UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-70084

CLINTON HUGH HOLLAND, JR.,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES — PAGE

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STATEMENT OF JURISDICTION

The Securities and Exchange Commission had jurisdiction of this proceeding pursuant to Section 19(d)(2) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78s(d)(2). This Court has jurisdiction of the petition for review pursuant to Section 25(a)(1) of the Exchange Act, 15 U.S.C. 78y(a)(1). Petitioner timely filed his February 2, 1996 petition for review within sixty days of the Commission's December 21, 1995 order, as required by Section 25(a)(1).

COUNTERSTATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Commission's finding that petitioner, the manager of a securities firm branch office, made unsuitable recommendations in violation of the Rules of Fair Practice of the National Association of Securities Dealers, Inc. (NASD) when he recommended to a retired customer in her eighties who depended upon him for investment advice that she invest a substantial portion of her assets in certain speculative and high risk securities.

2. Whether the Commission's affirmance of the sanctions imposed on petitioner by the NASD -- a censure, five-day suspension, $5,000 fine, and the requirement that he requalify by examination as a registered principal -- was an abuse of discretion.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

Petitioner Clinton Hugh Holland, Jr., a branch office manager for Paulson Investment Company, an NASD member firm, seeks review of the Commission's order sustaining disciplinary action taken against him by the NASD (see Commission Opinion (Comm. Op.), CR. 134). 1/ The Commission affirmed the NASD's finding that Holland made unsuitable recommendations of speculative and high risk securities to a customer in violation

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1/ CR. __ refers to the petitioner's excerpts from the Commission's administrative record; SR. refers to the Commission's supplemental excerpts from the record; R. __ refers to the record; Br. __ refers to the petitioner's brief.

of the NASD Rules of Fair Practice, and it sustained the sanctions of a censure, five-day suspension, $5,000 fine, and the requirement that Holland requalify by examination as a registered principal. 2/

B. The Regulatory Scheme

The NASD is a securities association registered with the Commission as a securities industry self-regulatory organization pursuant to Section 15A of the Exchange Act, 15 U.S.C. 78o-3. It has primary responsibility, subject to comprehensive oversight by the Commission, for regulating those who sell securities in the over-the-counter market. The Exchange Act requires the NASD to adopt rules to regulate the conduct of its member brokerage firms and associated persons such as Holland (see Section 15A(b)(6), 15 U.S.C. 78o-3(b)(6)), and requires the NASD to enforce its rules through the imposition of disciplinary sanctions. 3/

In accordance with the statutory scheme, disciplinary action taken by the NASD is subject to review by the Commission upon application by the aggrieved party. See Sections 19(d)(2) and (e)(1) of the Exchange Act, 15 U.S.C. 78s(d)(2) and (e)(1). In

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2/ A registered principal is a person associated with an NASD member firm who is "actively engaged in the management of the member's investment banking or securities business, including supervision, solicitation, conduct of business." NASD Manual ¶ 1021(b). Registered principals are required to pass an appropriate qualification examination. NASD Manual ¶ 1022(a).

3/ See Sections 15A(b)(7) and (8), and 15A(h), 15 U.S.C. 78o-3(b)(7) and (8), and (h). The Exchange Act specifies that the rules of a securities association be designed, among other things, "to promote just and equitable principles of trade * * * and, in general, to protect investors and the public interest." Section 15A(b)(6), 15 U.S.C. 78o-3(b)(6).

reviewing disciplinary action taken by the NASD, the Commission is required to make a de novo review of the record and make its own findings with respect to whether the conduct occurred and whether such conduct violates the NASD rule as charged. Sorrell v. SEC, 679 F.2d 1323, 1326 n.2 (9th Cir. 1982). The Commission reviews the sanction imposed to assure that it is not "excessive or oppressive." Section 19(e)(2) of the Exchange Act, 15 U.S.C. 78s(e)(2). Pursuant to this statutory scheme, it is the Commission's order, not the order of the NASD, that is the subject of this Court's review. Section 25(a) of the Exchange Act, 15 U.S.C. 78y(a); Eichler v. SEC, 757 F.2d 1066, 1069 n.2 (9th Cir. 1985).

