FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DANIEL EDWARD BECERRIL, II (CRD No. 4489715), Respondent.	Disciplinary Proceeding No. 2009018944001 Hearing Officer – SNB **HEARING PANEL DECISION** February 23, 2012

Respondent is barred for: (1) making material misstatements and omissions to a customer, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder and NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010; (2) misusing customer funds, in violation of NASD Rule 2110 and FINRA Rule 2010; and (3) failing to respond to a request for documents, in violation of FINRA Rules 8210 and 2010.

Appearances

Karen E. Whitaker, Esq. and Patrick K. Craine, Esq., for the Department of Enforcement.

Richard Jay Blaskey, Esq., for Respondent.

DECISION

I. Background

On December 2, 2010, Enforcement filed a three-cause Complaint against Daniel Edward Becerril II ("Respondent"). The first cause alleges that Respondent made fraudulent misrepresentations and omissions to customer CB. The second cause alleges that Respondent misused customer CB's funds. The third cause alleges that Respondent failed to respond to a

Rule 8210 request for bank records in connection with a FINRA Staff investigation of the misconduct alleged in causes one and two.[1]

Respondent filed an Answer and requested a hearing. On October 5 and 6, 2011, a hearing was held before a hearing panel composed of the Hearing Officer and two former members of the District 2 Committee.[2] Four witnesses testified, including Respondent.

II. Origin of Investigation

The investigation leading to this proceeding began after FINRA received a customer complaint from CB.[3]

III. Jurisdiction

Respondent entered the securities industry in 2001.[4] Respondent was registered as an Investment Company and Variable Products Representative with Veritrust Financial LLC (the "Firm") between September 2007 and August 2009, when he was terminated.[5]

IV. Discussion

The Complaint charges that Respondent misrepresented to customer CB that he would invest her daughter's inheritance in a mutual fund, but Respondent instead misappropriated the funds by placing the inheritance in a bank account that he controlled. Respondent denies these allegations. The Complaint also charges that Respondent failed to produce bank records related

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[1] NASD consolidated with the member regulation and enforcement functions of NYSE Regulation in July 2007 and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008. See Regulatory Notice 08-57 (Oct. 2008). In that process, FINRA renumbered NASD Rule 2110 as FINRA Rule 2010. This decision refers to and relies on the Rules that were in effect at the time of Respondent's alleged misconduct. In addition, because Enforcement filed the Complaint after December 15, 2008, FINRA's procedural rules govern this proceeding. The applicable rules are available at www.finra.org/rules.

[2] References to the transcript of the hearing are designated as "Tr." followed by the page number. Respondent did not submit exhibits in this case. Enforcement's exhibits are designated as "CX" followed by the exhibit number and, if necessary, the page number. Exhibits CX-1- 8, 8A, 8B, 8C, 8D, 8E, 9 – 25, 25A, 26-27, 27A, 27B, 27C, 28, 28A, and 29-30 were admitted into the record. Tr. 150, 279, 281.

[3] CX-1; Tr. 95.

[4] CX-29.

[5] *Id.*

to his alleged misuse of customer funds. While Respondent claimed that he attempted to provide the requested bank records, he does not dispute that he has failed to provide them. As discussed in further detail below, the Hearing Panel found the charges in the Complaint were supported by the evidence.

A. Respondent Recommends a Mutual Fund and Receives Payment from CB

On December 2, 2008, customer CB met with Respondent to discuss investing an $11,500 inheritance on behalf of her minor daughter.[6] CB requested a safe investment that was consistent with her responsibilities as custodian of her daughter's inheritance.[7] Respondent recommended that the funds be invested in the AIG Sun America 2010 High Watermark Fund ("the AIG mutual fund") because it would be a safe investment that would pay a higher return than a certificate of deposit.[8] He provided CB with the prospectus for the AIG mutual fund.[9]

