BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Michael O'Hare,
Bridgewater, NJ,

Respondent.

DECISION

Complaint No. C9B030045

Dated: April 21, 2005

Registered representative made unsuitable recommendations and traded excessively in customer account. Held, findings affirmed and sanctions modified.

Appearances

For NASD Department of Enforcement: Michael J. Newman, Regional Counsel.

For the respondent: Richard C. Szuch, Esq., Dillon, Bitar & Luther, LLC, Morristown, New Jersey.

DECISION

We called this matter for review pursuant to NASD Procedural Rule 9312 to reexamine a May 10, 2004 decision of an NASD Hearing Panel in which the Hearing Panel found that Michael O'Hare ("O'Hare") engaged in excessive trading in a customer's account. After reviewing the entire record in this matter, we find that O'Hare executed excessive and unsuitable transactions in the account of a customer. We modify the monetary sanctions to require O'Hare to pay restitution to the customer of $5,348 and a $2,500 fine and eliminate the 10-business-day suspension.

Procedural History

The Department of Enforcement filed the complaint in this matter in July 2003, after one of O'Hare's customers, GD, registered a complaint against O'Hare on NASD's Website. The parties participated in an evidentiary hearing before an NASD Hearing Panel in November 2003, and GD testified at the hearing. The parties also participated in an appeal hearing before a subcommittee of the National Adjudicatory Council ("Subcommittee") on December 2, 2004.

Background

O'Hare has been registered with NASD and affiliated with the East Brunswick, New Jersey office of A.G. Edwards & Sons, Inc. ("A.G. Edwards" or "the Firm") as a general securities representative since August 1995.

Discussion

Factual Findings

In mid-1999, GD moved her investment account from an A.G. Edwards representative in the Firm's Buffalo, New York office to O'Hare in the Firm's East Brunswick, New Jersey office.[1] At the time of the transfer, GD's account was valued at approximately $52,000. Under O'Hare's guidance, GD's account eventually increased in value to approximately $86,000. GD did not complain about O'Hare's conduct with respect to this account.

In November 2000, GD withdrew funds that she had held in three different 401(k) plans, combined them (for a total of $16,000), and used the funds to open an IRA account with O'Hare at A.G. Edwards. At the time, GD was 53 years old, worked as a secretary for a salary of $40,000 per year, lived in a home valued at approximately $250,000 that she owned mortgage-free, had no dependent children, and intended to retire in approximately 12 years. Although O'Hare's and GD's testimony varied on the issues of whether she could afford to lose the $16,000 and exactly how much risk she was willing to accept, neither disputed that GD did not require the $16,000 or any profits generated from it to cover living expenses.

The new account form for GD's IRA account listed her total net worth as $150,000 and her liquid net worth as $100,000. The IRA new account form stated that she had had seven

---

[1] GD moved from the Buffalo area to the East Brunswick area after divorcing her husband. In connection with GD's divorce, GD's ex-husband opened an investment account in GD's name in the Buffalo, New York office of A.G. Edwards. GD testified that she moved the account for convenience after relocating her home. O'Hare testified that GD advised him that she wanted to move the account because she hoped to improve her account performance and sought to trade aggressively with a small portion of her investment funds. O'Hare became GD's account representative when she called A.G. Edwards' East Brunswick office and was referred to O'Hare as the "broker-of-the-day."

years' experience investing in stocks, that her primary investment objective was aggressive growth, and that her secondary objective was conservative growth.[2] GD's hearing testimony regarding the facts and figures contained in her IRA new account form is somewhat contradictory. Early in GD's hearing testimony, she confirmed that her liquid net worth was $100,000. Later in the testimony, she disputed the liquid net worth figure, indicated that she never saw the new account form or stated her investment objective to be aggressive growth, and stated that she did not recall signing the new account form. The new account form, nonetheless, contains a signature that she admitted was her own.[3]

O'Hare testified that GD's 401(k) plans had invested her funds in aggressive-growth mutual funds.[4] He stated that, knowing that GD had few expenses, steady income, and no need for her retirement funds for 12 years, he suggested to her that she invest her IRA funds aggressively.[5] O'Hare contended that GD agreed.[6]

---

[2] GD's new account form for the investment account that her ex-husband opened for her in the Firm's Buffalo office listed similar investment objectives and did not contain information regarding GD's net worth. The East Brunswick new account form for GD's non-IRA investment account also listed aggressive growth as her primary investment objective and conservative growth as her secondary investment objective. The East Brunswick new account form (for GD's non-IRA investment account) also indicated that GD's total net worth was $200,000 and her liquid net worth was $75,000.

