FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. WILLIAM M. SOMERINDYKE, Jr. (CRD No. 4259702), and RESPONDENT 2, Respondents.	Disciplinary Proceeding No. 2009020081301 Hearing Officer – MC **AMENDED HEARING PANEL DECISION**[1] December 17, 2012

Respondent William R. Somerindyke, Jr. violated NASD Conduct Rules 3040 and 2110 by participating in three outside securities transactions. He is suspended from associating in any capacity with any FINRA member firm for 30 business days, fined $10,000, and assessed the costs of the hearing.

Respondents Somerindyke and Respondent 2 violated NASD Conduct Rules 3030 and 2110 by engaging in outside business activities without providing prompt written notice to their FINRA member firm employer. Respondent Somerindyke is suspended from associating in any capacity with any FINRA member firm for ten business days, and fined $5,000; Respondent 2 is fined $2,500. For a second alleged violation of Rules 3030 and 2110, the Hearing Panel finds that Respondents are not liable.

Appearances

Thomas M. Huber, Senior Regional Counsel, and David F. Newman, Senior Regional Counsel, Philadelphia, Pennsylvania, for the Department of Enforcement.

John F. Kane, Esq., Virginia Beach, Virginia, for Respondents.

I. Background

This case originated when an examiner at FINRA's Philadelphia District Office noticed a Uniform Termination Notice for Securities Industry Registration form ("Form U5") entry in the

[1] The original Hearing Panel Decision has been amended to correct an error in the original computation of the termination date of Respondent Somerindyke's period of suspension.

Central Records Depository ("CRD"). The entry reflected that FINRA member firm NYLife Securities LLC ("NYL") terminated Respondent William M. Somerindyke, Jr., for violating the firm's policy restricting employees' outside business activities.[2] The FINRA examiner initiated an investigation into the outside business activities of Somerindyke and a second person, Respondent 2, when they were associated with NYL.[3] The investigation concluded with the filing of a Complaint containing three causes of action.[4]

Cause One alleges that, from approximately October 2007 to March 17, 2008, Somerindyke participated in three private securities transactions outside the scope of his association with NYL without providing the firm with prior written notice of the transactions, in violation of NASD Conduct Rules 3040 and 2110.[5]

The remaining two causes of action focus on Respondents' outside business activities. Cause Two alleges that Respondents engaged in outside business activities by operating a company outside the scope of their relationship with NYL without providing prompt written notice to the firm, in violation of NASD Rules 3030 and 2110, and FINRA Rule 2010. Cause Three makes the same allegations as Cause Two, but relates to a second company that Respondents allegedly operated without giving NYL prompt written notice.

In their Answer, Respondents generally deny the allegations. Somerindyke denies participating in the private securities transactions. With regard to the outside business activities

[2] Tr. 119. References to the testimony at the hearing are designated "Tr." with transcript page numbers. References to exhibits introduced by Enforcement are designated "CX-___." References to exhibits introduced by Respondents are designated "RX-___."

[3] Tr. 121-22.

[4] Enforcement filed the Complaint on August 18, 2011.

[5] As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). Following consolidation, FINRA began developing a new Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008. *See* Regulatory Notice 08-57 (Oct. 2008). This Decision relies on the NASD and FINRA Rules in effect at the time of the alleged misconduct. The applicable rules are available at www.finra.org/rules.

alleged in Cause Two, Respondents claim they properly disclosed their involvement, and NYL approved the activity. They also deny they were employed or compensated by either company. As for the second company, the subject of Cause Three, Respondents claim that they did not need to provide written notice to NYL because this was a successor to the first company, and the activities in which they engaged with it were "consistent" with their employment agreements with NYL.

Based on the evidence presented in a one-day hearing[6] and for the reasons set forth below, the Panel finds Somerindyke liable for the selling away violations alleged in Cause One. The Panel does not find Respondents liable for the outside business activity alleged in Cause Two, but does find them liable for the outside activity alleged in Cause Three. Because the gravamen of the Complaint concerns Respondents' outside business activities, the discussion below addresses the Rule 3030 allegations first.[7]

[6] The Hearing Panel convened the hearing in Washington, DC, on July 2, 2012.