On the same day, CB completed the new account documentation that Respondent provided to open an account for the benefit of her daughter ("CB's account").[10] CB also gave Respondent a check for $11,500 to invest in the AIG mutual fund.[11] At Respondent's direction, CB made the check payable to A.P. Financial Group, Inc. ("A.P. Financial"), the name of Respondent's securities business conducted through the Firm.[12] CB also signed a document entitled "Financial Planning Services Agreement" which Respondent also signed on behalf of A.P. Financial.[13] The agreement indicated that Respondent was authorized to act as a Registered Investment Advisor with the Firm, although this was untrue.[14]

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[6] Tr. 24, 26.
[7] Tr. 45.
[8] Tr. 24.
[9] CX-3; Tr. 24-25.
[10] CX-4; Tr. 25-26, 48, 158-159.
[11] CX-5; Tr. 26.
[12] Tr. 27-28, 89, 210.
[13] CX-6; Tr. 49.
[14] CX-6 pp. 2, 4-5, 11; Tr. 67, 86, 216.

B. CB Attempts to Confirm the Mutual Fund Investment

By January 2009, CB became concerned that she had not received confirmation of her investment in the AIG mutual fund. Based upon her prior experience investing in another mutual fund, she expected to receive documentation of her investment by that time.[15] Accordingly, she began calling Respondent.[16]

On January 9, 2009, in response to CB's repeated inquiries, Respondent sent CB a letter by facsimile on the Firm's letterhead confirming receipt of CB's funds and indicating that the funds would be invested and settled within two days.[17] CB was somewhat relieved by this reassurance and believed, consistent with Respondent's representations, that the funds were in the CB account at the Firm awaiting investment in the mutual fund.[18] However, as time went on and she did not receive documentation from AIG, she again became concerned.[19]

C. Respondent Delays Returning CB's Funds

In April 2009, CB had still not received documentation of her investment from AIG. Accordingly, by email dated April 4, 2009, she asked Respondent to return her funds so that she could invest them in a certificate of deposit.[20] The same day, in the first of many stalling techniques, Respondent sent CB an email confirming that he would return the funds and stating:

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[15] Tr. 27-28.
[16] Tr. 28.
[17] CX-7; Tr. 29, 51. Respondent claimed that he did not send this letter to CB. Tr. 171. Respondent claimed that CB's friend and CB had access to Respondent's office and may have sent the letter. Tr. 168-170. The Hearing Panel found Respondent's claim far-fetched and rejected it. CB would have had no reason to send the letter. Respondent, on the other hand, had a strong motive to quell CB's concerns regarding her investment. Moreover, the terminology used in the letter, including the phrase "buy-in," also appeared in correspondence that Respondent admittedly prepared. Compare CX-7 with CX-8A p. 2.
[18] Tr. 30.
[19] *Id.*
[20] CX-8; Tr. 30-31, 177.

"I will email you the disbursement/withdrawal form next week. I will also find out about time frames in getting funds back to you."[21]

In response to CB's further inquiry, on April 9, 2009, Respondent sent CB an email, indicating that he was sending her a withdrawal form that day and stating that he had made the initial "buy-in" the prior week.[22] CB then contacted AIG directly to confirm the "buy-in" and assure herself that her daughter's funds were safe.[23] AIG informed CB that it had no record of her investment.[24] When CB informed Respondent of this, he responded: "I am not sure what you are doing but things really don't work like that. Your funds are getting pushed back out and will be back to you shortly."[25]

Finally, on May 6, 2009, Respondent sent her a document entitled "Account Transfer Form."[26] CB promptly completed the form and returned it to Respondent.[27] On May 22, 2009, CB again asked Respondent when she could expect to receive her funds back.[28]

D. CB Files a Complaint with FINRA and Receives a Refund

Over one month later, CB still had not received her funds back. On July 3, 2009, CB sent Respondent an email indicating that she was considering filing a complaint with the Securities and Exchange Commission if her funds were not returned within ten days.[29]

[21] CX8; Tr. 31.
[22] CX-8A p. 2; Tr. 32.
[23] Tr. 33.
[24] CX-8A p. 1; Tr. 33.
[25] CX-8A p. 1; Tr. 33.
[26] CX-8C; Tr. 37.
[27] Tr. 37.
[28] CX-8D p. 1; Tr. 37-38.
[29] CX-8D p. 2; Tr. 38.

