

State of Missouri  
Office of Secretary of State

Case No. AP-06-15

IN THE MATTER OF:

JAMES NORRIS HOLLAND, JR.  
d/b/a SOLOMON JAMES FINANCIAL  
715 Indiana Street  
Baldwin City, Kansas 66006; and

Respondent.

**ORDER TO CEASE AND DESIST AND ORDER TO SHOW CAUSE WHY CIVIL  
PENALTIES AND COSTS SHOULD NOT BE IMPOSED AND ORDER REFERRING  
REVOCATION PETITION TO THE ADMINISTRATIVE HEARING COMMISSION**

On the 18th day of April 2006, the Enforcement Section of the Securities Division (the "Division" or the "Securities Division"), by and through Mary S. Hosmer, Assistant Commissioner of Securities, submitted an Amended Petition for Administrative Relief Under §§ 409.4-412(d), 409.5-501 and 409.6-604, RSMo. (the "Petition"). After reviewing the Petition, the Commissioner of Securities issues the following findings of fact, conclusions of law and order:

**I. FINDINGS OF FACT**

1. James Norris Holland, Jr. ("Holland"), with a residential address at 115 Pinecone, Lawrence, Kansas 66046, was a registered agent of Missouri-registered broker-dealer Berthel, Fisher & Company Financial Services, Inc. ("Berthel"), from January 3, 1994 to August 30, 2005. Holland did business as Solomon James Financial and had an office located at 715 Indiana Street, Baldwin City, Kansas 66006.
2. Holland has been a registered agent in Missouri since June 30, 1993. Holland is registered with the Central Registration Depository System ("CRD") with the number 2150318.
3. Holland was terminated by Berthel on August 30, 2005, for failure to follow company procedures.
4. Berthel has a main office address of 701 Tama Street, Building B, Marion, Iowa 52302. Berthel has been a registered broker-dealer in Missouri since April 30, 1985 and is a member of the National Association of Securities Dealers ("NASD"). Berthel is registered with the CRD with the number 13609.
5. As used in this document, "Respondent" refers to Holland.
6. Holland acquired several customers who were employees of "Hallmark," as the company is referred to in the Petition. The Commissioner notes his assumption that "Hallmark" refers to Hallmark Cards, Inc., of Kansas City ("Hallmark").
7. Holland secured customers who were Hallmark employees through seminars he held, by referrals from other Hallmark retirees, and through a Hallmark newsletter.
8. In 2005, Holland had approximately eighty customers, many of whom were Hallmark retirees and their families.
9. During the time that Holland was a registered broker-dealer agent for Berthel and when he was providing services to his Hallmark retiree customers, there was ample discussion and coverage in mass media, industry journals and other sources that called into question the suitability of variable annuities as an investment vehicle, including writings in *BusinessWeek*, *CNNMoney*, *Entrepreneur*, *Forbes.com*, and *USAToday*.
10. The NASD, while Holland was a member, issued "Notices to Members" on at least five occasions addressing the suitability of variable annuities as investment vehicles.
11. In May 2003, the NASD issued an Investor Alert indicating the key issues which agents should disclose to customers, including liquidity issues, potential surrender charges, tax penalties, fees and market risk.
12. In June 2004, the United States Securities and Exchange Commission ("SEC") and the NASD issued a report<sup>[1]</sup> which found that the high fees and surrender charges inherent in variable insurance products made them inappropriate for many investors.

**MISSOURI RESIDENT 1**

13. In October 1998 a Missouri resident and retired Hallmark employee who is currently 70 years old ("MR1"), invested \$690,000 with Holland. Holland originally invested MR1's money into mutual funds. Of this amount, \$417,000 was invested into Putnam B Share mutual funds, which featured a seven-year surrender charge period. The manner in which Holland

structured the investment caused MR1 to miss four breakpoints which would have resulted in lower fees for MR1.