[7] At the time of the hearing, Respondents were not associated with any FINRA member firm. They do not contest FINRA's assertion of jurisdiction, and the Panel finds that FINRA has jurisdiction over them for the purposes of this disciplinary proceeding. Somerindyke first registered with FINRA in November 2000 as a General Securities Representative. From October 31, 2007, to October 30, 2009, he was registered in that capacity through NYL. CX-1. Although he has not been associated with any FINRA member firm since October 30, 2009, pursuant to Article V, Section 4 of FINRA's By-Laws, FINRA retains jurisdiction over him for the purposes of this disciplinary proceeding because Enforcement filed the Complaint less than two years after NYL terminated his registration with the firm, and the Complaint charges him with misconduct allegedly committed while he was associated with a FINRA member firm. Respondent 2 initially registered with FINRA in January 2000 as a General Securities Representative. She was registered through NYL in that capacity from November 13, 2007, to January 28, 2011, and was registered with FINRA through another member firm from January 10, 2011, to April 5, 2011. Since then, Respondent 2 has not been registered with any FINRA member firm. CX-2. Nonetheless, as with Somerindyke, FINRA retains jurisdiction over Respondent 2 for the purposes of this disciplinary proceeding because Enforcement filed its Complaint within two years after her last registration with a FINRA member firm and the Complaint alleges she engaged in misconduct while associated with a FINRA member firm.

II. Findings of Fact and Conclusions of Law

A. Respondents' Outside Business Activities

1. The Outside Business Activity Rule

NASD Rule 3030 states, in relevant part:

> No person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member. Such notice shall be in the form required by the member.

The requirement of the Rule is simple, and limited. Associated persons must promptly notify their employer firms in writing of their outside business activity. The rationale for the Rule is to allow firms to supervise properly all of the business activities of their representatives,[8] to prevent customer harm, and to avoid a firm's unwitting entanglement in legal difficulties based on an associated person's unmonitored outside business activities.[9] A violation of Rule 3030 is also a violation of the obligation of all registered persons to "observe high standards of commercial honor and just and equitable principles of trade." Thus, a violation of Conduct Rule 3030 is also a violation of Conduct Rule 2110.[10]

2. Background: [HSM] LLC

Cause Two of the Complaint alleges that Respondents violated NASD Rules 3030, 2110, and FINRA Rule 2010, by failing to provide prompt written notice to NYL of their involvement in a company called HSM, LLC ("HSM"). The Panel, however, finds that Respondents provided the notice to NYL required by Rule 3030.

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[8] *Dep't of Enforcement v. Schneider*, No. C10030088, 2005 NASD Discip. LEXIS 6, at *12-13 (N.A.C. Dec. 7, 2005).

[9] *Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23, at *46 (Jan. 26, 2006), *aff'd*, 209 F. app'x 6 (2d Cir. 2006)

[10] *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999) (stating that violation of an NASD rule also violates Conduct Rule 2110).

HSM is a marketing firm Respondents created in 2004. A[n] HSM private placement memorandum describes the functions Respondents performed for HSM. It identifies Somerindyke and Respondent 2 as the company's founders, describes Somerindyke as president, manager, and chief executive officer, and Respondent 2 as chief operating officer and manager.[11] The private placement memorandum states that the business operates digital advertising networks through advertising kiosks HSM deploys in hotels and shopping malls.[12] The memorandum identifies sales of advertising space on its kiosks as the principal source of the company's revenues.[13]

In 2007, HSM experienced financial difficulties, apparently stemming from the failure of investors to fulfill their subscription agreement obligations.[14] At the time, HSM had 250-300 kiosks placed in hotels and shopping malls on the East Coast from Atlantic City, New Jersey, to Myrtle Beach, South Carolina. Because of its lack of funds, HSM was unable to retain the personnel it needed to maintain the kiosks, and the businesses where the kiosks were located therefore wanted the kiosks removed from their premises. The task of retrieving the kiosks and returning them to the owner from whom HSM leased them fell to Somerindyke and Respondent 2.[15]

3. Respondents Provide Written Notice of HSM to NYL

In the meantime, Randy C. Cox, a managing partner at NYL's offices in Norfolk, Virginia, learned in 2007 from an NYL recruiter that Somerindyke might be a good prospect for employment by the firm. Consequently, Cox interviewed Somerindyke, who disclosed to Cox

[11] CX-39, at 38, 44.

[12] CX-39, at 35.

[13] *Id.*, at 32.

[14] Tr. 133-34.

