**FINANCIAL INDUSTRY REGULATORY AUTHORITY**
**OFFICE OF HEARING OFFICERS**

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| DEPARTMENT OF ENFORCEMENT,<br><br>Complainant,<br><br>v.<br><br>KEVIN SCOTT POUND<br>(CRD No. 2564356)<br><br>Respondent. | Disciplinary Proceeding<br>No. 2008012531501<br><br>Hearing Officer – MAD<br><br>**HEARING PANEL DECISION**<br><br>August 19, 2010 |

**Respondent is barred from associating with any member firm in any capacity for engaging in private securities transactions, in violation of Conduct Rules 3040 and 2110. In light of the bar, no additional sanctions are imposed for the Respondent's failure to timely respond to FINRA's requests for information, in violation of Procedural Rule 8210 and Conduct Rule 2110.**

**Appearances**

For Complainant: Jonathan M. Prytherch, Esq., Woodbridge, NJ, and Mark P. Dauer, Esq., New Orleans, LA, FINRA, DEPARTMENT OF ENFORCEMENT.

For Respondent: Jeffrey L. Costell, Esq., COSTELL & CORNELIUS LAW CORPORATION.

## DECISION

### I. INTRODUCTION

The Department of Enforcement ("Enforcement") charged Respondent Kevin Scott Pound ("Pound") with violating Conduct Rule 3040, which prohibits associated persons from engaging in private securities transactions without giving their employer prior written notice of the proposed transaction. Specifically, the Complaint alleges that Pound participated in the issuance of promissory notes of Acropolis Securities Group, LLC ("Acropolis") while he was

associated with D.C. Evans and Company, LLC ("D.C. Evans" or "the Firm"), a former member of the Financial Industry Regulatory Authority ("FINRA"),[1] without giving D.C. Evans prior written notice of his proposed participation. The Complaint further alleges that at least 60 investors, including seniors, invested approximately $5,886,000 in the notes through Pound. The Complaint also alleges that Pound failed to timely respond to FINRA's written requests for information in violation of Procedural Rule 8210 and Conduct Rule 2110.

## II. PROCEDURAL HISTORY

On July 31, 2009, Enforcement filed the Complaint in this disciplinary proceeding. Pound filed his Answer on August 28, 2009. In his Answer, Pound admitted that Acropolis, a company in which Pound was the majority owner and Chief Executive Officer, issued approximately $5,886,000 worth of promissory notes to investors, many of whom were seniors.[2] He generally denied the remaining allegations in the Complaint and requested a hearing. The hearing was held on May 24-26, 2010, in Los Angeles, California, before a Hearing Panel composed of the Hearing Officer, a current member of FINRA's District 2 Committee, and a former member of FINRA's District 2 Committee. Enforcement called eight witnesses: Douglas C. Evans ("Evans"), Managing Principal of D.C. Evans, Jack Litsky ("Litsky"), a FINRA Principal Examiner, Respondent Pound, and five customers. Pound testified on his own behalf and also called Evans.[3]

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[1] As of July 30, 2007, NASD and New York Stock Exchange Regulation, Inc. consolidated their member regulation functions and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA include, where appropriate, NASD. Initially, FINRA adopted NASD's rules and certain NYSE rules, but it is in the process of establishing a consolidated FINRA rulebook. To that end, on December 15, 2008, certain consolidated FINRA rules became effective, replacing parallel NASD and/or NYSE rules, and in some cases, the prior rules were re-numbered and/or revised. *See* Regulatory Notice No. 08-57, FINRA Notices to Members, 2008 FINRA LEXIS 50 (Oct. 2008). This Decision refers to and relies on the NASD rules in the Complaint that were in effect at the time of the Respondent's alleged misconduct.

[2] Answer ¶¶ 1, 9, 13.

[3] In this decision, "Tr." refers to the transcript of the hearing; "CX" to Enforcement's exhibits; "RX" to Respondent's exhibits. "Stip." refers to stipulations of fact between Enforcement and Respondent.

Based upon a preponderance of the evidence, the Hearing Panel makes the following findings of fact and conclusions of law.

## III. FINDINGS OF FACT

### A. Respondent's Background and Association with D.C. Evans

Pound entered the securities industry in March 1999 when he joined Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch").[4] He became registered as a General Securities Representative in November 1999.[5] In September 2002, Merrill Lynch terminated Pound.[6]

In May 2003, Pound founded an investment advisory firm, Pound Financial, LLC ("Pound Financial").[7] Through Pound Financial, Pound provided investment recommendations to individual investors.[8]

In July 2004, Pound joined Quality Home Loans ("QHL") as a manager.[9] QHL was a mortgage lending company that originated high interest rate loans for residential single family homes.[10] Several of Pound's investment advisory clients from Pound Financial invested in QHL.[11] Pound left QHL in November 2006.[12]

From October 19, 2006 until August 6, 2007, Pound was an associated person of D.C. Evans. The purpose of Pound's association with D.C. Evans related to a private placement

[4] CX-2, at 6.

