

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

AVIDAN DANNY FISHMAN  
(CRD No. 2614469),

Respondent.

Disciplinary Proceeding  
No. 2007008812801

**HEARING PANEL DECISION**

Hearing Officer -- SW

Date: September 18, 2008

**Respondent is suspended in all capacities from associating with any FINRA member for six months and fined \$2,500 for his willful failure to disclose his criminal history on his Form U4 and his employer's annual compliance forms, in violation of Article V, Section 2(c) of the FINRA By-Laws, Conduct Rule 2110, and IM-1000-1, and he is concurrently suspended for one month and fined \$2,500 for failing to disclose his outside business activities, in violation of Conduct Rules 3030 and 2110.**

**Appearances**

Joel T. Kornfeld, Esq., Senior Regional Counsel, and John S. Han, Esq., Principal Regional Counsel, Los Angeles, CA, for the Department of Enforcement.

Avidan "Danny" Fishman, pro se.

**DECISION**

**I. PROCEDURAL HISTORY**

**A. Complaint and Answer**

Count one of the two-count Complaint alleges that Respondent Avidan "Danny" Fishman ("Respondent") violated Article V, Section 2(c) of the FINRA By-Laws, Conduct Rule 2110, and IM-1000-1 by failing to promptly update his Form U4 to disclose that (i) he was charged with grand theft on January 13, 2005, and (ii) he pleaded

nolo contendere to petty theft on April 14, 2005. In addition, in November 2005 and October 2006, Respondent is alleged to have falsely certified to his employer that he had no misdemeanor or felony charges and/or convictions to disclose.

Count two of the Complaint alleges that Respondent violated Conduct Rules 3030 and 2110 by failing to provide his employer with prompt written notice of his outside business activity as a real estate salesperson.

Respondent admitted the violations, explaining that (i) he was waiting until all the regulatory proceedings were resolved before addressing the matter with his employer, and (ii) having reverted to part-time employment, he did not realize that he had to provide written notice of his full-time real estate activities to his part-time employer.

## **B. Hearing**

The Hearing Panel, consisting of two members of the District 2 Committee and a Hearing Officer, conducted a Hearing in Los Angeles, CA, on July 10, 2008.<sup>1</sup>

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Facts**

In March 1994, Respondent joined Primerica Financial Services, Inc., a multi-level marketing organization with a number of subsidiaries, including an insurance subsidiary, Primerica Life Insurance Company, and a broker-dealer subsidiary, PFS Investments, Inc. (collectively, “Primerica”). (CX-38, p. 4; Tr. pp. 76-77). Respondent began at Primerica working part-time to recruit other persons to sell life insurance and securities on a part-time basis. (CX-3, p. 6 at subpage 19; Tr. pp. 25-26).

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<sup>1</sup> “Tr.” refers to the transcript of the Hearing held on July 10, 2008; “CX” refers to the exhibits submitted by the Department of Enforcement; and “RX” refers to the exhibits submitted by Respondent.

Typically, Primerica agents first become licensed as insurance salesmen, and some agents later obtain their securities registrations. (Tr. p. 77). Beginning on March 31, 1994, Respondent obtained various insurance licenses, including life, fire, and casualty, issued by the California Department of Insurance. (CX-22, p. 1; Tr. p. 23). Two years after obtaining his insurance license, Respondent became registered as an investment company and variable contracts products representative with Primerica's broker-dealer subsidiary on June 12, 1996, and as an investment company and variable contracts products principal on May 29, 1997. (CX-38, pp. 3-4).

After becoming a Primerica regional vice president, Respondent worked full-time selling insurance and mutual funds, and opened his own office in 1999. (CX-3, p. 10 at subpages 36-37). In 2002, after determining that he was making insufficient income to support his elderly parents, daughter, and ex-wife, Respondent decided to make a career change. (Tr. pp. 28, 116, 144). He closed his Primerica office and began studying to take the California real estate exam. (Tr. pp. 18, 28, 73).

