Account, the accountant told Johnson's brother, "[W]hat I actually told Tom was that if it was mine, I'd take it out, but that he should check with an attorney first." Johnson, however, did not recall the accountant advising him to consult a lawyer. He admittedly never sought such legal advice.

A day or two later, on November 22, 2017, without further investigation into whether there had been a mistake, Johnson wrote a check payable to himself from the RBC Account in an amount equal to the total proceeds from the Securities' liquidation ($1,059,544.98) and deposited it in a checking account he and his wife had at an unaffiliated bank (the "Bank Account"). Johnson did so even though he used the RBC Account as his "everyday account" for his

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[10] An RBC supervisor testified that, during her own check on Bloomberg of the Doosan stock price two weeks later, she recalled seeing "KRW" in front of the price, indicating it was denominated in South Korean currency, and a Bloomberg screenshot from this time confirms the official's recollection. The record does not, however, contain evidence of how Bloomberg presented the stock price on November 14, 2017, although there is no evidence that such presentation changed during this time.

[11] At the hearing, FINRA introduced a June 16, 2018 screenshot of Doosan stock information from the Doosan website, which, according to Johnson, was "similar" to the page he reviewed on November 14, 2017. In that screenshot, there is a W symbol with a line through it, which denotes South Korean won, just to the right of the Doosan price. Johnson testified that "[t]he W meant nothing to me" and "I didn't pay attention to the W."

"everyday expenses" and the RBC Account paid him interest, while the Bank Account did not. Although he claimed at the hearing that he believed that he was entitled to the funds at the time of the transfer, he had testified to the contrary during the investigation, *i.e.*, that he then believed he "[p]robably [was] not" entitled to them. Moreover, he left the funds untouched in the Bank Account because, as he testified during the investigation, he "believed that there was a probability that [the funds] would be taken back." Despite that probability, Johnson claimed during the investigation that he moved the excess funds because he "got that advice from [his] accountant," and it was "the only explanation" he could provide. When asked at the hearing about this discrepancy between what he recalled at the hearing versus during the investigation, Johnson blamed it on his being in "a totally different state of mind" during the investigation.

On November 28, 2017, after RBC discovered the mistake, the firm issued a corrected confirmation, reflecting total proceeds to Johnson of just $924.79.[12] Upon being notified of the correction, Johnson promptly obtained a cashier's check for $1,060,000, which he deposited in the RBC Account the following day.[13] Despite his claim that he considered himself entitled to the excess funds at the time he transferred them, Johnson never challenged, or even sought an explanation of, RBC's determination to correct the amount it had credited him. Nevertheless, Johnson's actions triggered an internal review, which led to Johnson's termination on December 14, 2017 and, eventually, a FINRA investigation.

### C. FINRA found that Johnson violated Rule 2010 by converting funds and barred him from associating with any FINRA member.

On January 22, 2019, FINRA's Department of Enforcement filed a complaint against Johnson, alleging that he had violated FINRA Rule 2010 by converting approximately $1 million in RBC funds.[14] The complaint also alleged that Johnson violated FINRA Rules 8210 and 2010 by providing false and misleading statements to FINRA staff during its investigation about the mistaken credit in his account.

On August 23, 2019, following a two-day hearing, a hearing panel issued its decision, finding that "at no time did Johnson have a credible basis to believe," nor did he ever in fact "believe[]," that he was lawfully entitled to the funds at issue. The panel found that "under all the circumstances RBC's pricing error would have been obvious to an experienced broker like Johnson." Indeed, the panel found that, under the circumstances, "one need not be an experienced broker—any reasonable securities account holder would know that some sort of error had occurred." The panel further found that, "[g]iven the enormous size of the credit,

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[12] Although FINRA's decision and certain other portions of the record describe Johnson converting $1,059,544.98, the actual amount of funds that Johnson could have converted was $1,058,620.19, because he was entitled to $924.79 from the Doosan sale. This discrepancy does not impact our analysis.

[13] It is unclear why there is a slight difference between the amounts that Johnson originally withdrew from the RBC Account and then redeposited.