[3] The IRA new account form is dated November 30, 2000, the date when GD opened the IRA account, but GD's signature on the form is dated February 2, 2001. O'Hare's A.G. Edwards branch manager, Michael Doherty ("Doherty"), testified that GD opened her IRA account in November 2000, which is when O'Hare and Doherty signed the form. A.G. Edwards thereafter mailed the form to GD for her signature, but she did not sign and return the form to their office until February 2001.

[4] The record identified the mutual funds in which GD's 401(k) money had been invested, but did not otherwise indicate the type of trading in which the mutual funds engaged. The record also indicated that GD chose the following allocations for one of her 401(k) plans: 20 percent interest income fund, 20 percent small company fund, 20 percent S&P index fund, 10 percent international fund, and 30 percent diversified bond fund. For another 401(k) plan, she chose the following allocations: 30 percent in a fixed income fund, 30 percent in a growth company fund, 10 percent in an OTC fund, and 30 percent in a balanced fund.

[5] O'Hare determined that, because GD's IRA account represented 15 percent of GD's liquid net worth and 10 percent of her total net worth, aggressive investments could be suitable for her. GD denied that she had agreed to invest her IRA account aggressively, notwithstanding that the new account form that she signed indicated that her primary investment objective was aggressive growth, and each of GD's monthly account statements for the IRA account also listed her investment objective as aggressive growth.

In December 2000, O'Hare invested 100 percent of the equity in GD's account in Broadvision, Inc., a company that develops and sells packaged applications for conducting electronic business transactions. O'Hare identified the investment as an aggressive purchase.[7] In mid-January 2001, the price of Broadvision stock increased approximately 10 percent, and O'Hare recommended that GD sell the Broadvision stock and invest 100 percent of the equity in her IRA account in JDS Uniphase Corp., a company involved in fiber optics.[8] GD agreed to the transaction. O'Hare sold GD's JDS Uniphase stock on or about January 22, 2001, when the price appreciated from her $40 per share purchase price to $45 per share. O'Hare then recommended that GD invest all of the equity in her IRA account in Esoft, Inc., a company that produced pre-packaged software.[9] O'Hare purchased the Esoft stock in GD's account, then recommended that GD sell her Esoft stock within days of purchasing it, on or about January 25, 2001, when the value of the stock had increased and she could profit on the sale. O'Hare sold GD's Esoft stock. Thereafter, O'Hare recommended that GD immediately invest all the equity in her IRA account in Netergy Networks, Inc., a semiconductor and wireless telephone company.[10] GD purchased Netergy, and the price of Netergy's stock declined almost immediately after GD's purchase. Once the price rebounded, O'Hare sold GD's Netergy stock at a break-even point and invested all the equity in her account in Broadvision. O'Hare testified that the stock market thereafter "fell apart." At the end of January 2001, O'Hare recommended that GD sell Broadvision at a loss and purchase and hold Esoft. Because of the losses that GD's account had sustained, O'Hare stopped

---

[cont'd]

[6] O'Hare testified before the Hearing Panel that he recommended an "aggressive" trading strategy to GD. In an August 2001 letter to NASD, he stated that the trading strategy that he recommended to GD involved "trading speculative stocks for the short term."

[7] Broadvision's common stock was listed on the Nasdaq National Market. Broadvision's Form 10-K for the year ended December 31, 2000 reported that its operating results had fluctuated in the past and that its future operating results could be below the expectations of securities analysts and investors.

[8] JDS Uniphase's stock traded on the Nasdaq National Market and on the Toronto Stock Exchange. JDS Uniphase's Form 10-K for the year ended June 30, 2000 listed many potential risk factors associated with investment in JDS Uniphase, including potential fluctuations in its operating results.

[9] Esoft's stock began trading on the Nasdaq National Market in May 2000. Esoft's Form 10-K for the year ending December 31, 2000, stated that Esoft's stock prices were subject to significant fluctuation and that investment in Esoft entailed risk, particularly given the company's history of operating losses, accumulated deficit, and volatile stock prices.

[10] Netergy's stock traded on the Nasdaq National Market. Netergy's Form 10-Q for the quarter ended September 28, 2000 disclosed significant risks associated with investment in Netergy. Netergy reported operating losses, uncertainty as to future profitability, the need for additional operating capital, and volatile stock prices.

trading in the account on February 8, 2001. Although profitable at first, O'Hare's trading strategy ultimately produced a loss to GD of approximately $5,600.

