

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KENNETH J. MATHIESON
(CRD No. 1730324),

Respondent.

DISCIPLINARY PROCEEDING
No. 2014040876001

Hearing Officer —

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Between September 2010 and March 2012, Respondent Kenneth J. Mathieson participated in private securities transactions by investing \$96,550 in stock of Aspen University Inc. (referred to as "Aspen") through 14 separate transactions for himself and his children without providing written notice to, and receiving prior approval from, his member firm, Morgan Stanley Smith Barney, LLC ("Morgan Stanley"). He also participated in the sale of Aspen shares to other investors without notifying Morgan Stanley of the transactions, and otherwise participated in the purchase and sale of Aspen securities. By virtue of this conduct, Mathieson violated NASD Rule 3040 and FINRA Rule 2010.

2. Additionally, from approximately September 2010 through April 2012, Mathieson engaged in an unapproved outside business activity by participating in the management of Aspen, helping manage the company's relations with investors and advising the company's Board of Directors and Chief Executive Officer on a broad range of business and strategic

matters. Mathieson did not provide prior written notice to Morgan Stanley or obtain the firm's approval to engage in such activities, thus violating NASD Rule 3030 (for conduct prior to December 15, 2010) and FINRA Rule 3270 (for conduct on or after December 15, 2010).¹ By virtue of these violations, Mathieson also violated FINRA Rule 2010. He also violated FINRA Rule 2010 by continuing to participate in the business of Aspen after his request to do so was denied by Morgan Stanley and he was instructed to discontinue providing service to Aspen.

3. Mathieson also violated FINRA Rule 2010 by providing false certifications in a compliance questionnaire regarding his outside business activities and securities transactions.

RESPONDENT AND JURISDICTION

4. Mathieson entered the securities industry in July 1987. He was associated with two member firms before the latter of those two firms sold part of its business to Morgan Stanley in June 2009, at which point Mathieson became associated with Morgan Stanley. Morgan Stanley terminated his registration on April 9, 2014 as a result of his unapproved involvement with Aspen and unapproved purchases and sales of stock. He has been registered with Raymond James Financial Services Advisors, Inc. since June 2014. Because he is currently registered with a FINRA member, Mathieson is subject to FINRA's jurisdiction.

5. Mathieson is currently licensed as a general securities representative, general securities sales supervisor, state agent, and investment advisor, and has previously been licensed as a registered commodity representative.

¹ NASD Rule 3030 became FINRA Rule 3270 on December 15, 2010.

FACTS

Aspen University, Inc.

6. Aspen was a private for-profit entity specializing in post-secondary online education. It was acquired by Higher Education Management Group, Inc. (HEMG), an entity owned and controlled by an individual referred to herein as PS,² in April 2003. As of 2010, Aspen had approximately 100 shareholders. It intended to enter into a reverse merger with a shell company in order to become publicly traded.

7. In March 2010, Mathieson learned of Aspen through a friend who was a member of Aspen's Board of Directors. He invested in Aspen that month, and began acting as a strategic advisor to Aspen later in 2010, effectively serving as an independent contractor and *de facto* officer or director of the company. Among other things, he provided extensive strategic advice to the company and PS regarding Aspen's securities, other companies involved in online education, website design, and other matters.

8. In May 2011, Aspen merged with Education Growth Corp., a privately-held company, with Aspen as the surviving entity. In March 2012, a publicly-traded "penny stock" shell company called Aspen Group Inc. (formerly known as Elite Nutritional Brands Inc.) acquired Aspen via a reverse merger transaction for \$209.2 million in stock. The stock of Aspen Group, Inc. became publicly traded at or about that time. The surviving entity was subject to a "going concern" qualification issued by its auditors once the merger took place.

² Enforcement will file a supplemental submission identifying those persons identified by initials.

Mathieson's Authorized and Unauthorized Purchases of Aspen Securities

9. On or about March 23, 2010, Mathieson submitted an outside investment form to Morgan Stanley requesting permission to invest \$100,000 in Aspen. By signing the form, Mathieson explicitly acknowledged that he "will notify the Outside Activities Compliance Unit in writing in the event of a change in the status of my investment, a change of ownership, or if I intend to commit additional capital to this investment." He also checked "yes" in response to the question "Is your participation exclusively as a passive investor?"