14. In October 2002, Holland switched approximately \$315,000 of MR1's mutual funds to an Allianz Valuemark IV Variable Annuity with a seven-year surrender charge period.
15. In May 2003, Holland switched approximately \$80,000 of MR1's mutual funds to an Allianz High Five Variable Annuity with a seven-year surrender charge period.
16. In March 2004, Holland switched MR1's Allianz Valuemark IV Variable Annuity to an ING Variable Annuity with a nine-year surrender charge period.
17. In April 2004, Holland switched MR1's Allianz High Five Variable Annuity to an ING Variable Annuity with a nine-year surrender charge period.
18. In February 2005, Holland recommended that MR1 withdraw approximately \$150,000 from the ING Variable Annuity purchased in April 2004 to purchase an Amerus Life Indexed Annuity, and MR1 accepted this recommendation. The Amerus equity indexed annuity has a surrender charge period of fourteen years.
19. Holland generated gross commissions from MR1's account of \$92,177, and netted a total of \$75,974.
20. MR1 paid surrender charges of \$24,300 for the switches described in paragraphs 14 through 18.

### **MISSOURI RESIDENT 2**

21. In September 2000, a Missouri resident and Hallmark employee ("MR2") became a client of Holland. MR2 invested over \$450,000 with Holland. At Holland's recommendation, MR2 invested over \$302,000 into Putnam B Share Mutual Funds, which featured a seven-year surrender charge period. The manner in which Holland structured the investment caused MR1 to miss four breakpoints which would have resulted in lower fees for MR2.
22. In October 2002, Holland switched MR2 from the Putnam B Share Mutual Funds to an Allianz Variable Annuity which featured a seven-year surrender charge period.
23. In February 2004, Holland again switched MR2 from the Allianz Variable Annuity to an ING variable annuity which featured a nine-year surrender charge period.
24. Holland generated gross commissions of \$70,488 from MR2's account, and netted a total of \$58,861.
25. MR2 paid surrender charges of \$18,112 for the switches described in paragraphs 22 and 23.

### **MISSOURI RESIDENT 3**

26. A 69 year-old retired Missouri resident ("MR3") was introduced to Holland by a friend who worked at Hallmark. Holland recommended that MR3 purchase a variable annuity for \$70,000 from funds in MR3's 401(k) plan, and:
  - a. Holland told MR3 it was a "safe and secure" investment and MR3 wouldn't have to worry about her money;
  - b. MR3 stated that she doesn't remember having a choice of how to invest and stated "basically the decisions were left up to Holland;"
  - c. MR3 stated that she has no knowledge of investing and that she is "not good with that kind of stuff." MR3 stated, "I basically have to trust the person I'm working with to do the right thing."
  - d. MR3 stated that MR3 did not understand riders or annuitization.
27. MR3 does not know if MR3 is receiving monthly periodic payments or annuitization payments.

### **MISSOURI RESIDENT 5**

28. In 2000, a Missouri resident ("MR5"), a 56 year-old retired employee from Hallmark, was contacted by Holland. Holland, through Berthel, originally recommended that MR5 invest in mutual funds and a real estate investment trust. MR5 stated that MR5 relied on Holland's advice regarding investment choices.
29. In 2003, Holland called MR5 and wanted to meet with MR5 to discuss a variable annuity in ING. This variable annuity in ING was the only product that was discussed. MR5 stated that based on Holland's recommendation, MR5 purchased a variable annuity for \$450,000 for the purpose of protecting MR5's investment assets.
30. MR5 stated that he is fairly unsophisticated and not very market-savvy, but feels he probably has some knowledge. MR5 stated he understood a little about surrender fees, early withdrawal penalties and charges, but was not sure about annuitization or riders or whether those were discussed. MR5 stated that the variable annuity represents most of MR5's retirement funds.

