

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C02020014
v.	:	
	:	HEARING PANEL DECISION
YOUNG MIN KIM	:	
(CRD #1087988)	:	Hearing Officer - SW
Rossmoor, CA,	:	
	:	
	:	Dated: December 13, 2002
Respondent.	:	

For violating NASD Conduct Rules 3040 and 2110 by participating in the sale of securities without prior written notice to, and approval of, his employer, the Hearing Panel (i) orders Respondent Young Min Kim to requalify as a general securities representative and a general securities principal, (ii) suspends him for seven months, and (iii) fines him \$113,687.50 (\$10,000 plus \$103,687.50, the amount of his financial benefit).¹ The Hearing Panel also orders Respondent to pay the \$1,732.10 costs of the Hearing.

Appearances

David A. Watson, Esq., Regional Attorney, San Francisco, CA, for the Department of Enforcement.

David L. Casterline, Esq., Manhattan Beach, CA, for Respondent Young Min Kim.

DECISION

I. Procedural Background

On March 27, 2002, NASD Department of Enforcement (“Enforcement”) filed a one-count Complaint, alleging that Respondent, while associated with The Equitable Life

¹ Respondent testified that he intended to pay to one of his customers approximately \$30,000 in settlement of another legal proceeding regarding the same securities. If within 30 days of this decision, Respondent provides evidence to the NASD District 2 staff of the amount he has paid to settle the legal proceeding, the \$113,687.50 fine shall be reduced by that amount.

Assurance Society of the United States and its subsidiary, EQ Financial Consultants, Inc.,² (collectively, “Equitable”), participated in the sale of preferred stock of Satcom Media Corporation (“Satcom”), without providing prior notice to Equitable, in violation of Conduct Rules 3040 and 2110.

Respondent admitted that he executed a written agreement with Satcom to sell preferred stock of the company. Respondent admitted that, between January 1996 and September 1996, he participated in the sale of the Satcom preferred stock for compensation. Respondent admitted that the sales of Satcom preferred stock were outside the regular scope of his employment with Equitable and that he did not receive approval from Equitable prior to his participation in the sales.

Respondent explained that at the time of his participation in the securities transactions, which consisted solely of referring customers to Satcom and having Satcom employees solicit the purchases, he did not know that he was violating Rule 3040; accordingly, he argued that the violation was unintentional. In addition, prior to discovery of his actions by either his employer or the regulatory authorities, Respondent ceased his Satcom activities in September 1996 when he realized, while studying for his Series 24 principal exam, that his conduct was a violation of NASD rules.

The Hearing Panel, consisting of two current District 2 Committee members and a Hearing Officer, conducted a Hearing in Los Angeles, California, on September 17, 2002.³ Respondent was the only witness. The Hearing Panel admitted (i) a joint exhibit

² EQ Financial Consultants, Inc. changed its name to AXA Advisors, LLC. (JX-1, p. 4).

³ “Tr.” refers to the transcript of the Hearing held on September 17, 2002; “JX” refers to the Joint exhibit; “Stip.” refers to the Stipulations; and “RX” refers to Respondent’s exhibits.

and joint stipulations of facts offered by the Parties and (ii) two exhibits offered by Respondent, labeled RX-1 and RX-2.

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was employed by Equitable on November 1, 1984. (JX-1, pp. 4-5). On October 29, 1985, Respondent was registered as a general securities representative with Equitable.⁴ (Id.). Equitable terminated Respondent's registrations on February 23, 1999. (Id.). Since September 27, 2001, Respondent has been registered as a general securities representative and a general securities principal with Centaurus Financial, Inc. (JX-1, p. 3; Stip. at ¶1). Accordingly, the Hearing Panel determines that NASD has jurisdiction over Respondent.

B. Respondent's Participation in Satcom Securities Transactions

Respondent was initially trained as a chemical engineer. (Tr. pp. 24-25). After being laid off in 1981, Respondent was employed by Equitable for 15 years from 1984 to 1999. (Tr. p. 25; JX-1, p. 2). At the time that Respondent joined Equitable's Irvine, California office, he was one of only three individuals out of 120 that had a securities license. (Tr. pp. 42, 90). From 1986 to 1995, Respondent was a district manager in Equitable's Irvine office.⁵ (Tr. p. 92). In the latter part of 1995 in order to concentrate on his production, Respondent gave up his position as an Equitable district manager. (Tr. p. 19).