[14] *Dep't of Enf't v. Johnson*, Disciplinary Proceeding No. 2018056848101, 2019 WL 6827184, at *1 (Hearing Panel Aug. 23, 2019).

Doosan's historical share price (about which Johnson said he was aware), and the fact that it involved a foreign security, Johnson's testimony and actions demonstrate that he knew RBC had made an error."

In doing so, the panel found not credible Johnson's claims that his Bloomberg and Google searches convinced him that the prices he was paid for the Securities were right, noting that, "[a]s a seasoned broker, he would have known that a foreign issuer's securities would be quoted in local currency on Bloomberg." Moreover, the panel found that the fact that Johnson did not spend the money and immediately returned it—"no questions asked"—"reveal[s] that Johnson in fact knew the money was never his to spend." As to the reason why Johnson never contacted anyone at RBC to verify the prices in the initial confirmation, the panel found that "he hoped that RBC would never catch its error and he would reap an extraordinary 1,000-fold windfall at this employer's expense." In the panel's opinion, "[i]t would require the suspension of disbelief and an utter display of naiveté for the Panel to find otherwise" and "[i]t would defy common sense to arrive at a different conclusion." As a result, the hearing panel concluded that Johnson violated Rule 2010 by converting funds from RBC and barred him.

The hearing panel found, however, that FINRA Enforcement had not proven the charge that Johnson provided false and misleading statements to FINRA staff about having asked an assistant about the deposited funds' source and about his assistants' having confirmed the Securities' price. The hearing panel concluded, in part, that "[g]iven the nature of the event, some immediate confusion and excitement in the office about the money [wa]s likely." The panel accordingly found "it reasonable, under the circumstances, that Johnson, in some manner, had asked [his assistants] to double-check or review the activity in his account."

After Johnson appealed,[15] the NAC affirmed the panel's decision, concluding that "[c]oupled with the enormous size of the credit relative to Doosan's historical share price and the value reflected for the Doosan position in his account, Johnson's testimony and actions demonstrate that he knew that RBC had made an error." The NAC also affirmed the hearing panel's imposition of a bar. This appeal followed.

## II. Analysis

Under Section 19(e) of the Securities Exchange Act of 1934 ("Exchange Act"), we review FINRA disciplinary action to determine whether: (1) an applicant engaged in the conduct FINRA found; (2) that conduct violated the rules specified in FINRA's determination; and (3) those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[16] We conduct an independent review of the record and employ a preponderance of the evidence standard when applying this framework.[17] On the basis of our independent review, we

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[15] FINRA Enforcement did not appeal the panel's dismissal of the Rule 8210 charge.

[16] *Trevor Michael Saliba*, Exchange Act Release No. 91527, 2021 WL 1336324, at *12 (Apr. 9, 2021) (citing 15 U.S.C. § 78s(e)(1)), *denied in part & dismissed in part*, 47 F.4th 961 (9th Cir. 2022).

[17] *Id.*

find that Johnson converted RBC's funds, which conduct violated FINRA Rule 2010, and that such rule is, and was applied in a manner, consistent with the purposes of the Exchange Act.

### A. The record supports FINRA's finding that Johnson intentionally exercised control over funds to which he was not entitled.

FINRA found that Johnson converted RBC's funds for himself. FINRA defines conversion as "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."[18] And we have found that one violates Rule 2010 by engaging in such conduct where the applicant had knowledge that he or she was not entitled to the property at issue.[19] The record shows that Johnson engaged in such conduct here.

#### 1. Johnson converted the excess funds by transferring them into an account beyond RBC's control.

As FINRA found, Johnson converted more than a million dollars that RBC had erroneously placed into Johnson's RBC Account when he transferred those funds to his Bank Account, which was beyond RBC's control.[20] Johnson does not dispute that he ultimately lacked

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[18] FINRA Sanction Guidelines, at 36 n.2. (Oct. 2020), https://www.finra.org/sites/default/files/2021-10/Sanctions_Guidelines_2020.pdf; *cf. Meyers Assocs., L.P.*, Exchange Act Release No. 86193, 2019 WL 2593825, at *17 n.75 (June 24, 2019) (finding that the NAC properly applied the guidelines in effect while the matter was pending before it).

