STATE OF WASHINGTON

DEPARTMENT OF FINANCIAL INSTITUTIONS

In the Matter of: **JACK McDONOUGH,** ***Respondent.***	**OAH Docket No. 2006-DFI-0007** **DFI No. S-05-090** **FINAL ORDER OF DIRECTOR ON REVIEW AFFIRMING THE INITIAL ORDER**

THIS MATTER COMES NOW before Scott Jarvis (hereinafter, "Director"), in his capacity as Director and Presiding Officer of the Washington State Department of Financial Institutions (hereinafter, "Department"), upon review of the Findings of Fact, Conclusions of Law, and Initial Order (hereinafter, "Initial Order") of Administrative Law Judge Gail G. Mauer (hereinafter, "ALJ") of the Office of Administrative Hearings (hereinafter, "OAH"), against Jack McDonough (hereinafter, "Respondent"), entered on February 9, 2007, granting summary judgment in favor of the Department's Division of Securities (hereinafter, "Division") in a matter involving the interpretation and enforcement of the Business Opportunity Fraud Act, Chapter 19.110 RCW (hereinafter, "the Act").

Timing of Petition for Review and Response. The Director acknowledges that the Respondent, by and through his counsel of record, filed his Petition for Administrative Review of Initial Order (hereinafter, "Petition") with the Department on March 1, 2007, which was within the twenty (20) days permissible for seeking review from the Initial Order. The Director also acknowledges that the Division, by and through the Office of Attorney General

(hereinafter, "OAG"), filed with the Director its Reply to Respondent's Petition for Review (hereinafter, "Reply") on March 8, 2007, which was within the permissible number of days for formal reply to the Petition. The Director therefore determines that, since both the Petition and the Reply have been timely filed, a review of the Initial Order is timely and properly before the Director in his capacity as Presiding Officer of the Department for determination of a Final Order.

Record on Review. The Director has considered the entire record on review, including without limitation, the following: Summary Order to Cease and Desist (which includes the Statement of Charges); Application for Adjudicative Hearing; Request for Assignment of Administrative Law Judge dated April 3, 2006; Notice of Appearance of OAG filed April 13, 2006; Notice of Administrative Law Judge Assignment and Order Setting Prehearing Conference filed April 24, 2006; Notice of Hearing filed May 17, 2006, scheduling November 16, 2006 as the hearing date; Prehearing Conference Order dated May 17, 2006; Audio Tape of Proceedings dated May 9, 2006, and June 14, 2006; Declaration of Kate Reynolds dated June 6, 2006; Letter of Charles Clark (hereinafter, "Government Counsel") to ALJ dated June 12, 2006; Order Setting Status Conference and Ruling for Requesting Hearing Time Limit dated July 7, 2006; Notice of Appearance of Jon A. Payne, Esq. (hereinafter, "Respondent's Counsel") dated August 2, 2006; Status Conference Order dated September 18, 2006; Stipulation of Facts filed with the OAH on October 17, 2006 (inclusive of Exhibits E through F); the Division's Motion for Summary Judgment dated November 15, 2006; Summary Judgment Submission of Jack McDonough dated November 16, 2006; Letter from ALJ to Government Counsel and Respondent's Counsel dated December 5, 2006; Initial Order of ALJ dated February 9, 2007; the Petition filed with the Director on March 1, 2007; and the Reply filed with the Director on March 8, 2007.