After 2002, Respondent did not prospect for new clients, but he continued to maintain his securities registrations and earned residual income on past mutual fund sales.<sup>2</sup> (Tr. pp. 28, 43, 71). Mr. RH, who introduced Respondent to Primerica, was Respondent's supervisor. (Tr. pp. 27, 107-108). Respondent passed the real estate exam and obtained his license to sell real estate on September 12, 2003. (Tr. p. 24; CX-41).

On December 22, 2004, Respondent was arrested for stealing a \$498 leather jacket from Macy's Department Store in Sherman Oaks, CA.<sup>3</sup> (Tr. p. 49; CX-6). On

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<sup>2</sup> Respondent received residual income from Primerica in the amount of \$4,985 in 2005, and \$5,124 in 2006. (Tr. p. 71).

<sup>3</sup> Respondent was arrested while returning to Macy's with the leather coat. (Tr. pp. 50, 68).

January 13, 2005, he was charged with one count of grand theft, a misdemeanor. (Tr. p. 50; CX-7; CX-8). On April 14, 2005, Respondent pled nolo contendere to petty theft, a misdemeanor, and was convicted. (Tr. p. 51; CX-8). He was sentenced to two days in jail (time served), given 24 months probation, and ordered to stay away from the Sherman Oaks Macy's. (*Id.*).

Respondent's criminal attorney advised him to address his licenses, *i.e.*, insurance, real estate, and securities, after the criminal proceedings were completed and told him that the police would notify the licensing entities of his arrest. (Tr. pp. 48, 143). Upon learning of the criminal proceedings, the California Department of Insurance contacted Respondent. (Tr. p. 48). Respondent convinced himself that Primerica was waiting for him to resolve the California Department of Insurance matter before Primerica addressed any issues it had.<sup>4</sup> (Tr. pp. 48-49, 69-70). Respondent believed that he did not harm anyone when he did not immediately address the matters with Primerica because he was not doing any business, *i.e.*, he was not selling insurance or mutual funds. (Tr. pp. 69-70).

Primerica initially learned of Respondent's criminal proceedings and real estate activity in early 2007 when Respondent asked his supervisor, Mr. RH, to be a character

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<sup>4</sup> Respondent knew that he could not be employed by Primerica without an insurance license. (Tr. pp. 69-70). On January 12, 2007, the California Department of Insurance held a hearing to decide whether to suspend or revoke Respondent's insurance licenses because of the criminal conviction. (CX-22). On March 16, 2007, the California Department of Insurance served its Decision on Respondent. (*Id.*). The Department decided to revoke Respondent's insurance licenses and to issue restricted insurance licenses to him. (*Id.*). Upon receipt of the Department of Insurance's March 16, 2007 Decision, Respondent sent all the materials from the insurance proceeding to Mr. RH and to an individual in Primerica's compliance office. (Tr. p. 55; CX-43, p. 1).

witness in a California real estate administrative proceeding regarding his real estate license.<sup>5</sup> (Tr. pp. 54-55, 112-113).

On May 8, 2007, Primerica's broker-dealer subsidiary issued a reprimand to Respondent for his failure to timely disclose his criminal history. (CX-27). However, on May 16, 2007, Primerica terminated Respondent for failing to disclose his outside real estate activity as well as his criminal history.<sup>6</sup> (CX-29).

**B. Respondent Willfully Failed to Update His Form U4, and He Falsely Certified His Lack of Criminal History on Primerica's Annual Compliance Forms**

Count one of the Complaint alleges that Respondent violated Article V, Section 2(c) of the FINRA By-Laws, Conduct Rule 2110, and IM-1000-1 by failing to promptly update his Form U4. In addition, Respondent is alleged to have falsely certified on his annual compliance forms that he had no misdemeanor or felony charges and/or convictions to disclose.

Article V, Section 2(c) of the FINRA By-Laws requires that associated persons keep their Form U4s "current at all times," and that they file amendments to Form U4s "not later than 30 days after learning of the facts or circumstances giving rise to the amendment."

Conduct Rule 2110 states, "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."