The record is unclear as to when (before or after each trade) and to what extent O'Hare discussed each trade with GD. The record also contains conflicting evidence as to GD's investment objectives. O'Hare indicated that he had time and price discretion with respect to GD's IRA account. O'Hare also testified that: he generally spoke to GD about each trade beforehand; GD authorized all of the trades; and she wanted and agreed to an aggressive trading strategy. GD denied that O'Hare sufficiently disclosed possible risks to her and suggested that he executed some of the trades without her authorization. GD also contended that her desire was for safe investments, not aggressive trading. Enforcement did not allege unauthorized trading as a violation in this matter.

GD's testimony regarding her conversations with O'Hare and her understanding and authorization of the trades at issue is contradictory and unclear. With respect to almost all aspects of O'Hare's and GD's testimony, the Hearing Panel found O'Hare to be more credible than GD. The credibility determinations of the initial fact-finder are entitled to considerable weight and deference because they are based on hearing the witnesses' testimony and observing their demeanor. *Ashvin R. Shah*, 52 S.E.C. 1100, 1103 (1996); *see also Daniel D. Manoff*, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684 (Oct. 23, 2002) (credibility determinations by a fact-finder deserve "special weight"). These determinations can be overcome only when there is "substantial evidence" for doing so. *Anthony Tricarico*, 51 S.E.C. 457, 460 (1993). We do not find that there is substantial evidence for overcoming the Hearing Panel's credibility findings in this matter. We therefore credit O'Hare's testimony that GD's investment objective was aggressive growth, he disclosed to her and she consented to the trading strategy that O'Hare recommended, and the financial figures indicated on her new account form were consistent with what she represented to him. With these findings in mind, we now turn to whether O'Hare's trading strategy was suitable for GD.

Legal Conclusions

After thoroughly reviewing the record, we find that O'Hare's recommendations were unsuitable for GD's IRA account based on the account's turnover rate and cost-to-equity ratio. For the reasons discussed below, we affirm the Hearing Panel's finding that O'Hare violated NASD Rules 2110 and 2310[11] as alleged in the complaint.

"Before recommending a transaction, a registered representative must have reasonable grounds for believing, on the basis of information furnished by the customer, and after reasonable inquiry concerning the customer's investment objectives, financial situation, and needs, that the recommended transaction is not unsuitable for the customer." *Rafael Pinchas*,

---

[11] Rule 2110 requires observation of "high standards of commercial honor and just and equitable principles of trade" and Rule 2310 requires members to have reasonable grounds for believing that a recommendation is suitable for a customer based on his or her financial situation and needs. Rule 115(a) imposes on associated persons all duties and obligations of members.

Exchange Act Rel. No. 41816, 1999 SEC LEXIS 1754, at *19 (Sept. 1, 1999). As we stated in our decision in *Dep't of Enforcement v. Daniel Richard Howard*, Complaint No. C11970032, 2000 NASD Discip. LEXIS 16, at *15 (NAC Nov. 16, 2000), *aff'd* Exchange Act Rel. No. 46269, 2002 SEC LEXIS 1909 (July 26, 2002), *Howard v. SEC*, No. 02-1939, 2003 U.S. App. LEXIS 19454 (1st. Cir. Sept. 19, 2003), the suitability rule can be violated in a number of ways. Most often, the rule is violated based on the quality of the recommended transactions when compared to the customer's financial situation and needs. The rule also can be violated if a representative's recommendations are quantitatively unsuitable, *i.e.*, the representative excessively traded the account. *See id.* at *16. "Excessive trading represents an unsuitable frequency of trading and violates NASD suitability standards." *Paul C. Kettler*, 51 S.E.C. 30, 32 (1992).[12] In either case, a representative may make only such recommendations -- or effect such transactions in cases where the representative controls the account -- as would be consistent with the customer's financial situation and needs. *See Larry Ira Klein*, 52 S.E.C. 1030, 1040 (1996). Even in cases in which a customer affirmatively seeks to engage in highly speculative or aggressive trading, a representative is under a duty to refrain from making recommendations that are incompatible with the customer's financial profile. *See Pinchas*, 1999 SEC LEXIS 1754, at *22 (finding customer's desire to "double her money" does not relieve registered representative of duty to recommend only suitable investments).

As discussed below, we find that O'Hare's recommendations to GD were not suitable because of the excessive number of trades in GD's account, the short-term nature of the trading, and the cost-to-equity ratio for the account.