[19] *See, e.g.*, *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 WL 3087507, at *6-7 (June 2, 2016) (holding that applicant committed conversion, as defined by FINRA, and that conversion, so defined, violated Rule 2010); *Alfred P. Reeves III*, Exchange Act Release No. 76376, 2015 WL 6777050, at *4 (Nov. 5, 2015) (concluding that applicant committed conversion, thereby violating Rule 2010, where he continued to hold funds after "he knew the money was not his"); *Denise M. Olson*, Exchange Act Release No. 75838, 2015 WL 5172954, at *2 (Sept. 3, 2015) (concluding that applicant committed conversion, thereby violating Rule 2010, by submitting an expense report that she knew was false, which resulted in her improper receipt of $740.10 from her firm).

[20] *See, e.g.*, *People v. Miciek*, 308 N.W.2d 603, 604, 606 (Mich. Ct. App. 1981) (affirming defendant's larceny-by-conversion conviction where a bank erroneously deposited funds into an account that defendant was authorized to withdraw funds from, and defendant moved those funds to accounts at other banks because, "even though resulting from a bank error, there was a voluntary transfer of possession of the funds from [the first bank] to defendant" and, "due to defendant's actions, the bank did not retain control of the money"); *cf. Payne v. White*, 101 A.D.2d 975, 976 (N.Y. App. Div. 1984) (reinstating a conversion claim by one owner of a joint checking account against the other owner where the second owner removed more funds than she was entitled from the joint account and explaining that "[c]onversion causes of action have been unhesitatingly recognized in cases involving the unauthorized withdrawal of more than his share of the funds from a joint account by a cotenant").

a right to, or ownership over, those excess funds.[21] Instead, Johnson argues, without citing any legal support, that conversion occurs only when there is a change of ownership. And that, according to Johnson, did not happen because the funds moved only between accounts that were owned jointly by him and his wife. But that argument erroneously assumes that the funds were all his to control (and move) in the first instance. Johnson converted the funds when he removed them from the RBC Account and moved them to his Bank Account; this action deprived *RBC* of possession of that property and effectively gave Johnson sole control over funds that he was not entitled to possess.[22]

Johnson also argues, again without legal support, that FINRA's claim of conversion fails because FINRA never established that the excess funds were owned by RBC, as FINRA alleged in its complaint. Although Johnson does not explain how RBC could have credited the funds to the RBC Account if it did not own them, it is not necessary to establish who, *in particular*, owned the excess funds in order to find that Johnson converted them, so long as the evidence establishes, as it does here, that the owner was not Johnson.[23]

**2. Johnson knew that he was not entitled to the excess funds when he transferred them to an account beyond RBC's control.**

Johnson contends that he did not ultimately violate Rule 2010 by transferring the funds away from RBC's control because (he claims) he believed at the time that he was entitled to them. However, we, like FINRA, find that Johnson did not, in fact, believe he was entitled to the funds when he transferred them. As FINRA found, the extreme increase in the purported value of the Securities over such a short period would have put any reasonable securities holder—let alone a broker, like Johnson, with over 30 years of industry experience—on notice that the Securities' pricing was an error. Johnson admittedly knew that the Securities were worth less than $1,000 at the end of October, and we find it incredible, under the circumstances, that Johnson would believe that the Securities increased in value by over 100,000% in only 14

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21 *Cf. Shourek v. Stirling*, 621 N.E.2d 1107, 1110 (Ind. 1993) (noting that "[t]he right to withdraw and the right of ownership . . . are separate and distinct rights" and that an authorization to withdraw funds does not alone "create an ownership right in the funds that were withdrawn").

22 *See Miciek*, 308 N.W.2d at 604, 606; *cf. Payne*, 101 A.D.2d at 976.