[15] Tr. 152-53.

that he and Respondent 2 were actively engaged in several outside businesses, including HSM. Cox also interviewed Respondent 2 and discussed her involvement in HSM and other business activities in which she was involved with Somerindyke.[16]

Respondent 2 was interested in employment with NYL because, with HSM struggling, she needed income.[17] Somerindyke testified that he was interested in working for NYL as a result of

Cox's persuasive presentation of the opportunities it presented.[18]

Cox testified that he fully explained NYL's outside business activity policy to Respondents. NYL policy allowed agents to engage in outside businesses from which they could earn "passive income," but did not permit agents to work full time outside of NYL. NYL limited an employee's outside activity to a maximum of ten hours monthly. Cox stated that he "made it quite clear" to Respondents that they had to disclose their outside activities and that he was not in a position to approve or disapprove Respondents' participation in them. They needed to complete outside business activity forms to send to NYL's Corporate Compliance Department for review and a final decision.[19] Cox recalled that Somerindyke was concerned about reducing his business activities, and that this concern contributed to Somerindyke delaying the start of his employment with NYL.[20]

On July 31, 2007, Somerindyke filled out and signed an NYL outside business activity form. In it, he disclosed his involvement with HSM and several other business entities. On the form, Somerindyke described his role at HSM as "co-owner, president, director" and his

[16] Tr. 40-42.

[17] Tr. 132.

[18] Tr. 336.

[19] Tr. 45-46, 48-49.

[20] Tr. 50-51.

compensation as a "wage." He wrote that he devoted 20 hours per week to HSM.[21] On August 1, 2007, Cox signed an NYL form recommending approval of Somerindyke's request to continue his involvement with HSM.[22]

Respondent 2 completed the same outside business activity form on August 9, 2007. She described her role in HSM as "Director/Board member" and her compensation as "stock options/Dividends." She estimated that she devoted 10 hours monthly to the business.[23] Cox signed a request recommending NYL approval for her on the same day.[24]

NYL's Corporate Compliance Department issued a memorandum stating that NYL would allow Respondents to retain "passive participation," but not involvement in HSM's daily operations. In the memorandum, the Corporate Compliance Department specifically forbade Respondents from promoting or soliciting investments relating to HSM, from acting as officers or directors, or serving in any managerial position in the company.[25] According to Cox, he informed Respondents explicitly that they could not "engage in the day-to-day operations of the business."[26] He testified that Somerindyke did not protest NYL's restrictions on his involvement with HSM.[27] Somerindyke signed the memorandum on August 17, 2007; Respondent 2 did so on August 20, 2007.[28]

[21] CX-5, at 3-4.

[22] CX-5, at 5.

[23] CX-13, at 3-4.

[24] CX-13, at 5.

[25] CX- 5, at 1; CX-13, at 1.

[26] Tr. 109.

[27] Tr. 111.

[28] CX-5, at 2; CX-13, at 2.

Somerindyke's FINRA registration through NYL, making him subject to NASD Rule 3030, became effective on October 31, 2007.[29] Respondent 2's registration became effective November 13, 2007.[30]

4. Respondents Continue Their Involvement with HSM

Despite the restrictions NYL imposed on their involvement in HSM, Somerindyke and Respondent 2 continued to be actively engaged with HSM. Their primary activity involved traveling to malls and hotels to pick up the kiosks the business could no longer support given its financial problems, but they also managed and paid employees.

Somerindyke claims that he made clear to Cox that he needed to devote a minimum of 20 hours per week to HSM.[31] NYL's Corporate Compliance Department memorandum clearly did not permit Respondents to continue to engage in HSM business to the extent they did. Somerindyke testified that the reason he signed the memorandum was that Cox assured him he would advocate for Respondents to make NYL "better understand" the situation.[32] Somerindyke testified that Cox said he had "influence" with NYL, and that if an issue arose over the level of Respondents' continued involvement with HSM, Cox would "take care" of the problem.[33] When Cox conducted a 30-day review after Respondents signed the memorandum, Somerindyke signed a statement indicating that nothing had changed with regard to his outside activity. He testified that he did not believe he needed to renew his disclosures of his involvement with HSM.[34]

[29] Tr. 271; CX-1, at 3.

[30] Tr. 189-90.

[31] Tr. 255-56.

[32] Tr. 332.

[33] Tr. 258-60.

[34] Tr. 262.

Respondents continued their involvement in HSM through December 2007. Their company's bank records show that Somerindyke and Respondent 2, the only persons authorized to write checks and withdraw funds from the account, regularly did so.[35] They disbursed funds to compensate employees, to pay for business expenses, such as a cell phone, and to reimburse themselves for the expenses they incurred while traveling to collect the kiosks.[36] They wrote checks, some made to cash, through December 2007.[37] The company's check register also shows they actively used the company account check card.[38]

5. Respondents Properly Notified NYL of HSM

Enforcement argues that when Respondents' registrations took effect in October and November 2007, they were required to resubmit written notifications to NYL of the extent of their outside business activity with HSM, and to obtain NYL's approval. According to Enforcement, even if Cox told them he would "take care" of any problem arising because of NYL's limitations on their HSM work, it was unreasonable for Respondents to rely on such a representation. Enforcement contends that by not providing NYL with renewed written notifications while continuing to work for HSM, Respondents ran afoul of Rule 3030.[39]

The Hearing Panel disagrees with Enforcement's assessment. Rule 3030 required Respondents to provide NYL with prompt written notice of their involvement in HSM. The evidence clearly shows that Respondents did so at the outset of their association with NYL when, as noted above, they submitted their outside business activities forms with detailed disclosure of the work they were doing for HSM to Cox, who forwarded the forms to NYL's Corporate

[35] Tr. 165.