Standard of Review. This matter has come before the Director by way of a summary judgment granted by the ALJ against Respondent. The Department has never adopted its own rules of administrative procedure and, therefore, follows the Model Rules of Administrative Procedure, Chapter 10-08 WAC. These Model Rules of Administrative Procedure, at WAC 10-08-135, declare that "[a] motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." This is a standard identical to that of Washington Rule of Civil Procedure 56(c). That standard of review on summary judgment, which the Director follows here, is well settled. In the absence of any contrary administrative standard, the Director's review shall be de novo; for even in cases on appeal from a superior court, the appellate court engages in the same inquiry as the trial court. See *Trimble v. Washington State University*, 140 Wn.2d 88, 92-93 (2000), citing *Benjamin v. Washington State Bar Association*, 138 Wn.2d 506, 515 (1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Trimble*, *supra*, at p. 93, citing *Clements v. Travelers Indemnity Company*, 121 Wn.2d 243, 249 (1993). All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the Respondent as the non-moving party. *Trimble*, *supra*, at p. 93, citing *Clements*, *supra*, at p. 249. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Trimble*, *supra*; *Clements*, *supra*, citing *Wilson v. Steinbach*, 98 Wn.2d 434 (1982).

In this matter, a Stipulation of Facts was filed prior to the Motion for Summary Judgment. However, since the Director is bound by a standard of de novo review, the Director cannot ignore the claims in the Petition by Respondent's Counsel that Finding of Fact No. 5 is incomplete and misleading and that Finding of Fact No. 7 is not properly supported by the evidence. Accordingly, the Director must not only consider matters of law. Indeed, in spite of

the Stipulation of Facts, the Director must also consider whether there is a genuine issue of material fact. If there is a genuine issue of material fact, then this matter may be remanded to the OAH for further evidentiary hearing before the ALJ. However, if after reviewing the entire record, including the claims of Respondent's Counsel as set forth in the Petition and all reasonable inferences to be drawn therefrom, the Director determines that a *reasonable* person could only reach the conclusion that there is no issue of material fact, then this matter is still appropriate for summary judgment. The Director will then be obliged, in that case, to apply the appropriate law to the unquestionable facts and enter a Final Order on Review.

The Petition's Assignment of Error. The Petition would assign error to Finding of Fact No. 5, Finding of Fact No. 7, Conclusion of Law No. 6, Conclusion of Law No. 8 and Conclusion of Law No. 9. No other part of the Initial Order is contested in the Petition. Therefore, consistent with the requirements of WAC 10-08-211(3), the Director may limit the scope of his review of the Initial Order to the Petition's assignment of error. Nonetheless, after reviewing the *entire* record *de novo*, the Director has determined that the ALJ committed no error and that the Initial Order should be affirmed. However, addressing specifically the Petition's assignment of error, the Director sets forth below the reasons for rejecting the Petition's assignment of error and affirming, as they are presently written, the Findings of Fact and Conclusions of Law contained in the Initial Order.

Respondent's First Assignment of Error: "Finding of Fact No. 5 is Incomplete in Light of the Evidence of Record". The Petition contends that Finding of Fact No. 5 is incomplete and misleading in light of certain evidence provided in the Declaration of Jack McDonough (hereinafter, "McDonough Declaration") filed in support of the Department's Motion for Summary Judgment, which the Petition concedes was "uncontroverted." The Petition contends that Paragraphs 3 through 5 of the McDonough Declaration should have been included in Finding of Fact No. 5.

Government Counsel, however, contends in his Reply on behalf of the Division that "it would have been misleading for the ALJ to have included paragraphs 3 through 5 of Respondent's Declaration." [Reply, pp. 1-2.] Government Counsel then cites Paragraph 4 of the McDonough Declaration, as follows:

> "Since 2005, US Tax has purchased mailing lists from Info USA, a mailing list company. A true and correct copy of a letter from Info USA to me addressing the system used by Info USA to compile its lists is attached as Exhibit A to this Declaration. As noted in that letter, Info USA compiled a list of attorneys from the yellow pages, and runs its database against the NCOA (National Change of Address) database once a month. Further, Info USA makes 17 million calls a year to businesses in its database to verify the information on each business."

