FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DENNIS BROWN (CRD No. 3022551), Respondent.	Disciplinary Proceeding No. 2007010450601 Hearing Officer – MC **AMENDED HEARING PANEL DECISION**[1] **July 14, 2009**

For failing to respond in any manner to FINRA staff requests for information, in violation of Conduct Rule 2110 and Procedural Rule 8210, Respondent is barred from associating with any FINRA member firm in any capacity. In light of the bar, no additional sanctions are imposed for Respondent's failure to notify his firm of outside business activities, in violation of Conduct Rules 3030 and 2110.

Appearances:

William St. Louis, Deputy Regional Chief Counsel, and Frank M. Weber, Senior Regional Counsel, New York, NY, for the Department of Enforcement.

Dennis Brown, Springfield, MA, pro se.

DECISION

I. Introduction and Procedural History

This case originated as an investigation into whether Respondent Dennis Brown ("Respondent") had engaged in outside business activities from November 2006 through August 2007, without properly notifying his member firm employer. To conduct its investigation, FINRA staff sent two requests for information to Respondent, in November

[1] This Amended Decision is issued to correct Footnote 3 of the original Decision, which inaccurately characterized the Motion for Summary Disposition filed by the Department of Enforcement in this disciplinary proceeding.

and December of 2007, pursuant to Procedural Rule 8210, to which Respondent did not respond.[2]

Consequently, on October 13, 2008, the Department of Enforcement ("Enforcement") filed a two-cause Complaint. The First Cause of Action alleges that Respondent violated Conduct Rules 2110 and 3030, by engaging in unauthorized outside business activity without providing written notice to his employer. The Second Cause of Action alleges that Respondent violated Conduct Rule 2110 and Procedural Rule 8210, by failing to respond to two FINRA staff requests for information. Respondent filed an Answer on October 29, 2008, denying that he had engaged in outside business activity without notifying his employer and admitting his failure to respond to the information requests.

A Hearing Panel, composed of two current members of FINRA's District 11 Committee and the Hearing Officer, convened in Boston, MA, on March 31, 2009, to hear this matter.[3] In advance of the hearing, the Hearing Panel granted, in part, Enforcement's Motion for Summary Disposition.[4] As a result, the only issues before the Hearing Panel were (i) whether Respondent was liable for the allegations in the First Cause of Action of the Complaint, and, if so, (ii) what sanctions should be imposed for

[2] On December 15, 2008, the first phase of the new consolidated FINRA Rules, resulting from the consolidation of NASD with the member regulation and enforcement functions of NYSE Regulation, went into effect. *See* Regulatory Notice 08-57 (Oct. 2008). This Amended Decision refers to and relies on the NASD Conduct Rules that were in effect at the time of Respondent's alleged misconduct. The applicable rules are available at www.finra.org/rules.

[3] References to the testimony at the hearing are designated as "Tr. __." References to Enforcement's Exhibits are designated as "CX-__." Respondent offered one exhibit, RX-1.

[4] Enforcement filed a Motion for Summary Disposition seeking a summary finding of liability against Respondent on both Causes of Action. The Hearing Panel, however, granted the Motion only as to the Second Cause of Action, holding that there were material facts in dispute between the parties with regard to the First Cause of Action, alleging that Respondent had engaged in outside business activity.

Respondent's violations of Conduct Rules 2110 and 3030, and, finally, (iii) what sanctions should be imposed for Respondent's admitted failure to respond to requests for information, as alleged in the Second Cause of Action of the Complaint.

II. Findings of Fact

A. The Respondent

Respondent first registered with FINRA through member firm Pruco Securities, LLC in April 1998.[5] From July 14, 2006, through August 31, 2007, Respondent was registered as an Investment Company and Variable Contracts Products Representative through FINRA member firm OneAmerica Securities, Inc. ("OneAmerica" or the "Firm").[6] Respondent was employed at a branch office of OneAmerica in Springfield, MA, operating as Creative Financial Group.[7] On August 31, 2007, the Firm filed a Form U5 Uniform Termination Notice for Securities Industry Registration terminating Respondent's registration.[8] Respondent is not currently associated with any FINRA member firm.[9]

Nonetheless, Respondent remains subject to FINRA jurisdiction for the purposes of this proceeding. The Complaint charges Respondent with misconduct that occurred while he was registered, and with failing to respond to FINRA staff requests for information issued while Respondent was subject to FINRA jurisdiction. For these reasons, and because the Complaint was filed within two years after the termination of

[5] CX-2, pp. 4-5.

