NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C3B020013
v.	:	
	:	**HEARING PANEL DECISION**
CHRISTOPHER R. VAN DYK (CRD #1538653) Bainbridge Island, WA,	:	Hearing Officer - SW
	:	Dated June 23, 2003
Respondent.	:	

Respondent is barred in his capacity as a general securities principal, and is suspended for one year in his capacity as a general securities representative, for violating NASD Conduct Rules 3040 and 2110 by participating in the sale of securities without receiving approval from his employer. Respondent is concurrently suspended for one year in his capacity as a general securities representative for violating NASD Procedural Rule 8210 and Conduct Rule 2110 by failing to respond timely to Rule 8210 requests for information from NASD staff.

Appearances

David Utevsky, Esq., Regional Counsel, Seattle, Washington, and Cynthia A. Kittle, Esq., Regional Counsel, Los Angeles, CA, for the Department of Enforcement.

Christopher R. Van Dyk, pro se.

DECISION

I. Procedural Background

A. Complaint and Answer

On July 23, 2002, NASD Department of Enforcement ("Enforcement") filed a three-count Complaint against Respondent.[1]

On November 29, 2002, Enforcement filed a motion amending the Complaint, which was approved by the Hearing Officer on December 3, 2002. The two-count Amended Complaint alleges in count one that Respondent, while associated with Raymond James Financial Services, Inc. ("Raymond James"), offered and sold securities, in the form of (i) promissory notes convertible into common stock and (ii) common stock, issued by genieBooks.com Corporation, also known as Mylero Corporation ("genieBooks"), without providing prior written notice to, and receiving prior approval from Raymond James, in violation of Conduct Rules 3040 and 2110. Count two of the Amended Complaint alleges that Respondent failed to respond timely to the requests for documents issued by NASD staff.

Respondent admitted that: (1) he participated in the sale of the genieBooks securities between January 2000 and August 2000; (2) he participated in the sale of genieBooks securities outside the regular scope of his employment with Raymond James;

[1] The three-count Complaint included two causes of action for violations of NASD Procedural Rule 8210. In the second cause, the Complaint alleged that Respondent had produced certain information requested by NASD, but that he had failed to respond to the staff's requests in a timely manner. In the third cause, the Complaint alleged that Respondent had failed to produce certain documents requested by the staff. After the Complaint was filed, Respondent produced certain additional documents and represented to the staff that the remaining documents either did not exist or could not be found. Enforcement accepted Respondent's representations and filed an Amended Complaint to incorporate the late submissions of documents into the second cause of action and delete the third cause of action that Respondent failed to produce the requested documents contained in the original Complaint.

and (3) he did not receive written approval from Raymond James prior to his participation in the sale of genieBooks securities.

Respondent explained that, at the time of his participation in the securities transactions: (1) he was not paid for soliciting genieBooks investors; (2) he had orally advised Raymond James of his intention to seek funding for genieBooks in his capacity as an officer of genieBooks for some transition period; (3) as a registered investment advisor, he had an agreement with his employer that he could recommend and participate in private placements for his investment advisory clients as long as he did not receive compensation based on the specific security transaction; (4) in his solicitation activities, he specifically advised his customers orally and in writing that the genieBooks activities were completely separate from Raymond James; and (5) because he was in the process of "winding down" his brokerage business to concentrate on genieBooks, he was not actively performing registered representative duties. Accordingly, Respondent argued that he did not violate the underlying purpose of Rule 3040.

With respect to the Rule 8210 violation, Respondent argued that he had initially withheld certain information from NASD staff pending a determination of whether he could provide such information in his capacity as chairman of genieBooks without subjecting genieBooks to litigation, and because he did not realize that Rule 8210 could be used to obtain information from a registered representative regardless of the manner in which the information was obtained or maintained.

B. Hearing

The Hearing Panel, consisting of two current District 3 committee members and a Hearing Officer, conducted a Hearing in Seattle, Washington, on December 17 and 18,

2002.[2] The Parties presented joint exhibits JX-1 – JX-55[3] and Agreed Stipulations of Facts, which the Hearing Officer accepted. In addition, Enforcement offered exhibits CX-1, CX-3, CX-4, CX-5, and CX-11 – CX-24, and Respondent offered exhibits RX-2 – RX-15,[4] which the Hearing Officer accepted. Enforcement presented four witnesses: (i) Respondent; (ii) an NASD employee, Dale Perez; and (iii) two Raymond James employees, TW, a compliance auditor, and KC, vice president of Raymond James' compliance department. Respondent testified on his own behalf and presented three additional witnesses: (i) JF, a Raymond James vice president; (ii) JT, the CEO of genieBooks from inception until September 2000; and (iii) VM, a member of the board of directors of genieBooks and Respondent's sister.

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was employed by Robert Thomas Securities, Inc. ("Thomas Securities") from August 1996 to January 1999, when it completed a merger and became Raymond James. (JX-1, p. 1; Vol. 1, p. 16; Vol. 2, p. 68). From January 4, 1999 to August 15, 2000, Respondent was registered as a general securities principal, a registered options principal, and a general securities representative with Raymond James. (Stip. at ¶1; JX-1, p. 1).