On July 13, 2009, Respondent sent CB an email stating: "I got down to the bottom of the situation and I am resending the documentation on your withdrawal. Please allow 10 – 15 processing time."[30] On or about the same day, CB filed a complaint with FINRA.[31]

When Respondent's supervisor, EB, learned of CB's complaint, he initiated an investigation.[32] EB determined that the Firm had no documentation reflecting CB as a customer of the Firm. EB reviewed the January 9, 2009, letter from Respondent to CB bearing a Veritrust letterhead and confirmed that it was not a Veritrust document.[33] EB also confirmed that Respondent was not a Registered Investment Advisor with Veritrust, contrary to Respondent's statement in the Financial Planning Services Agreement Respondent had CB sign (also not a Veritrust document).[34] When EB contacted Respondent on August 26, 2009, Respondent told EB that he had returned CB's funds. [35] EB told Respondent that he knew that was not the case, as EB had already spoken with CB that day.[36] EB indicated to Respondent that he intended to contact law enforcement and that the best course of action would be for Respondent to return CB's funds.[37]

On August 25, 2009, Respondent told CB that her withdrawal check was available for pick-up the next day at Respondent's lawyer's office, where she would be required to sign a release before receiving the check.[38] On August 26, 2009, Respondent emailed CB that she could not pick up the check until August 28, 2009, because his lawyer was unavailable.[39]

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[30] CX-8E p. 1.
[31] CX-1; Tr. 95.
[32] Tr. 59, 65.
[33] CX-6, CX-24; Tr. 65-67.
[34] *Id.*
[35] Tr. 63.
[36] *Id.*
[37] *Id.*
[38] CX-9 p. 1; CX-10 pp. 1-2; CX-11 p. 1.
[39] CX-10 p. 1.

On August 27, 2009, the Firm terminated Respondent based upon the results of EB's investigation of CB's complaint.[40] On August 28, 2009, CB picked up a check for $11,750 from Respondent's lawyer, but refused to sign the release.[41] CB then attempted to cash the check, but it bounced. The check cleared the following day.[42]

E. Respondent Fails to Produce Documents to FINRA

As part of FINRA's investigation of CB's complaint, on September 14, 2009, FINRA Staff requested that Respondent produce monthly bank statements for the account into which CB's funds had been deposited.[43]

On October 7, 2009, Respondent produced certain other records that had been requested, but failed to produce the bank records.[44] Respondent testified that on October 7, 2009, he attempted to send the requested bank records, but that the email was blocked by FINRA's server.[45] During Respondent's October 8, 2009, on-the-record testimony ("OTR"), FINRA Staff reminded him that FINRA had not received the bank records that he was obligated to produce.[46] Respondent committed to send the bank records by overnight mail.[47] However, Respondent never produced the bank records.[48]

F. Respondent's Explanation Lacked Credibility

On the eve of his OTR, Respondent for the first time claimed that CB did not request that her funds be invested in the AIG mutual fund. Instead, Respondent claimed that CB gave her

[40] Tr. 72-73.
[41] CX-12; Tr. 40, 54. Respondent testified that he returned $250 more than CB's initial investment so that CB could not say that she lost money. Tr. 186-187.
[42] Tr. 40-41.
[43] CX-13.
[44] CX-16; Tr. 112.
[45] CX-18; Tr. 189.
[46] Tr. 118, 189.
[47] Tr. 234.
[48] Tr. 117-118, 235.