C. The Facts

1. The NASD rules at issue. The Commission found that Holland violated Sections 1 and 2 of Article III of the NASD Rules of Fair Practice. Section 1 requires that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." NASD Manual (CCH) ¶ 2151. At the time relevant to this proceeding, Section 2 required that

> [i]n recommending to a customer the purchase, sale, or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer [on] the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

Id. ¶ 2152. 4/

2. Holland's recommendations of unsuitable securities. This case involves Holland's handling of the account of Helen Bradley, a retired widow in her eighties. The Commission found that, taken as a whole, Holland's recommendations to Ms. Bradley of 19 securities purchases, involving 11 different securities, were unsuitable in light of her financial situation and needs.

Ms. Bradley had died by the time of the hearing before the NASD (CR. 114: 4), and the following statement of facts is based principally on the testimony of Holland himself together with the documentary evidence. The basic facts, therefore, were essentially undisputed, and the issue presented is whether those facts are sufficient to support the Commission's finding of violations.

Holland is the manager of the Salem, Oregon office of Paulson (SR. 33: 290; SR. 36). Ms. Bradley had been a customer of Paulson and a predecessor firm since 1968 (CR. 78). Holland became her account executive when her previous account executive retired in the spring of 1984 (CR. 33: 88, 97). From the time she opened the account until Holland became her account executive, she had generally invested in municipal, utility and corporate securities, principally debt, and was not an active

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4/ The Rule was amended in 1990, effective January 1, 1991, to require broker-dealers to make an affirmative inquiry into the customer's financial status, tax status, investment objectives, and other relevant information. NASD Manual (CCH) ¶ 2152.

trader (see CR. 79 5/). As Holland described Ms. Bradley's portfolio at the time he took over as account executive, while she had a variety of investments, she particularly liked aggressive utility securities and corporate debt with high yields -- "a little more risk with higher income" (CR. 33: 88, 97).

In the spring of 1984, shortly after Holland became Ms. Bradley's account executive, he filled out a new account form for her to update and supplement the information the firm had on file (SR. 33: 90-91; CR. 78). The new account form reflected a net worth in excess of $200,000 and an annual income in excess of $41,000 and showed her investment objectives as being income, and intermediate-term and long-term price appreciation. The form also listed four levels of risk, ranging from "investment grade" (least risk) through "good quality," "speculative" and "high risk" (most risk). Ms. Bradley's form was checked for the two middle categories, "good quality" and "speculative."

Ms. Bradley met regularly with Holland, typically twice a month, to review her account and discuss any questions that she might have (CR. 33: 244-245). While Ms. Bradley was active, independent and involved in her affairs up until approximately 1990 (CR. 59), Holland as well as other witnesses testified that

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5/ The cited exhibit is a list compiled by Holland's office of securities held in Ms. Bradley's account (CR. 33: 88). While the list is not entirely complete as to holdings purchased before 1984 -- it does not reflect securities that had been bought and then sold before the list was compiled -- there is no dispute that the holdings listed accurately represent the types of investments which Ms. Bradley had made (SR. 33: 89, 93-94, 110-111).

she relied on Holland's recommendations in acquiring and selling securities (CR. 33: 107; SR. 33: 200 (Holland), SR. 33: 186 (Moll, Holland's assistant)). According to Ms. Bradley's accountant Mark Mueller, Holland, not Ms. Bradley, was the driving force behind the investment strategy for her account (SR. 33: 80; CR. 60).