[5] *Id.*

[6] *Id.*

[7] CX-2, at 4.

[8] *Id.*

[9] CX-10, at 4-5.

[10] *Id.* at 5. QHL filed for bankruptcy on August 22, 2007. Tr. 701-02.

[11] *See, e.g.*, Tr. 295-96, 344, 362-63, 366, 379-80.

[12] Tr. 544.

offering of Acropolis that never took place.[13] Pound also applied for registration through D.C. Evans.[14] On October 19, 2006, D.C. Evans filed a Uniform Application for Securities Registration or Transfer ("Form U4") on Pound's behalf.[15] On August 6, 2007, D.C. Evans filed a Uniform Termination Notice for Securities Industry Registration ("Form U5"), terminating Pound's association as of August 5, 2007.[16] Pound is not presently associated with a member firm.[17]

### B. Acropolis Securities Group

In October 2006, just before his departure from QHL, Pound formed Acropolis and served as its Chief Executive Officer.[18] Acropolis, modeled after QHL,[19] was in the business of originating, holding, securitizing, borrowing against, and selling residential mortgages.[20] Typically, Acropolis either sold the loans immediately or packaged the loans and sold them on the secondary market.[21]

#### 1. Acropolis Promissory Notes

Acropolis issued promissory notes in order to raise money to capitalize its business.[22] The notes were issued in three different classes and identified Acropolis Securities Group as the

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[13] Tr. 59-60, 545; CX-9, at 2.

[14] Tr. 42, CX-2, at 5; CX-3, at 4; CX-9, at 2. Evans sold D.C. Evans in March 2009. Tr. 38. The new firm name is Charles Vista LLC. Tr. 38-39, 122, 124.

[15] CX-2, at 20, 22-39. Pound submitted a signed Form U4 and a fingerprint card, dated August 29, 2006, to D.C. Evans. Tr. 42, 51, 96; CX-4, at 5; CX-5, at 2. In addition, when Evans notified Pound of the examination and registration fees that D.C. Evans had incurred for Pound, Pound sent D.C. Evans a $442 check, dated November 30, 2006, for reimbursement. Tr. 49-51; CX-4, at 1-4.

[16] Tr. 64; CX-2, at 40-43.

[17] Answer ¶ 6.

[18] Tr. 541, 612.

[19] Tr. 544-45, 711-12.

[20] CX-9, at 3.

[21] Tr. 563.

[22] Tr. 547.

borrower.[23] Each note had a one year term and offered an interest rate of between 12 and 15 percent.[24] Pound drafted the Acropolis notes[25] and signed each note as the Chief Executive Officer of Acropolis.[26] While associated with D.C. Evans, he sold approximately $5,886,000 worth of promissory notes.[27] In order to obtain the notes, the purchasers completed paperwork from the alternative investment department of Fidelity Brokerage Services, LLC ("Fidelity").[28] The Acropolis notes were held in Fidelity brokerage accounts.[29] The note purchases were listed on Fidelity account statements as "securities bought" under the heading "brokerage activity."[30]

2. No Notice or Approval for the Promissory Notes

Pound did not give prior notice to, or obtain prior approval from, D.C. Evans regarding the Acropolis note transactions.[31] None of the Acropolis promissory notes was placed through D.C. Evans.[32]

3. Purchasers of the Promissory Notes

The purchasers of the Acropolis notes were primarily existing Pound Financial clients, or friends and family of Pound Financial clients.[33] Pound referred his Pound Financial clients to Acropolis, and then sold the Acropolis promissory notes to them.[34] Approximately 60 individuals purchased the notes, several of whom were seniors or individuals who held the notes in their

[23] *See* CX-9, at 5-9; CX-10A, 10B, 10C, 11.

[24] *See* CX-10A, 10B, 10C, 11.

[25] Tr. 710.

[26] *See* CX-10A, 10B, 10C, 11.

[27] Answer ¶ 1.

[28] Tr. 689; CX-13.

[29] Tr. 506; *see, e.g.*, CX-14, at 6-9.

[30] *See, e.g.*, CX-14, at 7.

[31] Tr. 68, 503; CX-9, at 2.

[32] Tr. 115, 637; CX-9, at 2.

[33] Tr. 560-61.

[34] Tr. 560-61; CX-9, at 2.