## MISSOURI RESIDENT 7

31. In July 2004, a Missouri resident ("MR7"), a retired worker from Hallmark who was a 62 year-old widower, contacted Holland and Berthel regarding his pension fund of over \$600,000. MR7 stated that Holland met with MR7 and advised MR7 to transfer MR7's pension plan to Holland.
32. Holland, among other things:
  - a. Invested \$544,847.78 of MR7's 401(k) into a Jackson National Life ("JNL") Perspective II Variable Annuity.
  - b. Sold MR7 a guaranteed minimum income benefit rider ("GMIB") in the JNL Perspective II Variable Annuity which cost MR7 0.6% more per year in fees.
  - c. Invested MR7's funds from the JNL Perspective II Variable Annuity in the following sub-accounts: 50% in a 1-year guaranteed fixed account, 40% in international funds and 10% in bonds.
33. Holland received a check made out to Jackson National Life for \$93,460.39 from MR7's profit-sharing plan approximately two weeks after investing MR7's first check as described in paragraph 32. In a written statement to the Division, Holland stated, among other things, that:
  - a. Holland placed the check from MR7's profit sharing plan for \$93,460.39 into a safe in Holland's office for approximately four months;
  - b. Holland did not want to put this money into the market as he felt the market was overvalued;
  - c. He did not anticipate the rally that the market had in the fourth quarter of 2004;
  - d. He made a mistake in holding the check; and
  - e. He did not know that holding the check violated any compliance procedures at his firm.
34. Holland attempted to reimburse MR7 for lost interest on the investment described in paragraph 33 by having Berthel issue a check to MR7 for \$350 and by sending MR7 a case of Omaha Steaks.
35. In an interview with MR7 on March 10 and June 6, 2005, MR7 told an investigator with the Division, among other things, that:
  - a. MR7 had never invested in anything other than his company's retirement program before MR7's investment with Holland;
  - b. The money invested with Holland consisted of over 75% of MR7's net-worth and 100% of MR7's liquid net-worth;
  - c. Holland did not explain the fee structure of the JNL Perspective II Variable Annuity;
  - d. MR7 had no idea what a GMIB rider was;
  - e. MR7 did not know what annuitization meant;
  - f. When annuitization was explained to MR7, MR7 stated that he would not annuitize the policy;
  - g. MR7 did not understand where Holland was going to place the funds, and Holland simply stated that Holland would take care of MR7;
  - h. It was Holland's decision not to invest the check for \$93,000; and
  - i. Holland told MR7 that it would be a better time to invest this money after the first of the year.

## RESPONDENT HOLLAND

36. On July 13, 2005, in an informal fact finding meeting with the Securities Division and The Missouri Department of Insurance, Holland stated, among other things:
  - a. Holland had been providing investment advice for fifteen years and that Holland's clients trusted and relied on him.
  - b. Variable annuity prospectuses were extremely hard to read and the fees added up over time.
  - c. Holland made higher commissions selling variable annuities than he made selling mutual funds.
  - d. Variable annuities were suitable for most of Holland's clients and a majority of Holland's clients were invested in variable annuities.

- e. Holland stated that MR7 was an unsophisticated investor that did not want to lose principal. Holland stated that MR7 did not read the annuity prospectus.
  - f. Holland put over 75% of MR7's net worth into an annuity.
  - g. Holland did not consider the client's need for liquidity a big issue. Holland stated that if MR7 needed more than the 12% penalty free withdrawal, MR7 could take out a mortgage or credit line on MR7's house.
  - h. Holland explained annuitization to MR7 by telling MR7 that MR7 could take an income stream from MR7's investment for life.
  - i. Holland stated that, "Holding the check [for approximately \$93,000 from MR7] was a bad decision . . . Holding the check was a simple, stupid oversight."
  - j. A certificate of deposit was a safe investment but Holland did not sell them because he could not "get [a certificate of deposit] in a variable annuity."
  - k. Holland's typical clients were already in an IRA and not seeking tax-deferral, therefore Holland did not consider tax-deferral a benefit when choosing to sell a variable annuity.
  - l. Holland had not had any customers annuitize a policy.
  - m. GMIIB riders were expensive and were "probably not" used by clients.
  - n. "And what I'm telling you guys is that practically speaking, these people don't conceptually want to take the time to understand. All they do is they look at me and they trust me, and they're relying on me. And so his daughter comes in and says, oh geeze, you can't trust [Holland]. . . he's been sitting on your check, you know. He's hiding things. . . Then all of a sudden they don't understand nothing. But, you know, the reality is that if you go to every client, especially unsophisticated investors, if you go to them and you try to help get them. . . really, if you sat down with everybody, you know, that's in my business and you did a section, a cross section of maybe their typical employ. . . especially a Hallmarker. If you get a typical Hallmarker, you're talking about people that are blue collar that have \$500,000 and never read the Wall Street Journal in their life. . . And so for them to conceptually to be able to understand these things, you guys, the reality is they don't."
37. On May 12, 2005, Berthel sent a letter to the Division that stated, among other things, that checks should not be held by a Berthel representative for more than twenty-four hours.
38. In March 2006, Holland spoke to an investigator with the Division and stated that at Berthel's annual conference, variable annuity wholesalers presented their products and "sold their stuff" and that these wholesalers "talked about the good, not the bad aspects of their products." Holland stated that he did not remember that Berthel provided any training about how to compare different variable annuities or how to compare variable annuities with mutual funds. Holland stated:
- a. that Berthel did not provide information or training about "who to sell or not to sell variable annuities to;"
  - b. that Berthel did not provide information or training about a customer's need for liquidity in the sale of variable annuities; and
  - c. that Holland met with variable annuity wholesalers in Holland's office.
39. An investigation by the Securities Division revealed that:
- a. Berthel approved Holland's sales of variable annuities sometimes as long as eight months after the sale took place.
  - b. Holland generated commissions from the sale of variable annuities in excess of \$90,000 in 2002. In 2004, Holland generated over \$150,000 in commissions from the sale of variable annuities to eight Missouri customers.