[6] CX-1; CX-2. CX-1 contains the factual stipulations submitted by the parties.

[7] Tr. 54.

[8] CX-3. The reason given was "Violation of company policies and procedures."

[9] CX-2, p. 3.

Respondent's last registration with a member firm, the jurisdictional criteria of Article V, § 4 of FINRA's By-Laws are satisfied.

B. Respondent Failed to Respond to FINRA Staff Requests for Information in Violation of Conduct Rule 2110 and Procedural Rule 8210

The parties have stipulated to facts that sustain the allegation that Respondent violated Conduct Rule 2110 and Procedural Rule 8210. The stipulations establish that:

- FINRA staff issued a letter dated November 5, 2007, pursuant to Procedural Rule 8210, requesting Respondent to provide written answers to questions;[10]
- FINRA staff sent the letter by first-class and certified mail to Respondent's last known residential address reflected on the records of the Central Registration Depository (the "CRD address");[11]
- Respondent received the letter but failed to respond;[12] and
- FINRA staff sent a second letter on December 3, 2007, by first-class and certified mail, to Respondent's CRD address, again requesting Respondent to answer questions pursuant to Procedural Rule 8210.[13]

In addition to the stipulations, Respondent admitted in his Answer that he failed to respond to the two requests for information issued to him by FINRA staff pursuant to Procedural Rule 8210. Respondent made further admissions to failing to respond to the requests for information during the course of this proceeding. For example, at the Initial

[10] CX-1, ¶ 13.

[11] CX-1, ¶ 14.

[12] CX-1, ¶ 15.

[13] CX-17, ¶¶ 16-17.

Pre-Hearing Conference on November 13, 2008, Respondent acknowledged "I know I was wrong in not responding."[14] At a Pre-Hearing Conference on March 6, 2009, when reminded that he had previously admitted to the violations of Procedural Rule 8210 alleged in the Second Cause of Action of the Complaint, Respondent said "Oh, yes, definitely …. I will not recant on my statement."[15] Respondent then qualified his admission briefly by adding "I did not respond in a timely manner."[16] But when asked, "Do you not agree that you failed to respond to the 8210 requests up to this time?" Respondent admitted, "Yes, that's correct."[17]

For these reasons, the Hearing Panel granted Enforcement's Motion for Summary Disposition as to the Second Cause of Action of the Complaint and found that Respondent failed to respond to requests for information issued by FINRA staff pursuant to Procedural Rule 8210.

C. Respondent Engaged in Undisclosed Outside Business Activity in Violation of Conduct Rules 2110 and 3030

1. Background

On or about August 8, 2007, a civil suit was filed against Respondent, Respondent's supervisor, and Creative Financial Group, among others.[18] The suit

[14] CX-14, p. 10.

[15] *See* Prehearing Conference Transcript, March 6, 2009, pp. 4-5.

[16] *Id.* at p. 5.

[17] *Id.* at p. 6.

[18] CX-1, ¶ 5; CX-7. The suit was filed in the District Court Department, Springfield Division, a Massachusetts trial court. The named defendants, other than Respondent, were Respondent's wife, Donna J. Brown, Respondent's supervisor, Richard Zampiceni, and Creative Financial Group.

alleged that Respondent failed to repay $60,000 given to him by a friend named Ronald South ("South") to invest on South's behalf.[19]

2. The Firm's Investigation

Once the Firm learned of the suit, it investigated the circumstances surrounding South's allegations. Joshua Frazier ("Frazier"), a compliance manager for the Firm at the time,[20] was responsible for the Firm's investigation. Respondent told Frazier that, beginning in late 2006, he had obtained a series of loans, totaling $60,000, from South, who was a friend but not a customer of the Firm. Respondent stated he borrowed the money to use in part to start a marketing company called DB Publishing and in part to invest in real estate.[21] After reviewing the matter, OneAmerica concluded that Respondent had engaged in unapproved outside business activities without notifying the Firm, in violation of Firm policy, and terminated Respondent's association with the Firm.[22]

3. Undisputed Facts

Prior to the hearing, the parties agreed to a number of stipulations of fact relating to the outside business allegation.[23] In statements made during the Firm's investigation, at a pre-hearing conference held in this case, and in written filings he submitted, Respondent admitted to a number of other relevant facts.