Investment Retirement Accounts ("IRAs").[35] Pound spoke directly to each purchaser.[36] Acropolis defaulted on the notes in the fall of 2007, and most, if not all, of the purchasers did not receive all of their promised interest payments or a return of their principal.[37]

Five of Pound's customers testified at the hearing. The purchasers were primarily motivated by the profit the notes were to generate. Customer VG purchased three promissory notes between January 26 and March 13, 2007, totaling $140,000, each with an interest rate of 12%.[38] VG was retired at the time she purchased the Acropolis notes.[39] She thought the 12% interest rate was very good compared to what she had received on other investments over the years.[40] She had previously invested with QHL, and understood that Acropolis would be conducting the same type business as QHL.[41]

Customer VH purchased a $25,000 promissory note, dated April 11, 2007, with an interest rate of 12%.[42] She understood that she was guaranteed a 12% return.[43] VH was retired and used her retirement funds to make the purchase.[44] Her motivation for investing in Acropolis was to get additional money for retirement.[45]

[35] Answer ¶ 13; Tr. 561.

[36] Tr. 563.

[37] Answer ¶ 14.

[38] CX-17.

[39] Tr. 385, 394.

[40] Tr. 383-84.

[41] Tr. 379-80.

[42] CX-16.

[43] Tr. 350.

[44] Tr. 350-51.

[45] Tr. 353.

Customer MB purchased three promissory notes between March 1 and May 2, 2007, totaling $479,000, each with an interest rate of 15%.[46] MB purchased the notes with funds from his IRA.[47] For MB, the interest rate was a motivating factor in making this investment.[48] MB testified that he purchased the notes because "it was a better return than what I was getting on my mutual fund."[49] "I thought it was a better return, a safer return, and I thought it was just great for a pension plan."[50]

Customer MR purchased a $30,000 promissory note, dated May 31, 2007, with an interest rate of 12%.[51] MR met Pound at QHL, and had invested similarly with QHL.[52] Pound told MR that others from QHL had invested in Acropolis.[53] MR testified that about a month and a half before he invested, Pound provided him with a brochure describing Acropolis and investments in Acropolis.[54] The brochure stated that "Acropolis offers to individual investors a mortgage investment product that delivers high return – relative to similar investments such as CDs and bonds – with a low degree of risk."[55] For MR, the 12% return was a motivating factor.[56]

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[46] CX-15.

[47] Tr. 152-53, 159.

[48] Tr. 149-50, 155.

[49] Tr. 149.

[50] Tr. 149-50.

[51] CX-14.

[52] Tr. 295, 344.

[53] Tr. 301.

[54] Tr. 296, 304, 320; CX-12.

[55] CX-12, at 3. Pound denied providing CX-12, the brochure, to MR; however, he acknowledged that brochures were available in his office and customers could have picked them up. Tr. 586, 659-60. MR was frequently at the Acropolis office as he was the insurance broker for Acropolis. Tr. 302-03. RX-16 is an invoice for printing materials that Pound asserted was for CX-12. Pound entered RX-16 into evidence to establish that the brochures were probably not available to MR prior to his purchase of the note. The panel did not find that RX-16 rebutted MR's credible testimony. RX-16 does not appear to be an invoice for CX-12, the brochure MR received. The Panel notes that RX-16 provides charges for "Tony Ng Corporate Profile" and "Revised Biographies for Income Fund: Pound, Haworth, McCroskey, Ng." However, CX-12 does not include a biography for Ng; it only provides biographies for three individuals: Pound, Haworth, and McCroskey. Accordingly, RX-16 appears to be an invoice for a revision to existing printed material. In fact, Pound testified that there were a lot of modifications to CX-12. Tr. 687.

[56] Tr. 310, 336.

Lastly, Customer MD and her husband purchased two Acropolis promissory notes, totaling $324,000, dated January 26 and March 6, 2007.[57] They had previously invested with QHL.[58] The January 26 note was in the amount of $75,000 with a 12% interest rate.[59] The source of the $75,000 was equity that they took out of their home.[60] The source of funds for the March 6 note, in the amount of $249,000 with a 15% interest rate,[61] was from an annuity.[62] MD and her husband were both retired at the time of their investment.[63] The interest payments were important to MD because she needed them to make her mortgage payment on her home.[64]

After Acropolis defaulted on the notes, many of the Acropolis note purchasers filed lawsuits for the return of their investments against Pound, Pound Financial, Acropolis, Evans, D.C. Evans, Fidelity, and other entities that Pound utilized when selling loans on the secondary market.[65] Pound used a $282,000 settlement Acropolis had received from a home loan that was in litigation to defend against the lawsuits.[66] None of the settlement money was distributed to the note purchasers to offset their losses.[67]

[57] CX-20.