As Government Counsel points out, the Petition before the Director seems to suggest that the mailing list was carefully scrutinized by Info USA to make sure that it excluded "in-house counsel, judges, government lawyers and other attorneys who were not actively participating in private practice." [McDonough Declaration, ¶ 5.] However, the only logical conclusion to be made from a reading of the McDonough Declaration, including Paragraph 4 cited above, is that the present language of Finding of Fact No. 5 is the only reasonable inference to be drawn from an entire reading of the McDonough Declaration, even in a light most favorable to Respondent. The list in question was composed of names and addresses of Washington attorneys that were obtained from telephone yellow page listings. Paragraph 4 of the *uncontroverted* McDonough Declaration does not say *what* information was verified by Info USA on each business. Respondent is bound by his own declaration. The Director concludes that Info USA's mailing list contained nothing more than an accurate list of Washington attorneys that was compiled from the yellow pages. Accordingly, the Director also concludes that to adopt any other reading or characterization, or to add any language to Finding of Fact No. 5 as urged by the Petition, would itself be misleading and not supported by the evidence provided by Respondent in the Motion for Summary Judgment.

The Petition further contends that the ALJ needs to "[i]nclude more extensive detail than was adopted in Finding of Fact No. 5 on the issue of identifying those to whom US Tax intended to mail information." [Petition, p. 3.] However, the Director notes that "intent" is irrelevant in this proceeding. In addition, the Director has determined that the ALJ, as a matter of law, was not required to provide more extensive detail in Finding of Fact No. 5. RCW 34.05.461(3) does not require that findings and conclusions contain an extensive analysis. *Nationscapital Mortgage Corp. v. Department of Financial Institutions*, 133 Wn.App. 723, 751-752 (2006), citing *US West Communications, Inc. v. Washington Utilities and Transportation Commission*, 86 Wn.App. 719, 731 (1997). As aptly stated by Government Counsel [Reply, p. 3], "[a]dequacy, not eloquence, is the test for [the Director] evaluating whether findings and conclusions satisfy [the required standard] in RCW 34.05.461."

Therefore, Finding of Fact No. 5 *as written* is clearly adequate and proper, not misleading, and supported by substantial evidence.

Respondent's Second Assignment of Error: "Finding of Fact No. 7 is Not Properly Supported by the Evidence". In Finding of Fact No. 7, the ALJ found that the "IRS niche system is marketed as a product that will enable a purchaser to substantially change and even completely change his or her law practice."

The Petition contends that there is no evidence in the record that the product enables a purchaser to "substantially change and even completely change his or her law practice." However, the Petition ignores Respondent's own statement, recited by the ALJ in Finding of Fact No. 7, as follows:

> You can read about more lawyers using my materials in the testimonials that I have enclosed with this report. Every single one of these lawyers either went flat-broke to millionaire . . . or . . . already successful to *seriously* padding their bank account while slashing hours worked and business headaches . . . and they all had ONE THING in common . . .
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> They Didn't Believe a Word I Said, At First

> *All* of them were skeptical as hell . . . many had been burned before and seriously doubted I could produce anything . . . even close . . . to the claims I made. The old. 'one [sic] bitten – twice shy." But, after they put aside ther understandable skepticism, they transformed their business and life with my methods in such an amazing way, they became die-hard fans. [Underlining added (by the ALJ).]

Initial Order at p. 4, citing Stipulation of Facts, Exhibit B at p. 13.

By underlining the word "transformed," the ALJ was emphasizing the fact that, *as a selling point*, Respondent was actually admitting or claiming that the product would substantially modify, or "transform," the businesses of recipients.

The Petition claims that there is no evidence in the record of the nature of the then-existing law practice of any of the Washington attorneys that received materials from US Tax. [Petition at p. 6] However, this claim ignores that Respondent stipulated to the fact that the product is sold to licensed attorneys without regard to the areas of the law in which they currently practice. [Stipulation at p. 4, ¶ 4] Respondent's stipulation as to this fact provides substantial and uncontroverted evidence that the product was marketed to at least some attorneys who were not currently engaged in tax practice.

The Petition downplays the testimonials cited by the ALJ in its Initial Order, only picking and choosing parts of them that are self-serving and without accurately representing the entire written record. For instance, the Petition selects a partial quote from Exhibit B-3 that states: "In 1998 or 1999 my law practice was primarily domestic relations cases." However, the Petition fails to complete that same sentence of the testimonial, by omitting the material language which follows: "[M]y goal made at my first boot camp was to phase out of my domestic practice and replace it with IRS clients."