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<sup>5</sup> On December 6, 2006, the California Department of Real Estate filed an accusation or complaint to review Respondent's real estate license because of the 2005 misdemeanor conviction. (CX-19). On April 5, 2007, the California Department of Real Estate issued a notice of hearing on the accusation. (CX-21). Mr. RH agreed to testify as a character witness on behalf of Respondent. (Tr. p. 112).

<sup>6</sup> Respondent remains subject to FINRA jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of the FINRA By-Laws, because (1) the Complaint was filed within two years after his registrations through Primerica's broker-dealer subsidiary were terminated, and (2) the Complaint charges him with misconduct while he was registered.

A violation of NASD Conduct Rule 2110 may occur in either of two ways. First, Rule 2110 is violated whenever a member violates the federal securities laws, regulations, or FINRA rules, “because members are expected and required to abide by the applicable rules and regulations.”<sup>7</sup> Second, because Conduct Rule 2110 “is not limited to rules of legal conduct but rather . . . it states a broad ethical principle,”<sup>8</sup> it may also be violated by unethical conduct, independent of a violation of any other law, regulation, or rule.

IM-1000-1 provides that “[t]he filing with [FINRA] of information with respect to membership or registration as a Registered Representative which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade. . . .”

Accordingly, Article V, Section 2(c) of the FINRA By-Laws, Conduct Rule 2110, and IM-1000-1 require associated persons to answer the questions of the Form U4 accurately and fully and to keep the information updated.

Respondent does not dispute that, over a two year span, he failed to amend his Form U4 to update his responses to Question 14B of the Form U4 to disclose that he had been charged with a misdemeanor involving wrongful taking of property on January 13, 2005, and that he had pled nolo contendere in a domestic court to a misdemeanor involving wrongful taking of property on April 14, 2005. (CX-8, pp. 1-2).

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<sup>7</sup> *Dep’t of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, \*12-13 (NAC June 2, 2000). See also *Stephen J. Gluckman*, Exch. Act Rel. No. 41,628, 1999 SEC LEXIS 1395, at \*22 (July 20, 1999) (finding that a violation of any SEC or NASD rule constitutes a violation of 2110).

<sup>8</sup> *Timothy L. Burkes*, 51 S.E.C. 356 (1993), *aff’d mem.*, *Burkes v. SEC*, 29 F.3d 630 (9th Cir. July 24, 1994).

Respondent admitted that he knew that he was required to update his Form U4 to disclose the misdemeanor charge and conviction. (Tr. pp. 36-37, 67). Respondent also admitted that he intentionally decided not to disclose his criminal history on the Form U4 or on Primerica's 2005 or 2006 annual compliance forms. (Tr. pp. 67-70, 138).

Respondent stated that he failed to do so because (i) he was so mortified by his conduct that he had difficulty facing the consequences of his actions and underwent counseling for nine months to help him face his situation, (ii) he wanted to wait until after the California Department of Insurance had reached its decision before addressing the criminal charge and conviction with Primerica, and (iii) he believed that Primerica knew about the arrest, if not the criminal charge and conviction. (Tr. pp. 67-70, 138; CX-22, p. 2).

Although it was illogical for Respondent to believe that Primerica knew about his arrest, but not the actual criminal charge and conviction, based on Respondent's demeanor and the testimony of Mr. RH, the Hearing Panel finds that Respondent did hold those two inconsistent beliefs at least until 2007. While the Hearing Panel believed Respondent's testimony, the Hearing Panel finds that Respondent did not act reasonably when he executed false certifications and failed to update his Form U4.

The Hearing Panel finds that Respondent intentionally failed to update his Form U4 and falsely certified that he had no criminal proceedings to disclose on his 2005 and 2006 Primerica annual compliance forms, and that his conduct was unethical.

Accordingly, the Hearing Panel finds that Respondent violated Article V, Section 2(c) of the FINRA By-Laws, Conduct Rule 2110, and IM-1000-1.