#### **DIVISION OF INSURANCE ACTION**

40. On March 6, 2006, the Missouri Department of Insurance filed a complaint with the Administrative Hearing Commission, alleging that Holland violated the insurance laws by, among other things:
- a. Failing to remit an insurance premium resulting in the failure to obtain or continue insurance coverage; and
  - b. Using fraudulent, coercive or dishonest practices, or demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state.

#### **SELLING SECURITIES IN SJS**

41. In or about 2001, Holland formed Solomon James Sports, Inc. ("SJS"). This company was formed, according to Holland,

“to handle the representation of professional sports athletes.”

42. During annual reviews of Holland’s office, a Berthel examiner noted that Holland was operating SJS.
43. Holland told the Division that he always contacted Berthel’s home office and relayed information to them when Holland was about to do something he “had not done before.”
44. In March 2001, Holland contacted MR2 about investing in SJS. Holland provided information to MR2 about SJS. This information included, among other things, the following:
  - a. A twelve-page executive summary (the “Executive Summary”) that contained information about the company, its history, the management, advisory board, consultants, objectives growth, financial information, and investment valuation.
  - b. Four pages of promotional material about SJS that included, among other things, the following:
    - i. An SJS Mission Statement;
    - ii. Testimonials from Berthel customers and others relating to Holland’s character and integrity;
    - iii. A financial services document that stated among other things, the following:
      - A. That financial services were to be provided by Berthel;
      - B. All accounts were insured by the Securities Insurance Protection Corporation (“SIPC”); and
      - C. That the SIPC policies provided insurance against fraud for up to one hundred million dollars.
    - iv. The investment valuation in the Executive Summary stated, among other things, that:
      - A. Solomon James Inc. expects to be operating at a profit within 24 months of the offering date, January 24, 2004.
      - B. Solomon James Inc. expects to double its earnings each year starting at year three. Earnings expectations are \$60,000 year three, \$120,000 year four, and \$240,000 year five.
45. In the summer of 2001, MR2 invested \$30,000 in SJS through Holland. Holland set up an IRA for MR2 at a bank to act as custodian for the MR2’s investment in SJS. The statements from the bank list Holland as the registered representative and Berthel as the broker-dealer on the IRA. In September 2001, MR2 invested another \$10,000 in SJS with Holland.
46. On March 20, 2006, Holland went to MR2’s house. MR2 told Holland that MR2 wanted MR2’s money out of the IRA. Holland told MR2 that the money had been spent.
47. During this March 2006 meeting, Holland stated that he was forming a new company and that all the shareholders of SJS would be shareholders of this new entity. Holland stated that MR2 would have to pay a 1% fee per year to be a shareholder in the new entity. Holland stated that they would not be profitable for ten years. Holland told MR2 not to tell anyone about this.
48. In or about 2001, Holland contacted MR5 to invest in SJS. MR5 was provided documents similar to the documents received by MR2. MR5 invested \$40,000 with Holland in SJS. Holland opened a custodial IRA account at a bank for MR5’s investment in SJS. The statements from the bank list Holland as the registered representative and Berthel as the broker-dealer on the IRA.
49. On March 21, 2006, Holland contacted MR5 regarding SJS. Holland stated that he was starting up a new investment company and that it was being held up by the state of Missouri because he wanted to be licensed in Missouri and Kansas. The shares in SJS would be transferred and the investors in SJS would be investors in the new investment company. MR5 stated that she did not want to put money in the new company but wanted MR5’s money returned to MR5. Holland told MR5 not to tell anyone about this new company.
50. In March 2006, Holland spoke to an investigator with the Division and stated that he had sold investments in SJS to approximately nine investors. All of the investors in SJS were customers of Berthel. Holland stated that he was not sure if he had given investors a written disclosure document but stated that he might have made disclosures orally.
51. Holland stated that he had discussed SJS with the officers of Berthel and that he listed this company on Holland’s outside business activities. Holland thought that he discussed selling securities in SJS with Berthel officers as well.
52. An investigation by the Securities Division revealed that the SIPC website states that SIPC does not insure against fraud.
53. A review of the records with the Division revealed that the securities in SJS were not registered to be sold in the State of Missouri.