23 *Cf. United States v. Osborne*, 462 F. App'x 366, 367 (4th Cir. 2012) (per curiam) (holding, in response to defendant's argument that he did not commit conversion under 18 U.S.C. § 641 because the government had not proved "its ownership of the funds that had been erroneously deposited" in his account, that, "[a]s a matter of law, the Government retained an ownership interest for purposes of § 641 in the erroneously-issued funds"); 18 U.S.C. § 641 (making it a criminal offense for someone to "knowingly convert[] to his use . . . any record, voucher, money, or thing of value of the United States"); *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 WL 7873431, at *8 (Dec. 4, 2015) (holding that respondent's "*lack* of ownership rights in the [funds] is a necessary element of a conversion claim, and that was established").

calendar days.[24] Short of dramatically positive news regarding improved prospects for Doosan—which Johnson admittedly was unaware of and did not search for—such a stark increase beggars belief.

Like FINRA, we also find it telling that Johnson did not contact RBC to verify the amount it had credited to the RBC Account. Given his admission that the amount of the credit did not "make sense," it was incumbent on Johnson to verify the amount with RBC before transferring the funds to the unaffiliated Bank Account.[25] Johnson's failure to do so demonstrates that, as FINRA found, he hoped to "reap an extraordinary 1,000-fold windfall at his employer's expense" by not raising what was an obvious error. We further echo FINRA's finding that Johnson's immediate return of the excess funds once RBC reversed the error—without a hint of protest or first asking for an explanation from RBC—supports FINRA's finding that Johnson knew the funds were "never his to spend." And we agree with FINRA that Johnson's claims are implausible that he started to believe that the Doosan prices in the initial confirmation were correct after his searches on Bloomberg and Doosan's website, given evidence that those sites did not denominate the stock's price in dollars. Weighing all the facts in the record before us, we find that Johnson knew he was not entitled to the excess funds when he moved them from the RBC Account to his unaffiliated Bank Account.

Johnson also argues that it was inconsistent for FINRA to dismiss the charge that he made false statements about having his assistants check the price of the Securities, while at the same time finding Johnson not credible when he asserted that he did not know that the over $1 million credit to his RBC Account was an error. We see no inconsistency. FINRA's finding that FINRA Enforcement had not proven that Johnson made false claims about asking his assistants to check the price he was paid in connection with the Securities' liquidation does not mean that Johnson's other testimony was credible—particularly about whether he believed that the credit at issue was correctly calculated. Indeed, as explained above, we find that Johnson was not credible regarding his belief that he was entitled to the funds.[26]

### B. Johnson violated Rule 2010 when he intentionally converted the excess funds.

FINRA Rule 2010 requires FINRA members to "observe high standards of commercial honor and just and equitable principles of trade."[27] This rule provides an avenue for FINRA to

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[24] *Cf. Reeves*, 2015 WL 6777050, at *1, *3-4 (rejecting as "not plausible" the claim of applicant, a 40-year veteran of the securities industry, that he believed that a $59,704.93 payment, which he directed to his personal account, was payment for a $2,000 invoice he submitted).

[25] *Cf. id.* at *3, *6 (concluding that, under the circumstances, applicant should have "inquired as to the amount and purpose" of a transfer of funds before "directing the payment to his personal account" where he expected a $2,000 payment, but received $59,704.93).

[26] As noted, neither of Johnson's assistants recalled having been asked to verify the prices used to calculate the credit, although one acknowledged being asked to look at the credit by Johnson at the time.

[27] FINRA Rule 2010.

"regulate[] the ethical standards of its members"[28] and proscribes a "broad range of conduct."[29] It "encompass[es] business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security."[30] We have consistently held that one violates Rule 2010 by intentionally taking or exercising ownership over property where the person neither owns the property nor is entitled to possess it and knows that he was not entitled to the property.[31] Accordingly, we agree with FINRA that Johnson's intentional conversion of the excess funds as described above violated Rule 2010.

### C. Rule 2010 is, and was applied in a manner, consistent with the Exchange Act's purposes.

Exchange Act Section 15A(b)(6) requires that FINRA design rules that "promote just and equitable principles of trade."[32] Rule 2010 achieves this purpose.[33] Because Johnson's intentional conversion of RBC's funds was inconsistent with just and equitable principles of trade, FINRA acted consistent with the purposes of the Exchange Act in finding him liable.