[36] Tr. 153-54, 172.

[37] CX-20, at 3-10; Tr. 169-70.

[38] Tr. 165-66; CX-19.

[39] Tr. 340.

Compliance Department. Thus Respondents satisfied NASD Rule 3030's requirement that they provide prompt written notice of the outside activity in HSM to NYL.

NYL approved only what it called "passive" continued involvement by Respondents in HSM. It appears that Respondents, by maintaining active engagement in HSM through December 2007, exceeded the restrictions imposed by NYL and may well have violated NYL internal policy. Such a violation of firm policy does not constitute a violation of the express terms of Rule 3030, however. Under these circumstances, the Panel finds Respondents are not liable for violating Rule 3030 as charged, and dismisses Cause Two of the Complaint.

6. SMG, LLC

Cause Three of the Complaint alleges that Respondents improperly engaged in outside business activities relating to a second company they founded, [SMG, LLC] ("SMG"). The Complaint alleges that they failed to provide prompt written notice of their activities with SMG to NYL, in violation of NASD Conduct Rules 3030 and 2110, and FINRA Rule 2010.

In a proposal he submitted to the Defense Commissary Agency on August 15, 2007, Somerindyke described SMG as an entity interested in developing in-store television networks employing large-screen LCD televisions in United States Defense Commissary Agency and other military properties. He claimed that SMG was "in the finishing stages" of establishing a "digital signage network" in various United States Navy installations.[40] He described himself as "a founder" and president of SMG, responsible for "overall strategy, market expansion, business development and marketing." Somerindyke described Respondent 2 as a "founder," "VP, Operations" and responsible for "overall Operations."[41] In an on-the-record interview during the

[40] CX-23, at 1.

[41] *Id.*, at 4.

investigation, Somerindyke testified that he was "pretty active in working the military contract" on behalf of SMG during 2008.[42]

Respondent 2 applied to the Commonwealth of Virginia for SMG's Certificate of Incorporation, and it was issued on December 6, 2007.[43] On the same date, Somerindyke and Respondent 2 opened a bank account for the company for which they were the only authorized signatories,[44] and Somerindyke deposited a check for $10,000 from an investor.[45] He deposited a check from another investor in the amount of $15,000 on March 27, 2008.[46] Respondents wrote a total of 16 checks from the account to cash and to various payees from December 7, 2007, through May 3, 2008.[47] Respondent 2 testified they were all for SMG business expenses.[48]

Based on this evidence, the Panel finds that, at least from December 6, 2007, through March 27, 2008, Respondents were engaged in business activity, as officers of the company, in the employ of SMG.[49]

7. Respondents Failed to Provide NYL Written Notice of SMG

Respondents contend that they did not need to notify NYL of their involvement in SMG because they had disclosed their work for HSM earlier, and SMG was essentially the same

[42] CX-37, at 21 (transcript page 247).

[43] CX-24. Somerindyke testified that SMG was functioning prior to the issuance of its Certificate of Incorporation, and that it was through an "oversight" that Respondents did not incorporate it until December 2007.

[44] CX-25.

[45] CX-26.

[46] CX-30, at 3-4.

[47] CX-27 – CX-31. Respondent 2 appears to have signed only six of the checks, between December 7, 2007, and January 4, 2008.

[48] Tr. 186.