In addition, the Hearing Panel finds that (i) the information regarding Respondent's criminal history was material, and (ii) Respondent's failure to disclose the information on the Form U4 in a timely manner was willful because Respondent knew that the Form U4 required him to update the information regarding his criminal background, and he intentionally decided to delay disclosing the information to Primerica.<sup>9</sup>

**C. Respondent Failed to Provide His Employer with Prompt Written Notice of His Outside Business Activity**

Count two of the Complaint alleges that Respondent violated Conduct Rules 3030 and 2110 by failing to provide his employer with prompt written notice of his outside business activity as a real estate salesperson from 2004 to 2007.

Conduct Rule 3030 provides that “[n]o person associated with a member shall be employed by, or accept compensation from, any other person as a result of any business activity ... outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member ... in the form required by the member.”

The purpose of Rule 3030 is to provide member firms with prompt notice of outside business activities so that the member's objections, if any, to such activities can be raised at a meaningful time and the member can exercise appropriate supervision as

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<sup>9</sup> A willful violation of the securities laws means merely “that the person charged with the duty knows what he is doing.” See *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000).



necessary under applicable law.<sup>10</sup> Rule 3030 requires disclosure of all outside business activity, not just securities-related activity.<sup>11</sup>

In 2003, after receiving his real estate license, Respondent began working at a real estate firm, Rodeo Realty, Inc. (Tr. p. 29). In 2004, Respondent earned \$8,070 at Rodeo Realty. (CX-32). In 2004, Respondent moved to Re/Max Commercial Brokerage and earned \$12,409. (Tr. p. 29; CX-31). In 2005, Respondent moved to Milan Properties Inc. and earned \$27,865. (Tr. p. 30; CX-33). In 2006, Respondent earned \$42,607 at Milan Properties. (Tr. p. 30; CX-34).

Respondent did not attempt to hide his real estate activities, and, in fact, he advised a number of his Primerica colleagues, including Mr. RH's boss in Primerica's office of supervisory jurisdiction, of his real estate activities to obtain real estate referrals from them.<sup>12</sup> (Tr. pp. 44, 72, 134). Respondent admitted that he did not provide written notice to Primerica when he first took steps to commence a business activity unrelated to his relationship with Primerica as required by Primerica's procedures and Rule 3030.<sup>13</sup> (Tr. p. 42). At the time, Respondent mistakenly thought that his disclosure obligations depended on whether he was a full-time or part-time Primerica agent; he did not realize

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<sup>10</sup> *Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exch. Act Rel. No. 26,063, 1988 SEC LEXIS 1841 (Sept. 6, 1988), adopted at Exch. Act Rel. No. 26,178, 1988 SEC LEXIS 2032 (Oct. 13, 1988).

<sup>11</sup> *Dist. Bus. Conduct Comm. v. Cruz*, No. C8A930048, 1997 NASD Discip. LEXIS 62, at \*96 (Oct. 31, 1997).

<sup>12</sup> Mr. RH was not aware that Respondent was in the real estate business, in part, because they seldom saw each other anymore. (Tr. pp. 73-74, 113). Mr. RH testified that he realized later that other people in his office, who had greater contact with Respondent, did know that Respondent was working in real estate. (Tr. p. 113).

<sup>13</sup> *Department of Enforcement v. Schneider*, No. C10030088, 2005 NASD Discip. LEXIS 6, at \*13-14 (NAC. Dec. 7, 2005).

that because of his securities registrations, he had an obligation to disclose regardless of whether he was employed full-time or part-time.<sup>14</sup> (Tr. p. 101).

The Hearing Panel finds that Respondent violated Conduct Rules 3030 and 2110 because Respondent engaged in an outside business activity for compensation while registered with Primerica's broker-dealer subsidiary without providing prompt written notice of the outside activity to the firm.