daughter's inheritance to Respondent in return for a 10% one-year promissory note.[49] Respondent produced the promissory note purportedly signed by CB, although CB identified the signature as a forgery.[50] Respondent claimed that he had full discretion over these funds, which he planned to invest in a landscaping business or single family homes.[51] Respondent admitted that he deposited the funds in an account that he controlled, claiming that the funds remained there until he returned them to CB.[52]

In rejecting Respondent's explanation and crediting CB's testimony that she did not invest in a promissory note, the Hearing Panel considered that Respondent never corrected CB's repeated references to her investment in the AIG mutual fund over the many months that they corresponded. For example, when CB told Respondent she had contacted AIG, Respondent did not express surprise.[53] Similarly, when Respondent's supervisor, EB, raised concern over Respondent's failure to invest CB's funds in a mutual fund, Respondent never mentioned that CB had invested in a promissory note with Respondent.[54]

Moreover, Respondent did not claim that CB signed a promissory note until just prior to Respondent's OTR. Additionally, Respondent dated the promissory note several weeks before CB's first meeting with Respondent. This error suggests that Respondent prepared the promissory note in haste after FINRA began its investigation.

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[49] Tr. 163-164.
[50] CX-17.
[51] Tr. 222.
[52] Tr. 164. Respondent produced no bank documents to support this claim. In the absence of bank records, the Hearing Panel rejected Respondent's unsubstantiated contention that CB's funds remained in the account in light of CB's contemporaneous communication to FINRA Staff that her refund check initially bounced before it cleared. CX-12.
[53] CX-8A p. 1.
[54] Tr. 86. The Firm did not allow representatives to obtain loans from customers or engage in outside business activities without the Firm's approval. Tr. 88.

The Hearing Panel also considered that Respondent gave CB a copy of the AIG mutual fund prospectus and had CB complete a Veritrust new account form - actions that were consistent with the purchase of a mutual fund.

In addition, Respondent only reimbursed CB after his supervisor made him aware of FINRA's investigation. Even then, the refund check of $11,750 initially bounced before it cleared, and paid less than the 10% interest rate on the promissory note.[55] Respondent also testified that he needed to replace CB's money with someone else's money, indicating that Respondent needed CB's money.[56]

The various stalling techniques employed by Respondent to delay returning CB's funds also demonstrated that Respondent acted dishonestly throughout his interactions with CB. In addition, Respondent's unusual request that CB meet with Respondent's lawyer and sign a release indicates that he knew he had engaged in wrongful behavior.

On the other hand, the Hearing Panel found CB's testimony credible and fully consistent with her correspondence with Respondent, contemporaneous documents, and the testimony of Respondent's supervisor.

V. Violations

A. Respondent Made Fraudulent Statements and Omissions to a Customer

Respondent is charged with making willful misrepresentations and omissions to CB by telling her that he would invest her funds in a mutual fund, when in fact he deposited the funds in an account that he controlled, in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, NASD Rules 2120 and 2110 and FINRA Rules 2020 and 2010.

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[55] CX-12.

[56] Tr. 181, 222. FINRA Staff was unable to investigate whether other investors were harmed because Respondent failed to produce bank records, which led the Hearing Panel to become concerned that there may be other investors who were defrauded in a similar manner. For example, Respondent testified that he had to get money from other investors before he could return CB's investment. Tr. 222, 225.

NASD Rule 2120, an antifraud rule, parallels Exchange Act Rule 10b-5, and provides that no member shall effect any transaction, or induce the purchase or sale of any security, by means of any manipulative, deceptive, or fraudulent device.[57] Both Rules 2120 and 10b-5 are designed to ensure that sales representatives fulfill their obligations to their customers to make accurate statements about securities.[58]

To establish a violation of Section 10(b) of the Exchange Act and Rule 10b-5, the Hearing Panel must find that the respondent made material misrepresentations or omissions in connection with the purchase or sale of a security, acted with scienter, and used the instrumentalities of interstate commerce, the mails, or any facility of a national securities exchange.[59] The antifraud provisions of Section 10(b) and Rule 10b-5 have been held applicable even when the securities are non-existent or counterfeit.[60]

Here, Respondent misrepresented that CB's funds would be invested in a mutual fund, and omitted to disclose that he instead deposited the funds in an account that he controlled. This misrepresentation and omission continued throughout the time that Respondent exercised control over CB's funds.