First, we find that O'Hare's trading strategy was not suitable for GD based, in part, on the cost-to-equity ratio in GD's IRA account. "[An] indicator of excessive trading is the cost-to-equity ratio, which is the percentage of return on the customer's average net equity needed to pay [commissions and expenses]." *Rafael Pinchas*, 1999 SEC LEXIS 1754, at *18. In essence, the cost-to-equity ratio measures the amount of income that an account would have to generate in order merely to break even. *Id.* NASD examiner John Clark ("Clark") testified that, during the three-month period under review, the cost-to-equity ratio in GD's IRA account was 35 percent or

---

[12] NASD IM-2310-2 (Fair Dealing with Customers) provides in pertinent part as follows: "Some practices that have resulted in disciplinary action and that clearly violate [the reasonable grounds] for fair dealing are . . . [e]xcessive activity in a customer's account . . . ."

140 percent annualized.[13] It is axiomatic that a cost-to-equity ratio of 20 percent or more generally indicates that excessive trading has occurred. *Daniel Richard Howard*, 2002 SEC LEXIS 1909, at *8. We find that the cost-to-equity ratio in GD's IRA account indicated that O'Hare engaged in unsuitably excessive trading.

A second factor that causes us to find that O'Hare's strategy was unsuitable for GD is the short holding periods that he employed for each of the securities that he purchased. As noted above, O'Hare purchased one speculative security with the entire amount of equity in GD's IRA account, held the security for a short period, then sold it and bought a different, equally speculative stock. In two instances, O'Hare actually repurchased a stock that he had bought and sold once already during the two prior months. During O'Hare's initial purchase of Broadvision in GD's account, he held it for 22 days before selling it. He bought Broadvision again just one month later and held it for 14 days before selling it. O'Hare held JDS Uniphase and Esoft in GD's account for only five days each. He held Netergy Networks stock in GD's account for three days. After selling Esoft out of GD's account, he repurchased it again less than three weeks later. This type of in and out trading is very difficult to justify. *See Harry Gliksman*, Exchange Act Rel. No. 42255, 1999 SEC LEXIS 2685, at *12 (finding that "in and out" trading indicates excessiveness); *Rafael Pinchas*, 1999 SEC LEXIS 1754, at *16 n.13 (same).

Third, we find that O'Hare's recommendations in GD's account were unsuitable because of the frequency of trades caused by the short-term holding periods. "[E]xcessive trading occurs when a registered representative has control over trading in an account and the level of activity in that account is inconsistent with the customer's objectives and financial situation." *Harry Gliksman*, 1999 SEC LEXIS 2685, at *6 (Dec. 20, 1999).[14] While there is no single test for finding excessive trading, the turnover rate[15] and the number and frequency of trades in an

---

[13] Thus, in order not to lose money during the months of December 2000 and January and February 2001, GD's account would have had to generate returns of at least 35 percent.

[14] *De facto* control is established if a customer, although not granting his broker a formal power of attorney, so relies on the broker that the latter is in a position to control the volume and frequency of transactions in the account. *John M. Reynolds*, 50 S.E.C. 805, 807 (1991). *De facto* control also is established if the client habitually follows the advice of the broker. *Donald A. Roche*, 53 S.E.C. 16, 23, n.14 (June 17, 1997). In this case, O'Hare was responsible for all of the investments in GD's IRA account, and the evidence suggests that he sometimes told her about the investments only after the fact. GD had limited investment experience prior to investing with O'Hare, and she followed all of his recommendations. O'Hare even testified that he operated as if he had time and price discretion in the account, which establishes another indication of control. *See Harry Gliksman*, 1999 SEC LEXIS 2685 (finding that time and price discretion is evidence of "control" over the customer's account). We find that O'Hare exercised *de facto* control over GD's account.

[15] The turnover rate is computed "by dividing the aggregate amount of the purchases by the average cumulative monthly investment, the latter representing the cumulative total of the net investment in the account at the end of each month, exclusive of loans, divided by the number of

[Footnote continued on next page]

account introduce some measure of objectivity or certainty into the analysis and provide a basis for finding unsuitably excessive trading. *Id.*; *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417, 435-36 (N.D. Cal. 1968), *modified on other grounds*, 430 F.2d 1202 (9th Cir. 1970). There is no definitive turnover rate that establishes excessive trading, but a turnover rate of six generally indicates that excessive trading has occurred. *Daniel Richard Howard*, Exchange Act Rel. No. 46269, 2002 SEC LEXIS 1909, at *8 (July 26, 2002); s*ee Peter C. Bucchieri*, 52 S.E.C. 800, 805 (1996) ("While there is no clear line of demarcation, courts and commentators have suggested that an annual turnover rate of six reflects excessive trading."); *Shearson Lehman Hutton Inc.*, 49 S.E.C. 1119, 1122 (1989) (same).[16] Here, O'Hare turned over GD's IRA account 5.339 times during the three months of December 2000 and January and February 2001. Annualized, the turnover rate in GD's IRA account would have been 21.358.[17] We find that O'Hare excessively traded GD's IRA account.