## III. Sanctions

Under Exchange Act Section 19(e)(2), we sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[34] When making this assessment, we consider evidence of any aggravating or mitigating factors, as

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[28] *Stephen Grivas*, Exchange Act Release No. 77470, 2016 WL 1238263, at *4 (Mar. 29, 2016) (quoting *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *7 (Jan. 9, 2015)).

[29] *Id.*; *see also Butler*, 2016 WL 3087507, at *7 n.17 ("Rule 2010 sets forth a standard intended to encompass 'a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace.'" (quoting *Dante J. Difrancesco*, Exchange Act Release No. 66113, 2012 WL 32128, at *5 (Jan. 6, 2012))).

[30] *Grivas*, 2016 WL 1238263, at *4 (quoting *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (per curiam)); *see also Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 WL 5571625, at *7 (Sept. 30, 2016) (holding that "neither Rule 2010 nor FINRA's definition of conversion is limited to misconduct involving firm customers or securities").

[31] *See, e.g.*, *Butler*, 2016 WL 3087507, at *6-7 (holding that applicant committed conversion, which violated Rule 2010); *Reeves*, 2015 WL 6777050, at *3-4 (holding applicant committed conversion and that "[i]t is well settled that conversion violates Rule 2010").

[32] 15 U.S.C. § 78o-3(b)(6).

[33] *See, e.g.*, *Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 WL 1272876, at *10 (Apr. 1, 2016) (holding that Rule 2010 is consistent with the Exchange Act's purposes).

[34] 15 U.S.C. § 78s(e)(2). Johnson does not allege, nor does the record demonstrate, that FINRA's sanction imposes an unnecessary or inappropriate burden on competition.

well as whether the sanctions serve remedial rather than punitive purposes.[35] The Commission also uses FINRA's Sanction Guidelines as a benchmark, even though the Guidelines do not bind us.[36] For conversion, the Guidelines recommend a bar "regardless of [the] amount converted."[37]

As we have held, absent mitigating circumstances, conduct involving conversion warrants a bar because it "is antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their money"[38] and persons who engage in such conduct present a substantial risk to investors and the markets. This is so even when the converted funds are an employer's rather than a customer's.[39] Based on our own independent review of the record, we, like FINRA, conclude that barring Johnson is neither excessive nor oppressive and serves a remedial purpose.

FINRA found several aggravating factors, which we agree are present here.[40] First, Johnson converted a substantial amount of money—over $1 million.[41] Second, as described above, Johnson acted with scienter, having intentionally transferred the excess funds away from RBC when he knew that he was not entitled to them.[42] Finally, Johnson's conversion resulted in the potential for him to obtain an improper monetary gain of more than $1 million at RBC's expense.[43]

In terms of mitigating factors, we agree with FINRA that Johnson's termination for the misconduct at issue here is a mitigating factor because it occurred before FINRA detected the

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35 *See Saad v. SEC*, 718 F.3d 904, 906, 913 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007); *McCarthy v. SEC*, 406 F.3d 179, 188-91 (2d Cir. 2005).

36 *See, e.g.*, *J.W. Korth & Co., LP*, Exchange Act Release No. 94581, 2022 WL 990183, at *16 (Apr. 1, 2022).

37 FINRA Sanction Guidelines, at 36.

38 *Olson*, 2015 WL 5172954, at *3.

39 *See id.* at *1, *4 (sustaining FINRA's imposition of a bar for applicant's conversion from her employer because applicant's conversion posed a "continuing danger" to investors); *id.* at *7 (holding that the applicant's conversion was "no less serious because it did not involve customers." (citation omitted)); *Leonard John Ialeggio*, Exchange Act Release No. 40028, 1998 WL 268957, at *3 (May 27, 1998) (holding that it was "not mitigative" that the applicant "abused only his employer's trust").

40 On appeal, Johnson does not challenge any of the aggravating factors that FINRA found.

41 FINRA Sanction Guidelines, at 8 (listing as Principal Consideration 17, "[t]he number, size and character of the transactions at issue").