⁴ On May 22, 1997, Respondent became registered as a general securities principal with Equitable. (JX-1, pp. 4-5).

⁵ A district manager was responsible for hiring new insurance agents, providing product training for the new agents, and assisting them in their selling efforts. (Tr. pp. 83-84).

In January 1996, Equitable's Los Angeles, California district manager, Jay Lim, whom Respondent had known since the late 1980s, solicited Respondent to purchase shares of preferred stock of Satcom. (Tr. pp. 23, 45). Satcom was in the satellite communication business and conducted a series of preferred stock private offerings through 1999. (Tr. pp. 45, 98). In connection with this solicitation, Mr. Lim asked Respondent whether any of his customers might also be interested in the opportunity to purchase shares of Satcom prior to its conducting an initial public offering. (Tr. p. 23).

Respondent indicated that there were customers who had previously expressed an interest in riskier investments with a potential for higher returns. (Tr. pp. 23-24). Ultimately, Respondent referred approximately 30 people, 20 of whom invested in Satcom. (Tr. p. 24). Respondent also personally invested \$20,000 in Satcom. (Tr. pp. 46-47).

At the time that Mr. Lim contacted Respondent in 1996, Respondent had approximately 400 customers and was primarily involved in selling mutual funds and annuities. (Tr. pp. 85, 87). Respondent testified that he had no clear understanding of Rule 3040. (Tr. pp. 31-32). He vaguely believed that the rule involved obtaining approval to sell products in direct competition with the products of his employer, which consisted of primarily insurance products. (Tr. pp. 31-32, 63-64).

Respondent described, without contradiction, Equitable's quarterly compliance meetings as product promotion meetings. (Tr. p. 31, 95-96). In the last five minutes of the meetings, the agents were directed to execute compliance forms indicating that they were complying with NASD rules. (Tr. pp. 31, 96). Respondent admitted that Equitable

provided a compliance manual for the use of its agents and periodically sent updates to the manuals.⁶ (Tr. pp. 88-89).

In the fall of 1996, Respondent was asked to become an Equitable district manager again. (Tr. pp. 29-30). Subsequently, Equitable directed all of its district managers to take the Series 24 principal exam. (Tr. pp. 29-30, 73). Respondent testified that he discovered that his Satcom activities violated NASD rules in late 1996 during his preparation for the Series 24 exam.⁷ (Tr. p. 29). Respondent immediately stopped his participation in the sale of Satcom. (Tr. pp. 30, 65). Nevertheless, Respondent did not advise Equitable of the outstanding violation. (Tr. p. 65). In the fall of 1998, Mr. Lim telephoned Respondent and told him that the president of Satcom had been arrested. (Tr. pp. 99-100). Although Respondent knew that Satcom was in trouble, he did not advise Equitable of his prior activities with Satcom. (Tr. p. 65).

Equitable discovered Respondent's activities with Satcom in 1999, after Satcom had filed for bankruptcy, and one of Respondent's Satcom investors filed suit against Equitable and Respondent. (Tr. p. 66). The lawsuit was settled, and Respondent's liability insurance was utilized. (Tr. p. 60). Subsequently, a second investor sued Equitable and Respondent, and Respondent agreed to pay \$30,000 to settle the suit. (Tr. pp. 60-61). The Satcom bankruptcy is still pending, and Respondent does not believe that any of the investors have received any money. (Tr. p. 62).

⁶ Neither the Equitable compliance manual nor the compliance questionnaires were presented at the Hearing.

⁷ The Hearing Panel noted that approximately nine months elapsed between September 1996 when Respondent ended his Satcom selling activity and May 22, 1997 when Respondent was approved as a registered principal. (Tr. p. 74; JX-1, p.4).