[49] The Panel further finds, based on Respondent 2's testimony, that her activity on behalf of SMG was considerably more limited than Somerindyke's. She testified that was unaware of the $10,000 investment deposited to establish SMG's bank account. Tr. 181. Respondent 2 testified that she had never seen the proposal, on SMG letterhead, that Somerindyke sent to the Defense Commissary Agency, that she did not know if there was a private placement memorandum for SMG, and that her involvement was limited to filling out the form application for the certificate of incorporation and signing the documents to set up the bank account. Tr. 173, 179-80.

company. Respondent 2 testified that SMG was merely a different "division" of HSM. She claimed that she believed HSM and SMG were "the same thing,"[50] that "SMG is HSM, HSM is SMG."[51] Somerindyke testified that Respondents formed SMG as a "subsidiary" to HSM.[52] These claims appear to be consistent with language contained in the proposal Somerindyke sent to the Defense Commissary Agency, describing SMG as having been "involved in the digital signage space for more than three years" and having installed "interactive kiosks/digital signage in over 300 hospitality locations including hotels, museums, visitor centers and airports."[53]

Both Respondents claim that, despite not formally notifying NYL about SMG in writing, they had made Cox aware of the company. Somerindyke asserts that he made it clear to Cox that ending his activity with either HSM or SMG was "not an option."[54] He insists that NYL "knew kind of what was going on"[55] and that it was unnecessary to provide written notification to NYL of SMG because he was "operating within the boundaries that [NYL] allowed me to."[56] Respondent 2 insists Cox knew about SMG because he frequently asked her how the "military network" was progressing.[57]

Cox, however, testified that throughout his discussions with Respondents about their outside business activity, they never mentioned SMG or the work they did for the company.[58]

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[50] Tr. 154.

[51] Tr. 173.

[52] Tr. 235-36.

[53] CX-23, at 3.

[54] Tr. 261.

[55] Tr. 299.

[56] Tr. 292.

[57] Tr. 213.

[58] Tr. 68-69.

The Panel, given the conflicting testimony, is unable to resolve this disputed issue, and cannot determine whether Respondents orally informed Cox of their work for SMG.

Regardless of whether Respondents did so, the Panel finds that SMG, contrary to Respondents' contentions at the hearing, was a business activity separate and apart from HSM, and Respondents should have notified NYL of it promptly in writing. At least as of the December 6, 2007, issuance of SMG's Certificate of Incorporation, as Respondent 2 concedes, SMG was "a new company" formed to undertake new projects, one of which was a "military network" of "digital signage."[59] Respondent 2 also testified during the FINRA investigation that SMG's projects were to be completely separate from the hotel and retail advertising networks operated by HSM. In an on-the-record interview, Respondent 2 admitted that she "should have" included SMG on the outside business activity form she submitted to NYL.[60] In her response to a FINRA request for information, Respondent 2 stated that SMG "was opened separately as the Military Network was going to be completely separate from the … divisions that HSM specialized in."[61]

Somerindyke, too, gave investigative testimony contradicting his claim at the hearing that HSM and SMG were essentially the same, making it unnecessary to provide NYL with written notice of SMG. He acknowledged that SMG and HSM were "two completely different business models."[62] In an on-the-record interview, Somerindyke stated that SMG was a "different entity," "not a HSM deal," and "out of the scope of what HSM was doing."[63]

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[59] Tr. 173-74.

[60] CX-38, at 6 (transcript page 190).

[61] CX-33, at 4.

[62] CX-36, at 11 (transcript page 133), CX-37, at 11 transcript page 107).

[63] CX-36, at 9 (transcript pages 110-11).

For these reasons, the Panel finds that from December 2007 through at least March 2008, Respondents actively engaged in outside business activities in the employ of SMG, after becoming registered through NYL, without providing NYL the prompt written notice required by NASD Rule 3030. As a result, they violated NASD Rules 3030 and 2110, as alleged in the Complaint's third cause of action.[64]

B. Respondent Somerindyke's Private Securities Transactions

1. The Rule

NASD Rule 3040(a) states unambiguously: "No person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this Rule." Rule 3040 (b) specifies, in equally plain language, prerequisites with which an associated person must comply in order to participate in a private securities transaction. In pertinent part, it requires the person to give written notice to his firm, "describing in detail the proposed transaction and the person's proposed role therein…." The Securities and Exchange Commission has held that failure to provide these particulars in writing to one's firm violates Rule 3040.[65]

Rule 3040(e) defines "private securities transaction" to include "any securities transaction outside the regular course or scope of an associated person's employment with a member, including … new offerings of securities which are not registered with the Commission …."

2. The Selling Away Allegations

[64] The Complaint's third cause of action alleges that Respondents also violated FINRA Rule 2010 "for any conduct after December 14, 2008." Although Somerindyke testified in an on-the-record interview that in 2008 he was actively engaged in working on SMG, the Panel finds there is insufficient evidence of Respondents' active employment by SMG after March 2008, well before FINRA Rule 2010 supplanted NASD Rule 2110.