On August 16, 2000, Raymond James filed a Form U-5 terminating Respondent's registration and disclosing that Respondent had been discharged for his failure to disclose

[2] "Vol. 1" refers to the transcript of the Hearing held on December 17, 2002; "Vol. 2" refers to the transcript of the Hearing held on December 18, 2002; "JX" refers to the Joint exhibits; "Stip. at ¶" refers to the "Agreed Stipulations of Fact," dated November 25, 2002; "CX" refers to Enforcement's exhibits; and "RX" refers to Respondent's exhibits.

[3] The Parties did not offer pre-hearing exhibit JX-10.

[4] The Hearing Officer agreed to permit Respondent to file an affidavit for one of his witnesses post-hearing, to be designated as RX-16.

outside business activities and possible selling away transactions. (JX-3). Respondent is not currently associated with any member firm. (JX-1, p. 1).

Article V, Section 4 of the NASD's By-Laws creates a two-year period of retained jurisdiction over persons whose association with a member has been terminated, covering conduct that occurred prior to termination of the association and failure to provide information requested pursuant to Rule 8210 during the period of retained jurisdiction.

Enforcement filed the Complaint on July 23, 2002, within two years of Respondent's August 16, 2000 termination of registration, and the Complaint alleges misconduct that occurred while Respondent was associated with Raymond James and failures to respond timely to requests for information issued during the period of retained jurisdiction. Accordingly, the Hearing Panel finds that NASD has jurisdiction over Respondent.

B. Respondent Participated in the Sale of genieBooks Securities, in Violation of Rules 3040 and 2110

1. Background

(a) Respondent's intention to leave the securities industry

Respondent initially joined the securities industry in July 1986. (Stip. at ¶1; JX-1, p. 8). Beginning in mid-1996, Respondent began switching his focus from a transactional practice to primarily an advisory practice. (Vol. 1, pp. 17-18, 104, 153). Respondent joined Thomas Securities in 1996, specifically to obtain the option of being dually registered as a representative and as an independent advisor. (Vol. 1, p. 76).

On August 8, 1996, Respondent executed an independent sales associate agreement with Thomas Securities.[5] (JX-4). From August 1996 until December 2000, Respondent was also president and owner of Securities Advisors Group, Inc. ("Securities Advisors"), a registered investment advisor. (Stip. at ¶3). Respondent viewed his agreement with Thomas Securities as allowing him to advise clients on the investment of securities in their portfolio, including securities not provided by Raymond James.[6] (JX-32, p. 36). Some of Respondent's advisory clients had securities accounts at Raymond James, i.e., passport accounts, for which the clients paid fees based on the assets under management, rather than commissions based on the securities transactions executed in the account. (Vol. 1, p. 114).

Pursuant to his agreement with Thomas Securities, Respondent was required to maintain a financial reserve fund at Thomas Securities' clearing firm in an amount and under the terms stated in Exhibit B to the sales associate agreement.[7] (JX-4). Although the reserve account funds could be invested at the discretion of Respondent, no funds could be withdrawn from the reserve account without the prior approval of Thomas Securities. (JX-4, p. 6).

[5] As an independent contractor, Respondent received a portion of the gross commissions or fees earned on securities transactions executed by clients, but was responsible for the expenses of his office, including insurance. (JX-4).

[6] Respondent's investment advisory application ("ADV") described Respondent's investment advisory activities to include "Applicant or its associated persons may also provide consulting or advice on private placements, and other business related activities." (RX-3, p. 18). In a November 12, 1996 letter, Thomas Securities approved the dual registration of Respondent with Thomas Securities and Securities Advisers Group, Inc. (RX-3, p. 28).

[7] The initial reserve deposit required was $10,000, which amount could be increased to a maximum of 5% of the registered representative's previous year's gross commissions. (JX-4, p. 17).

On December 7, 1998, Respondent filed an insurance claim under his errors and omissions insurance policy for a trading error.[8] (JX-5, p. 1). After the merger of Thomas Securities and formation of Raymond James in January 1999, a committee of Raymond James employees determined that Respondent's insurance claim failed to meet the criteria for coverage, and therefore the insurance policy would not cover Respondent's error. (Id.). Raymond James began deducting funds from Respondent's commissions to cover the approximately $17,000 loss. (Vol. 1, pp. 121-122). Approximately $1,700 was deducted from Respondent's commissions on a monthly basis.[9] (Vol. 1, p. 122).

As a result of being notified on May 18, 1999 that the errors and omissions insurance policy would not cover a trading error in his personal reserve account, Respondent described himself as being in the "frame of mind at that point to leave the business." (Vol. 1, pp. 17, 85).

(b) Roxy.Books

In the summer of 1999, Respondent's brother contacted Respondent with the idea of RoxyBooks.com Corporation ("RoxyBooks"), a company that intended to sell electronic copies of books over the Internet. (Vol. 2, p. 10). Prior to becoming a registered representative, Respondent had been a book dealer and book wholesaler. (Vol. 2, p. 13). Respondent reviewed the business plan and decided to become involved. (Vol. 2, p. 10). Respondent became involved initially by drafting a proposed offering

[8] The insurance claim involved a trading error that Respondent entered into his personal reserve account. (JX-5, p. 1). Respondent had intended to enter an order to sell 3 call options and inadvertently entered 300 call options. (Id.). The call options were bought back at a loss of $16,707.62 to the account. (Id.).