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[19] CX 7, p. 3.

[20] Tr. 20.

[21] Tr. 27, 31-33. At the hearing, Respondent denied telling Frazier that South loaned him the money to invest in DB Publishing and real estate. Tr. 39, 96-97.

[22] Tr. 23-24; CX-20.

[23] CX-1.

The parties stipulate that Respondent formed a company he named DB Publishing in 2007 and, in doing so, obtained a tax identification number and established a bank checking account for the company.[24] Respondent did not inform anyone at OneAmerica about the formation of the company.[25]

The letters "DB" in the name of DB Publishing are Respondent's initials.[26] Respondent established the company to produce a publication for advertisements relating to travel to the Caribbean and Jamaica commencing in 2008.[27] Respondent had previous professional experience in publishing.[28] The checks printed for the company's bank account bore the identifying imprint "DB PUBLISHING, OWNER DENNIS BROWN, 315 BRIDGE ST., SPRINGFIELD, MA."[29] According to Respondent, the Bridge Street address is the downtown Springfield, MA, address of a business owned by a friend, a location he sometimes uses for various "different purposes," such as to book appointments and make telephone cold-calls.[30] Respondent chose the Bridge Street address to appear on the DB Publishing bank account checks because he intended to locate the company offices in that area of downtown Springfield, and it was the only address available to him.[31]

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[24] CX-1, ¶¶ 9-10.

[25] Tr. 94.

[26] Tr. 73.

[27] CX-1, ¶ 9. Respondent told Frazier the publication would market and advertise Caribbean vacations. CX-19; Tr. 25.

[28] Tr. 74.

[29] CX-8; CX-9.

[30] Tr. 97-98.

[31] Tr. 115-116.

There is also no dispute that in late 2006 and early 2007, Respondent received a total of $60,000 from South, who was not a customer of the Firm.[32] The parties stipulate further that Respondent gave South two checks in July 2007, each drawn on the DB Publishing checking account, each in the amount of $30,000, with a memo line notation "loan repayment," payable to South.[33] The checks were post-dated by Respondent and were never honored.[34]

4. Respondent's Claims

Respondent has offered inconsistent and confusing explanations of his conduct relating to DB Publishing and the money he received from South.

Respondent insists that DB Publishing "did not exist,"[35] conducted no business, and therefore did not constitute an outside business activity about which he should have notified the Firm. Respondent argues he did not create DB Publishing, he merely "registered it."[36] He testified that he opened the bank account in the company name in 2007 because he "needed to,"[37] but that he did not plan to "start" the business until 2008.[38] Respondent insists that he did not need to tell anyone at his Firm about DB Publishing because "it wasn't operating."[39] Respondent claims DB Publishing had no

[32] CX-10; CX-20; CX-21.

[33] CX-1, ¶¶ 3, 4; CX-8; CX-9.

[34] Tr. 80.

[35] Tr. 77, 99.

[36] Tr. 73.

[37] Tr. 76.

[38] *Id.*

[39] Tr. 94

bills, no expenses, and no office phone.[40] Furthermore, Respondent claims that he was not engaged in any active business for OneAmerica at the time, and therefore, was under no obligation to notify the Firm of his activities.[41]

Respondent testified that he received the $60,000 he borrowed, starting in December 2006,[42] in six $10,000 checks written by South.[43] Respondent asserts he needed to borrow the money from South because, having been dismissed from OneAmerica, he was unable to procure a job,[44] and he lacked the funds required to pay his mortgage and to pay private school tuition costs for his children.[45] Respondent did not deposit any of the checks from South into a bank account but, instead, accompanied South to a bank where he cashed the checks and gave the proceeds to Respondent.[46] Respondent claims he used the money to pay his expenses in cash.[47] Respondent admits signing two promissory notes in which he promised to repay South more than the amounts he borrowed.[48] In one, "for the sum of $22,000," Respondent promised to pay

[40] Tr. 103.