[65] *Anthony H. Barkate*, Exchange Act Rel. No. 49542, 2004 SEC LEXIS 806, at *2 (Apr. 8, 2004), *aff'd*, 125 F. App'x. 892 (9th Cir. 2005); *Dep't of Enforcement v. Keyes*, No. C02040016, 2005 NASD Discip. LEXIS 9, at *13 (N.A.C. Dec. 28, 2005).

Cause One of the Complaint charges Somerindyke with "selling away" by participating in three private securities transactions while associated with NYL without providing the firm with prior written notice as required. The first transaction occurred when Somerindyke solicited an investor who had previously invested in HSM to make a second investment of $25,000 in October 2007. Somerindyke deposited the funds into HSM's bank account, and used them to conduct HSM's business. The second transaction occurred in December 2007 when Somerindyke solicited a different investor to invest $10,000 in SMG. The third occurred when a married couple invested $15,000 in SMG in March 2008. Somerindyke allegedly deposited these latter two investments into SMG's checking account and used the funds to conduct SMG's business. Because all three checks were for the purchase of securities, and because Somerindyke failed to provide NYL with prior written notice of the transactions, the Complaint alleges he violated NASD Rules 3040 and 2110.

3. The Transactions Were Sales of Securities

Somerindyke became associated with NYL upon the filing of his Form U4 by NYL on October 4, 2007.[66] He received the $25,000 investment in HSM by a check dated October 16, 2007.[67] Somerindyke testified that this check represented the "second tranche" of a commitment to invest $50,000 that the investor made in July 2007. Thus, Somerindyke contends that he did not run afoul of Rule 3040 because he was not associated with NYL when the customer originally made his investment commitment.[68]

[66] Tr. 271-72.

[67] Tr. 273; CX-22.

[68] Tr. 248, 273, 278-79, 353-54.

As for the investments in SMG, Somerindyke testified that it was not he who solicited them. He testified that another individual, a shareholder in HSM, did so.[69] However, Somerindyke concedes that when he met and spoke with SMG's first investor, he handed Somerindyke a $10,000 check, and Somerindyke immediately deposited it.[70] Although Somerindyke testified that he never met the second investor, he received the investment check personally from the HSM shareholder who solicited the customer to invest, and deposited the check or helped with depositing it into the SMG account.[71]

Somerindyke concedes that the sales of interests in HSM and SMG constituted sales of securities. Both HSM and SMG are limited liability companies.[72] The HSM private placement memorandum offers sales of "units" for investors to purchase, describes the offering as an opportunity to invest in securities, and explains that HSM units are offered for sale pursuant to an exemption under the Securities Act of 1933.[73] Somerindyke provided the investor in HSM with a subscription agreement.[74] He testified that the first SMG investor also received a subscription agreement, and he assumed that the second SMG investor received a subscription agreement as well.[75] As the evidence above demonstrates, Respondents owned and operated both companies, and Somerindyke, upon whose efforts the profitability of the enterprises depended entirely, controlled them. There is no evidence that the investors expected or were entitled to play any role in the operation of the companies.

The Panel finds, therefore, under these facts and the applicable law, that the investment in

[69] Tr. 284, 294.

[70] Tr. 287-88.

[71] Tr. 297.

[72] CX-21, at 1; CX-24.

[73] CX-39, at 1, 5, 12, 13.

[74] CX-21.

[75] Tr. 295.

HSM and the two investments in SMG constituted securities transactions.[76]

4. Somerindyke Participated in the Transactions

As noted above, Somerindyke claims the HSM investment was made prior to his association with NYL, and denies that he participated in the investments in SMG, which another person solicited. Rule 3040 and the applicable law make clear, however, that the concept of "participation" in a securities transaction is broad. The Rule prohibits participation "in any manner" in securities transactions outside the scope of one's employment without complying with specific requirements. Even though Somerindyke claims that he solicited the investment in HSM prior to his association with NYL, the investor signed a subscription agreement dated October 15, 2007, which was after Somerindyke associated with NYL.[77] Somerindyke admits receiving and depositing the investor's $25,000 check, dated October 16, 2007, thereby facilitating the investment in HSM. He admits meeting with the first SMG investor, accepting the investment check, and depositing it; receiving the second SMG investor's check, facilitating its deposit, and speaking with the second investor once or twice by phone. By these acts, Somerindyke solicited, encouraged, and facilitated the investments. By doing so, and by ensuring the investors' checks were properly endorsed and deposited, Somerindyke participated in the securities transactions.[78]

For the reasons set forth above, the Panel finds that Somerindyke participated in the three private securities transactions after becoming associated with NYL. The transactions were

[76] *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946)(a security exists when there is an investment of money in a common enterprise with an expectation of profits derived from the efforts of the promoter; the test for determining whether an investment is in a security is to be construed broadly in order to protect the investing public; holding that investment in a limited liability company constituted a security); *United States v. Leonard*, 529 F.3d 83 (2d Cir. 2008)(holding that investment in a limited liability company in which investors did not actively participate in the management and control of the company constituted a security).