[58] Tr. 362, 366.

[59] CX-20, at 1-2.

[60] Tr. 367.

[61] CX-20, at 10-11.

[62] Tr. 364-65.

[63] Tr. 369.

[64] Tr. 363, 365, 367-68.

[65] *See* RX-13; Tr. 71-72, 177, 358, 373, 394-95, 486-88, 606-07.

[66] Tr. 670-72. Pound has exhausted those funds and still owes counsel of record for his defense in this disciplinary proceeding. Tr. 672.

[67] Tr. at 671.

4. Pound's Compensation for the Promissory Notes

Pound received compensation for the note transactions. Each Acropolis note purchaser was also a client of Pound Financial.[68] According to Pound, the advisory fees Pound collected from his Pound Financial investment advisory clients were calculated according to the total value of assets under management, which included the purchase price of the Acropolis notes.[69] In 2007, approximately half of the assets under management were Acropolis notes.[70] Pound received $20,000 in fees from his advisory clients, which included the Acropolis note purchasers.[71]

**C. FINRA's Investigation**

FINRA's investigation into Pound's activities began on February 24, 2008, when it received a customer complaint from MR.[72] As discussed above, MR purchased a $30,000 Acropolis promissory note, dated May 31, 2007, with an interest rate of 12%.[73] He stated that after purchasing the note, he stopped receiving interest payments in October 2007.[74] MR had been unable to get his $30,000 principal returned to him.[75] He attempted to speak to Pound, but Pound was not returning his calls.[76]

On March 11, 2008, pursuant to Procedural Rule 8210, FINRA Principal Examiner Litsky sent a letter to Pound, requesting information concerning MR's complaint.[77] The letter

[68] Tr. 689. Many of the note purchasers were already Pound Financial customers. The remainder completed investment advisory agreements to become Pound Financial customers. Tr. 719-20.

[69] Tr. 629, 706.

[70] Tr. 740.

[71] Tr. 633-34.

[72] Tr. 119-20; CX-1.

[73] CX-14.

[74] CX-1, at 1.

[75] *Id.*

[76] *Id.* at 2.

[77] Stip. 1.

required Pound to provide a written response by March 25, 2008.[78] Although Pound acknowledged that he received the request,[79] he did not respond by the deadline.[80]

On March 31, 2008, Litsky sent another Rule 8210 request letter to Pound, requesting the same information previously sought in the March 11 letter.[81] That request also warned Pound of potential disciplinary action and sanctions, including a bar, for failing to respond.[82] The letter directed him to provide the requested information by April 14, 2008.[83] Again, Pound did not respond to the letter by the deadline.[84]

In April 2008, Litsky located a telephone number for Pound and left a message for him.[85] Pound did not call back.[86] On November 11, 2008, Litsky called Pound again and was able to speak to him about the outstanding information requests from March 2008.[87] Pound told Litsky he had received the request letters but forgot to respond, and he would check with his attorney about cooperating.[88] Pound testified that after speaking to Litsky, he provided the Rule 8210 request letters to an attorney.[89]

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[78] Stip. 2.

[79] Tr. 489, 517, 521-22.

[80] Stip. 4.

[81] Stip. 5.

[82] *Id.*; CX-7, at 2.

[83] Stip. 5; CX-7, at 2.

[84] Stip. 8.

[85] Tr. 141.

[86] *Id.*

[87] Tr. 142; CX-23.

[88] Tr. 143; CX-23.

[89] Tr. 489, 517, 521-22.

In June 2009, FINRA sought Pound's on-the-record testimony ("OTR").[90] At that point, Pound had engaged a new attorney to represent him, counsel of record for this disciplinary proceeding. On June 11, 2009, Litsky sent a letter to Pound's new attorney, scheduling Pound's OTR for July 10, 2009.[91] In the letter, Litsky also memorialized a conversation he had with Pound's new attorney, confirming that the information requested in the March 31, 2008 Rule 8210 request letter would be produced by June 30, 2009.[92] Pound provided the information sought in the March 2008 request letters on June 12, 2009,[93] and participated in the OTR on July 10, 2009.[94]

## IV. CONCLUSIONS OF LAW

### A. Jurisdiction

FINRA has jurisdiction over its members and associated persons.[95] As explained in Notice to Members 99-95, "any person who signs and submits a Form U-4 is an associated person."[96] In addition, by signing the Form U4, Pound explicitly submitted to the authority of FINRA and agreed to comply with the by-laws, rules, and regulations of FINRA.[97]

On October 19, 2006, D.C. Evans filed a Form U4 on Pound's behalf.[98] On August 6, 2007, D.C. Evans filed a Form U5 for Pound, terminating his association as of August 5, 2007.[99]

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[90] CX-8, at 3.