10. As part of the request for approval of his investment, Mathieson explicitly represented to Morgan Stanley that he "would not solicit clients to invest in or purchase goods or services of" Aspen and that he was not "requesting permission to recommend, refer, or solicit others (including clients) in any way in connection with this investment." He also answered "no" to the questions "Do you currently advise or plan advise, the issuer and/or private investment in any way concerning this or any other securities transaction or with any investment decisions?" [sic] and "Do you currently participate or plan to participate in the management of the entity and/or private investments?"

11. Mathieson's supervisor approved the investment by signing the request form submitted by Mathieson, and Mathieson invested \$100,000 in Aspen on March 24, 2010.

12. On March 26, 2010, the firm's Outside Activities Unit sent Matheson an email approving the investment. The email included the statement "Please note that any additional commitments of capital you may elect to make in this investment will require your additional submission and prior Compliance approval."

13. After his initial investment of \$100,000 in Aspen, Mathieson made an additional 14 purchases of Aspen securities for himself and members of his family totaling \$96,550 during a 20-month period:

- a. On or about September 17, 2010, Mathieson bought 10,000 shares of Aspen stock for \$20,000 for his own account.
- b. On or about February 18, 2011, Mathieson bought 4,150 shares of Aspen stock for \$8,300 for his own account.
- c. On or about February 22, 2011, Mathieson bought 6,315 shares of Aspen stock for \$6,000 for his own account.
- d. On or about March 8, 2011, Mathieson bought 21,052 shares of Aspen stock for \$20,000 for his own account.
- e. On or about April 20, 2011, Mathieson bought 10,526 shares of Aspen stock for \$10,000 for his three children.
- f. On or about May 18, 2011, Mathieson bought 7,250 shares of Aspen stock for \$7,250 for his three children.
- g. On or about May 20, 2011, Mathieson bought 20,000 shares of Aspen stock for \$20,000 for his own account.
- h. In April 2012, Mathieson bought 10,000 shares of Aspen stock for \$5,000 for his three children.

Despite having been explicitly told by Morgan Stanley's Outside Activities Unit that he would need to obtain prior Compliance approval before making any additional investments in Aspen,

Mathieson failed to provide written notice of, or receive written permission for, any of these 14 investments in Aspen for himself and for his children.

Mathieson's Unapproved Involvement with Aspen's Business and Securities Transactions

14. At about the time Mathieson began making additional undisclosed investments on behalf of himself and his family, he became significantly involved in the management of Aspen as a self-styled "strategic advisor" to both the company and its CEO, PS. He functioned as an independent contractor and a *de facto* officer or director of the company.

15. Morgan Stanley's policies prohibited registered representatives from participating in private securities transactions or outside business activities without obtaining prior written approval from their supervisors and from the compliance department. The firm's Compliance Manual defined participation in private securities transactions broadly, including "not only making the purchase, but also referring or introducing customers to the issuer, arranging and/or participating in meetings between customers and the issuer, receiving selling compensation from the issuer, or investing directly for your own account or an Employee Account or Employee-Related Account." Its Code of Conduct identified potential outside business activities requiring pre-approval as including, among other things, "employment by, or acting as a consultant for, another person or entity."

16. Despite his March 2010 representation that he did not intend to advise the issuer or others in any way concerning securities transactions or investment decisions or to participate in the management of the entity and/or private investments, Mathieson began his extensive "strategic advisor" role in or about October 2010, shortly after he began making the unauthorized purchases of Aspen stock alleged above. Among other things, he helped develop and implement

the initial plan for a reverse merger of Aspen with another company and to advance that proposed merger. His activities included:

- a. In October 2010, Mathieson wrote an email to an Aspen director suggesting how to structure and price a merger between Aspen and another entity involving an exchange of shares followed by a private placement of Aspen stock for \$5 million.
- b. Later that month, he hosted a meeting among himself, PS, the owner of another entity, and the attorneys for the parties to try to finalize the terms of a merger between Aspen and the other entity.
- c. In late November 2010, Mathieson helped draft a letter of intent to effectuate the proposed transaction in which the other entity would be acquired by Aspen in exchange for preferred stock, a third party would invest \$400,000 in Aspen, and Aspen would raise \$3 million through a private placement of new preferred stock to other investors.

The letter of intent was signed on December 22, 2010, and the merger of Aspen and the other entity (then called Education Growth Corp.) was finalized in the spring of 2011.

17. Mathieson also became involved in other aspects of Aspen's business and management. His involvement included the following:

- a. On November 17, 2010, Mathieson sent an email to two Aspen directors setting forth potential Aspen stock transactions, which included his prediction that "we can sell 1.5 million shares @ \$1...."