[77] Tr. 245; CX-21.

[78] *Dep't of Enforcement v. De Vietien*, No. 2006007544401, 2010 FINRA Discip. LEXIS 45, at *27-28 (N.A.C. Dec. 28, 2010).

clearly outside the scope of Somerindyke's employment with NYL. Somerindyke founded, actively promoted, and served as a principal officer in both SMG and HSM. He clearly stood in a position to benefit from the investments in both SMG and HSM in which he participated. He had a "personal stake in the health and success" of both companies.[79] His participation in these transactions, without written notice to NYL, therefore violated NASD Rules 3040 and 2110.[80]

III. Sanctions

A. Respondents' Outside Business Activities

For engaging in outside business activity in violation of FINRA Rule 3270, which replaced, and is identical to, Rule 3030, the FINRA Sanction Guidelines recommend a fine of $2,500 to $50,000 and suspension for up to 30 business days. When aggravating factors are present, the Guidelines recommend suspension for up to one year. In egregious cases, such as those involving a substantial volume of business, the Guidelines suggest a longer suspension or a bar in all capacities. The Guidelines identify several Principal Considerations: whether the outside business activity involved customers of a respondent's employer firm; whether the outside activity resulted in injury to customers; the duration of the activity, dollar volume of sales, and number of customers; whether a respondent gave the impression that the firm approved the product or service; and whether a respondent concealed the activity from the employer firm.[81]

For Somerindyke's Rule 3030 violations, Enforcement recommends a $5,000 fine and two-month suspension in all capacities. For Respondent 2's, Enforcement recommends a $2,500

[79] *Dep't of Enforcement v. Siegel*, No. C05020055, 2007 NASD Discip. LEXIS 20, at *44 (N.A.C. May 11, 2007), *aff'd*, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459 (Oct. 6, 2008)

[80] A violation of Rule 3040 is also a violation of Rule 2110. *Id*., at *21 & n. 9.

[81] *FINRA Sanction Guidelines*, at 13 (2011) (available at www.finra.org/oho (then follow "Enforcement" hyperlink to "Sanction Guidelines")).

fine and one-month suspension in all capacities. Enforcement argues there are several aggravating factors: Respondents each held a direct ownership interest in SMG; they formed SMG after NYL notified them of the limits the firm placed on their activities with HSM; and they knew that NYL required them to provide written notice of and apply for approval for this new outside business activity. Because Somerindyke had a larger role than Respondent 2 in the outside business activities, Enforcement believes a stronger sanction should be imposed upon him than upon Respondent 2.[82]

The Panel finds that Respondents' failure to promptly provide written notice of SMG was at least negligent, even accepting Somerindyke's testimony that he assumed that Cox would "take care" of any concerns NYL might have about Respondents' outside business activities. However, taking into consideration the Principal Considerations in the Guidelines, the Panel finds Respondents' outside business involvement with SMG does not require severe sanctions.

The Panel finds there is no evidence that SMG's investors were customers of NYL, or that Respondents gave anyone the impression that NYL approved SMG. The duration of Respondents' involvement with SMG, based on their testimony and the available records from SMG's checking account, appears to have been relatively short, extending from some time before December 6, 2007, through March 2008. There were only two investors in SMG, and the amounts invested were not large. There is no evidence of economic harm, although the evidence suggests SMG, like HSM, was not a successful enterprise during the period relevant to this case.

The Panel agrees with Enforcement's characterization of Somerindyke's outside business activity with SMG as substantially greater than Respondent 2's. From the establishment of SMG's bank account on December 6, 2007, at least through March, 2008, Somerindyke was the chief officer of SMG and actively engaged in promoting it. It was Somerindyke who received

[82] Dep't. of Enforcement's Pre-Hearing Submission 11.

the two investments and facilitated their deposit into SMG's bank account. Respondent 2 appears to have provided relatively modest assistance to Somerindyke and SMG by applying for the certificate of incorporation, setting up the company's bank account, and writing several checks to pay business expenses.

For these reasons, the Panel finds that a suspension in all capacities for ten business days and a fine of $5,000 will serve to deter future similar misconduct by Somerindyke and others similarly situated. For Respondent 2, the Panel finds no need to impose a period of suspension, and that a fine of $2,500 is sufficient to achieve the remedial objectives of the Sanction Guidelines.