42 *Id.* (listing as Principal Consideration 13, "[w]hether the respondent's misconduct was the result of an intentional act, recklessness or negligence").

43 *Id.* at 7-8 (listing as Principal Consideration 11, "whether the respondent's misconduct resulted directly or indirectly in injury to . . . other parties, and . . . the nature and extent of the injury" and, as Principal Consideration 16, "whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain").

misconduct.[44] On appeal, Johnson asserts several additional mitigating factors which, he argues, FINRA failed properly to consider. We agree with Johnson that FINRA erred in not considering as mitigating that his conduct did not involve "a pattern of misconduct" and was of short duration.[45] We find, however, that the mitigating effect of these circumstances, along with the fact that he was terminated, does not outweigh our concern about the continuing threat Johnson poses, particularly given that the Guidelines recommend a bar for even a single instance of conversion regardless of the amount involved.[46]

Johnson's remaining contentions regarding mitigation lack merit. We do not attach significance to Johnson's claim that he cooperated truthfully with RBC's and FINRA's investigations into the matter, given that we and FINRA found his explanation during those investigations of what he believed about the money credited to his RBC Account to be not credible.[47] Although we agree with Johnson that acceptance of responsibility and acknowledgement of misconduct can be mitigating, Johnson's acknowledgement that "he would have done things differently" does not amount to an acknowledgment of misconduct. Nor, in any event, would such an acknowledgement of wrongdoing be mitigating because it occurred after Johnson's misconduct was discovered.[48]

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44 *See Olson*, 2015 WL 5172954, at *5 (holding that FINRA erred in not considering applicant's termination mitigating where applicant was terminated before FINRA opened its investigation into the same misconduct for which the firm terminated her, but, nevertheless, sustaining FINRA's imposition of a bar on applicant).

45 *See* FINRA Sanction Guidelines, at 7 (listing as Principal Consideration 8, "[w]hether the respondent engaged in numerous acts and/or a pattern of misconduct" and, as Principal Consideration 9, "[w]hether the respondent engaged in the misconduct over an extended period of time"); *Olson*, 2015 WL 5172954, at *2, *5 (concluding that applicant's single act of conversion, for which she reimbursed her firm approximately two months after the conversion, was mitigating under Principal Considerations 8 and 9).

46 *See Olson*, 2015 WL 5172954, at *5 (giving limited mitigating weight to the fact that respondent's conversion occurred only once because the Guidelines "obviously indicate[] that a single instance of theft provides ample justification to bar an individual from the securities industry, no matter the sum involved"); FINRA Sanction Guidelines, at 36 (suggesting that the sanction for conversion should be to "[b]ar the respondent regardless of amount converted").

47 *See* FINRA Sanction Guidelines, at 8 (listing as Principal Consideration 12, "[w]hether the respondent provided substantial assistance to FINRA in its examination and/or investigation of the underlying misconduct, or . . . attempted to delay FINRA's investigation, to conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA").

48 *See id.* at 7 (listing as Principal Consideration 2, "[w]hether an individual . . . accepted responsibility for and acknowledged the misconduct *to his or her employer* . . . or a regulator *prior to detection and intervention* by the firm . . . or a regulator" (emphasis added)); *Olson*, 2015 WL 5172954, at *6 ("[W]e find that Olson's admission came too late to be mitigating under Principal Consideration 2 because the Firm had already detected the misconduct and intervened.").

It is further not mitigating that Johnson promptly returned the excess funds because, again, that happened only after RBC detected the error and debited his RBC Account.[49] Indeed, as noted above, Johnson's immediate response to RBC's discovery of the mistake—returning the funds without question or challenge to the correction—supports the conclusion that Johnson was fully aware of the pricing error when he effected the transfer to the Bank Account. Similarly, although we recognize that Johnson retained the excess funds for only a week, that still at least indirectly deprived RBC of those funds, even if only temporarily. But even if we were to credit Johnson's contention that RBC was not harmed, that lack of harm would not be mitigating,[50] and, in any event, is outweighed by the aggravating factors present here.