- b. On November 18, 2010, he sent the same directors an email suggesting numerous “things to do” for Aspen, including holding a meeting to discuss hiring a full-time public relations marketing employee, outsourcing certain Internet functions, and updating Aspen’s website; developing a “deeper professional relationship with Google”; recapitalizing Aspen to 50 million total shares; putting together a dinner for potential investors; deciding how much money to raise through stock sales; and working a merger of PS’s company HEMG with Aspen.
- c. That same month, Mathieson became involved in efforts to repurchase shares from a group of investors who wanted to unwind their prior investments in Aspen. He sent an email to Aspen’s directors proposing how to structure the stock purchases.

18. Mathieson did not disclose these activities to Morgan Stanley, and did not seek his firm’s approval for any business affiliation with Aspen until many weeks later when, on December 13, 2010, he submitted an “Outside Directorships and Business Affiliations” form to Morgan Stanley requesting permission to serve as a director of Aspen. In his request, he described his position as “Strategic Advisor” and described his expected duties as “Advise Board on Strategic Developments for Distance Education.”

19. The firm denied this request on December 23, 2010, and specifically directed him “to refrain from, or discontinue your role in, the outside activity.”

20. Mathieson defied this instruction and continued advising the board of Aspen and PS and participating in many aspects of Aspen’s management and business, including business development, providing information about other companies in its industry, web design, marketing, and the hiring of employees. He attended and participated in meetings of Aspen’s

Board of Directors, during which he provided advice regarding on-line universities, optimizing the use of Google, and various other business matters. He hosted at least one Aspen board meeting at his Morgan Stanley office. In May 2011, he contacted an insurance agent about obtaining director and officer insurance for Aspen. Between September 2010 and April 2012, Mathieson sent or received almost 5,000 emails relating to Aspen.

21. Mathieson also continued his involvement in Aspen's efforts to raise funds through private placements of its securities and other methods. This included the following activities:

- a. Mathieson helped arrange a January 2011 meeting for potential investors by compiling a list of possible attendees. Some of the attendees on the list invested in Aspen.
- b. In the late winter and early spring of 2011, Aspen raised \$250,000 in funding for a bridge loan in order to provide working capital pending its May 2011 merger with Education Growth Corp. Mathieson provided \$6,000 towards legal fees in connection with this loan, in return for which he received 6,315 shares of preferred stock. In addition, he was kept apprised by Aspen's management of the status of funding and the disbursement of funds. Mathieson provided information to one of Aspen's officers regarding the status of checks being sent in by individuals participating the bridge financing.
- c. Mathieson was kept apprised of investor funds received by Aspen at various times during 2011. For instance, in February 2011, Aspen's CEO sent Mathieson a list of members of an investor group. In March 2011, the office of Aspen's outside counsel sent him updates on investor funds received for convertible notes.

In May 2011, the same office sent him copies of notes, subscription agreements, stock purchase agreement signature pages, and an update schedule of investors.

22. In other instances, Mathieson acted as an intermediary between Aspen and some investors, or was held out as such by Aspen. For instance:

a. In May 2011, he directed his friend JP to contact an individual at Aspen to request a document to sign relating to making an additional Aspen investment. The individual at Aspen sent JP the signature page, and told him to call Mathieson or her with any questions. In January 2011, a few weeks before JP's initial investment, he sent Mathieson an email asking him to "let me know when you firm up the Aspen date."

b. That same month, an individual, JdeP, bought 10,000 shares of Aspen stock for \$20,000. When Aspen sent JdeP the signature page for the stock purchase agreement, the sender told JdeP to call either Mathieson or her with any questions.

23. In May 2011, Mathieson assisted in finalizing the merger between Aspen and Education Growth Corp. His participation in those efforts included the following:

a. On May 13, 2011, Mathieson asked Aspen's Chief Marketing Officer to send him the merger documents so that he could print and prepare them for PS's signature.

b. On May 17, 2011, Mathieson forwarded a copy of an email from Aspen's outside counsel to three of Aspen's directors seeking formal approval for the

merger, telling them to send “an ‘I approve’” to Aspen’s counsel if they were comfortable doing so.

c. On May 20, 2011, Mathieson provided Aspen with email addresses for new shareholders so that the firm could send letters to the shareholders at the time Aspen was trying to finalize the merger with Education Growth Corp.