For several years after Holland became account executive, the account continued to be invested as it had been previously. Thus, in December 1987, by which time its value was around $86,000 (SR. 41), the account held approximately 12 different municipal, utility, and corporate securities, primarily debt (CR. 1: Schedule A). In late 1987, however, Holland discussed with Ms. Bradley an investment strategy that would allocate 25% of her total assets to each of four categories: income, income with growth, growth, and speculation (SR. 33: 98-99; CR. 33: 100-103). According to Holland, Ms. Bradley orally agreed with this investment strategy, but he did not prepare a new account form reflecting this strategy (SR. 33: 256-257).

From approximately January 1988 to August 1990, Holland substantially revised the character of Ms. Bradley's holdings (CR. 134: 4). 6/ He recommended that Ms. Bradley purchase 27 different securities (CR. 1: Schedule A). The NASD found that 11

6/ During this period, there were deposits into the account totaling approximately $99,000 and income of approximately $36,000, with the value of the account peaking at some $220,000 in July 1990 (R. 394-513).

of these were unsuitable for her. 7/ As to each of these unsuitable securities, Paulson was either the underwriter at the time Ms. Bradley made her purchase or had been the underwriter at the time the securities were first offered (SR. 43: 516; 44: 543; 45: 571; 46: 618; 49: 677; 51: 750; 53: 819; 54: 873; 55: 894; 56: 945; 57: 972; 58: 1019).

Typical of the recommended investments is Renaissance GRX, the first security purchased pursuant to the new strategy. In his testimony, Holland conceded that Renaissance GRX "was more aggressive from what she had prior to that" (CR. 33: 112). Renaissance GRX's initial public offering had been underwritten by Paulson in July 1987 (SR. 43: 516). The offering prospectus described the shares as involving "a high degree of risk" and stated that they "should be considered only by persons able to sustain a total loss of their investment" (SR. 43: 516). Renaissance was a development-stage company that had been operating for only a year and a half at the time of the offering (SR. 43: 518). It had cumulative net operating losses in excess of $2,000,000, a working capital deficit of approximately $1,000,000, and was in default on approximately $1,500,000 in debt (SR. 43: 518). Its market capitalization was less than

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7/ The eleven were: (1) Renaissance GRX, Inc. common stock; (2) Hughes Homes units; (3) Benton Oil & Gas units; (4) International Yogurt Company common stock; (5) International CMOS Technology, Inc. units and common stock; (6) Skolniks, Inc. units; (7) Payline Systems, Inc. convertible debentures; (8) Irvine Sensors Corporation units; (9) Go Video Inc. units; (10) Ryka, Inc. units; and (11) Pit Stop Auto Centers Inc. units (CR. 114: 5-9).

$7,000,000 (SR. 43: 518). Shortly before Holland recommended Renaissance to Ms. Bradley, a Paulson research report noted that the company's exclusive distributor had requested termination of the distribution agreement, which the report characterized as a severe setback (SR. 47).

After Ms. Bradley purchased 2,900 shares in April 1988, Paulson underwrote a second offering for Renaissance in October 1988 (SR. 44: 543). The company was continuing to experience operating losses, had discontinued the manufacture of two of its three initial products, and expected no further orders from the customer that had purchased two-thirds of its production (SR. 44: 548). Despite these continuing reversals, Holland purchased an additional 1,235 shares for Ms. Bradley's account in April 1989 (CR. 1: Schedule A). 8/

These eleven securities were considerably more speculative and higher risk than the types of securities in which Ms. Bradley had been investing (SR. 33: 112; CR. 33: 139). Seven of the companies had offerings that were characterized in the prospectus as involving substantial or high risk (SR. 43: 516; 46: 618; 49: 677; 51: 750; 54: 873; 56: 945; 57: 976). Of these seven, five warned in the offering documents that the securities were suitable only for those who could afford to lose their entire investment (SR. 43: 516; 51: 750; 54: 873; 56: 945; 57: 976).

8/ The decision of the NASD National Business Conduct Committee describes the speculative nature of each of the other securities (CR. 114: 5-9).