Next, Johnson argues that it is mitigating that he consulted with his accountant before moving the funds to his Bank Account. Although relying on the advice of an accountant or other professional can be mitigating, the advice must be "competent" and the reliance must be "reasonable."[51] Johnson has not established that his accountant was competent to give him advice regarding a legal question—whether Johnson was entitled to the excess funds and what action he should take—rather than an accounting question, such as how the windfall should be handled for tax purposes. Indeed, to the extent the accountant addressed the legal question, there is evidence that he may have advised Johnson to consult a lawyer, indicating that the accountant did not consider himself qualified to advise Johnson. Johnson, of course, chose not to seek legal advice before acting. Under the circumstances, to the extent he relied on the accountant in transferring the excess funds, such reliance was unreasonable.[52]

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[49] *See* FINRA Sanction Guidelines, at 7 (listing as Principal Consideration 4, "[w]hether the respondent voluntarily and reasonably attempted, *prior to detection* and intervention, to pay restitution or otherwise remedy the misconduct" (emphasis added)); *Olson*, 2015 WL 5172954, at *7 (concluding that "voluntary repayment is only considered mitigating under the Guidelines when made 'prior to detection and intervention'" (quoting FINRA Sanction Guidelines, at 6 (2013) (Principal Consideration 4))).

[50] *See Louis Ottimo*, Exchange Act Release No. 95141, 2022 WL 2239146, at *7 (June 22, 2022) ("[W]e have consistently held that 'the lack of customer harm is not mitigating.'" (quoting *Ahmed Gadelkareem*, Exchange Act Release No. 82879, 2018 WL 1324737, at *9 (Mar. 14, 2018))); *see also Olson*, 2015 WL 5172954, at *7 (concluding that "voluntary repayment is only considered mitigating under the Guidelines when made 'prior to detection and intervention'" (quoting FINRA Sanction Guidelines, at 6 (2013) (Principal Consideration 4))).

[51] FINRA Sanction Guidelines, at 7 (listing as Principal Consideration 7, "[w]hether the respondent demonstrated *reasonable* reliance on *competent* legal or accounting advice" (emphasis added)); *see also Rockies Fund, Inc.*, Exchange Act Release No. 56344, 2007 WL 2471612, at *3 & n.14 (Aug. 31, 2007) (rejecting respondents' argument that their reliance on auditors was mitigating where "[r]espondents adduced no evidence showing full disclosure of relevant facts to the auditor"), *petition denied*, 298 F. App'x 4, 6 (D.C. Cir. 2008) (holding that the Commission's determination to not "give mitigating weight to [respondents'] reliance on the advice of counsel and auditor . . . [was] reasonable and reasonably explained").

[52] *Cf. Timothy S. Dembski*, Exchange Act Release No. 80306, 2017 WL 1103685, at *11 (Mar. 24, 2017) (concluding that respondent "could not have relied on [legal advice] in good faith" when he was aware of facts that undermined that advice); *SEC v. Goldfield Deep Mines*

Nor do we agree with Johnson's claim that a bar is unwarranted because he never spent the excess funds after transferring them to the Bank Account, which he claims demonstrates that he "is not a risk to the investing public." To the contrary, the fact that Johnson transferred over $1 million to the Bank Account while knowing that he was not entitled to that money demonstrates both a cavalier dishonesty and a callousness towards the property of others, which pose a future and continuing danger to the public—regardless of whether Johnson spent the money in this instance.[53]

Finally, Johnson argues that precedent supports leniency here, citing a sole FINRA decision—*Department of Enforcement v. Doni*—as an example of FINRA imposing a sanction less severe than a bar for conversion.[54] There, FINRA imposed only a two-year suspension for conversion because it found that sufficient mitigating factors existed to outweigh both the aggravating factors and the recommended Guidelines sanction for conversion. Regardless of FINRA's decision in *Doni*, however, we evaluate sanction determinations based on the facts presented in each particular case.[55] Comparisons to other matters with lesser sanctions are thus not dispositive.[56] Moreover, *Doni*, which involved the conversion of intellectual property and presented a "unique context in comparison to other conversion matters," is readily distinguishable from the present case.[57] For instance, unlike here, FINRA found that Doni testified credibly, "did not seek to realize a 'monetary benefit'" from his actions, and expressed "true remorse" by "immediately accept[ing] responsibility when he was confronted by his supervisor, and never attempt[ing] to justify his misconduct or blame others."[58]

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*Co. of Nev.*, 758 F.2d 459, 467 (9th Cir. 1985) (rejecting reliance-on-counsel defense when defendants "knew" that statements made in public filings "were false or misleading").