24. In or about April or May 2011, PS agreed to repurchase Aspen shares from three shareholders. He signed promissory notes totaling \$20,200, but failed to pay for the shares. Mathieson participated in completing one of the transactions and arranging a substitute purchase and sale for another by doing the following:

a. In November 2011, Mathieson and Aspen’s outside counsel contacted PS, and reached an agreement whereby PS would send a check to one of the shareholders, BS, in order to effectuate PS’s purchase of the shares, and PS would release his rights to the shares held by the others so that Aspen would be able to purchase them.

b. In November and December 2011, Mathieson arranged for Aspen to purchase the shares from at least one of the other shareholders, JH, by participating in telephone calls with her and obtaining her agreement to resell her shares to Aspen.

25. Mathieson also participated in two purchases of Aspen securities by his personal acquaintances:

a. In May 2011, Mathieson’s business partner at Morgan Stanley, MK, invested \$50,000 in a private placement of Aspen securities after learning about Aspen from the director who first introduced Mathieson to Aspen. Mathieson put MK in

touch with Aspen, and told Aspen who MK was when it received funds from him. Mathieson also told Aspen that MK would be sending in his documentation, adding "Go man go."

b. On or about October 2011, Mathieson participated in the sale of Aspen convertible preferred stock to SS for a total of \$25,000. He submitted her purchase agreement to Aspen, and recommended that she be allocated shares from PS's position. In November 2011, Matheson asked an employee of Aspen's outside law firm to send SS a receipt for her purchase.

26. During the late summer of 2011, Aspen began to terminate its relationship with PS. Mathieson participated in efforts to unwind PS's involvement in Aspen by helping identify potential purchasers of his stock:

a. On August 27, 2011, Aspen's CEO sent an email to three Aspen directors and Mathieson describing a proposal to offer existing investors the opportunity to purchase PS's shares, and asking the recipients to identify any shareholders who should not be solicited. Mathieson responded within ten minutes, stating that the list looked good to him.

b. In September 2011, Aspen's CEO sought Mathieson's assistance in contacting purchasers of SP's shares in order to obtain payment for their purchases.

27. Mathieson expected, and sought, to be compensated for his efforts on behalf of Aspen through the issuance of options.

a. In May 2011, Aspen's outside counsel circulated proposed documentation for a merger between Aspen and Education Growth Corp. to Mathieson, officers and directors of Aspen, and other attorneys. The proposed documentation included an Equity Incentive Plan authorizing the issuance of Aspen stock options to its officers, directors, employees, and consultants. The documentation also included a proposed Unanimous Consent of the Board of Directors authorizing, subject to shareholder approval, the grant of 100,000 options each to eight individuals, including Mathieson. All of the other designated recipients were the named directors and officers of Aspen.

b. As the efforts to conduct a reverse merger continued into 2012, Mathieson sent an email to Aspen's CEO and a director suggesting that it would be preferable to get the stock options after the reverse merger transaction, and that they should share the options that would otherwise have gone to PS. He added: "God knows we've all worked hard for them."

FIRST CAUSE OF ACTION
Private Securities Transactions
(NASD Rule 3040 and FINRA Rule 2010)

28. The Department realleges and incorporates by reference paragraphs 1 through 27 above.

29. NASD Rule 3040, in effect at the time of the alleged violations, prohibited associated persons from participating in any private securities transaction without obtaining written approval from his or her firm, which may impose specified conditions on the associated person's participation in the transaction.

30. As alleged above, after his initial investment of \$100,000 in Aspen, Mathieson made an additional 14 purchases of Aspen securities for himself and members of his family totaling \$96,550. Mathieson failed to provide written notice of, or receive written permission for, his participation in these private securities transactions. Moreover, these purchases were contrary to the firm's specific condition that he obtain its written permission before making any additional investments after the initial \$100,000 investment.

31. As alleged above, Mathieson participated in the sale of \$75,000 of Aspen securities involving additional investors MK and SS. Mathieson failed to provide written notice of, or receive written permission for, his participation in these private securities transactions.

32. As alleged above, Mathieson participated in efforts to sell, repurchase, or otherwise transfer ownership of Aspen shares, including but not limited to his participation in planning and executing the May 2011 merger with Education Management Group, the March 2012 reverse merger of Aspen with a publicly-traded entity, purchases of shares by PS, and sales of PS's shares. Mathieson failed to provide written notice of, or receive written permission for, his participation in these private securities transactions.

33. Mathieson violated NASD Rule 3040 by participating in the foregoing private securities transactions. By virtue of this violation, Mathieson also violated FINRA Rule 2010.