[9] The debt would have been paid in full by May or June of 2000. (Vol. 1, p. 122).

circular to raise financing for the project. (Vol. 2, pp. 10-11). Respondent became an officer, shareholder, and director of RoxyBooks. (Stip. at ¶8).

Respondent did not advise Raymond James of his involvement with RoxyBooks until "we got it to a point where it was going to go forward, it looked like it would work." (Vol. 2, p. 11). Respondent testified that he had a general familiarity with the policies and procedures of Thomas Securities but he did not sit down and specifically read them.[10] (Vol. 1, p. 70). Respondent testified that he was aware that he could not maintain outside business activities that had not been disclosed or were not within the "purview" of his investment advisory agency. (Id.). Respondent testified that he did not generally obtain NASD Notices to Members, and he had not reviewed Notice to Members 94-44, which discussed the application of the private securities rule to individuals dually registered as a representative and an investment advisor. (Vol. 1, p. 81).

In an October 11, 1999 letter, Respondent advised Raymond James that he was accepting the appointment as president and chief administrative officer, chief financial officer, and director of marketing with RoxyBooks.[11] (Stip. at ¶9; JX-6). Enclosed with the October 11, 1999 letter, was a complete set of the RoxyBooks solicitation documents, including a private placement memorandum, form of offeree questionnaire, and form of subscription agreement. (JX-6). The October 11, 1999 letter specifically indicated that RoxyBooks anticipated raising $3,375,000 in a first round of financing, and requested Raymond James' permission to present RoxyBooks' Private Placement Memorandum to certain of Respondent's long-time investment advisory clients who were also clients at

[10] In 1999, Raymond James' policy provided that all activities for which compensation is received must be disclosed and approved in writing via a "Request to Engage in Outside Activity" form. (CX-15, p. 1).
[11] Respondent sent Raymond James the information via letter, although in 1999, Raymond James provided its representatives with a specific form on which to disclose outside business activities. (Vol. 1, p. 71; CX-14).

Raymond James. (Id.). Respondent indicated that he would not be compensated for the placement of RoxyBooks securities beyond his normal compensation as an officer of RoxyBooks. (Id.).

In a four-line memorandum dated November 10, 1999, the president of Raymond James advised Respondent that Raymond James did not approve the outside activity. (Stip. at ¶10; JX-7). Respondent testified, and stated in a January 9, 2000 letter, that he received the memorandum on November 15, 1999, by which time the need for Raymond James' approval of his RoxyBooks' activity was moot. (JX-12, p. 2; Vol. 1, pp. 90-91). On November 11, 1999, Respondent had been terminated as an officer of RoxyBooks. (JX-12). Subsequently, on November 15, 1999, Respondent submitted his resignation as a director of RoxyBooks. (Id.).

2. genieBooks

In mid–December 1999, Respondent was advised that RoxyBooks might fail and its assets might become available for a new company. (JX-14). In January 2000, Respondent began working on a new offering memorandum to provide financing for the new company. (Id.). Respondent executed Articles of Incorporation for genieBooks on January 11, 2000.[12] (JX-8). Initially, Respondent anticipated that it would be three or four months before he could execute the plan for genieBooks to acquire RoxyBooks. (Vol. 1, p. 97). However, on January 27, 2000, genieBooks issued a tender offer to the stockholders of RoxyBooks.[13] (Stip. at ¶14; JX-11; Vol. 1, p. 93). At the time of the

[12] Respondent has been the president, chairman of the board of directors, and a minority shareholder of genieBooks since its inception. (Stip. at ¶13). Respondent owned 4.5 million shares of genieBooks, approximately 46.15% of the outstanding stock in January 2000. (Vol. 1, pp. 98-99).

[13] The tender offer documents indicated that the offer would expire on February 5, 2000 unless the offer was extended, and indicated that, after the purchase of shares of RoxyBooks, genieBooks would merge with RoxyBooks and operate as the surviving corporation. (JX-11, p. 1).

tender offer, Respondent called Raymond James' compliance department and indicated that he intended to go forward with the electronic bookseller in the form of genieBooks. (Vol. 1, p. 94). In the telephone conversation, the compliance department reiterated that Respondent would have to resign from Raymond James. (Id.).

In a February 9, 2000 letter to KC,[14] the compliance director for the Raymond James securities division, Respondent explicitly stated that he had decided to go forward with the development of genieBooks, and, accordingly, was tendering his resignation to Raymond James.[15] (Stip. at ¶17; JX-13). In the February 9, 2000 letter, Respondent specifically stated that genieBooks intended to raise $3 million in a series of small private placement offerings over the next few months, and that he was interested in working out a way to engage in both businesses. (Id.). Respondent stated that, if it could not be done, he requested a transition period in which to "wind down" his registered representative status. (Id.). Raymond James never responded to the February 9, 2000 letter. (Stip. at ¶18; Vol. 1, p. 102).