[91] CX-8, at 5.

[92] *Id.*

[93] CX-9.

[94] CX-10.

[95] *Berger v. SEC*, No. 09-0062, 2009 U.S. App. LEXIS 21524 (2nd Cir. 2009).

[96] 1999 NASD LEXIS 117 (Nov. 1999); *see Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *9 (Nov. 14, 2008) (holding that any person who signs and submits a Form U4 is an associated person), *pet. for rev. den. sub nom., Berger v. SEC*, No. 09-0062, 2009 U.S. App. LEXIS 21524 (2nd Cir. 2009).

[97] CX-3A, at 13 (Item # 2 under applicant's acknowledgement and consent).

[98] CX-2, at 20, 22-39; CX-3, at 4.

[99] CX-2, at 20, 40-43; CX-3, at 4.

FINRA has jurisdiction over Pound and this proceeding because (1) the Complaint was filed within two years following the termination of Pound's association with D.C. Evans, and (2) the Complaint charges him with misconduct occurring during his association with a member firm and with failing to timely respond to FINRA's requests for information made during the two-year period following the termination of his association with D.C. Evans.[100]

**B. Private Securities Transactions**

Conduct Rule 3040 prohibits an associated person from participating in private securities transactions for compensation without first providing written notice to, and receiving written permission from, the employer firm. The Rule applies to a securities transaction "outside the regular course or scope of an associated person's employment with a member."[101] In order to determine whether Pound violated Conduct Rule 3040, it is necessary to ascertain whether the Acropolis notes were securities.

1. The Promissory Notes are Securities

In *Reves v. Ernst & Young*, the Supreme Court devised the "family resemblance" test for determining whether a particular note is in need of regulation and should therefore be deemed a "security" for purposes of federal securities laws and regulations.[102] Under the family resemblance test, all promissory notes are presumed to be securities, and this presumption is rebutted only by a showing that the investments bear a strong resemblance to a list of financial instruments specifically excluded as securities by the Supreme Court in *Reves*, or by proving, under a four-factor test, that the note is of a type that should be added to the list of excluded

[100] Article V, Sec. 4(a), FINRA By-Laws, *available at* www.finra.org/rules.

[101] Conduct Rule 3040(e)(1).

[102] *Reves v. Ernst & Young*, 494 U.S. 56, 63-67 (1990).

financial instruments.[103] The four factors delineated by the Court in *Reves* are: (1) the motivations that would prompt a reasonable borrower and lender to enter into the transaction; (2) the plan of distributing the notes; (3) the reasonable expectations of the investing public regarding whether the instruments were securities; and (4) the presence of any alternative scheme of regulation or other factor that significantly reduces the risk of the instrument so as to make regulation under the securities laws unnecessary.[104]

At the outset, the Acropolis notes do not resemble the list of Court exempted financial instruments. In addition, the four factors considered in *Reves* do not suggest that the Acropolis notes should be added to the list of excluded financial instruments. Pound sold the notes to raise money to conduct Acropolis' regular business, which was the purchase and resale of residential home mortgages.[105] In addition, the Acropolis notes were distributed broadly. Pound sold the notes to approximately 60 customers.[106] The customers' reasonable perceptions of the Acropolis notes also suggest that they should be categorized as securities.[107] A reasonable investor giving funds to Acropolis Securities Group and receiving a guaranteed rate of return ranging from 12 to 15 percent would consider that the notes were investments. Here, the five customers who testified confirmed that they made the investment because of the attractive interest rate. Finally, there is no regulatory scheme providing an adequate substitute for the

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[103] *Id.* at 66-67; *see also Stoiber v. SEC*, 161 F.3d 745, 749 n.7 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1069 (1999) (articulating that the "mere introduction of some evidence suggesting that [the] note[s]" are not securities is not enough to overcome this presumption).

[104] *Reves*, 494 U.S. at 66-67.

[105] *See Reves*, 494 U.S. at 66 (explaining that an instrument is likely a security when the seller's purpose is to raise operational capital).

[106] *See Stoiber*, 161 F.3d at 750; *Robin Bruce McNabb*, 54 S.E.C. 917, 919, 923 (2000) (*citing Trust Co. v. N.N.P., Inc.*, 104 F.3d 1478, 1489 (5th Cir. 1997) ("A debt instrument may be distributed to but one investor, yet still be a security.")), *aff'd sub nom., McNabb v. S.E.C.*, 298 F.3d 1126 (9th Cir. 2002).