In reviewing the Stipulation of Facts and record as a whole, the Director has determined that Respondent's statements clearly indicate that he is offering a *new line of business*, even though recipients have an existing law practice. Secondly, the Director has determined from the record that Respondent offers his product to licensed attorneys. And thirdly, the Director

also has determined from the record that the product enables such attorneys to substantially modify, or even completely change, their existing practice. Therefore, the Director concludes that the ALJ's Finding of Fact No. 7 is proper and supported by substantial evidence.

Conclusion of Law No. 6 Is Proper. The Director has determined that the only reasonable inferences that can be drawn from Finding of Fact No. 5, which the Director has determined was proper and sufficient, was the language of Conclusion of Law No. 6 at Page 9 of the Initial Order, which states:

> ". . . [Respondent] targets yellow page listed attorneys without regard to practice emphasis, if any. It is reasonable to assume that the promotional materials were directed to sole practitioners and small partnership attorneys including many with no IRS practice and some with no active practice of any type. It is also reasonable to assume that for some attorneys there would be little change in practice and the IRS niche would only add to and not substantially change or modify an ongoing practice. . . .

Also, the ALJ properly concluded in Conclusion of Law No. 6 that a substantially *modified* or *transformed* business, as found in Finding of Fact No. 7, is a "new business" under RCW 19.10.020(1).

In this regard, we note preliminarily that the Petition did not assign error to Conclusion of Law No. 5. However, since the Petition addresses some of the court cases relied upon by the ALJ in Conclusion of Law No. 5, the Director grants some latitude to discuss those cases and the legal issues raised by them even though the Petition has not strictly followed the requirements of WAC 10-08-211(3).

The Director has determined that the Respondent's promotional product enables an attorney already in private practice to substantially modify an existing business or to start a new line of business, satisfying the legal test in RCW 19.110.020(1) of "enabl[ing] a purchaser to start a business." Since there is no case in Washington addressing this issue, it is appropriate for the Director to look to case law in other states interpreting statutes or regulations

substantially similar to the legal test set forth in RCW 19.146.020(1), which is cited above. *Fineman v. Armstrong World Industries, Inc.*, 774 F. Supp. 225, 236-237 (D.NJ. 1991), interpreting Connecticut's definition of "business opportunity," is just such a case. The Connecticut's definition of "business opportunity," found in CGSA §36B-61(6), is very similar to RCW 19.110.020(1) and provides, as follows:

> "Business opportunity means the sale or lease, or the offer for sale or lease of any products, equipment, supplies or services which are sold or offered for sale to the purchaser-investor of the purpose of ***enabling the purchaser-investor to start a business***, and . . . ." [Emphasis added.]

In *Fineman* the U.S. District Court in New Jersey held that the Connecticut Business Opportunity Investment Act applied where the sale of a product enabled the purchaser to modify an existing business in a substantial manner. While that case was reversed in part on a different issue [980 F.2d 171 (3rd Cir. 1992)], the Third Circuit Court of Appeals specifically did not address therein the issue of whether Connecticut's Business Opportunity Investment Act applied [980 F.2d at p. 190].

In discussing the *Fineman* case, the ALJ declared in the Initial Order, at p. 9, as follows:

> "The courts applying and interpreting Connecticut's business opportunities fraud law applied an interpretive opinion of the Connecticut enforcement agency director, Banking Commissioner Wolf who was quoted in *Fineman*:
>
> > "If the purchaser-investor is in an already existing business, the Act would not apply. It should be noted, however, that the 'existing business' concept should not be construed too broadly. In the author's opinion n8, the sale of products, equipment, etc., to a purchaser-investor of an existing business must not substantially change, modify or add to the lines of products, equipment, etc., carried by the purchaser-investor. Any substantial changes, modifications or additions should be construed so as to preclude one from relying upon the 'existing business' concept because of the substantial change in the nature of the business." [Underline added by the ALJ.] [Note omitted.]