[41] Tr. 94, 102.

[42] Tr. 95-96.

[43] Tr. 114-115.

[44] Tr. 84.

[45] Tr. 85.

[46] Tr. 107-108.

[47] Tr. 109.

[48] Tr. 82-84.

the principal plus $12,000.[49] In the other, Respondent promised to repay South $32,000.[50]

5. Credibility Determinations

In reaching its findings, the Hearing Panel carefully weighed the evidence before it, including the stipulated facts, the parties' exhibits, and the testimony of witnesses, including the Respondent. The Hearing Panel heard testimony from Joshua Frazier, currently director of supervision at the Firm but, as mentioned above, formerly the Firm's compliance manager; Gary Jaggs, a FINRA Principal Examiner with FINRA's Woodbridge, NJ District Office; and Respondent. The Hearing Panel considered the demeanor of the witnesses, as well as the substance of their testimony, in reaching determinations as to their credibility.

The Hearing Panel finds that Respondent's testimony was, on a number of matters, not credible. For example, Respondent testified that the reason he needed to borrow money from South was his loss of income as a result of his dismissal from the Firm. Respondent was not dismissed from OneAmerica, however, until *after* he obtained the money from South: South's suit seeking repayment caused the Firm to investigate and subsequently to fire Respondent.[51]

Importantly, Respondent testified that he borrowed the money from South to rectify his mortgage arrearage and pay his children's private school tuition, making no mention of using any of the money for real estate investments or DB Publishing.[52] This

[49] CX-7, p. 9.

[50] CX-7, p. 10.

[51] Tr. 120-121.

[52] Tr. 85.

conflicts with what he told Frazier, who testified that Respondent informed him that the purpose of the loan was, in part, to establish DB Publishing.[53] Frazier's account is corroborated by Enforcement's Exhibit CX-10, an e-mail summarizing the statement he made to Frazier, explicitly asserting that the loan was for "various items, such as investing into [sic] real estate, DB Publishing, (a company of yours), and other personal items that you did not mention."[54] Respondent admitted in his hearing testimony that he reviewed the e-mail and that he wrote "I agree with the above statements made to you over the phone," and signed it.[55]

Nonetheless, Respondent insisted that he never told Frazier that the money he borrowed was used for DB Publishing, testifying: "We never had that discussion. I never discussed that with Mr. Frazier."[56] When asked why he signed the statement and acknowledged its accuracy, Respondent recited a number of reasons: (i) he did so because he felt under pressure, being interviewed on the phone without prior warning; (ii) at the time, he was led to expect that this was a minor matter, and that the consequences he faced, at most, were that he might be cautioned and told to review compliance procedures; and (iii) he did not perceive that outside business activity was an issue.[57]

The Hearing Panel rejects Respondent's explanations for why he signed the statement indicating his agreement with Frazier's summary of their conversation. The

[53] Tr. 27, 31-33.

[54] CX-10.

[55] CX-10; Tr. 89-90.

[56] Tr. 90.

[57] Tr. 91-92.

evidence does not support his contention that he signed the statement under pressure. The Hearing Panel notes, and Respondent admitted in his testimony, that the telephone interview with Frazier occurred on August 16, 2007, while Respondent's signature on the e-mail is dated August 22, 2007, a full six days after the interview.[58] The Hearing Panel concludes that Respondent signed CX-10, agreeing with Frazier's summary of his statements, not under pressure, but after six days had passed during which Respondent had the opportunity to read and consider exactly what he had said and what he was agreeing to.