3. genieBooks securities offerings

In the Private Offering Memorandum, dated February 25, 2000, genieBooks offered for sale to the public 200 convertible notes at $1,000 face value per note, and 30

---

[14] KC joined Thomas Securities as vice president of compliance in internal audit in July 1994 and served in that capacity until the 1999 merger. (Vol. 2, p. 68). After the merger, KC served as compliance director for the Raymond James securities division until approximately February 2000, at which time he left to become chief executive officer of Raymond James Investment Services, a former joint venture of Raymond James, located in London, England. (Vol. 2, pp. 67-68).

[15] The February 9, 2000 letter referenced Respondent's inquiry the prior week about continuing with Raymond James as a registered representative while serving as president of genieBooks. On February 9, 2000, Respondent also sent to Raymond James' compliance department, via facsimile transmission, a copy of a letter that he sent to the attorney of a former director of RoxyBooks, which stated, among other things, Respondent's intent to resign from Raymond James to pursue genieBooks. (JX-12).

convertible notes at $1,000 face value per note (the "Notes").[16] (JX-21). The Private Offering Memorandum specifically stated:

> This Offering is not an offering by or of Raymond James Financial Services, Inc., for which Mr. Van Dyk has served as a Registered Representative or Securities Advisors Group, Inc., a Registered Investment Advisory firm, nor has either Corporation or their representatives passed upon the merits of these securities or the accuracy or completeness of this Memorandum. Mr. Van Dyk acts in connection with the Offering solely as an Officer of the Company and has a substantial financial interest in the Company. (JX-21, p. 11).

In an April 16, 2000 Confidential Private Placement Memorandum, genieBooks offered for sale 800,000 shares of common stock at $.50 per share.[17] (JX-22). The April 16, 2000 Private Placement Memorandum also included a Raymond James disclaimer. (JX-22, p. 11).

Respondent testified that as an officer of genieBooks, he solicited money for genieBooks. (Vol. 1, pp. 81-82). Respondent was involved in creating the offering documents and in contacting prospective investors. (Vol. 1, pp. 110-111). Respondent admitted that he assisted in accepting subscription agreements and issuing the company's convertible notes and common stock to investors.[18] (Id.).

4. Respondent's resignation from Raymond James

In July 2000, TW, a Raymond James compliance auditor, conducted a surprise audit of Respondent's branch office. (Vol. 1, p. 158; JX-18). Prior to auditing a Raymond James branch office, TW would receive a pre-audit compliance packet, which included on the first page a contact sheet with the location of the office. (Vol. 1, p. 159).

[16] The offer was to expire March 1, 2000 unless extended. (JX-21). The Notes paid simple interest at a rate of 4.5% and initially were convertible into 13,333 shares of common stock. (Id.).

[17] The offer was to expire on April 30, 2000 unless extended by the Company, and required a minimum investment of $10,000. (JX-22).

[18] The two offerings raised approximately $683,000. (Vol. 2, p. 162).

For the 2000 audit of Respondent's office, TW initially went to the building where Respondent was previously located.[19] (Vol. 1, p. 162).

TW noted that Respondent's new office was located inside a suite of offices for genieBooks. (Vol. 1, p. 164). TW testified that, when he asked Respondent whether he was involved with genieBooks, Respondent answered no, he was not. (Id.).

Respondent contradicted TW's testimony, testifying that he told TW about his involvement with genieBooks and showed him the genieBooks offering documents, specifically the Raymond James disclaimer language. (Vol. 1, p. 196). On the Branch Manager Annual Compliance Interview, dated July 13, 2000, Respondent indicated that he had disclosed all outside business activities on an outside business activity report.[20] (JX-18, p. 1).

Having observed the demeanor of Respondent, the Hearing Panel found Respondent more credible than TW.[21] The Hearing Panel noted that Respondent had previously advised Raymond James of his involvement with genieBooks in writing and orally on several occasions. Respondent had also advised the NASD staff of his involvement with genieBooks.[22] The Hearing Panel does not believe that suddenly, in July 2000, Respondent began denying his involvement with genieBooks. TW testified

[19] TW performed a compliance audit of Respondent's office in 1999. (Vol. 1, p. 158). TW testified that he been a compliance auditor since 1999. (Id.).

[20] Raymond James' procedures required that account executives wishing to participate in outside employment complete, sign, and submit a "Request to Engage in Outside Activity" form. (CX-14). If a registered representative did not use the form, but instead sent a letter, and Raymond James was willing to approve the outside activity, the registered representative would have been required to fill out the "Request to Engage in Outside Activity" form. (Vol. 2, p. 71). Respondent failed to use the required form. (Id.).

[21] The Hearing Panel noted that in his July 2000 NASD declaration, TW indicated that he had difficulty obtaining documentation from Respondent during the audit, but at the Hearing, TW testified that he did not have any difficulty. (Vol. 1, p. 179; CX-1, p. 1).