While the *Fineman* decision is not binding in Washington State, it is persuasive authority which appears to the Director to support the Department's interpretation of the Act, and in particular the definition of "business opportunity" under RCW 19.110.020(1). Respondent's IRS niche secret system is marketed as a product that will enable a purchaser to substantially change and even completely change or her law practice. [Initial Order at p. 4, Finding of Fact No. 7] Consistent with the analysis in *Fineman*, which relied upon a substantially similar Connecticut statute, Respondent's product falls within the Act because it enables attorneys to modify their existing practice or business in a substantial manner or otherwise permits a licensed attorney to start an *entirely new line of business*. Two cases cited by Respondent, *Bunting v. Perdue, Inc.*, 611 F. Supp. 682 (E.D.N.C. 1985), and *Batlemento v. Dove Fountain, Inc.*, 593 So.2d 234 (Fla. Dist. Ct. App. 1991), are distinguishable because they did not involve the offering of a product that purported to enable a purchaser to substantially change and even completely change his or her business.

In addition, the Director has determined that *Eye Associates, P.C. v. IncomRx Systems Ltd. Partnership*, 912 F.2d 23, 27 (2nd Cir. 1990), also cited by Respondent in the Petition, is distinguishable, because in that case the U.S. District Court had been simply interpreting the language of a certain marketing agreement between the parties without looking to any extrinsic evidence as to whether the rights under the agreement constituted a business opportunity. In the matter before the Director, however, the parties did stipulate to facts *extrinsic* from any contract language to the effect that Respondent has represented his product as enabling a purchaser to substantially change and even completely change his or her business. Moreover, *Fineman*, *supra*, 774 F. Supp. At pp. 236-237, which the Director considers persuasive in this matter, distinguished *Eye Associates*.

Accordingly, the undisputed conduct of Respondent does not raise any triable issue of fact but rather a *question of law* as to whether Respondent is offering a product that purports to enable a purchaser to substantially change and even completely change his or her business.

The Petition requests that the Director look to the "plain meaning" of the phrase "start a business" under RCW 19.110.020(1), which Respondent characterizes as being "unambiguous." Even assuming that the language "start a business" under RCW 19.110.020(1) is plain on its face, the "plain meaning" rule includes a review of legislative purpose. *Washington Public Ports Association v. Department of Revenue*, 148 Wn.2d 637, 645 (2003). Courts discern the plain meaning of a statute not only from a provision in question but from the underlying legislative purpose. *Nationscapital Mortgage Corp. v. Department of Financial Institutions*, 133 Wn. App. 723, 736 (2006). The Division's interpretation of "start a business" is consistent with the Legislature's consumer protection goals for adopting the Act in response to the widespread and unregulated sale of business opportunities, which had been a common problem in Washington State, as noted by the Legislature in RCW 19.110.010. The Director concurs with the position of the Division and Government Counsel that, just because an attorney holds a license to practice law, he or she should not be excluded from receiving protection under the Act. The purpose of the Act is to protect purchasers of business opportunities. RCW 19.110.010. A "purchaser" under the Act is *any* person who buys or leases a business opportunity. RCW 19.110.020(4). There is *nothing* in the language of the Act, including RCW 19.110.040, which would exclude lawyers from being protected as "purchasers" under the Act.

To resolve the present legal question of statutory construction, the Director is obliged to adopt an interpretation which best advances the purposes of the Legislature. *Bennett v. Hardy*, 113 Wn.2d 912, 928 (1990); *Department of Transportation v. State Employees' Insurance Board*, 97 Wn.2d 454 (1990); *Armstrong v. State*, 91 Wn. App. 530, 537 (1998).