B. Somerindyke's Private Securities Transactions

The Sanction Guidelines prescribe a framework for determining sanctions for engaging in private securities transactions. The Guidelines require adjudicators to start by considering several quantitative and qualitative factors to weigh in mitigation and aggravation.

The quantitative factors are: (i) the dollar value and number of sales; (ii) the number of customers; and (iii) the length of time over which the misconduct occurred.[83]

The relevant qualitative factors applicable in this case include: (i) whether the investment violated federal or state securities laws or regulations; (ii) whether the respondent had a proprietary or beneficial interest in the selling enterprise, and if so, whether the respondent disclosed the interest to customers; (iii) whether the respondent attempted to create the impression that his employer member firm sanctioned the activity; (iv) whether the selling away resulted in injury to the investing public, and if so, the nature and extent of the injury; (v) whether the respondent sold away to customers of the firm; (vi) whether the respondent gave oral

[83] *Guidelines*, at 14.

notice of the proposed transaction and, if he did, the firm's oral or written response; (vii) whether the respondent sold directly to customers; (viii) whether the respondent recruited other registered individuals to sell the product; and (ix) whether the respondent misled his employer about the selling away or concealed it.[84]

For selling away in cases in which a respondent makes sales amounting up to $100,000, the Guidelines recommend suspension for a period of ten business days to three montHSM, and a fine of $5,000 to $50,000.[85]

Enforcement recommends imposing a $10,000 fine and a two-month suspension in all capacities for Somerindyke's selling away activities, in addition to the sanctions imposed for his outside business activity. Enforcement notes that the NYL memorandum addressing his outside business activity in HSM expressly provided that he could not "promote and/or solicit any investment" relating to the business.[86] Enforcement also argues that Somerindyke's ownership interests in HSM and SMG aggravate his misconduct, as does the fact that he took the investment in HSM when the business was "in distress" and used the money "in a failing, or failed, business."[87]

As noted above, the total dollar value of the three sales was $50,000. The sales occurred over a period of approximately five montHSM.[88] There were only three investors. The Panel considers none of these factors to be aggravating.

As noted above, although the record suggests that HSM ceased to operate in January 2008, the evidence is insufficient to permit the Panel to determine to what extent, if any, their

[84] *Guidelines*, at 14-15.

[85] *Id*, at 14.

[86] CX-5.

[87] Dep't of Enforcement's Pre-Hearing Submission 12.

[88] The HSM investor signed a subscription agreement and wrote his check on October 16, 2007; the second SMG investor dated his check March 17, 2008. CX-22; CX-30.

investments in HSM and SMG harmed the investors. There is no evidence that the investments violated any federal or state securities laws or regulations, that Somerindyke failed to disclose his proprietary interests in the businesses to the investors, or that the investors were customers of NYL. No evidence suggests Somerindyke enlisted other registered individuals to sell interests in HSM or SMG. Certainly he did not enlist Respondent 2, who was the sole registered person involved in the businesses with him.

On the other hand, the Panel finds that Somerindyke gave no oral notice to Cox or to NYL that he was accepting these investments. The Panel also finds that Somerindyke directly solicited both the HSM investment and SMG's initial investment. These are aggravating factors.

For all of these reasons, the Panel concludes that to deter Somerindyke and others similarly situated from similar misconduct, it is necessary to impose a suspension in all capacities for 30 business days, and a fine of $10,000.

IV. Conclusion

For engaging in three private securities transactions, in violation of NASD Conduct Rules 3040 and 2110, Respondent William M. Somerindyke, Jr., is suspended from associating in any capacity with any FINRA member firm for 30 business days and is fined $10,000.

For engaging in outside business activities, in violation of NASD Conduct Rules 3030 and 2110, Respondent Somerindyke is suspended from associating in any capacity with any FINRA member firm for an additional ten business days and is fined an additional $5,000, and Respondent 2 is fined $2,500. In addition, Respondent Somerindyke is ordered to pay the costs of the hearing, in the amount of $2,732.25, which includes the cost of the transcript and a $750 administrative fee.

If this Hearing Panel Decision becomes FINRA's final disciplinary action Respondent

Somerindyke's suspensions shall become effective with the start of business on February 4, 2013, and terminate at the close of business on April 2, 2013. Respondent Somerindyke's fines shall be due and payable upon his return to the securities industry. Respondent 2, who is not currently associated with any FINRA member firm, shall pay her fine when she re-enters the securities industry.[89]

HEARING PANEL.

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By: Matthew Campbell
Hearing Officer

[89] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.