[22] Respondent had advised NASD staff of his genieBooks activities as early as February 2000. (JX-14).

that Respondent told him he was leaving the business to join genieBooks. (Vol. 1, p. 167). TW was an independent auditor for Raymond James, and TW got paid only if he did the audit.[23] (Vol. 1, pp. 166-167). The Hearing Panel believes that Respondent told TW about his genieBooks activities.

On August 14, 2000, the President of Raymond James called Respondent for an explanation of possible selling away activities. (Vol. 1, p. 123). In a memorandum faxed to Raymond James on August 15, 2000, Respondent tendered his resignation effective immediately. (Stip. at ¶5; JX-16). The only explanation that Respondent had for the February 2000 to August 2000 delay in making his resignation effective was, "If I didn't have to deal with it, it got, you know, ignored, and I think that was an error."[24] (Vol. 1, p. 154).

5. <u>Respondent participated in the offer and sale of genieBooks securities without providing prior written notice to, and without obtaining prior approval of, Raymond James</u>

Rule 3040 requires that an associated person who intends to participate in a private securities transaction, prior to the transaction, must "provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction . . . ." Further, if the transaction is for

[23] The 2000 audit report of Respondent's office was not presented as an exhibit at the Hearing.

[24] During the period January 2000 to August 2000, Respondent explored the possibilities of transferring his registration to another broker-dealer or transferring his accounts to another broker. (Vol. 1, p. 101-102). Respondent described the months between February and August 15, 2000 as "the fastest months I've ever lived." (Vo1. 1, p. 19).

compensation, the member firm must approve or disapprove of the proposed transaction in writing.[25]

Respondent argued that: (1) he was not paid for soliciting genieBooks investors; (2) he had orally advised Raymond James of his intention to seek funding for genieBooks in his capacity as an officer of genieBooks for some transition period; (3) as a registered investment advisor, he had an agreement with his employer that he could recommend and participate in private placements for his investment advisory clients as long as he did not receive compensation based on the specific security transaction;[26] (4) in his solicitation activities, he specifically advised his customers orally and in writing that the genieBooks activities were completely separate from Raymond James; and (5) because he was in the process of "winding down" his brokerage business to concentrate on genieBooks, he was not actively performing registered representative duties. Accordingly, Respondent argued that he did not violate the underlying purpose of Rule 3040.

First, Rule 3040 defines "selling compensation" broadly to include any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security. Respondent admitted that the source of the money he received as an officer of genieBooks was investor funds.[27] (Vol. 1, p. 120). Consequently, any funds that Respondent paid himself from genieBooks were a direct

[25] Pursuant to Rule 3040, if the member approves a person's participation in the proposed transaction, the transaction must be recorded on the books and records of the member and the member must supervise the person's participation in the transaction.

[26] Respondent testified that, if there had been an underwriter or some one being paid to raise money for genieBooks, it would have been a securities transaction requiring the approval of Raymond James. (Vol. 1, pp. 80-82).

[27] In the period from January 2000 through August 15, 2000, Respondent received payments of $42,690 from genieBooks in his capacity as its officer, director, and/or chairman, including $37,690 in consulting fees and $5,000 as reimbursement of expenses. (Stip. at ¶25).

result of his private securities transactions and thus selling compensation under Rule 3040.[28]

Second, although Respondent orally advised Raymond James that he intended to participate in the financing of genieBooks, and he followed up such oral representation with the February 9, 2000 letter, Rule 3040 requires that the notice be in writing and specify in detail the proposed transactions. Neither the oral communication nor the February 9, 2000 letter, which did not detail the terms of the genieBooks note offering and/or common stock offering, satisfied the requirements of Rule 3040.

Because of the February 9, 2000 letter, Raymond James should have been aware that Respondent intended to proceed with his participation in genieBooks. Consequently, the length of time that the misconduct continued is, in part, a result of Raymond James' failure to follow up on the February 9, 2000 letter. Nevertheless, Respondent was aware that Raymond James had orally advised him in January 2000 that he could not be involved in genieBooks and be a registered representative. It was unreasonable for Respondent to assume that he had Raymond James' permission to proceed with genieBooks for some extended transition period because Raymond James did not respond or object to his February 9, 2000 letter, in which he requested a week to transition from Raymond James to genieBooks.

Third, although Respondent was dually registered and his advisory business was approved to "provide advice on private placements," approval to be dually registered does not supercede the requirements of Rule 3040. Respondent may have initially believed that pursuant to his agreement with Raymond James he was permitted to advise

[28] See William Louis Morgan, 51 S.E.C. 622, 627 (1993) (cash derived from private securities transactions used to finance branch office operations and personal expenses held to be "selling compensation").

his advisory clients regarding private placements. However, after Raymond James rejected his participation in RoxyBooks, it was unreasonable for Respondent to fail to review closely the relevant rules before he began soliciting his advisory clients for genieBooks. Even a cursory review of NASD Notice to Members 94-44 would have raised red flags about Respondent's genieBooks activities.

Fourth, Respondent's belief that he had fulfilled the underlying purpose of Rule 3040 by providing each investor with a written and oral disclaimer regarding Raymond James' involvement with genieBooks did not justify his failing to comply with the explicit requirements of Rule 3040.