6. Findings

The Hearing Panel finds that Respondent borrowed money from South in part to form DB Publishing. His failure to repay the funds borrowed led to the suit South filed against Respondent, his supervisor and his employer. The Securities and Exchange Commission has expressly held that one of the prophylactic purposes of Rule 3030 was to prevent "a firm's entanglement in legal difficulties based on an associated person's unmonitored outside business activities."[59]

Conduct Rule 3030 prohibits persons associated with a member firm from being "employed by, or accepting 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." The design of the Rule is to enable member firms to improve supervision of registered persons.[60] The Rule's two-pronged objectives are (i) to protect the investing public, and (ii) to limit the risk to firms

[58] CX-10; Tr. 93-94.

[59] *Abbondante*, *supra*, 2006 SEC LEXIS 23 at *46-47.

[60] *See NASD Notice to Members 88-86.*

of legal entanglements resulting from associated persons' outside business ventures, unknown to and unsupervised by the firms, which may be entirely unrelated to the securities industry.[61]

The Rule requires an associated person "to report *any* kind of business activity engaged in away from their firm."[62] The Rule was "intended to improve the supervision of registered personnel by providing information to member firms concerning outside business activities of their representatives."[63] Member firms are to receive "prompt notification of *all outside business activities*" of their associated persons so that the member's objections, if any, to such activities [can] be raised at a meaningful time and so that appropriate supervision [can] be exercised."[64] Rule 3030 requires prompt disclosure "at the time *when steps are taken to commence* a business activity" unrelated to an associated person's relationship with his firm.[65] It is of no consequence if the evidence fails to show the associated person received compensation: compensation is not required for Rule 3030 liability to attach.[66] It is no defense for an associated person to assert, as Respondent does here, that the entity he formed was created to conduct business in the future, and had not yet begun to do so.[67]

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[61] *Dep't of Enforcement v. Sears*, No. C07005042, 2006 NASD Discip. LEXIS 41, *21-*22 (Sept. 19, 2006).

[62] *NASD Notice to Members 01-79*.

[63] *Notice to Members 88-86* (introducing the substance of what is now Conduct Rule 3030).

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

[65] *Id.* at *13-14 (emphasis added), *citing Micah C. Douglas*, 52 S.E.C. 1055, 1059 (1996).

[66] *Id.* at *15, n. 5.

[67] *Dep't of Enforcement v. Abbondante*, No. C10020090, 2005 NASD Discip. LEXIS 43, at *30 (NAC Apr. 5, 2005).

The Hearing Panel finds that Respondent took substantial steps to establish DB Publishing, an outside business entirely unrelated to his relationship with his Firm. Respondent admitted that he "registered this corporation,"[68] and obtained both a state tax identification number and bank account for the company.[69] These steps constituted active measures by Respondent to establish DB Publishing, and they amounted to more than the passive investment activity that falls outside the scope of Rule 3030.[70]

For these reasons, the Hearing Panel finds Respondent's activities in connection with DB Publishing constituted outside business activities requiring him to notify his Firm, and that his failure to do so violated Conduct Rules 2110 and 3030.

III. Sanctions

The FINRA Sanction Guidelines recommend a bar when a respondent fails to respond in any manner to a request for information issued pursuant to Procedural Rule 8210. If there are mitigating factors, the Guidelines recommend consideration of a suspension in any or all capacities for up to two years.[71]

As has often been observed, "Conduct Rule 2110 and Procedural Rule 8210 are crucial components of [FINRA's] examinations and investigations …. Procedural Rule 8210 gives [FINRA] the right to require a member or person associated with a member to provide information, orally or in writing, in connection with an examination or investigation. The Rule further states that no member or person shall fail to provide such

[68] CX-14, p. 9.

[69] Tr. 74-75.

[70] *Abbondante*, *supra*, 2006 SEC LEXIS 23 at *45.