[cont'd]
months under consideration." *Frederick C. Heller*, 51 S.E.C. 275, 279 n.10 (1993). In accounts opened principally with securities rather than a cash deposit, a modified formula, which divides the total cost of purchases by the average monthly equity, is appropriate. *See Allen George Dartt*, 48 S.E.C. 693 (1987). Examiner Clark testified that he calculated the turnover ratios in GD's IRA account by comparing the average equity in the account to the total purchases during the review period.

[16] Furthermore, turnover rates between three and five have triggered liability for excessive trading. *Stephen Stout*, Exchange Act Rel. No. 43410, 2000 SEC LEXIS 2119, at *50 (Oct. 4, 2000) (finding annualized turnover ratios of 3.44 to 11.84 excessive, particularly in light of high cost-to-equity ratios); *Donald A. Roche*, 53 S.E.C. at 21-22 (finding that turnover rates of 3.3, 4.6 and 7.2 provided strong support for finding of churning).

[17] O'Hare contends that in order to calculate the turnover rate in GD's IRA account, NASD should have combined the figures for both of GD's A.G. Edwards accounts rather than consider the trading in her IRA account alone. We disagree. Lower activity in another account does not make excessive trading more acceptable. In order accurately to measure account activity, it is appropriate to consider the assets in the account at issue, not other assets that the customer may possess. *Cf. Laurie Jones Canady*, Exchange Act Rel. No. 41250, 1999 SEC LEXIS 669, at *19 (Apr. 5, 1999).

O'Hare also argues that NASD should have reviewed the trading in GD's IRA account during a period in excess of the three months reviewed. We do not agree. First, we note that GD opened the IRA account in November 2000 and deposited funds in December 2000. O'Hare stopped all trading in the account in February 2001. Examiner Clark's review period included all of the time that the account was active – December 2000 and January and February 2001. Additionally, even if GD's IRA account had been open and active for a longer period, NASD is not limited to looking only at the full period that a broker managed an account to determine if the broker engaged in excessive trading. "It is appropriate for [NASD] to review the trading done over a reasonably abbreviated portion of the entire period" to measure account activity

[Footnote continued on next page]

O'Hare argues that GD understood the risks associated with speculative investments and that she actively sought an investment strategy that included growth and speculation. Even if we conclude that GD understood O'Hare's recommendations and decided to follow them, "that [would] not relieve [O'Hare] of his obligation to make reasonable recommendations." *Clinton Hugh Holland*, 52 S.E.C. 562, 566 (1995); *see also Charles W. Eye*, 50 S.E.C. 655, 659 (1991) ("[R]egardless of whether [the client] appeared willing, or even eager, to pursue 'growth' as Eye understood it, it was Eye's duty to advise her against that pursuit to the extent that it was incompatible with her acknowledged needs."). The test for whether O'Hare's recommended investments were suitable is not whether GD considered the investments to be suitable, but whether the recommendations were consistent with her financial situation and needs. *Stephen Thorlief Rangen*, 52 S.E.C. 1304, 1308 (1997). In light of the cost-to-equity ratio, turnover rate, and short-term holding periods in GD's IRA account, we find that the recommendations were not suitable.

O'Hare was obligated to tailor his recommendations to GD's financial situation and needs. *David A. Gingras*, 50 S.E.C. 1286, 1288 (1992). O'Hare's recommendations to GD for her IRA account failed to meet this obligation in terms of the cost-to-equity ratio in the account, the number of transactions that he executed, and the holding periods for securities in the account. O'Hare's recommendations to GD between December 2000 and February 2001 were unsuitable and violated Conduct Rules 2110 and 2310.