Fifth, although Respondent may not have been actively seeking new customers or soliciting transactions from customers, Respondent was performing the duties of a registered representative during the period. TW, a Raymond James auditor, testified that in July 2000, Respondent's projected production for 2000 was $83,000, about 55% of his 1999 production. (Vol. 1, p. 169).

In any event, Rule 3040 requires not only that the associated person provide prior notice to the employer of the private securities transactions, but also provides that if the employer disapproves of the associated person's participation in the private securities transaction, the associated person shall not participate in the transaction in any manner, directly or indirectly. Raymond James did not approve Respondent's participation in genieBooks.

Respondent may not have intended to violate Rule 3040. However, scienter is not required to find liability under Rules 2110 or 3040.[29] Respondent solicited the purchase

[29] District Bus. Conduct Comm. for Dist. Number 8 v. Norman M. Merz, Complaint No. C89960094, 1998 WL 1084545 at *10 (Nov. 11, 1998).

of securities for compensation without obtaining the prior approval of his employer. Accordingly, the Hearing Panel finds that Respondent violated Conduct Rules 3040 and 2110.

C. Failure to Timely Respond to Rule 8210 Requests

On August 16, 2000, Raymond James filed a Form U-5 disclosing that Respondent was discharged for failure to disclose outside business activities and possible selling away. (Stip. at ¶4; JX-3). Upon receipt of the Form U-5 filed by Raymond James, the NASD staff initiated an investigation and sent Respondent, on April 23, 2001, a request for information, pursuant to Rule 8210.[30] (Stip. at ¶¶33, 35; JX-24). The request was sent to Respondent's former residential address. (JX-24; Vol. 1, p. 31).

On May 16, 2001, NASD sent a Rule 8210 request for information to Respondent at his correct address. (Stip. at ¶39; JX-25). On May 30, 2001, Respondent responded to the NASD staff's inquiries and indicated that documents would be provided in a timely manner. (Stip. at ¶42; JX-26).

On July 2, 2001, NASD staff requested additional information and repeated its request for genieBooks documentation. (Stip. at ¶45; JX-27). In a July 24, 2001 letter, Respondent explained that he would attempt to provide the documents and responses to the questions in a timely manner, but he explained that he would not be able to respond immediately because he was in the process of consolidating two offices and he was currently involved in other litigation. (Stip. at ¶48; JX-28).

---

[30] On February 9, 2000, in response to an earlier inquiry, Respondent advised NASD of his involvement with RoxyBooks and genieBooks. (JX-14). The letter indicated Respondent's intent to pursue genieBooks. (Id.).

On July 26, 2001, NASD sent a letter indicating that Respondent's July 24, 2001 response was not adequate and requested that Respondent appear at an on-the-record interview. (Stip. at ¶49; JX-29). In an August 3, 2001 response, Respondent provided additional information to NASD staff, including (i) the two genieBooks private placement memoranda, and (ii) a list of 11 genieBooks investors whom he identified as Raymond James clients. (Stip. at ¶¶52-53; JX-30; JX-31). Nevertheless, Respondent did not provide a complete list of all genieBooks investors. (Stip. at ¶53). On August 22, 2001, Respondent attended an NASD on-the-record interview. (Stip. at ¶55; JX-32).

As a result of the on-the-record interview, NASD sent Respondent, on September 10, 2001, an additional request for a complete schedule of all genieBooks' investors for both offerings, and a list of all individuals who provided loans to genieBooks. (Stip. at ¶¶56, 58; JX-34). On September 24, 2001, Respondent responded that he had provided a complete list of individuals and institutions that were clients of both Raymond James and his investment advisor, and that Mylero Corporation would have to respond separately regarding all investors.[31] (Stip. at ¶59; JX-35).

On January 3, 2002, NASD sent an additional request letter to Respondent, stating that a list of all investors regardless of whether Respondent deemed them to be "non-clients" of Raymond James should be provided. (Stip. at ¶¶62, 64; JX-36). In a January 17, 2002 letter, Respondent stated that he would not provide any information that he received in his capacity as chairman and president of genieBooks, and indicated that

[31] genieBooks underwent a legal name change in August 2000 to Mylero Corporation. (JX-32, p. 184).

Mylero Corporation would provide such information only upon receipt of "comprehensive hold harmless and indemnification from [NASD]."[32] (Stip. at ¶65; JX-37).

On June 3 and June 5, 2002, Respondent provided a list of all investors, and copies of offeree questionnaires and subscription agreements executed by the investors. (Stip. at ¶70; JX-42; JX-43). On July 23, 2002, Enforcement filed the Complaint in this proceeding. In an October 9, 2002 letter, Respondent provided copies of subscription agreements and offeree questionnaires for the two remaining investors. (Stip. at ¶74; JX-45).

NASD Procedural Rule 8210(a)(1) authorizes the NASD to require persons associated with a member of the NASD to report "orally, [or] in writing … with respect to any matter" under investigation by it. The purpose of this rule is to provide a means for the NASD to carry out its regulatory functions in the absence of subpoena power; it is a "key element in the NASD's effort to police its members."[33] Failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate.[34]

[32] During this time period, genieBooks had been sued and just completed a $14 million settlement of civil litigation with a former Roxy.Books director. (Vol. 1, pp. 136-137).