[107] *Stoiber*, 161 F.3d at 751 (*citing Reves*, 494 U.S. at 68-69).

protection of the federal securities laws applicable to these instruments.[108] Indeed, the record makes clear that the Acropolis note holders needed the protection of the federal securities laws when Acropolis defaulted on the notes.

2. Pound Provided No Written Notice and Received No Approval

Conduct Rule 3040 requires an associated person to provide his employer with written notice of private securities transactions before the transactions take place.[109] The Securities and Exchange Commission has held that the written notice must describe in detail the proposed transactions and the associated person's proposed role in the transactions, and state whether the associated person has received or may receive selling compensation in connection with the transactions.[110] Under Rule 3040, "selling compensation" is defined as "any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security, including, though not limited to, commissions; finder's fees; securities …; rights of participation in profits … dissolution proceeds, as a general partner or otherwise; or expense reimbursements."[111] If the transaction is for compensation, the associated person may not engage in the transaction unless the employer gives its prior approval in writing.[112]

Here, a portion of Pound's fees from his investment advisory clients related to the Acropolis note transactions. Pound argues that the advisory fees he collected would have been the same if another type of investment was substituted for the Acropolis notes.[113] In this case, it is irrelevant how the compensation is classified as Pound concedes that he provided no written

[108] *See Reves*, 494 U.S. at 71-72.

[109] *See* Conduct Rule 3040(b).

[110] *Anthony H. Barkate*, Exchange Act Release No. 49,542, 2004 SEC LEXIS 806, at *2 (Apr. 8, 2004), *aff'd*, 125 Fed. Appx. 892 (9th Cir. 2005).

[111] *See* Conduct Rule 3040(e)(2).

[112] *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 53,136, 2006 SEC LEXIS 93, at *55, 57 (Jan. 18, 2006).

[113] Tr. 629-30.

notice to, and received no written approval from, D.C. Evans.[114] Furthermore, Evans testified that the Acropolis notes were unapproved products of which he was unaware.[115]

3. Respondent Engaged in Private Securities Transactions

As discussed above, the Acropolis notes were securities. Pound admits that the sale of the Acropolis notes was outside his employment with D.C. Evans.[116] He participated in the transactions by: (1) referring his Pound Financial clients to Acropolis to purchase the notes,[117] (2) directly selling each note to the purchasers,[118] (3) drafting the notes,[119] (4) signing the notes,[120] and (5) receiving the funds for the notes from the purchasers.[121] At no time did Pound notify or receive approval from D.C. Evans prior to engaging in the transactions.

Pound asserts that Acropolis, rather than he, is responsible to the note holders because he acted through Acropolis when participating in the note transactions.[122] However, in this proceeding, Pound was charged because of his personal involvement in the Acropolis note sales and his failure to notify his employer. The fact that Acropolis, rather than Pound himself, was the issuer of the notes is irrelevant to the charges.[123]

[114] Tr. 503; CX-9, at 2.

[115] Tr. 68; CX-3, at 5.

[116] CX-9, at 2.

[117] CX-9, at 2.

[118] Tr. 563.

[119] Tr. 709-10.

[120] *See* CX-10A, 10B, 10C, and 11.

[121] *See, e.g.,* Tr. 351, 369.

[122] Tr. 612.

[123] *See Dist. Bus. Conduct Comm. v. Goldsworthy*, 2000 NASD Discip. LEXIS 13, at *36 (N.A.C. Oct. 16, 2000) (disregarding corporate existence and holding respondent liable for private securities transactions).

The Hearing Panel finds that Pound violated Conduct Rules 3040 and 2110 by engaging in private securities transactions without providing written notification to, or receiving approval from, D.C. Evans.[124]

### C. FINRA's Requests for Information

Procedural Rule 8210(a)(1) requires persons associated with a member of FINRA to report "orally, [or] in writing ... with respect to any matter" under investigation by FINRA. The obligation to respond is unqualified.[125] Pound was obligated to respond promptly in writing to FINRA's request for information or to explain why he could not.[126] "The failure to respond to [FINRA] information requests frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets."[127]

In this case, FINRA requested information about a possible private securities violation. Pound was capable of providing FINRA with the requested information, but he failed to do so in a timely manner. Although Pound ultimately provided FINRA with a satisfactory response, he did so 14 months after FINRA initially requested the information.