C. Respondent Participated in the Offer and Sale of Satcom Stock Without Prior Written Notice to, and Approval of, Equitable

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

During the period from January 1996 through September 1996, Respondent referred potential investors to Satcom, and Respondent received \$103,687.50 in fees because persons referred by him purchased \$1,382,500 of Satcom preferred stock.⁸ (Stip. at ¶6). Satcom preferred stock was not a product offered by Equitable and Respondent’s referral of investors to Satcom was outside the regular course and scope of his employment with Equitable. (Stip. at ¶7). Respondent did not provide prior written notice to Equitable of his intention to refer investors to Satcom and to receive compensation from Satcom for his participation. (Stip. at ¶8).

The reach of Rule 3040 is very broad, encompassing the activities of an associated person who not only makes a sale but who participates in any manner in the transaction. An associated person who introduces clients to an investment and later receives a finder’s or referral fee participates in the transaction within the meaning of

⁸ Respondent earned a 7 1/2% fee on the transactions. (Stip. at ¶6; Tr. pp. 27-28).

Rule 3040.⁹ Scierter is not required to find liability under Rules 2110 or 3040.¹⁰

Accordingly, the Hearing Panel finds that Respondent violated Conduct Rules 3040 and 2110 by participating in the sale of securities to customers, without obtaining the prior approval of Equitable.

III. SANCTION

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.¹¹

Recognizing that this was not an egregious case, Enforcement recommended that Respondent be fined \$113,687.50 (a \$10,000 fine increased by the amount of his financial benefit, \$103,687.50) and suspended for one year.

The Hearing Panel agrees that this is not an egregious 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;
- (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;

⁹ Gilbert M. Hair, 51 S.E.C. 374, 378 (1993); Charles A. Roth, 50 S.E.C. 1147, 1150 (1992).

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

¹¹ NASD Sanction Guidelines, p. 19 (2001).

(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.

Although Respondent became an investor in Satcom, he did not have a proprietary or managerial role in Satcom. There was no evidence presented that Respondent attempted to create the impression that his employer sanctioned the activity. Because Respondent did not advise Equitable of the sales, he did sell the product after its rejection by Equitable. On the other hand, a majority of the Satcom purchasers were Equitable customers, and Respondent did not give Equitable any verbal notice of his activities.

The Hearing Panel recognized that part of the reason Respondent never questioned whether there was a problem was because the opportunity was presented to him by an Equitable district manager, Mr. Lim. Without contradiction, Respondent testified that Equitable's compliance meetings were essentially product sales meetings with no real discussion of compliance issues. When Respondent recognized that his activities were a violation of the Conduct Rules, he ceased participating in the sale of Satcom stock. Although Respondent did not have the fortitude to advise his employer of his mistake, he did not compound the error by continuing the misconduct. The Hearing Panel was impressed that when presented with the opportunity by the president of Satcom to continue, Respondent chose not to violate the rules.

The Hearing Panel noted that Respondent had been fired by Equitable after 15 years with the company and was forced to slowly rebuild his customer base. The Hearing

Panel also noted that it was unlikely that Respondent would engage in this type of misconduct in the future based on his demeanor, that he stopped his participation when he realized there was a problem, and that he refused to resume his participation when the Satcom president contacted him. The Hearing Panel found that Respondent was candid in his testimony.¹² The Hearing Panel believes that Respondent did not know he was violating Rule 3040 when he began referring persons to Satcom.

On the other hand, Respondent had a responsibility as a registered representative to understand the NASD Rules.¹³ One of the main purposes of the notification requirement is to protect investors, as well as NASD members, from unscrupulous stock promoters.¹⁴ If Respondent had notified Equitable of his proposed participation in these transactions, as required, Equitable would have been provided the opportunity to conduct proper and reasonable due diligence of Satcom.¹⁵ Equitable was adversely affected by Respondent's misconduct. Equitable paid \$275,000 to settle a lawsuit with one of Respondent's Satcom investors, and was in the process of settling a second lawsuit with another Satcom investor.

In addition, on at least a quarterly basis, Respondent was repeatedly presented with compliance forms that included questions regarding selling away and was not

¹² Respondent testified that, when he realized he had violated NASD rules, he was afraid to tell his manager. (Tr. pp. 65-66).

¹³ As a matter of law, Respondent is presumed to know and understand the NASD Rules. Carter v. SEC, 726 F.2, 472, 474 (9th Cir. 1983).