[33] Richard J. Rouse, 51 S.E.C. 581, 1993 WL 276149, at *2 (1993). ("The duty to respond is in no way dependent upon one's status or title within in [sic] a firm but falls upon any associated person to whom a request is directed.").

[34] Michael David Borth, Exchange Act Release 31602 (Dec. 16, 1992), 1992 SEC LEXIS 3248, at *4 (1992). ("[Respondents], as registered representatives, each had a clear obligation to supply the information that the NASD requested.").

In this case, NASD requested information about a possible private securities violation. Although Respondent ultimately responded to the requests for information, he did so more than one year after the May 16, 2001 request for information.

The Hearing Panel rejects the argument that Respondent did not have to provide the documents for non Raymond James customers because they were in the possession of genieBooks rather than Respondent. In any event, the Hearing Panel holds that Respondent had custody and control of the information and documents and could have provided them in response to the requests, as he did eventually in October 2002.[35]

Based on the undisputed facts, the Hearing Panel finds that Respondent violated Procedural Rule 8210 and Conduct Rule 2110 by failing to provide the investor information and documentation in response to the staff's requests in a timely manner. Respondent's failure to review Rule 8210 and completely understand its reach does not excuse his violation. Respondent's decision that information that he obtained in his capacity as an officer of genieBooks was not subject to NASD jurisdiction without further investigation was unreasonable.[36] Respondent's attempt to answer timely the questions that he thought the staff should ask, rather than the questions that were asked, does not justify his failure to answer timely.[37]

---

[35] In this proceeding, Respondent provided the genieBooks offering documents to NASD, although VM confirmed that the genieBooks' Board of Directors never met formally to decide whether to provide the genieBooks offering documents to NASD. (Vol. 2, pp. 133-134).

[36] In Redacted Decision, Complaint No. C8A990071, available at www.nasdr.com/pdf-text/nac0401_01red.txt, the NAC rejected and found no mitigation in Respondent 2's claim that he had no access to or legal authority to provide the requested legal documentation, because he had at all times the ability, whether in his individual capacity as a client of the law firm or as President and controlling shareholder of both the Firm and Firm A, to obtain and produce them.

[37]Respondent believed that the continuous implication of NASD's letters was that genieBooks had retained an underwriter or a broker "to raise us money," which was not true. (Vol. 1., pp. 134-135). See In re General Bond and Share Co., 51 S.E.C. 411 (1993), aff'd in part, vacated and remanded on other grounds,

III. Sanctions

A. Private Securities Transactions: NASD Conduct Rules 3040 and 2110

The NASD Sanction Guidelines for Private Securities Transactions recommend a fine ranging from $5,000 to $50,000, and suggest the adjudicator may increase the fine amount by adding the amount of respondent's financial benefit. The Guidelines also suggest that the adjudicator suspend the individual in any or all capacities for up to two years, and bar the individual in egregious cases.[38]

Arguing that this was an egregious case, Enforcement recommended that Respondent be barred, or, in the alternative, that he be suspended for two years and fined $47,690 (a $10,000 base amount plus $37,690 representing the amount of compensation that Respondent received from genieBooks from January 2000 to August 15, 2000). On March 12, 2003, Enforcement filed a motion to stay this proceeding indicating that Respondent had filed a bankruptcy petition. In its motion to stay, Enforcement withdrew its request for monetary fines.[39]

The Hearing Panel agrees that this is a very serious case. In determining the appropriate remedial sanction, the Hearing Panel considered, among other things, the following five factors listed in the Guidelines for Private Securities Transactions:

> (1) whether the respondent had a proprietary or beneficial interest in, or was otherwise affiliated with, the selling enterprise;

---

39 F.3d 1451 (10th Cir. 1994) (associated persons may not ignore NASD inquiries, nor may they determine for themselves if the information requested is material to an investigation).

[38] NASD Sanction Guidelines, p. 19 (2001).

[39] In an order dated March 19, 2003, the United States Bankruptcy Court for the Western District of Washington lifted the automatic stay in Respondent's bankruptcy proceeding, to permit this disciplinary decision to be issued, but it required that no monetary sanctions be imposed.

(2) whether the respondent attempted to create the impression that his employer sanctioned the activity, for example, by using the employer's premises, facilities, name, and goodwill;

(3) whether the respondent sold away to customers of his employer;

(4) whether the respondent provided his employer with verbal notice of all relevant factors; and

(5) whether the respondent sold the product at issue after prior rejection by the firm, a warning from a supervisor to stop sales, or some other prohibition of sales by the member firm.

The Guidelines also list a number of general factors to be considered in determining sanctions, including:

(1) whether the individual respondent accepted responsibility for and acknowledged the misconduct to his or her employer or regulator prior to detection and intervention;

(2) whether the respondent engaged in numerous acts and/or a pattern of misconduct;

(3) whether the respondent engaged in the misconduct over an extended period of time;

(4) whether the respondent attempted to conceal his or her misconduct;

(5) whether the respondent's misconduct resulted directly or indirectly in injury to third parties, and the extent of the injury;

(6) whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence;

(7) whether the respondent's misconduct resulted in the potential for respondent's monetary or other gain; and

(8) the number, size, and character of the transactions at issue.