The Panel rejects Pound's argument that the March Rule 8210 requests were abandoned, lapsed, superseded, or extended by FINRA. Litsky called Pound in April and November 2008, to inquire about the outstanding Rule 8210 information requests. Litsky's June 11, 2009, letter to Pound's counsel also referenced the outstanding March 2008 information request. Further, Litsky testified that he did not give Pound any extension of time to respond to the requests. The

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[124] A violation of Conduct Rule 3040 is a violation of Conduct Rule 2110. *Dep't of Enforcement v. Frankfort*, No. C02040032, 2007 NASD Discip. LEXIS 16, at *39 n.25 (N.A.C. May 24, 2007) (citation omitted).

[125] *See Dep't of Enforcement v. Ryerson*, No. C9B040033, 2005 NASD Discip. LEXIS 14, at *28 (O.H.O. Jan. 24, 2005).

[126] *See, e.g., Charles C. Fawcett*, Exchange Release Act No. 56770, 2007 SEC LEXIS 2598, at *18-19 (Nov. 8, 2007).

[127] *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *petition for review denied sub nom. Paz Sec. v. SEC*, 566 F.3d 1172, 2009 U.S. App. LEXIS 11500 (D.C. Cir. May 29, 2009).

Panel finds that Pound violated Procedural Rule 8210 and Conduct Rule 2110 by failing to provide information to Enforcement in a timely manner.

## V. SANCTIONS

### A. Private Securities Transactions

#### 1. The Sanction Guidelines

The FINRA Sanction Guidelines relating to private securities transactions (selling away) recommend a fine ranging from $5,000 to $50,000, and a suspension of up to a year, and, in cases involving sales of over $1,000,000, a 12-month suspension or bar.[128] The Guidelines also state that "[t]he presence of one or more mitigating or aggravating factors may either raise or lower the sanctions."[129]

In addition to the dollar amount of sales, the Guidelines direct the Hearing Panel to consider twelve other factors when determining sanctions: (1) number of customers; (2) length of time over which the selling away activity occurred; (3) whether the product has been found violative of federal or state securities laws or federal, state or SRO rules; (4) whether respondent had a proprietary or beneficial interest in, or was otherwise affiliated with, the selling enterprise or issuer, and, if so, whether respondent disclosed this information to his customers; (5) whether the respondent attempted to create the impression that his employer sanctioned the activity; (6) whether respondent's selling away activity resulted, either directly or indirectly, in injury to the investing public and, if so, the nature and extent of the injury; (7) whether respondent sold away to customers of his or her employer; (8) whether respondent provided the member firm with verbal notice of the details of the proposed transaction and, if so, the firm's verbal or written response, if any; (9) whether respondent sold the securities after the member firm instructed him

[128] FINRA Sanction Guidelines, 15 (2007), www.finra.org/sanctionguidelines.

[129] Guidelines at 15.

or her not to sell the product at issue; (10) whether respondent participated in the sale by referring customers or selling the product directly to customers; (11) whether respondent recruited other registered individuals to sell the product; and (12) whether respondent misled his employer about the existence of the selling away activity or otherwise concealed the selling away activity from the firm.[130]

Considering the above factors, the Hearing Panel concludes that this is an egregious case. Pound directly sold nearly $6 million of Acropolis Notes to 60 customers during a seven-month period.[131] Several customers purchased more than one note. The Hearing Panel notes that virtually all of the customers lost their entire principal investment and the promised interest payments when Acropolis defaulted on the notes.[132] In addition, Pound had a beneficial interest in Acropolis. As the owner and CEO of Acropolis, Pound would certainly gain financially if Acropolis succeeded.[133]

On the other hand, Pound portrayed his violation as a technicality, caused in substantial part by the collapse of the real estate market. Pound presented several arguments in mitigation.[134] He emphasized that he did not act with scienter; however, scienter is not an element of this cause of action.[135] Pound highlighted the fact that he has no disciplinary history, but FINRA has repeatedly rejected the argument that a lack of disciplinary history is a mitigating factor.[136] Pound also noted that he cooperated with FINRA's investigation. While a respondent's substantial

[130] *Id.* at 15-16.

[131] *Id.* at 7 (Principal Consideration No. 18).

[132] *Id.* at 6 (Principal Consideration No. 11).

[133] *Id.* at 7 (Principal Consideration No. 17).

[134] In Pound's pre-hearing brief, he raised the defense of advice of counsel. Respondent's Pre-Hr'g Br. at 17, 19. However, during the hearing, Pound, through counsel, specifically withdrew that defense. Tr. 217.

[135] *Alvin W. Gebhart,* 2006 SEC LEXIS 93, at *55, 57.