### III. SANCTIONS

#### A. Respondent Failed to Disclose His Criminal History

For filing a false, misleading, or inaccurate Form U4, the *FINRA Sanction Guidelines* recommend a fine ranging from \$2,500 to \$50,000, as well as consideration of a five to 30 business-day suspension in all capacities.<sup>15</sup> In egregious cases, such as those involving habitual misconduct, the *Guidelines* suggest that a longer suspension of up to two years, and possibly a bar, may be appropriate.<sup>16</sup>

A Form U4 is fundamental to the business and integrity of the securities industry. It is “used by all the self-regulatory organizations, including [FINRA], state regulators, and broker-dealers to monitor and determine the fitness of securities professionals,”<sup>17</sup> and “serves as a vital screening device for hiring firms and [FINRA] against individuals with

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<sup>14</sup> Previously, when Respondent was a part-time Primerica agent, he was not registered with Primerica's broker-dealer subsidiary. (Tr. p. 22; CX-3, p. 6 at subpage 19). It had been Respondent's experience that most part-time Primerica agents did not advise Primerica of changes in their regular full-time jobs. (Tr. p. 38). Most of the part-time Primerica agents, however, were not registered with Primerica's broker-dealer subsidiary. (*Id.*). Primerica has about 120,000 insurance representatives and only 25,000 securities representatives. (Tr. p. 77.).

<sup>15</sup> *FINRA Sanction Guidelines*, p. 73 (2007), available at <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf>

<sup>16</sup> *Id.* at 74.

<sup>17</sup> *Rosario R. Ruggiero*, Exch. Act Rel. No. 37,070, 1996 SEC LEXIS 990, at \*8-9 (Apr. 5, 1996).

‘suspect history.’”<sup>18</sup> “The candor and forthrightness of applicants is critical to the effectiveness of this screening process.”<sup>19</sup>

The *Guidelines* suggest three principal considerations: (1) the nature and significance of information at issue; (2) whether the omission resulted in a statutorily disqualified person becoming associated with a firm; and (3) whether the misconduct harmed a registered person, a firm, or anyone else.<sup>20</sup> Relevant general considerations include: (1) whether the misconduct occurred over an extended period of time; and (2) whether the misconduct was intentional.<sup>21</sup>

The Hearing Panel found three aggravating factors. First, a criminal charge and conviction are significant information under any circumstances. Respondent testified that he was on his way back into the store to return the leather coat when he was arrested, but even if that was true, he should have disclosed the arrest and conviction, along with that explanation, rather than electing not to disclose the information at all. Second, Respondent’s failure to disclose his criminal charge and conviction spanned two years, even though Respondent mistakenly believed that the police had informed Primerica of the initial arrest. (Tr. p. 67). Third, Respondent’s failure to disclose his criminal history was intentional because he was aware of his affirmative obligation to immediately advise

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<sup>18</sup> *District Business Conduct Committee v. Prewitt*, Complaint No. C07970022, 1998 NASD Discip. LEXIS 37, at \*8 (NAC Aug. 17, 1998). See also, e.g., *Thomas R. Alton*, Exch. Act Rel. No. 36,058, 1995 SEC LEXIS 1975, at \*4 (Aug. 4, 1995).

<sup>19</sup> *Alton*, 1995 SEC LEXIS 1975, at \*4. See also, e.g., *District Business Conduct Committee v. Perez*, Complaint No. C10950077, 1996 NASD Discip. LEXIS 51, at \*7 (NAC Nov. 12, 1996) (“Full and accurate disclosures on a Form U4 are critical to the securities industry because member firms must be able to assess properly whether an individual should be employed, and, if so, subject to enhanced supervision.”).

<sup>20</sup> *Guidelines* at 73 (2007).

<sup>21</sup> *Id.* at 6-7.

Primerica of the criminal charge and conviction, and he purposefully decided to wait until the California Department of Insurance completed its proceedings to discuss the resulting matters with Primerica.

On the other hand, Respondent's failure to disclose the criminal proceedings did not cause injury to his firm, customers, or other parties, in part, because Respondent was not active in the securities business during the period. Second, the misdemeanor theft conviction did not involve cash or securities and therefore would not have disqualified Respondent from associating with a FINRA member.

Enforcement requested a suspension of six months and a \$5,000 fine for Respondent's failure to disclose his criminal proceedings on his Form U4 and his annual compliance forms.

After careful consideration of the above factors, the Hearing Panel finds that the appropriate remedial sanction in this case is a suspension of six months in all capacities and a fine of \$2,500.