Only two of the 11 companies (Skolniks and Hughes Homes) reported operating profits (see SR. 53: 823; 50: 705); the remaining companies disclosed that they had operating losses and no anticipation of paying dividends (SR. 43: 519, 521; 46: 623, 624; 49: 679, 681; 51: 754, 762; 54: 874, 876; 55: 898, 901; 56: 949, 952; 57: 977, 983; 58: 1022, 1024).

Furthermore, Skolniks and Hughes Homes posed substantial risks despite their reported operating profits, including the fact that both of these debt investments were unsecured obligations, not backed by any sinking fund (SR. 50: 708; 53: 825). Holland himself characterized Skolniks as "struggling" and involving "a degree of risk" (CR. 33: 211). As to Hughes Homes, he recommended that Ms. Bradley invest $53,000 (SR. 41: 428) -- 1/8 of his estimate of her net worth (CR. 33: 163). 9/

The investments in Renaissance GRX and the other speculative and high-risk securities recommended by Holland totaled approximately $256,000 over this two-and-one-half-year period (SR. 33: 40).

In late 1990, Ms. Bradley's health deteriorated, and in January 1991 a conservator was appointed to handle her affairs (R. 1044). 10/ The conservator closed Ms. Bradley's account with Paulson in January 1991 and liquidated the holdings (R. 1461-88).

9/ Hughes Homes' reported profits proved to be non-existent when its financials were exposed as fraudulent in late 1989 (CR. 33: 226). Investors, including Ms. Bradley, suffered a total loss (CR. 1: Schedule A).

10/ Bradley died in 1994 (CR. 114: 4). She left the bulk of her estate to her church and to charity (SR. 100).

At the time the account was closed, it had experienced approximately $17,000 in realized profits and $128,000 in unrealized losses from the challenged transactions (SR. 33: 39). The conservator filed an arbitration claim against Paulson and Holland, which resulted in a settlement for $75,000 (SR. 70). Holland paid $33,800 of the settlement (SR. 33: 246). 11/

D. The Proceedings Below

1. Proceedings before the NASD

On June 18, 1993, NASD District Business Conduct Committee (DBCC) filed a complaint against Holland, alleging that he made unsuitable recommendations to Ms. Bradley of speculative and high risk securities in violation of Article III, Sections 1 and 2 of the NASD's Rules of Fair Practice (CR. 1). After a hearing at which it heard the testimony of Holland and a number of other witnesses and received exhibits offered by both parties, the DBCC concluded that Holland had made unsuitable recommendations as charged in the complaint and, as sanctions, fined him $5,000, censured him, suspended him for five business days, and required that he requalify by examination as a registered principal (SR. 105: 14-15). Holland appealed the DBCC decision to the NASD Board of Governors, which affirmed the DBCC's findings and sanctions (NBCC Op., CR. 114).

11/ At some points in his brief, petitioner impugns the motives or performance of the conservator appointed to manage Ms. Bradley's affairs (see Br. 7-8, 12). The conduct of the conservator is, of course, not relevant to any issue in this case, which is concerned solely with the appropriateness of Holland's recommendations.

2. Proceedings before the Commission

Holland appealed the Board's decision to the Commission (R. 1784). After a de novo review of the record, the Commission concluded that Holland had made unsuitable recommendations to Ms. Bradley (Comm. Op., CR. 134: 5).

The Commission rejected Holland's argument that the speculative investments were appropriate because Ms. Bradley did not depend on the income from the account for her living expenses and had no heirs (CR. 134: 6-7). Ms. Bradley's lack of dependence on her account did "not mean that such funds should have been invested in companies with little or no capitalization, high debt, or, in many cases, limited operational experience" (CR. 134: 6). The Commission found that Ms. Bradley had definite plans for her estate: "Bradley made it clear to Holland that it was her strong desire to leave as much as possible to her church and to charity. The high risk and speculative investments Holland recommended were inconsistent with this objective" (CR. 134: 7). Moreover, the fact that she was not dependent on these assets at the time Holland made his recommendations did not mean that she would not become dependent in the future, particularly in light of her advanced age and lack of Medicare supplemental health insurance (CR. 134: 6-7).