Materiality of a fact under Rule 10b-5 depends on "the significance the reasonable investor would place on the withheld or misrepresented information," and Enforcement must show that such information "would have been viewed by the reasonable investor to have changed

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[57] NASD IM-2310-2 states that fraudulent activities violate a registered representative's responsibility of fair dealing with customers.

[58] *Dist. Bus. Conduct Comm. v. Euripides*, 1997 NASD Discip. LEXIS 45 (NBCC July 28, 1997). A violation of NASD Conduct Rule 2120 is also a violation of NASD Conduct Rule 2110. *Dep't of Enforcement v. Cipriano*, No. C07050029, 2007 NASD Discip. LEXIS 23 at * 30 n. 20 (NAC July 26, 2007).

[59] *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450 (2d Cir. 1996). Interstate commerce is established, among other ways, by the email and facsimile communications between Respondent and CB.

[60] *First Nat'l Bank of Chicago v. Shearson*, 1988 U.S. Dist. LEXIS 17186 at *16-26 (N.D. Ill. 1988) (holding "the fact that a defendant never owned the securities does not preclude protection of the plaintiff by the federal securities law when the plaintiff was an actual party to the securities transaction and, but for the defendant's fraud, would have become an actual purchaser." *citing*, *First Nat'l Bank v. Estate of Russell*, 657 F.2d 668, 673 n.16 (5th Cir. 1981). *See also*, *Sulkow v. Crosstown Apparel, Inc.*, 807 F.2d 33, 36 * 7-8 (2nd Cir. 1986).

the total mix of information made available."[61] Here, it is plainly material that Respondent did not invest CB's funds in a mutual fund as promised but instead converted the funds to his own use.

Scienter is defined as "a mental state embracing intent to deceive, manipulate or defraud." Here, the facts establish that Respondent acted intentionally by misrepresenting that CB's funds were invested in a mutual fund when in fact Respondent converted the funds to his own use. Accordingly, the Hearing Panel found that Respondent willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010.

B. Misuse of Customer Funds

Respondent is charged with misuse of customer funds, in violation of NASD Rule 2110 and FINRA Rule 2010. "The misuse of customer funds … [violates these rules] because such conduct is patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote."[62]

"An associated person makes improper use of customer funds where he or she fails to apply the funds (or uses them for some purpose other than) as directed by the customer."[63] Using customer funds improperly is a violation of the fundamental relationship between a registered representative and the customer, and "undermines the integrity of the securities industry."[64]

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[61] *SEC v. Hasho*, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992).
[62] *Dep't of Enforcement v. Patel*, No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-25 (NAC May 23, 2001)(internal quotation omitted)(affirming the decision of a Hearing Panel barring a representative for misuse of customer funds by depositing customer funds into his own account rather than investing them as directed by the customers).
[63] *Patel*, 2001 NASD Discip. LEXIS 42, at *24-25.
[64] *Dist. Bus. Conduct Comm. v. Westberry*, No. C07940021, 1995 NASD Discip. LEXIS 225, at *24 (NBCC Aug. 11, 1995).

Here, the evidence established that Respondent misused CB's funds. He directed CB to draft a check payable to an account Respondent controlled and put the funds to his own use rather than investing in a mutual fund. He then engaged in an extended course of misconduct to avoid and postpone the return of CB's funds. By doing so, he violated NASD Rule 2110 and FINRA Rule 2010.