54. Holland did not inform investors that the securities in SJS were not registered with the Missouri Securities Division.
55. Holland provided testimonials that purported to be quotes from individuals relating to Holland's character and integrity; however, these same testimonial statements were attributed to different people in another testimonial document Holland used.
56. Holland omitted to disclose the following material information to investors in SJS:
  - a. The risks factors associated with an investment in SJS;
  - b. The method or manner which SJS would employ to "double profits starting in year three";
  - c. That the securities were not registered with the Missouri Division of Securities; and
  - d. That the testimonials that purported to be quotes from individuals relating to Holland's character and integrity were attributed to different people in another testimonial document.
57. A review of Holland's CRD record reveals that Holland disclosed on the CRD that he was employed as the CEO of SJS during the time he was registered with Berthel.

## **II. CONCLUSIONS OF LAW**

58. §409.6-604(a), RSMo., provides:

"If the commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice or course of business constituting a violation of this act or a rule adopted or order issued under this act or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act, the commissioner may:

1. Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary and appropriate to comply with this act . . . ."

59. §409.4-412(b), RSMo., states: "If the commissioner finds that the order is in the public interest and subsection (d) authorizes the action an order issued under this act may revoke, suspend, condition, or limit the registration of a registrant . . . ."

60. Variable annuities are securities under federal law. SEC v. Variable Annuity Life Insurance Company of America, 359 U.S. 65 (1959).

61. §409.5-501, RSMo., reads as follows:

"It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

1. To employ a device, scheme, or artifice to defraud;
2. To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or
3. To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person."

62. §409.4-412(d)(13), RSMo., states: "A person may be disciplined under subsections (a) to (c) if the person:

13. Has engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance, or insurance business within the previous ten years . . . ."

63. Pursuant to MO 15 CSR 30-51.170(BB), "Grounds for the discipline or disqualification of broker-dealers or agents shall include, in addition to other grounds specified in section 409.4-412(d) of the Missouri Securities Act of 2003 (the Act), the following dishonest or unethical practices in the securities business: . . . (BB) Failing to comply with any applicable provision of the Conduct Rules of the National Association of Securities Dealers, or any applicable fair practice or ethical standard promulgated by the Securities and Exchange Commission or by a self-regulatory organization approved by the Securities and Exchange Commission . . . ."

64. §2110 of the NASD Conduct Rules (formerly Article III, Section 1 of the NASD Rules of Fair Practice) states, "A member in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."

65. §2310 of the NASD Conduct Rules (formerly Article III, Section 2 of the NASD Rules of Fair Practice) states:

"(a) In 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 upon 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.