[71] *FINRA Sanction Guidelines*, p. 35 (2007).

information."[72] Concerning sanctions for violating Rule 8210, "[t]he Guidelines treat a failure to respond … as egregious."[73]

The Hearing Panel notes that, prior to the hearing, Respondent was evasive in explaining his failure to respond to the FINRA staff's requests for information. In a pre-hearing conference, he blamed his attorney, claiming that he had given her the documentation to respond to the request, but that she had "dropped the ball" and told him she had "filed it" when she had not.[74] Even if the Hearing Panel found this believable, it is well settled that the responsibility for responding to a request issued for information under Rule 8210 is the respondent's.[75]

The Hearing Panel finds that Respondent was also evasive when he testified at the hearing about the Rule 8210 violations. When asked what he understood he was required to produce in response to the FINRA staff requests, Respondent replied "To be honest with you, I couldn't say," even though he admitted that he had read the Rule 8210 letter.[76] When asked why he failed to produce any of the requested information in the months following the request, Respondent claimed that Enforcement's counsel had advised him that it was more important for Respondent to reply to Enforcement's Motion for Summary Disposition than it was for him to reply to the 8210 request.[77] When pressed as to why he failed to provide any information before the Complaint was filed,

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[72] *Dep't of Enforcement v. Masceri*, No. C8A040079, 2006 NASD Discip. LEXIS 29, at *35 - *36 (NAC Dec. 18, 2006).

[73] *Id.* at *41.

[74] CX-14, pp. 7, 10.

[75] *See Michael David Borth*, Exch. Act Rel. No. 31602, 1992 SEC LEXIS 3248 at *7-*8 (Dec. 16, 1992).

[76] Tr. 117.

[77] Tr. 118-119.

Respondent testified, "… that is a question that, you know, I really am unable to answer," and that he simply did not make the time to do so.[78]

The Hearing Panel finds, therefore, no mitigating circumstances for Respondent's failure to respond to the FINRA staff information requests. A bar, therefore, is the appropriate sanction for Respondent's violations of Conduct Rule 2110 and Procedural Rule 8210.

For Respondent's violations of Conduct Rules 2110 and 3030, Enforcement suggests that the Hearing Panel impose sanctions consisting of a fine of $5,000 and a suspension from associating with any FINRA member in all capacities for 15 business days.[79] As Enforcement notes, this is consistent with the recommendation in the Guidelines of a fine from $2,500 to $50,000 and, in a case lacking aggravating factors, a suspension of up to 30 business days. The Principal Considerations enumerated in the Guidelines include: (i) whether the outside activity involved customers of the firm; (ii) whether the outside activity injured customers of the firm; (iii) the duration of the outside activity; (iv) whether the respondent misled the employer firm or concealed the outside activity from the firm; and (v) whether the respondent's outside activity, when it involves the sale of a product or service, could have created the impression that the member firm had approved the activity.[80]

In this case, Respondent's outside business activity appears to have consisted primarily of his taking substantial steps to create a commercial publishing company by borrowing money to fund it, registering it, and establishing a company bank account.

[78] Tr. 119.

[79] Tr. 141.

[80] *Guidelines*, *supra*, at 14.

There was no proof of involvement of or injury to customers of the Firm. Although Respondent did not inform the Firm, there is no evidence that the business involved the sale of a product or service under circumstances that could have led to the creation of an impression that the Firm had approved the activity.

On the other hand, Respondent's failure to repay monies obtained, at least in part, to fund the company led to a lawsuit filed against his employer and his supervisor, among others. The Hearing Panel finds, in addition, Respondent's untruthful testimony about why he borrowed the $60,000 to be aggravating.

For these reasons, the Hearing Panel finds Enforcement's suggested sanctions reasonable and would impose them, but for the imposition of the bar for Respondent's violations of Conduct Rule 2110 and Procedural Rule 8210. Because it is imposing a bar for those violations, the Hearing Panel finds it unnecessary to impose further sanctions for Respondent's violations of Conduct Rules 2110 and 3030.

IV. Conclusion

The Hearing Panel finds that Respondent Dennis Brown violated Conduct Rule 2110 and Procedural Rule 8210, by failing to respond in any manner to requests for information issued by FINRA staff pursuant to Procedural Rule 8210. Accordingly, the Hearing Panel bars Respondent from associating with any FINRA member firm in any capacity.

In addition, Respondent is ordered to pay the costs of the hearing, in the amount of $1,736.25, which includes an administrative fee of $750 and the cost of the hearing transcript.

If this Amended Decision becomes FINRA's final disciplinary action, the bar shall be effective immediately.[81]

HEARING PANEL.

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By: Matthew Campbell
Hearing Officer

Copies to:

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