[136] *See, e.g., Dep't of Enforcement v. Roethlisberger,* No. C8A020014, 2003 NASD Discip. LEXIS 48, at *18 –19 (N.A.C. Dec. 15, 2003).

assistance to FINRA is recognized in the Guidelines as generally mitigating,[137] the Panel did not find that Pound provided substantial assistance to FINRA. In fact, Pound delayed FINRA's investigation by failing to promptly respond to FINRA's information requests. Once Pound obtained counsel, he cooperated with the investigation as he was obligated to do.

Pound also stressed that he is hopeful that a pending settlement with the note holders will be finalized. However, even if this is accomplished, it will not result in any payment to the note holders from Pound.[138] Pound's counsel stipulated that "the settlement agreement … is a mere contractual obligation where the gentleman would have a judgment against him that he couldn't pay and that he could file for bankruptcy and that the intent is that there would be no recourse."[139]

The Hearing Panel notes that Pound had the opportunity to offset some of the harm suffered by the note holders when Acropolis received the $282,000 home loan settlement.[140] However, when the $282,000 Acropolis loan settlement arrived, Pound did not disperse any funds to the note holders.[141] Instead, Pound used the settlement money to defend against the lawsuit filed by the note holders, which sought the return of their investment.[142]

The Panel found Pound's refusal to accept responsibility for his violations to be an aggravating factor.[143] In fact, what Pound regretted was his failure to file the Form U5 sooner to enable him to escape FINRA's jurisdiction. Pound testified, "Unfortunately, I opened a window and didn't change the U5 and now I'm under this jurisdiction."[144]

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[137] Guidelines at 7 (Principal Consideration No. 12).

[138] Guidelines at 6 (Principal Consideration No. 4).

[139] Tr. 680.

[140] Guidelines at 6 (Principal Consideration No. 4).

[141] Tr. 671.

[142] Tr. 672.

[143] Guidelines at 6 (Principal Consideration No. 2).

[144] Tr. 729.

Conduct Rule 3040 is designed to protect investors from unsupervised sales. A failure to comply with the requirements of Rule 3040 deprives investors of a firm's oversight, due diligence, and supervision, which investors have a right to expect.[145] The Rule also serves to "protect employers against investor claims arising from associated person's private transactions."[146] Here, the goals of Rule 3040 were thwarted because Pound failed to notify D.C. Evans of his promissory note transactions. The end result was extensive customer harm and the initiation of legal proceedings against Evans, D.C. Evans, Fidelity, and other entities. After careful consideration, the Hearing Panel concludes that a bar is the appropriate sanction for violating Conduct Rules 3040 and 2110.[147]

### B. FINRA's Requests for Information

The applicable Guideline recommends that, where an individual does not respond in a timely manner to a request for information issued under Rule 8210, a suspension of up to two years and a fine ranging from $ 2,500 to $ 25,000 should be imposed. Under this Guideline, the following factors are relevant to determining the appropriate remedial sanctions for a Rule 8210 violation: (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.[148]

The Panel finds it aggravating that FINRA had to send two request letters and make two phone calls during its investigation, and that Pound took 14 months to respond to FINRA's

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[145] *Chris Dinh Hartley*, Exchange Act Release No. 50031, 2004 SEC LEXIS 1507, at *15 (July 16, 2004).

[146] *Dep't of Enforcement v. Carcaterra*, No. C10000165, 2001 NASD Discip. LEXIS 39, at *8-9 (N.A.C. Dec. 13, 2001).

[147] *Cf. Dep't of Enforcement v. Keyes*, No. C02040016, 2005 NASD Discip. LEXIS 9, at *21-22 (N.A.C. Dec. 28, 2005) (holding that respondent violated Rule 3040 and stating that the quantitative factors alone support the imposition of a bar).

[148] Guidelines at 35.

information requests. Pound's failure to respond timely to FINRA information requests is serious misconduct. We therefore suspend Pound in all capacities for 14 months and fine him $25,000. In light of the bar for Pound's Rule 3040 violation, the Panel declines to impose this suspension and fine.

## VI. ORDER

Pound is barred from associating with any firm in any capacity for engaging in private securities transactions in violation of Conduct Rules 3040 and 2110, as alleged in the Complaint.[149] The bar shall become effective immediately if this decision becomes FINRA's final disciplinary action in this proceeding. In light of the bar, no additional sanctions were imposed for Pound's failure to timely respond to FINRA's requests for information, in violation of Procedural Rule 8210 and Conduct Rule 2110.

Pound is also ordered to pay costs in the amount of $6,491, which includes a $750 administrative fee and the cost of the hearing transcript. The costs shall be payable on a date set

[149] The Hearing Panel considered and rejected without discussion all other arguments of the parties.

by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter.

**HEARING PANEL**

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Maureen A. Delaney
Hearing Officer
For the Hearing Panel

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