(b) Prior to the execution of a transaction recommended to a non-institutional customer, other than transactions with customers where investments are limited to money market mutual funds, a member shall make reasonable efforts to obtain information concerning:

1. the customer's financial status;
  2. the customer's tax status;
  3. the customer's investment objectives; and
  4. such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer . . . .”
66. §409.4-412(k), RSMo., provides: “If a proceeding is instituted to revoke . . . registration of any agent . . . or investment adviser representative pursuant to subsection (b), the commissioner shall refer the matter to the administrative hearing commission.”
67. §409.6-604(d), RSMo., provides: “In a final order . . . the commissioner may impose a civil penalty up to one thousand dollars for a single violation or up to ten thousand dollars for more than one violation.”
68. §409.6-604(e), RSMo., provides: “In a final order, the commissioner may charge the actual cost of an investigation or proceeding for a violation of this act or a rule adopted or order issued under this act. These funds may be paid into the investor education and protection fund.”
69. The Missouri Commissioner of Securities is empowered to issue such orders as he may deem just. §409.6-604(a), RSMo.

#### COUNT 1

##### ENGAGING IN AN ACT, PRACTICE, OR COURSE OF BUSINESS THAT OPERATES OR WOULD OPERATE AS A FRAUD OR DECEIT UPON ANOTHER PERSON IN VIOLATION OF SECTION 409.5-501(3), RSMo.

70. The facts contained in paragraphs 1 through 69 are incorporated by reference as though fully set forth here.
71. To establish a violation of Section 409.5-501(3), RSMo., the Division must show a fraudulent or deceitful operation conducted in connection with the offer, sale or purchase of a security.
72. The Division failed to demonstrate in its Petition the required elements of Section 409.5-501(3) to satisfy this count.

#### COUNT 2

##### Making an Untrue Statement of Material Fact or Omitting to State a Material Fact in Connection with the Offer, Sale or Purchase of a Security in Violation of SECTION 409.5-501(2), RSMo.

73. The facts contained in paragraphs 1 through 69 are incorporated by reference as though fully set forth here.
74. Respondent Holland, in connection with the offer, sale or purchase of securities in SJS, directly or indirectly, made untrue statements of material fact to MR2 and MR5 when he stated that their SJS accounts were insured by SIPC against fraud when, in fact, SIPC does not insure against fraud.
75. Holland, in connection with the offer, sale or purchase of securities in SJS, omitted to state material facts to MR2 and MR5 necessary in order to make other statements made to MR2 and MR5, in the light of the circumstances under which they were made, not misleading, including:
- a. The risks factors associated with an investment in SJS;
  - b. That the securities were not registered under the Missouri Securities Act of 2003; and
  - c. That the testimonials that purported to be quotes from individuals relating to Holland's character and integrity were attributed to different people in a subsequent testimonial document Holland used.
76. Because Respondent made untrue statements of material fact, and omitted to state material facts necessary to make other statements not misleading, Respondent is subject to a cease and desist order pursuant to §409.6-604(a), RSMo, Supp. 2005.
77. Because Respondent made untrue statements of material fact and omitted to state material facts Respondent's registration is subject to revocation pursuant to §409.4-412(d)(2), RSMo, Supp. 2005.

#### Count 3

Grounds to Revoke, Suspend, Condition, or Limit the Registration OF A REGISTRANT Pursuant to SECTION 409.4-412(d) (13), Dishonest or Unethical Practices in the Securities, Commodities, Investment, Franchise, Banking, Finance, or Insurance Business-Violation of NASD Conduct Rules

