BEFORE THE SECURITIES COMMISSIONER
OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
	)	
FLETCHER KING, and	)	**Case No. 01-6-1**
MORGAN STANLEY DW,	)	
	)	
Respondents.	)	

ORDER

This is the Hearing Officer's ruling on the Securities Division's motion for leave to supplement the record. The motion is denied.

To support such a motion, Rule 250 of the Rules and Regulations Pursuant to the Delaware Securities Act requires "reasonable grounds" for failure to adduce evidence in the hearing. The Securities Division ("Division") does not have reasonable grounds here for its failure to call an expert witness on the topic of the riskiness of the securities sold to the investor. A failure to anticipate how the Hearing Officer will react to the case presented by the Division does not constitute reasonable grounds for reopening the hearing.

The Division misreads the meaning of my statements in the Opinion and Order of September 15, 2006 ("Opinion"). That Opinion did not create a new evidentiary requirement for suitability cases presented by the Division. Rather, the Opinion relied on an old rule: to prevail, the Division must present a preponderance of the evidence. It is elementary that, when the respondent presents expert testimony on a central issue in the case, and the Division presents virtually no evidence whatsoever, the Division will not be found to have prevailed by a preponderance of the evidence. My statement that the Division *must* present such evidence is preceded by the phrase "to prevail in a case such

as this." The respondents in this case presented expert testimony that the securities were suitable for the investor. The Division cited no legal precedent on point stating that a 100% equity portfolio is unsuitable for an investor in Ms. circumstances. The issue of risk is a complicated one, with few bright-line standards, as I stated in the Opinion.

The Division cites penny stock cases for the proposition that the Hearing Officer is competent to assess the securities at issue. However, there is a large difference between thinly-traded, individual penny stocks and highly-rated mutual funds comprised of the securities of prominent large cap companies. To the best of my recollection, the Hearing Officer did not, in any of these penny stock cases, play the role of securities analyst/witness for the prosecution to rebut the testimony of respondents' experts. Rather, some obvious inferences as to the speculative nature of the securities were drawn.

Although the Division introduced some documents in this case pertaining to the securities sold to the investor, there was little information that would have guided a decision in the Division's favor. The bad results of the investments were insufficient evidence of a lack of suitability at the time the recommendation was made. The prospectuses stated in general terms that the mutual funds were invested in the stock market and the stock market is risky. Ms. did not testify she could not tolerate any risk or that the investment objective she communicated to Mr. King at all times was safety of principal.

Experienced litigators rarely allow testimony on a central issue to be put into the record by the opposing party without meeting it with equal testimony of the same sort. The point of my statement in the Opinion about using an expert witness was that if the

Division wants to advocate an arguably novel extension of the suitability doctrine, it must give the Hearing Officer some solid and persuasive evidence to rely upon. It did not do that here.

Richard W. Hubbard
Hearing Officer

Date: October 30, 2006