¹⁴ District Bus. Conduct Comm. for Dist. Number 3 v. Norman D. Autry, Complaint No. C3A940001, 1995 NASD Discip. LEXIS 245 at *7 (January 3, 1995).

¹⁵ Rule 3040(d)(2) provides that if a member firm approves a representative's participation in a private securities transaction, "the transaction shall be recorded on the books and records of the member and the member shall supervise the person's participation in the transaction as if the transaction were executed on behalf of the member."

conscientious enough to even raise the issue of his activities with Equitable, although his compensation from the outside activity ultimately involved approximately 30% of his income in 1996.¹⁶ (Tr. pp. 59, 78).

Furthermore, the misconduct occurred over an extended period of time and involved a significant amount of money. Respondent participated in the sale of preferred stock of Satcom for a nine-month period lasting from January 1996 to September 1996. Respondent solicited approximately 30 people, of which 20 individuals purchased Satcom stock for \$1.3 million. (Tr. p. 57). As discussed earlier, a majority of the purchasing customers were customers of Equitable. (Tr. pp. 47-52). Finally, Respondent's customers have not received any reimbursement from the pending Satcom bankruptcy.¹⁷

Accordingly, the Hearing Panel finds that Respondent's conduct warrants a serious sanction. The Hearing Panel (i) requires Respondent to requalify as a general securities representative and a general securities principal, (ii) suspends him for seven months, and fines him \$113,687.50 (a \$10,000 fine plus the amount of his financial benefit). Respondent testified that his financial benefit would be reduced because he intended to pay approximately \$30,000 in settlement to one of his customers in another legal proceeding regarding Satcom. If within 30 days of this decision, Respondent

¹⁶ For example, in June 1996, when Respondent earned \$41,250 from a single Satcom transaction, Respondent failed to discuss his participation with anyone at Equitable. (Stip. at ¶6).

¹⁷ Customer SB invested \$550,000 in Satcom. (Stip. at ¶6). SB was very enthusiastic about Satcom and negotiated a separate side deal with Satcom. (Tr. p. 101). After Satcom's bankruptcy filing, SB filed and settled a lawsuit with Equitable and Respondent in which SB received \$375,000, \$275,000 from Equitable and \$100,000 from Respondent's insurance policy. (Tr. p. 60).

provides evidence to the NASD District 2 staff of the amount he paid to settle the legal proceeding, the \$113,687.50 fine shall be reduced by the amount of that payment.¹⁸

IV. Conclusion

The Hearing Panel (i) orders Respondent Young Min Kim to requalify as a general securities representative and a general securities principal, (ii) suspends him for seven months, and (iii) fines him \$113,687.50 (\$10,000 plus the amount of his financial benefit). If within 30 days of this decision, Respondent provides evidence to the NASD District 2 staff of the amount that he has paid to settle the legal proceeding concerning the Satcom securities, the \$113,687.50 fine shall be reduced by that amount. In addition, Respondent is ordered to pay the \$1,732.10 hearing costs, which include an administrative fee of \$750 and hearing transcript costs of \$982.10.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after this decision becomes the final disciplinary action of the NASD, except that, if this decision becomes the final disciplinary action of the NASD, the suspension shall become effective with the opening of business on Monday, February 3, 2003 and end at the close of business on Monday, September 3, 2003.¹⁹ The fine and the costs may be paid on an installment basis: one quarter due when the decision becomes final and the remaining payments due on a quarterly basis over a three year period ending February 1, 2006, with interest due on the unpaid amount from February 1, 2003,

¹⁸ The Hearing Panel also found that Respondent, with liquid assets of \$127,000 and a net worth of \$381,500, had sufficient financial resources to pay the fine. (RX-1).

¹⁹ 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.

calculated in accordance with the NASD Finance Department's usual terms and conditions.

SO ORDERED

HEARING PANEL

By: _____
Sharon Witherspoon
Hearing Officer

Dated: Washington, D.C.
December 13, 2002

Copies to:

Young Min Kim (via Airborne Express and first class mail)
David L. Casterline, Esq. (via facsimile and first class mail)
David Watson, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)