Respondent's narrow interpretation of RCW 19.110.020(1) would defeat the purpose of the Legislature to protect all "purchasers" from high pressure, potentially deceptive, business opportunities. There is substantial evidence in the Stipulation of Facts that Respondent's marketing program consists of aggressive marketing tactics and the making of extensive guarantees, which in turn would make Respondent's product ripe for deception and unfulfilled promises. Registration of the business opportunity with the Division, along with providing disclosures approved by the Division, would help protect "purchasers" from the problems identified by the Legislature in its intent statement at RCW 19.110.010.

A "purchaser" designed to be protected under the Act is any "person" who buys or leases a business opportunity. RCW 19.110.020(4). The purpose of the Act presumes that "purchasers" are *consumers* of "business opportunities." Accordingly, an interpretation of "business opportunity" which includes a product that creates a new line of business or enables a business to be substantially modified is consistent with the Legislature's purposes under the Act.

Statutes should be construed to effect their purpose and to avoid unlikely, absurd or strange consequences. *State v. Fjeremestad*, 114 Wn.2d 828, 835 (1990); *Nationscapital, supra*, 133 Wn. App. at p. 737. The Director is not persuaded by the fact, stressed in the Petition, that Respondent may only be sending his promotional packet to individuals that are listed in the Yellow Pages. The Director has determined that this fact should not make his product exempt from registration. To conclude that lawyers should not be protected by the Act because they are listed in the Yellow Pages would be absurd. To conclude as well that lawyers were not intended by the Legislature to be protected by the Act if they have an existing though entirely unrelated practice appears highly unlikely. The consumer protection purpose of the Act should apply equally to persons having an existing business, provided, as was shown by

substantial uncontroverted evidence, the product being offered is represented as enabling an entirely new line of business.

Therefore, the requirement in the Act that a product "enable the purchaser to start a business," as set forth in RCW 19.110.020(1), in order to be deemed a "business opportunity," applies where the product in question, as here, would enable licensed attorneys to substantially modify an existing law practice by starting a new IRS niche line of business.

Conclusion of Law No. 8 and Conclusion of Law No. 9 Are Proper. As discussed above with reference to Conclusion of Law No. 6, the Director has concluded that the "start a business" element has been met by the Division because the product would enable purchasers to substantially modify an existing business. Therefore, Conclusion of Law No. 8 of the Initial Order (at page 10 thereof) is correct. Respondent's offer of sale of the IRS taxpayer resolution product described in the promotional letters sent to prospective "purchasers" constitutes the offer or sale of a business opportunity as defined in RCW 19.110.020. In addition, Conclusion of Law No. 9 of the Initial Order (at page 10 thereof) is also correct. The "start a business" element was met because the product would enable "purchasers" to *substantially modify* an existing business.

Conclusion and Final Order. The Director therefore assigns no error to Finding of Fact No. 5, Finding of Fact No. 7, or Conclusions of Law Nos. 5, 6, 8 and 9. Accordingly, the Director has determined that there is no genuine issue of material fact and that the Department is entitled to summary judgment affirming the Initial Order (including all of the Findings of Fact and Conclusions of Law as written) as a matter of law.

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The Initial Order is hereby affirmed.

IT IS HEREBY ORDERED THAT Jack McDonough, his agents and employees each shall cease and desist offering or selling unregistered business opportunities in violation of the registration requirements of RCW 19.110.050.

Date: July 25, 2007

/s/ Scott Jarvis

Scott Jarvis, Director
WASHINGTON STATE DEPARTMENT OF FINANCIAL INSTITUTIONS

NOTICE TO THE PARTIES

In accordance with RCW 34.05.470 and WAC 10-08-215, any Petition for Reconsideration of the Final Order of Director on Review Affirming the Initial Order (hereinafter, "Final Order") must be filed with the Director within ten (10) days of service of the Final Order. It should be noted that Petitions for Reconsideration do not stay the effectiveness of the Final Order. Judicial Review of the Final Order is available to a party according to provisions set out in the Washington Administrative Procedure Act, RCW 34.05.570.

This is to certify that the above Final Order has been served upon the following parties on July 25, 2007, by depositing a copy of same in the United States mail, postage prepaid.

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