In this case, the Hearing Panel found the following aggravating factors:

(1) Respondent had a proprietary and managerial role in genieBooks, the selling enterprise;

(2) certain of the genieBooks purchasers were Raymond James customers;[40]

(3) Respondent participated in two separate securities offerings raising approximately $683,000 from 52 investors over a four-month period;

(4) Respondent's misconduct resulted in his monetary gain; and most importantly,

(5) Respondent participated in the sale of genieBooks securities, even after Raymond James indicated that Respondent could not do so and still remain registered with Raymond James.

On the other hand, several aggravating factors typically found in private securities transaction cases in which a bar in all capacities was imposed were absent in this case. For example, there was no evidence presented that Respondent attempted to create the impression that his employer sanctioned the activity. In fact, Respondent's written disclosure provided to customers specifically included a disclaimer regarding Raymond James. Additionally, Respondent's misconduct was not the direct cause of the losses sustained by the genieBooks investors. Respondent advised Raymond James of his activities albeit without sufficient detail to constitute notice.

Respondent testified that there was no intent to deceive either Raymond James or any public customers. The Hearing Panel believes that Respondent did not intend to deceive anyone. However, the Hearing Panel also believes that Respondent never took the time to closely review Raymond James' policies or NASD's rules,[41] and that his failure to do so in light of Raymond James' clear disapproval of the activity amounted to extreme recklessness. Such recklessness is unacceptable in a registered principal.

[40] Respondent testified that about 15 or 16 of the 50 genieBooks investors were Respondent's advisory clients. (Vol. 2, p. 35). Raymond James' customers invested approximately $187,500 in genieBooks. (JX-31).

[41] As a matter of law, Respondent is presumed to know and understand the NASD Rules. Carter v. SEC, 726 F.2d, 472, 474 (9th Cir. 1983).

Respondent made a conscious decision to focus on making genieBooks a success to the detriment of his responsibilities as a securities principal and a registered representative.

Accordingly, based on the above factors, the Hearing Panel finds that Respondent's misconduct warrants a bar in his capacity as a general securities principal, and a one-year suspension in his capacity as a registered representative. No monetary sanctions are imposed.

B. Failure to Timely Respond: Procedural Rule 8210 and Conduct Rule 2110

The applicable NASD Sanction Guideline recommends that, where an individual does not respond in a timely manner to a request for information issued under NASD Procedural Rule 8210, a suspension of up to two years and a fine ranging between $2,500 and $25,000 should be imposed.[42] Prior to Respondent's filing for bankruptcy, Enforcement requested that the Hearing Panel bar Respondent in all capacities, or, in the alternative, suspend Respondent for two years and fine him $25,000.

Under NASD Sanction Guidelines, the following factors are relevant in determining the appropriate remedial sanctions: (1) the nature of the information requested; (2) the number of requests made; (3) the time respondent took to respond; and (4) the degree of regulatory pressure required to obtain a response.[43]

The information requested was necessary to investigate a serious alleged violation. Enforcement was forced to make five official requests to obtain compliance. Respondent took more than a year to respond completely to the requests for information. Enforcement was forced to exert a great degree of regulatory pressure to obtain a response to a Rule 8210 request regarding Respondent's possible misconduct.

[42] NASD Sanction Guidelines, 39 (2001).

[43] Id.

On the other hand, Mr. Perez, the NASD examiner, testified that there was no time that he tried to reach Respondent and could not, and there was no time that Respondent failed to return telephone calls in a timely manner. (Vol. 1, p. 46). In addition, the Hearing Panel believes that Respondent believed he was providing NASD with the information it needed to determine if he had violated Rule 3040, by providing the list of the Raymond James customers and form copies of the offering documents. Similar to his earlier behavior, Respondent attempted to comply with his understanding of the underlying purpose of the rule rather the rule itself.

Accordingly, although the Hearing Panel does not find that Respondent was deliberately attempting to impede the investigation, the Hearing Panel finds that Respondent's failure to respond completely to the requests for documentation warrants a serious sanction. The Hearing Panel, therefore, suspends Respondent in all capacities for one year. No monetary sanctions are imposed.

IV. Conclusion

The Hearing Panel (i) bars Respondent Christopher R. Van Dyk as a general securities principal, and (ii) suspends him for one year as a securities representative for count one of the Complaint and concurrently (iii) suspends him for one year as a securities representative for count two of the Complaint. If this decision becomes the final disciplinary action of NASD, the bar in his capacity as securities principal shall become effective immediately, and the suspensions shall become effective with the

opening of business on Monday, August 18, 2003 and end at the close of business on August 17, 2004.[44]

HEARING PANEL

By:_____
Sharon Witherspoon
Hearing Officer

Dated: Washington, D.C.
June 23, 2003

Copies to:

Christopher R. Van Dyk (via Airborne Express and first class mail)
David Utevsky, Esq. (via electronic and first class mail)
Cynthia A. Kittle, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

[44] The Hearing Panel considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.