

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

RICHARD L. MACDUFF
Registered Representative,
(CRD No. 4306223)

Respondent.

Disciplinary Proceeding
No. 2005000920402

Hearing Officer Andrew H. Perkins

**ORDER ACCEPTING OFFER OF
SETTLEMENT**

Date: February 24, 2006

INTRODUCTION

Disciplinary Proceeding No. 2005000920402 was filed on December 30, 2005, by the Department of Enforcement of NASD ("Complainant"). Respondent Richard L. MacDuff submitted an Offer of Settlement ("Offer") to Complainant on January 25, 2006. Pursuant to Code of Procedure Rule 9270(e), the Complainant and the National Adjudicatory Council ("NAC") Review Subcommittee or the Office of Disciplinary Affairs ("ODA") have accepted the uncontested Offer. Accordingly, this Order now is issued pursuant to Code of Procedure Rule 9270(e)(3). The findings, conclusions and sanctions set forth in this Order are those stated in the Offer as accepted by the Complainant and approved by the NAC.

Under the terms of the Offer, Respondent has consented, without admitting or denying the allegations of the Complaint, and solely for the purposes of this proceeding and any other

proceeding brought by or on behalf of NASD, or to which NASD is a party, to the entry of findings and violations consistent with the allegations of the Complaint, and to the imposition of the sanctions set forth below, and fully understands that this Order will become part of Respondent's permanent disciplinary record and may be considered in any future actions brought by NASD.

BACKGROUND

Richard L. MacDuff ("Respondent") entered the securities industry as a General Securities Representative of RBC Dain Rauscher Inc. ("Dain Rauscher"), a member of NASD, on November 10, 2000. Respondent was registered with Dain Rauscher in such capacity until February 20, 2002. From February 22, 2002 to February 3, 2003, Respondent was registered in the same capacity with First Wall Street Corp. ("First Wall Street"), a member of NASD. From January 29, 2003 to December 31, 2003, Respondent was registered in the same capacity with First Montauk Securities Corp. ("First Montauk"), a member of NASD. Respondent is not currently registered with any member of NASD, and has no history of disciplinary action by NASD.

FINDINGS AND CONCLUSIONS

It has been determined that the Offer be accepted and that findings be made as follows:

1. In or about 1998, Respondent incorporated a corporation named Peak Olympic Financial, Inc. ("Peak Olympic"). During all times relevant to this matter, Respondent was the Treasurer and Secretary of Peak Olympic.
2. In 1998 and 1999, before Respondent became registered with any member of

NASD, he solicited a total of about \$630,000 from about 66 members of the public, with 43 different last names for an investment in Peak Olympic. Initially, Respondent gave the members of the public undated checks payable to them in the amount of their investments. In or around 1999, after Respondent learned that he had not acted properly in giving the undated checks to the members of the public, Respondent exchanged the undated checks with promissory notes from Peak Olympic to the members of the public.

3. In September 1998, Respondent opened a securities account in the name of Peak Olympic with Muriel Siebert & Co., Inc. ("Muriel Siebert"), a member of NASD. The securities account in the name of Peak Olympic was opened from in or about September 1998 to at least in or about until December 2001. During this entire time, Respondent was an authorized signator on the account and was authorized to place securities transactions in the account.

4. From November 10, 2000 to December 2001, while Respondent was registered with Dain Rauscher, he placed a total of about 93 securities transactions in the Peak Olympic account, which consisted of the only business activity of Peak Olympic. The funds used for such transactions were derived from the money that Respondent received from the members of the public. In effecting the securities transactions in the Peak Olympic Account, Respondent was engaging in private securities transactions, because he was effecting securities transactions outside the regular course of his employment with Dain Rauscher, while he failed to provide prior written notice to Dain Rauscher describing in detail his proposed transactions and his proposed role therein. At no time did Dain Rauscher provide Respondent written approval of his participation in the 93 securities transactions in the Peak Olympic Account or any of his activities related to Peak Olympic.

5. In November 2000, Respondent prepared and distributed to about 42 members of

the public who had given him funds to invest in options, sales literature in the form of a newsletter ("November 2000 Mailing") informing them about the status of his trading in the Peak Olympic account.

6. On December 26, 2000, Respondent prepared and distributed to about 42 members of the public who had given him funds to invest in options, sales literature in the form of a newsletter ("December 26, 2000 Mailing") informing them about the status of his trading in the Peak Olympic account.

7. On February 1, 2001, Respondent prepared and distributed to about 42 members of the public who had given him funds to invest in options, sales literature in the form of a newsletter ("February 1, 2001 Mailing") informing them about the status of his trading in the Peak Olympic account.