53 *Cf. Ottimo*, 2022 WL 2239146, at *7-8 (sustaining FINRA's imposition of a bar and explaining that "we have consistently held that 'the lack of customer harm is not mitigating.'" (quoting *Gadelkareem*, 2018 WL 1324737, at *9)).

54 *See Dep't of Enf't v. Doni*, Complaint No. 2011027007901, 2017 WL 6619344 (NAC Dec. 21, 2017).

55 *See McCarthy*, 406 F.3d at 190 (vacating the SEC's affirmance of SRO's two-year suspension and explaining that "each case must be considered on its own facts").

56 *See Edward Beyn*, Exchange Act Release No. 97325, 2023 WL 3017562, at *14 (Apr. 19, 2023) ("We have recognized that the appropriate sanction 'depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action take[n] in other proceedings.'" (alteration in original) (quoting *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *28 (July 2, 2013))).

57 *Doni*, 2017 WL 6619344, at *13; *see also Beyn*, 2023 WL 3017562, at *17 (finding unpersuasive applicant's citation to another FINRA case, which imposed lesser sanctions, to support his argument that FINRA should have imposed a lesser sanction on him and distinguishing the cited case); *Murphy*, 2013 WL 3327752, at *28 (same).

58 *Doni*, 2017 WL 6619344, at *13-15.

As explained above, we find three aggravating factors and three mitigating factors, and we give the mitigating ones little weight. Johnson's actions in seeking to move more than $1 million dollars beyond the reach of RBC when he had to know that it had been credited to the RBC Account by mistake and that it did not belong to him demonstrate a fundamental lack of integrity and are wholly inconsistent with the high ethical standards required of securities professionals. Given the threat his dishonest conduct indicates he poses to investors, firms, and other market participants, we believe the public interest requires his permanent exclusion from further association with any FINRA member.[59] Accordingly, we find that the sanction FINRA imposed on Johnson is neither excessive nor oppressive within the meaning of Exchange Act Section 19(e).

An appropriate order will issue.[60]

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

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[59] *See Springsteen-Abbott v. SEC*, 989 F.3d 4, 9 (D.C. Cir. 2021) ("[I]f imposed to 'protect the public,' an industry bar is 'remedial.'" (quoting *Saad v. SEC*, 980 F.3d 103, 107-08 (D.C. Cir. 2020))); *see also Saad v. SEC*, 873 F.3d 297, 303 (D.C. Cir. 2017) ("[I]t is the deception and fraud in the handling of others' property that endangers the integrity of the securities industry, and that threat remains the same whether the victim is a trusting employer or trusting client."); *Grivas*, 2016 WL 1238263, at *5, *8 (sustaining a FINRA bar on applicant for violating FINRA Rule 2010 through conversion and noting that, even if particular misconduct does not involve a security, in the future it "could very well involve securities"); *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *7 (Feb. 13, 2009) (stating that "'[t]he securities industry presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants'" and noting that "the importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business" (quoting *Bruce Paul*, Exchange Act Release No. 21789, 1985 WL 548579, at *2 (Feb. 26, 1985))), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

[60] We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 99596 / February 23, 2024

Admin. Proc. File No. 3-20646

In the Matter of the Application of

THOMAS LEE JOHNSON

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that FINRA's finding that Thomas Lee Johnson violated FINRA Rule 2010 by converting funds is sustained; and that the bar FINRA imposed on Thomas Lee Johnson is sustained.

By the Commission.

Vanessa A. Countryman
Secretary