The Commission also rejected Holland's argument that Ms. Bradley's acquiescence in his recommendations relieved him of his obligation not to make unsuitable recommendations (CR. 134: 7). The Commission noted "Bradley's dependence on Holland for

recommendations" and the "concentration of high risk and speculative securities in Bradley's account" despite the fact that "Bradley never selected 'high risk' as a risk factor for her account" (CR. 134: 8). Holland's obligation to recommend only suitable securities was not negated by Ms. Bradley's purported agreement: "Even if we conclude that Bradley relied on his recommendations and decided to follow them, that does not relieve Holland of his obligation to make reasonable recommendations" (CR. 134: 7).

The Commission concluded "that the recommendations at issue, taken as a whole, were unsuitable for Bradley's account" (CR. 134: 5). Accordingly, it found that Holland had violated Article III, Sections 1 and 2. The Commission also rejected Holland's challenge to the sanctions imposed by the NASD, finding them to be "relatively lenient" and not excessive or oppressive in light of Holland's violation (CR. 134: 8).

STANDARD OF REVIEW

The Exchange Act provides that "[t]he findings of the Commission as to the facts, if supported by substantial evidence, are conclusive." Section 25(a)(4), 15 U.S.C. 78y(a)(4); see, e.g., Rutherford v. SEC, 842 F.2d 214, 215 (9th Cir. 1988). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Eichler, 757 F.2d at 1069. If the evidence is susceptible of more than one rational interpretation, the Court must uphold the Commission's findings. Davy v. SEC, 792 F.2d

1418, 1421 (9th Cir. 1986). The Commission's conclusions of law are to be set aside only if arbitrary, capricious, or otherwise not in accordance with law. Rutherford, 842 F.2d at 215. And the Commission's interpretation of rules that it administers is entitled to substantial deference. See Environmental Action, Inc. v. SEC, 895 F.2d 1255, 1259 (9th Cir. 1990).

This Court reviews the Commission's affirmance of the NASD's imposition of sanctions for an abuse of discretion and will not disturb those sanctions "unless they are either unwarranted in law or without justification in fact." Carter v. SEC, 726 F.2d 472, 474 (9th Cir. 1983) (quoting Hinkle Northwest, Inc. v. SEC, 641 F.2d 1304, 1310 (9th Cir. 1981); see Sorrell, 679 F.2d at 1327 ("The [Commission] has broad power to determine appropriate sanctions, and we will reverse only for an abuse of discretion").

SUMMARY OF ARGUMENT

The Commission found that the recommendations made by Holland, taken as a whole, were unsuitable for Ms. Bradley's account. This finding is supported by substantial evidence and must therefore be affirmed.

Holland advances a number of challenges to the Commission's decision, all of which lack merit. First, he contends that there was no violation because investment in "speculative" securities was one of Ms. Bradley's investment objectives and the 11 securities at issue were speculative. The evidence established, however, that these securities were excessively risky under the

circumstances, even in light of Ms. Bradley's desire to make some speculative investments.

He also argues that it is not "per se" unreasonable to recommend speculative securities to an elderly woman or to recommend securities underwritten by his firm. These arguments are strawmen: the Commission followed no per se rules of liability, instead considering all the facts and circumstances relevant to this case in coming to the conclusion that Holland had violated the NASD Rules. Holland himself concedes that the age of an investor is a relevant factor in determining suitability, and the Commission's consideration of the fact that he limited the range of available investments by looking only to securities underwritten by his firm is also appropriate. The claim that Ms. Bradley's gender played any part in the Commission's findings, let alone that it was the determining factor, is entirely without support in the record.

Holland argues that he did not commit any violations because the evidence does not show that he acted in bad faith. The NASD Rules, however, impose ethical standards on those who sell securities to the public, standards that are not automatically met simply by the absence of bad faith.