8. On May 26, 2001, Respondent prepared and distributed to about 42 members of the public who had given him funds to invest in options, sales literature in the form of a newsletter ("May 26, 2001 Mailing") informing them about the status of his trading in the Peak Olympic account.

9. In June 2001, Respondent prepared and distributed to about 42 members of the public, who had given him funds to invest in options, sales literature in the form of a newsletter ("June 2001 Mailing") informing them about the status of his trading in the Peak Olympic account.

10. On January 15, 2002, Respondent prepared and distributed to about 42 members of the public who had given him funds to invest in options, sales literature in the form of a newsletter ("January 15, 2002 Mailing") informing them about the status of his trading in the Peak Olympic account.

11. On August 18, 2002, Respondent prepared and distributed to at least two members of the public, who had given him funds to invest in options, sales literature in the form of a newsletter ("August 18, 2002 Mailing") informing them about the status of his trading in the Peak Olympic account.

12. On February 23, 2003, Respondent prepared and distributed to least two members of the public, who had given him funds to invest in options, sales literature in the form of a newsletter ("February 23, 2003 Mailing") informing them about the status of his trading in the Peak Olympic account.

13. Respondent distributed the November 2000, December 26, 2000, February 1, 2001, May 26, 2001, June 2001, January 15, 2002 Mailings without obtaining the knowledge and approval of a registered principal of Dain Rauscher, as required by NASD Conduct Rule 2210(b).

14. Respondent distributed the August 18, 2002 Mailing without obtaining the knowledge and approval of a registered principal of First Wall Street, as required by NASD Conduct Rule 2210(b).

15. Respondent distributed the February 23, 2003 Mailing without obtaining the knowledge and approval of a registered principal of First Montauk, as required by NASD Conduct Rule 2210(b).

16. The November 2000 Mailing and June 2001 Mailing contain discussions of mutual funds and therefore should have been filed with NASD Advertising Department, pursuant to NASD Conduct Rule 2210(c)(2). Respondent failed to so file these mailings.

17. The November 2000 Mailing, December 26, 2000 Mailing and February 1, 2001 Mailings contain statements that are promissory and fail to reflect the inherent uncertainty of investment returns, in violation of NASD Conduct Rule 2210(d)(1)(B), in that they contained the

following statements:

- a. "You can bank that the market will be higher then than it is now;"
- b. "As long as we are long-term investors we will come out ahead in the long run;"
- c. "Think long term and everything should work out okay;"
- d. "Over the next three months the market has its up trend that is expected and we regain what has been lost over the past three;"
- e. "The longer you stay in the higher the return will be;"
- f. "At some point in time, Microsoft will make it back to \$70;"
- g. "Someday there will be profits;" and,
- h. "We should be paying out over \$40,000 in 12 months and then \$100,000 in 12 more. This is a conservative estimate based on the returns since November."

18. The January 15, 2002 Mailing contained statements that were unwarranted and misleading, because the statements were not substantiated within the communications, in violation of NASD Conduct Rule 2210(d)(1)(B), in that it contained the following statements:

- a. "The two areas I specialize in are a managed Mutual Fund portfolio and a Covered Call portfolio. Both strategies are working extremely well and I am now at the point where existing clients are suggesting to their friends and relatives that they let me manage their wealth;"
- b. "The Mutual Funds I recommended to my clients during 2001 were up an average of 16.6% for the year;" and,
- c. "I am at the top of my class in terms of production and consistently in the top 50 nationwide for opening new accounts month after month."

19. The August 18, 2002 Mailing contained an unwarranted statement in violation of

NASD Conduct Rule 2210(d)(1)(B), in that it contained the statement, "I am now helping many new clients generate returns on their invested amount with no fear of market downturns."

20. The August 18, 2002 Mailing was also misleading in violation of NASD Conduct Rule 2210(d)(1)(B), in that it contained the statement, "Because I am licensed my email is monitored by the SEC and the NASD along with my trades in my clients accounts," which implied that NASD and the SEC endorsed or guaranteed Respondent MacDuff's conduct.

21. The November 2000, December 26, 2000, February 1, 2001, May 26, 2001, and June 2001 Mailings were public communications on behalf of Dain Rauscher, yet they failed to name this member firm in the Mailings, which violated NASD Conduct Rule 2210(d)(2)(C).

22. The August 18, 2002 Mailing was a public communication on behalf of First Wall Street; yet it failed to name this member firm in the Mailings, which violated NASD Conduct Rule 2210(d)(2)(C).