C. Failure to Produce Documents

Respondent is also charged with failing to produce documents, in violation of FINRA Rules 8210 and 2010. Rule 8210 authorizes FINRA to require any member subject to its jurisdiction to provide information and testimony related to any matter under investigation. Rule 8210 serves as a key element in FINRA's oversight function and allows FINRA to carry out its regulatory functions without subpoena power.[65]

Here, while Respondent claims that he initially attempted to email the bank records to FINRA Staff, there is no dispute that he failed to produce the documents the Staff requested, despite a reminder of his obligation to do so at his OTR and his commitment to provide the documents by overnight mail. Respondent's failure to produce the requested bank records constitutes a violation of Rule 8210. A violation of Rule 8210 constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of Rule 2010.[66]

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[65] *See, e.g.*, *Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), *aff'd*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because [FINRA] lacks subpoena power over its members, a failure to provide information fully and promptly undermines [FINRA's] ability to carry out its regulatory mandate.") (citation omitted); *Joseph G. Chiulli*, Exchange Act Rel. No. 42359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for FINRA to effectively conduct its investigations, and emphasizing that FINRA members and associated persons must fully cooperate with requests for information).

[66] *Joseph Ricupero*, Exchange Act Rel. No. 62891, 2010 SEC LEXIS 2988, at *13 n.12. (Sept. 10, 2010), aff'd 436 Fed. Appx. 31 (2d Cir. 2011).

VI. Sanctions

A. Material Misrepresentations and Omissions

The FINRA Sanction Guidelines for intentional misrepresentations or material omissions of fact recommend a fine of $10,000 to $100,000 and consideration of a suspension from 10 days to two years, or in egregious cases, a bar.[67]

Here, Respondent's misconduct was egregious. Respondent intentionally misled a customer into thinking that her funds were invested in a mutual fund when in fact he had taken control of her funds and put them to his own use. Later, when the fraud was discovered, rather than taking responsibility for his actions, Respondent provided a false account of the facts to his employer, FINRA Staff, and the Hearing Panel.

Respondent should not be permitted to remain in the industry. A bar is warranted for this violation.

B. Misuse of Customer Funds

Under the Guidelines, a bar is standard for misuse of customer funds amounting to conversion, as is the case here.[68] Respondent fraudulently obtained CB's funds and deposited them into an account that he controlled. He then engaged in an extended course of fraudulent representations to postpone the return of CB's funds. A bar is the appropriate sanction.

C. Failure to Produce Documents

The Guidelines were amended in 2011 to provide that a bar is standard for a partial but incomplete response to a request for information, unless the person can demonstrate that the information provided substantially complied with all aspects of the request.[69] Here, Respondent failed to provide important information that could have assisted Enforcement in determining

[67] *FINRA Sanction Guidelines* ("Guidelines") at 88 (2011), http://www.finra.org/sanctionguidelines.
[68] Guidelines at 36.
[69] Guidelines at 33.

whether Respondent had defrauded CB and other investors. Respondent's refusal to provide the requested documents thwarted FINRA Staff's ability to determine whether other investors were harmed. There are no mitigating factors. Accordingly, Respondent's refusal to produce important documents warrants a bar.

VII. Conclusion

Respondent is barred for each of three violations: (1) for making material misstatements and omissions to a customer, in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and NASD Conduct Rules 2120 and 2110 and FINRA Rules 2020 and 2010; (2) for misusing customer funds, in violation of NASD Rule 2110 and FINRA Rule 2010; and (3) for failing to respond to a request for documents, in violation of FINRA Rules 8210 and 2010.[70] Respondent is also ordered to pay the costs of the hearing in the amount of $2,783.40, which includes a $750 administrative fee and the cost of the hearing transcript.

HEARING PANEL

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By: Sara Nelson Bloom
Hearing Officer

Copies to: Daniel Edward Becerril, II *(via overnight courier and first-class mail)*
Richard Jay Blaskey, Esq. (*via electronic and first class mail)*
Karen E. Whitaker, Esq. (*via electronic and first class mail)*
Patrick K. Craine, Esq. *(via electronic mail)*
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

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