78. The facts contained in paragraphs 1 through 69 are incorporated by reference as though fully set forth here.
79. To establish grounds for a revocation, suspension, condition upon or limitation upon the registration of Respondent pursuant to Section 409.4-412(d)(13), RSMo., the Division must demonstrate that Respondent engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance or insurance business.
80. In its Petition, the Division relied upon violations of NASD Conduct Rules in asserting that Respondent engaged in dishonest or unethical practices.
81. Though MO 15 CSR 30-51.170(BB), cited in the Division's Petition, allows that failure to comply with the NASD Conduct Rules is adequate grounds for discipline in addition to and separate from the other grounds specified in Section 409.4-412(d), RSMo., the Division did not attempt to seek discipline or other action against Respondent on the basis of the state regulation, but instead used the state regulation as a proposed standard for gauging whether dishonest or unethical practice took place.
82. The NASD Conduct Rules, and the interpretative memoranda which accompany them, are useful guides in determining whether a registered broker-dealer agent engaged in dishonest or unethical conduct.
83. The NASD Conduct Rules require a registered broker-dealer agent to "observe high standards of commercial honor and just and equitable principles of trade." NASD Conduct Rules § 2110. The NASD Conduct Rules also require an agent to obtain information about his customer's financial status, tax status and investment objectives before making a recommendation, and to have reasonable grounds to believe that any recommendation is suitable for his customer upon 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. NASD Conduct Rules § 2310.
84. Failure to comply with NASD Conduct Rules § 2110 or § 2310 is indicative of unethical or dishonest behavior.
85. Respondent engaged in unethical or dishonest conduct in the securities, investment and insurance businesses when:
  - a. he recommended that MR7 invest in two variable annuities, even though: (1) Holland knew that MR7 had limited investment experience and knowledge; (2) MR7 did not understand what annuitization meant and Holland did not adequately explain the concept; (3) Holland did not explain the investment structure or the fee structure of the annuity products; and (4) Holland believed that MR7 did not and had not read the prospectus for the annuity products.
  - b. he sold MR7 a GMIB rider when MR7 did not understand what a GMIB rider was and when Holland believed that GMIB riders were expensive and "probably not" used by his clients.
  - c. Holland, in violation of his supervising broker-dealer's policy, held MR7's check for over \$93,000, intended for investment, for approximately four months without investing or otherwise applying the money.
  - d. Respondent did not have reasonable grounds for believing that the investment recommendations he made to MR7 were suitable for MR7 based on MR7's securities holdings, financial situation, needs and other information used or reasonable to use in making recommendations.
86. Respondent's failure to follow NASD Conduct Rules §§ 2110 and 2310 demonstrates that Respondent engaged in a dishonest or unethical practice in the securities, commodities, investment, franchise, banking, finance, or insurance business within the previous ten years, and the commissioner may by order revoke Respondent's registration pursuant to §409.4-412(d)(13), RSMo.

**Count 4**

Grounds to Revoke, Suspend, Condition, or Limit the Registration Pursuant to SECTION 409.4-412(d)(13), Dishonest or Unethical Practices in the Securities, Commodities, Investment, Franchise, Banking, Finance, or Insurance Business-Violation of NASD Conduct Rules

87. The facts contained in paragraphs 1 through 69 are incorporated by reference as though fully set forth here.
88. To establish grounds for a revocation, suspension, condition upon or limitation upon the registration of Respondent pursuant to Section 409.4-412(d)(13), RSMo., the Division must demonstrate that Respondent engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance or insurance business.
89. In its Petition, the Division relied upon violations of NASD Conduct Rules in asserting that Respondent engaged in dishonest or unethical practices.
90. Though MO 15 CSR 30-51.170(BB), cited in the Division's Petition, allows that failure to comply with the NASD Conduct Rules is adequate grounds for discipline in addition to and separate from the other grounds specified in Section 409.4-412(d),

RSMo., the Division did not attempt to seek discipline or other action against Respondent on the basis of the state regulation, but instead used the state regulation as a proposed standard for gauging whether dishonest or unethical practice took place.