Sanctions

The Hearing Panel below fined O'Hare $7,848 ($5,348 representing O'Hare's ill-gotten gains and $2,500 representing a fine), suspended him for 10 business days, and assessed hearing costs. We modify the sanctions by ordering that the portion of the fine that represents O'Hare's ill-gotten gains ($5,348) be paid to GD as restitution and eliminating the suspension. Thus, we fine O'Hare $2,500, order him to pay restitution of $5,348 to GD, and assess hearing costs from below.

The Sanction Guidelines instruct us to take into account principal considerations that apply to all violations.[18] In this case, we note that certain aggravating factors do not exist. We acknowledge that O'Hare generated in excess of $5,000 in commissions in GD's account. O'Hare, however, does not appear to have been motivated by the potential for pecuniary gain, has no disciplinary history, did not engage in the misconduct over an extended period of time,

---

[cont'd]
accurately. *Jack H. Stein*, Exchange Act Rel. No. 47335, 2003 SEC LEXIS 338, at *18 (Feb. 10, 2003).

[18] *See* Sanction Guidelines (2001 ed.) at 9. The individual Sanction Guidelines for unsuitable recommendations and excessive trading do not recommend the consideration of additional factors.

and never attempted to conceal his actions. The evidence suggests that the speculative trading strategy that O'Hare employed, although misguided, is in fact what his client sought and that his misconduct resulted from poor judgment rather than from an intentional effort to churn the account solely to generate commissions. While we do not consider that any of these facts mitigate the seriousness of the violation, we also note the overall absence of numerous aggravating factors that generally would suggest that a fine at the high end of the recommended range is appropriate.

Furthermore, we find that certain mitigating factors exist. O'Hare reevaluated his trading strategy in GD's IRA account and, acting in his client's interest, halted trading in the account when he determined that the strategy was no longer profitable. The Hearing Panel also found that O'Hare was forthright in his testimony and that, unlike GD, his testimony was consistent and credible.

The evidence suggests to us that GD not only consented to O'Hare's recommended trading strategy, but also that she transferred her IRA account to him because she hoped to increase her returns and possibly trade aggressively with at least a portion of it. Like the Hearing Panel, we do not find GD's claims of ignorance as to the activity in her IRA account credible and find that O'Hare genuinely believed that the strategy that he followed was in GD's best interest. O'Hare was mistaken and, as a result of his poor judgment, GD lost approximately $5,600 in her IRA account and he generated approximately $5,348 in commissions. Regardless of whether GD wanted to engage in aggressive and speculative trading, O'Hare was obligated to abstain from making recommendations that were inconsistent with GD's financial situation and needs. *See John M. Reynolds*, 50 S.E.C. 805, 809 (1992). O'Hare failed in his obligation, and the sanctions that we have determined to impose are appropriately remedial for this violation in light of the unique facts and circumstances of this case.

Therefore, we eliminate the Hearing Panel's imposition of a 10-business-day suspension and affirm the Hearing Panel's assessment of costs. We modify the monetary sanctions to require O'Hare to pay restitution of $5,348 to GD and pay a fine of $2,500. The record establishes that GD lost approximately $5,600 through O'Hare's trading in GD's IRA account and that O'Hare generated $5,348 in commissions in the account. Because the amount of GD's actual loss is not precisely documented in the record, but is close to the amount of commissions that O'Hare generated on these trades ($5,348), we order restitution in the amount of $5,348, which we find roughly equals the amount of GD's losses. We order restitution because the SEC has encouraged NASD to use its remedial powers to return to investors funds lost in cases like this one in which a professional has acquired a benefit by failing to meet his obligations. *See Wendell D. Belden*, Exchange Act Rel. No. 47859, 2003 SEC LEXIS 1154, at *18 (May 14, 2003) (affirming order of restitution in suitability case); *David Joseph Dambro*, 51 S.E.C. 513, 518 (1993) (finding that restitution is a fitting sanction in suitability cases).[19]

Conclusion

[19] The sanctions are slightly below the range recommended in the Sanction Guidelines for suitability and excessive trading violations.

We find that O'Hare effected unsuitable transactions in GD's account, in violation of NASD Conduct Rules 2110 and 2310.[20] We order O'Hare to pay restitution to GD of $5,348 with interest from January 31, 2001, at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. §6621(a), impose a fine of $2,500, and affirm the Hearing Panel's imposition of costs of $2,744.85.

On Behalf of the National Adjudicatory Council,

_____

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

F:\Depts\OGC\NASDR Appellate Group\CarloniC\O'Hare\FinalO'HareNACDecision.doc

[20] We also have considered and reject without discussion all other arguments advanced by the parties.

Pursuant to NASD Procedural Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.