**B. Respondent Failed to Disclose His Outside Business Activity**

The *Guidelines* for Outside Business Activities suggest a fine of \$2,500 to \$50,000, and suspensions of (i) up to 30 business-days where the conduct does not involve aggravating factors, (ii) up to one year where aggravating factors are present, and (iii) over one year or a bar where the conduct is egregious.<sup>22</sup>

The principal considerations in determining sanctions for a Rule 3030 violation are: (i) whether the outside activity involved customers of the firm; (ii) whether the outside activity resulted directly or indirectly in injury to customers of the firm and, if so,

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<sup>22</sup> *Id.* at 14.

the nature and extent of the injury; (iii) the duration of the outside activity, the number of customers, and the dollar volume of sales; (iv) whether the respondent's marketing and sale of the product or service could have created the impression that the employer member firm had approved the product or service; and (v) whether the respondent misled his or her employer member firm about the existence of the outside activity or otherwise concealed the activity from the firm.<sup>23</sup>

The Hearing Panel has considered the Principal Considerations under the *Guidelines*, and finds that a number of aggravating factors are not present in this case.

There was no evidence presented that the outside activity involved customers of the firm or that the outside activity resulted directly or indirectly in injury to customers of the firm. There was no evidence that the Respondent's real estate activity created the impression that the member firm had approved the real estate services. In fact, during the period, Respondent was not actively engaged in the securities business. Having discussed his real estate business with his Primerica colleagues and actually having sought their real estate business, Respondent did not intentionally conceal his activities from Primerica. Finally, Respondent's violation of the Rules was not the result of intentional or reckless conduct, but rather of negligence in not understanding what the Rules required.

Enforcement recommended that Respondent be suspended for one month and fined \$5,000 for violating Conduct Rules 3030 and 2110 by not disclosing his outside business activity.

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<sup>23</sup> *Id.*

The Hearing Panel believes that Respondent is contrite and sincere in his stated intention to comply with all applicable Rules in the future. The Hearing Panel finds that the appropriate remedial sanction in this case is a concurrent suspension of one month in all capacities and a fine of \$2,500.

#### **IV. CONCLUSION**

For his willful failure to disclose his criminal history on his Form U4 and Primerica's annual compliance forms, in violation of Conduct Rule 2110, and IM-1000-1, Respondent is suspended from associating with any FINRA member firm in any capacity for six months and fined \$2,500, payable upon re-entry into the securities industry.<sup>24</sup>

For his failure to disclose his outside business activities, in violation of Conduct Rules 3030 and 2110, Respondent is suspended from associating with any FINRA member firm in any capacity for one month and fined \$2,500, also payable upon re-entry into the securities industry.

If this Decision becomes the final disciplinary action of FINRA, the suspensions shall run concurrently, and shall begin at the opening of business on November 17, 2008, and end on May 17, 2009. In addition, Respondent is ordered to pay Hearing costs of

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<sup>24</sup> Because the Hearing Panel finds that Respondent willfully failed to state on his Form U4 material facts required to be stated therein, Respondent is deemed statutorily disqualified pursuant to Article III, Section 4 of the FINRA By-Laws and Section 3(a)(39)(F) of the Securities Exchange Act of 1934.

\$2,057.13, which includes a \$750 administrative fee and a \$1,307.13 transcript fee, payable upon re-entry into the securities industry.<sup>25</sup>

**HEARING PANEL.**

By: \_\_\_\_\_  
Sharon Witherspoon  
Hearing Officer

Dated: Washington, DC  
September 18, 2008

Copies to:  
Avidan “Danny” Fishman (via FedEx and first class mail)  
Joel T. Kornfeld, Esq. (via electronic and first class mail)  
John S. Han, Esq. (via electronic and first class mail)  
Mark P. Dauer, Esq. (via electronic and first class mail)  
David R. Sonnenberg, Esq. (via electronic and first class mail)

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<sup>25</sup> The Hearing Panel considered and rejected without discussion all other arguments of the Parties.