91. The NASD Conduct Rules, and the interpretative memoranda which accompany them, are useful guides in determining whether a registered broker-dealer agent engaged in dishonest or unethical conduct.
92. The NASD Conduct Rules require a registered broker-dealer agent to “observe high standards of commercial honor and just and equitable principles of trade.” NASD Conduct Rules § 2110. The NASD Conduct Rules also require an agent to obtain information about his customer’s financial status, tax status and investment objectives before making a recommendation, and to have reasonable grounds to believe that any recommendation is suitable for his customer upon 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. NASD Conduct Rules § 2310.
93. Failure to comply with NASD Conduct Rules § 2110 or § 2310 is indicative of unethical or dishonest behavior.
94. Respondent engaged in unethical or dishonest conduct in the securities, investment and insurance businesses when he recommended that MR3 invest in two variable annuities, even though:
  - a. MR3 had limited investment experience and knowledge;
  - b. MR3 did not understand the concepts of annuitization or riders, and Holland did not adequately explain the concepts;
  - c. MR3 did not understand the investment structure or payment structure of the annuity products;
  - d. Respondent did not have reasonable grounds for believing that the investment recommendations made to MR3 were suitable for MR3 based on MR3’s securities holdings, financial situation, needs and other information used or reasonable to use in making recommendations.
95. Respondent’s failure to follow NASD Conduct Rules §§ 2110 and 2310 demonstrates that Respondent engaged in a dishonest or unethical practice in the securities, commodities, investment, franchise, banking, finance, or insurance business within the previous ten years, and the commissioner may by order revoke Respondent’s registration pursuant to §409.4-412(d)(13), RSMo.

## **COUNT 5**

### Grounds to Revoke, Suspend, Condition, or Limit Registration Pursuant to SECTION 409.4-412(d)(13), Dishonest or Unethical Practices in the Securities, Investment, or Insurance Business-Unethical Practice in the Insurance Business

96. The facts contained in paragraphs 1 through 69 are incorporated by reference as though fully set forth here.
97. The Division failed to establish the necessary grounds in its Petition for a revocation, suspension, condition upon or limitation upon the registration of Respondent due to unethical practices in the insurance business pursuant to Section 409.4-412(d)(13), RSMo.

## **ORDER**

**NOW, THEREFORE**, it is hereby **ORDERED** that Respondent, his affiliates, agents, employees and servants, and all other persons or entities participating in or about to participate in the above-described violations with knowledge of this order are prohibited from:

- a. offering or selling securities, including stock in SJS or any other securities as defined in Section 409.1-102(28), RSMo., in the State of Missouri unless those securities are registered with the Securities Division in the Office of the Secretary of State in accordance with the provisions of Section 409.3-304, RSMo.;
- b. engaging in the acts, practices and courses of business described in paragraphs 74, 75, 85 and 94, above;
- c. violating or materially aiding in any violation of § 409.5-501, RSMo., in connection with the offer or sale of securities, as defined by § 409.9-102(28), RSMo., by engaging in an act, practice or course of business that operates or would operate as a fraud or deceit upon any person or making an untrue statement of a material fact or omitting to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading.

**IT IS FURTHER ORDERED** that, pursuant to § 409.6-604(d), RSMo., the Commissioner will determine whether to grant the Enforcement Division’s petition for an imposition of a civil penalty of up to one thousand dollars for a single violation or up to ten thousand dollars for more than one violation against Respondent, for violations of § 409.5-501, RSMo., in a final order, unless Respondent requests a hearing and shows cause why the penalty should not be imposed.

**IT IS FURTHER ORDERED** that as the Enforcement Section has petitioned for an award for costs of the investigation against Respondent in this proceeding, the Commissioner will issue a final order awarding an amount to be determined after review of evidence submitted by the Enforcement Section, unless Respondent requests a hearing and shows cause why an award should not

be made.

**IT IS FURTHER ORDERED** that this matter will be referred to the Attorney General's Office for the filing of a petition for revocation of Respondent's registration.

**IT IS FURTHER ORDERED** that leave is granted to the Securities Division to amend Count 1 of the Petition, though such amendment must be filed no later than 10 days from the date of this Order.

**SO ORDERED:**

WITNESS MY HAND AND OFFICIAL SEAL OF MY OFFICE AT JEFFERSON CITY, MISSOURI THIS 27<sup>TH</sup> DAY OF APRIL, 2006

[\[1\]](#) Joint SEC/NASD staff Report on Examination Findings Regarding Broker-Dealer Sales of Variable Insurance Products, Dated June 9, 2004, Office of Compliance Inspections and Examinations United States Securities and Exchange Commission.

ROBIN CARNAHAN  
SECRETARY OF STATE

(Signed/Sealed)  
MATTHEW KITZI  
COMMISSIONER OF SECURITIES