Holland also claims that he did not commit any violations because the evidence shows that Ms. Bradley understood and approved of the recommendations. But it is well established that an unsuitable recommendation does not become suitable simply because the customer is persuaded to accept it.

Finally, Holland asserts that the sanctions imposed are excessive. However, the relatively lenient sanctions imposed were based on a careful consideration of all of the mitigating factors relied upon by Holland, and the Commission's affirmance of those sanctions was well within its discretion.

ARGUMENT

I. THE COMMISSION PROPERLY FOUND THAT HOLLAND'S RECOMMENDATIONS WERE UNSUITABLE IN LIGHT OF MS. BRADLEY'S FINANCIAL SITUATION AND NEEDS.

The Commission held that "the recommendations at issue, taken as a whole, were unsuitable for Bradley's account" (Comm. Op., CR. 134: 5); see F.J. Kaufman & Co., 50 S.E.C. 164, 168 (1989) ("The suitability rule . . . requires a broker to make a customer-specific determination of suitability and to tailor his recommendations to the customer's financial profile and investment objectives"). The Commission found that between 1988 and 1990, Holland's recommendations produced a significant change in the composition of Ms. Bradley's portfolio, with the introduction of a substantial block of speculative and high risk securities that injected a much greater degree of risk than had previously been the case. As explained in more detail above, Holland's recommendations included companies with no history of profits or expectation of paying dividends, and companies only suitable for those who could afford to lose their entire investment. 12/

12/ Holland testified at the hearing that in his view the portfolio had always contained a speculative component,

(continued...)

The Commission concluded that this large proportion of risky securities was inconsistent with Ms. Bradley's financial situation, given that she had no insurance or family to care for her should she become incapacitated, had a limited prospect of future income, and wanted to leave as much as possible to her church and charity after her death. Furthermore, when Holland filled out Ms. Bradley's new account form in 1984, speculative and good quality, but not high risk, were selected as risk factors for her account, yet Holland nonetheless recommended a number of securities labeled by their issuers as high risk.

Thus, there is no basis for Holland's suggestion (Br. 17) that the recommendations must necessarily have been suitable because one of Ms. Bradley's investment objectives was to invest in speculative securities. Ms. Bradley's wishes cannot be taken as giving Holland carte blanche to invest in any speculative security, no matter how risky and no matter how inappropriate in light of Ms. Bradley's overall financial situation and needs.

Holland makes three additional challenges to the Commission's decision: (1) it is not "per se" unreasonable to recommend speculative securities to an elderly woman or to

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(...continued)
identifying Occidental Petroleum, New Mexico Public Service and other highly leveraged utilities as falling into this category (CR. 33: 97; SR. 33: 257). But the Commission found, and this finding is not challenged, that there is "a significant difference" between the debt securities of the established but highly leveraged companies that Ms. Bradley had held and "the development-stage companies with a limited history of operations and no profitability that Holland recommended" (Comm. Op., CR. 134: 6 n.16).

recommend securities underwritten by a broker's firm (Br. 16, 19-22); (2) he committed no violation since the evidence did not show that he acted in bad faith (Br. 16); and (3) the recommendations were not unsuitable because Ms. Bradley understood and accepted the recommendations (Br. 17). None of these arguments has merit.

1. The argument that it was not "per se" unreasonable to recommend speculative securities to an elderly customer (Br. 16) is a strawman. Although the age of the investor is often a relevant consideration in making a suitability determination, 13/ it was not the sole determining factor in this case. The Commission did not find that speculative securities could never be appropriately recommended to an elderly person; rather, as explained above, it found that these securities should not have been recommended to this customer (Comm. Op., CR. 134: 5-8). While Ms. Bradley's age was properly a factor in the Commission's analysis of the recommendations, it was far from being the sole