SECOND CAUSE OF ACTION

Outside Business Activity

(NASD Rule 3030 and FINRA Rules 3270 & 2010)

34. The Department realleges and incorporates by reference paragraphs 1 through 33 above.

35. FINRA Rule 3270 and its predecessor, NASD Rule 3030, impose restrictions on undisclosed outside business activities by registered persons. Under the current rule, a registered person

may not be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he has provided prior written notice to the member, in such form as specified by the member.

Under the predecessor rule, a registered person could not be employed by, or accept compensation from, any other person without providing written notice.

36. Mathieson never requested Morgan Stanley's permission to participate in the business of Aspen after December 23, 2010 and never obtained written approval from the firm to engage in any outside business activity with Aspen.

37. Mathieson acted in the capacity of an independent contractor for Aspen, or as a *de facto* officer or director of the company, by virtue of his extensive involvement in its business, including but not limited to his involvement in its financing arrangements and merger transactions.

38. By engaging in the conduct alleged above, Mathieson effectively functioned as an employee, independent contractor, sole proprietor, officer, director or partner of Aspen despite not holding any formal title. In addition, Mathieson had a reasonable expectation of compensation for his extensive work on behalf of the company by virtue of his anticipated receipt of stock options that he said he had "worked hard for."

39. Mathieson violated NASD Rule 3030 (for conduct prior to December 15, 2010) and FINRA Rule 3270 (for conduct on or after December 15, 2010) by continuously engaging in the

outside business activities on behalf of Aspen before providing Morgan Stanley with notice of his intention to do so and after Morgan Stanley denied his request for approval to do so.

40. In addition, to the extent Mathieson's involvement in any of the securities transactions set forth under the First Cause of Action did not constitute participation in private securities transactions, Mathieson's involvement in Aspen's capital raising and restructuring efforts constituted a further violation of FINRA Rule 3270.

41. By violating NASD Rule 3030 and FINRA Rule 3270, Mathieson also violated FINRA Rule 2010.

THIRD CAUSE OF ACTION
(Alternative to the Second Cause of Action)
Ongoing Participation in Aspen's Business in
Violation of Firm's Refusal to Allow Participation
(FINRA Rule 2010)

42. The Department realleges and incorporates by reference paragraphs 1 through 41 above.

43. As alleged above, on December 23, 2010, Morgan Stanley directed Mathieson "to refrain from, or discontinue your role in, the outside activity" involving Aspen.

44. Notwithstanding this directive, Mathieson continued to be deeply involved with Aspen, as alleged above. He remained involved in Aspen's financing activities and continued to advise the firm on many aspects of its business, in blatant disregard of his firm's admonition not to do so.

45. Mathieson's on-going participation in the activities described above was inconsistent with his March 23, 2010 representation to Morgan Stanley that he would not be advising Aspen

in any way concerning securities transactions or participating in the management of the company.

46. This conduct interfered with Morgan Stanley's ability to effectively supervise Mathieson's activities.

47. By doing so, Mathieson violated FINRA Rule 2010 by failing to observe high standards of commercial honor and just and equitable principles of trade.

FOURTH CAUSE OF ACTION
False Compliance Certifications
(FINRA Rule 2010)

48. The Department realleges and incorporates by reference paragraphs 1 through 47 above.

49. On or about April 12, 2011, Mathieson answered "no" to the question "do you participate in any outside business interests or affiliations that require disclosure?" on his annual sales questionnaire submitted to Morgan Stanley.

50. This certification was false in light of Mathieson's substantial participation in the business of Aspen alleged above.

51. On or about April 12, 2011, Mathieson answered "no" to the question whether he had ever "been responsible for, assisted in, purchased or received any private placement investments" during his employment with Morgan Stanley.

52. This certification was false in light of Mathieson's participation in private placements of Aspen securities for himself, relatives, and others.

53. Mathieson violated FINRA Rule 2010 by submitting false answers on his annual firm sales questionnaire.

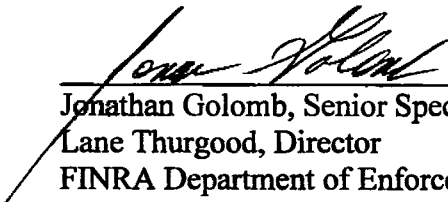
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed; and
- C. order that Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: March 3, 2016


Jonathan Golomb, Senior Special Counsel
Lane Thurgood, Director
FINRA Department of Enforcement
15200 Omega Drive
Rockville, MD 20850
Phone: (301) 258-8532 Fax: (202) 721-8320
jonathan.golomb@finra.org
lane.thurgood@finra.org