23. The June 2001 Mailing discussed a specific mutual fund and therefore was subject to Rule 482, pursuant to the Securities Act of 1933, and it should have: advised investors to consider the investment objectives, risks, and charges and expenses of the investment company carefully before investing; explained that the prospectus contains this and other information about the investment company; identified a source from which an investor may obtain a prospectus; and, stated that the prospectus should be read carefully before investing, in violation of NASD Conduct Rule 2210(e).

24. The November 2000 Mailing discussed specific options contracts and performance, and the February 1, 2001, May 26, 2001, June 2001 and January 15, 2002 Mailings discussed the performance of options strategies, so they all qualified as sales literature as defined in NASD Conduct Rule 2220(a)(3). Therefore these Mailings were required to be approved by a

Compliance Registered Options Principal of Dain Rauscher, but were not so approved, in violation of NASD Conduct Rule 2220(b).

25. The November 2000 Mailing contained an exaggerated and promissory statement, in that in discussing naked put options it stated, "the returns when they work are phenomenal," in violation of NASD Conduct Rule 2220(d)(1)(B).

26. The November 2000, February 1, 2001, May 26, 2001, June 2001 and January 15, 2002 Mailings discussed option strategies but did not reflect the special risks associated with purchasing and selling options and did not warn that options are not suitable for all investors, in violation of NASD Conduct Rule 2220(d)(2)(A).

27. The November 2000, February 1, 2001, May 26, 2001, June 2001 and January 15, 2002 Mailings discussed options contracts and performance but failed to state that supporting documentation for the claims and statistics would be supplied upon request, in violation of NASD Conduct Rule 2220(d)(2)(D)(i).

28. The November 2000, May 26, 2001 and June 2001 Mailings contained statements, which projected the performance of options contracts but failed to disclose the amount of commissions and failed to discuss the risks of the loss of market value of the stock, in violation of Rule 2220(d)(2)(D)(ii). The:

- a. November 2000 Mailing projected that Virta Corporation January calls would rise to 22.5;
- b. May 26, 2001 Mailing projected a return from options writing of 13% per month for each of 22 months while omitting required disclosures and suggesting a certainty of future performance, when it stated, "22 months from now I will have paid back \$102,400 since April 1st this year and we will have almost \$500,000 in

the accounts. If we have a really good month, the return will be more like 20-25% in a month instead of 12-13%," and,

- c. June 2001 Mailing projected a return of 10% per month for each of 17 months.

29. The November 2000, February 1, 2001, June 2001 and January 15, 2002 Mailings contained statements which portrayed the performance of past recommendations without providing required information and statements, such as the commissions, market conditions, trade dates and prices, and failed to contain an initialed fairness determination by Dain Rauschers' Registered Options Principal, in violation of NASD Conduct Rule 2220(d)(2)(D)(iii).

The statements that portrayed the performance of past recommendations were the:

- a. Performance of the Virta Corporation call and a trading involving a Broadvision call contained in the November 2000 Mailing;
- b. Claim that Respondent MacDuff achieved "a return of over 11% since November" contained in the February 1, 2001 Mailing, without providing any details;
- c. Claim that Respondent MacDuff "was able to generate slightly over \$4,000 with covered calls on our positions," contained in the June 2001 Mailing, without providing any details; and,
- d. Claim that, "the covered call strategy generated an 18% return of the amount invested since May 1st," contained in the January 15, 2002 Mailing without providing any details.

Based on the foregoing, Respondent is found to have violated NASD Conduct Rules 2110, 2210, 2220 and 3040, as alleged in the First and Third Causes for Complaint. The charges contained in the Second Cause for Complaint are dismissed.

Based on these considerations, the sanctions hereby imposed by the acceptance of the Offer are in the public interest, are sufficiently remedial to deter Respondent from any future misconduct, and represent a proper discharge by NASD, of its regulatory responsibility under the Securities Exchange Act of 1934.

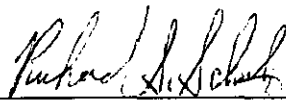
SANCTIONS

It is ordered that Respondent be barred from association with any member of NASD in any capacity.

The sanctions imposed herein shall be effective on a date set by NASD staff. Pursuant to IM-8310-2(f), a bar or expulsion shall become effective upon approval or acceptance of this Order by the NAC.

SO ORDERED.

NASD

By: 

Richard S. Schultz
Regional Counsel
on behalf of the Director of ODA, pursuant to
delegated authority