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13/ Indeed, Holland himself concedes that "[o]f course, age may be relevant in assessing 'financial needs' * * *" (Br. 19). See Jolley v. Welch, 904 F.2d 988, 995 (5th Cir. 1990), cert. denied, 498 U.S. 1050 (1991) (jury entitled to conclude that trades were unsuitable in light of investor's age (71) and financial expectations); In re David Joseph Dambro, 51 S.E.C. 513, 517 (1993) ("we agree with the NASD that `the sale of a highly speculative security which had exhibited little evidence of profit[able] potential to a person of advanced age is inherently suspect and requires further inquiry into the person's investment objective and the suitability of the particular stock'").

consideration, and Holland's "per se" argument is therefore irrelevant. 14/

Nor did the Commission hold that it was a "per se" violation (see Br. 19-22) for an account executive to recommend securities that had been underwritten by the executive's firm. Rather, the Commission appropriately noted that the securities had been underwritten by Paulson, 15/ which limited the range of investments that were recommended to Ms. Bradley. 16/

2. Holland urges that he committed no violation because the evidence does not show that he acted in bad faith (Br. 16). The applicable Rules of Fair Practice required Holland to "observe high standards of commercial honor and just and equitable principles of trade" and to "have reasonable grounds for believing that" a recommendation is suitable for his customers. Mere absence of bad faith or intent to defraud is scarcely sufficient to meet these professional ethical standards. See

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14/ Holland also suggests that the Commission applied a different standard to Ms. Bradley because of her gender (Br. 5, 5 n.6, 13-14, 19, 23). Nowhere in the Commission's opinion is there any basis for concluding that gender was a basis for the decision.

15/ The Commission explained that "[t]he concentration of high risk and speculative securities in Ms. Bradley's account, which were predominately underwritten by Paulson, was not suitable" (Comm. Op., R. 134: 8).

16/ The NASD decisions and court cases cited by Holland in support of his "per se" arguments (Br. 16, 21) are, like the arguments themselves, irrelevant because no "per se" rules were relied upon here. Beyond that, the cases merely held that unsuitability was not shown on the specific facts of those cases, facts that are not appreciably similar to the facts before this Court.

Erdos v. SEC, 742 F.2d 507, 508 (9th Cir. 1984) ("An NASD violation does not require that the dealer act with scienter"); Wall Street West, Inc. v. SEC, 718 F.2d 973, 975 (10th Cir. 1983) (same); Securities Acts Amendments of 1975, S. Rep. No. 94-75, 94th Cong., 1st Sess., S. 249, at 23 ("Industry organizations, i.e. the exchanges and the NASD are delegated governmental power in order to enforce at their own initiative, compliance by members of the industry with both the legal requirements laid down in the Exchange Act and ethical standards going beyond those requirements") (emphasis supplied). 17/

3. Finally, Holland argues that even if the recommendations were unsuitable, he committed no violation because Ms. Bradley agreed with his recommendations (Br. 17-18). Holland misunderstands his obligation not to provide unsuitable recommendations. The mere fact a customer is persuaded to accept an unsuitable recommendation does not excuse the violation: the NASD Rules require that the recommendations be suitable in the first instance. Erdos, 742 F.2d at 508 ("The NASD rule against making unsuitable recommendations is governed by whether the dealer `fulfilled the obligation he assumed when he undertook to counsel the [customer], of making only such recommendations as would be consistent with the customer's financial situation and needs'"); In re Paul F. Wickswat, 50 S.E.C. 785, 786 (1991)

17/ Given that scienter is not required to violate these standards, the Rule 10b-5 cases cited by Holland are inapposite. See, e.g., O'Connor v. R.F. Lafferty & Co., 965 F.2d 893, 898 (10th Cir. 1992) ("we conclude the scienter element is dispositive").

(client's consent to transactions did not negate broker's obligation to make "only such recommendations as were consistent with her financial situation and needs"); In re Gordon Scott Venters, 51 S.E.C. 292, 295 n.8 (1993) ("the issue is not whether or not the client considers the transactions in her account suitable, but whether the salesman, when he undertakes to counsel the client, fulfills the obligation he assumes to make only such recommendations as would be consistent with the client's financial situation and needs").

II. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN AFFIRMING THE SANCTIONS IMPOSED ON HOLLAND BY THE NASD.

Holland contends that the sanctions imposed are excessive (Br. 22). That contention is meritless. As the Commission noted, the NASD took into account Holland's otherwise clean record, good reputation and the settlement with Ms. Bradley's conservator when it departed downward from its sanction guidelines in imposing sanctions on Holland (DBCC Op., SR. 105: 14-15; Comm. Op., CR. 134: 8-9 & n.24). 18/ The Commission's affirmance of the relatively lenient sanctions imposed by the NASD was not an abuse of discretion.

18/ The guidelines suggest a monetary sanction in "[t]he amount of any commissions, concessions, or profits to the respondent and firm, plus $5,000 to $25,000," and possible restitution of customer losses, and, when the case involves numerous recommendations of clearly unsuitable securities with no prior misconduct, a suspension of 10 to 30 days. NASD Sanction Guidelines 43 (1993) (reproduced in the Addendum). Here, the monetary sanction imposed was $5,000, with no loss of commission, and the suspension was only five days.

CONCLUSION

For the foregoing reasons, the order of the Commission should be affirmed.

Respectfully submitted,

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JUNE 1996

STATEMENT OF RELATED CASES

The Commission is not aware of any related cases pending in this Court.

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CLINTON HUGH HOLLAND, JR.,

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v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

CERTIFICATION PURSUANT TO CIRCUIT RULE 32(e)(4)(ii)

The brief of the Securities and Exchange Commission, respondent uses a monospaced typeface of 10 characters per inch, and does not exceed 14,000 words.

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JUNE 1996

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-70084

CLINTON HUGH HOLLAND, JR.,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 1996, I caused two copies of the Brief of the Securities and Exchange Commission, Respondent, and a copy of Respondent's Supplemental Excerpts of Record to be served by Federal Express overnight delivery on petitioner, addressed to counsel as follows:

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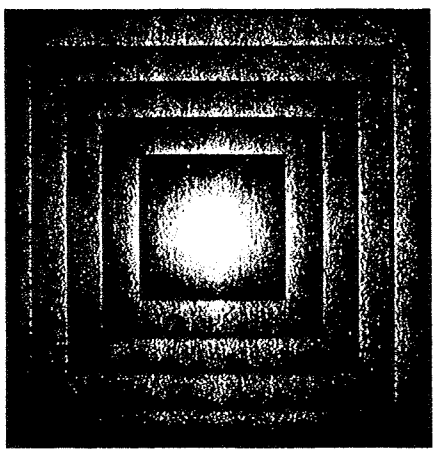
A D D E N D U M

NASD Sanction Guidelines



Suitability[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar, or Other Sanctions
1) Prior or other similar misconduct. 2) Amount of commission or other benefits to respondent. 3) Extent of harm or injury to customers. 4) Number of unsuitable recommendations and number of customers involved. 5) Attempts to conceal misconduct by misstating customer information. 6) Honest misunderstanding of the customer's financial resources, other security holdings, and investment objectives. 7) Investment experience, sophistication, and resources of customer(s). 8) Prompt and voluntary restitution by the respondent. 9) Other mitigating or aggravating factors.	The amount of any commissions, concessions, or profits to the respondent and firm, plus $5,000 to $25,000. (Where appropriate, consider requiring restitution of customer losses.)	In a case involving numerous recommendations of clearly unsuitable securities and no prior similar misconduct, consider suspending the respondent in all capacities for 10 to 30 business days. Also consider requiring requalification by examination. As to the firm, see the Supervision Sanction Guideline.

[1]These guidelines are also appropriate for violations of MSRB Rule G-19. Note that there need not be a loss for unsuitability to be found.