

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 55209 / January 31, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12555

In the Matter of

Marshall Dornfeld,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS PURSUANT TO
SECTION 15(b) OF THE SECURITIES
EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) against Marshall Dornfeld (“Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings, Making Findings, and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds¹ that:

¹ The findings herein are made pursuant to Respondent’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Respondent

1. Marshall Dornfeld, 43, resides in Quogue, New York. From 1994 to January 2003, Dornfeld was a Managing Director at CIBC World Markets Corp., serving as the Head of Financial Services. Among other responsibilities, Dornfeld supervised the Mutual Fund Services department and the Oppenheimer Life Agency at CIBC World Markets Corp. He holds Series 7 and 24 licenses.

Other Relevant Entity

2. CIBC World Markets Corp. (“CIBC”), is a New York based broker-dealer subsidiary of Canadian Imperial Bank of Commerce, a Canadian financial and bank holding company. CIBC, through its CIBC Oppenheimer retail division, serviced high-net-worth individuals, money managers, and other customers, including hedge funds. In January 2003, CIBC sold its Oppenheimer retail division to another broker-dealer. During the relevant time period, CIBC was registered with the Commission as both a broker-dealer and an investment adviser.

Summary

3. This matter involves Dornfeld’s failure reasonably to supervise registered representatives (“brokers”) of CIBC who engaged in an illegal market timing scheme on behalf of numerous CIBC customers.

4. Between 1999 and January 2003, the CIBC brokers defrauded hundreds of mutual funds and the funds’ shareholders by utilizing deceptive practices to circumvent the mutual funds’ restrictions on market timing. More specifically, mutual funds would reject market timing customers’ trades, and notify CIBC and the brokers that this trading violated prohibitions set forth in the funds’ prospectuses and harmed the funds’ performance. In response, the brokers employed a variety of deceptive acts and practices to enable their customers to continue timing the same funds. These practices included misrepresenting the nature of the trades to the funds, opening numerous additional accounts on behalf of their customers to conceal the customers’ identity from the funds, utilizing multiple registered representative identification numbers to hide their own identity, and entering trades in amounts that would avoid the funds’ market timing detection triggers. Through these activities, the brokers violated, among other provisions, Section 17(a) of the Securities Act of 1933 (“Securities Act”) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and aided and abetted violations of 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5.

5. Dornfeld failed reasonably to supervise the brokers with a view to preventing their violations of the federal securities laws. Dornfeld supervised the mutual fund marketing and annuity groups at CIBC, which were responsible for obtaining dealer-agreements with underwriters for mutual funds and annuity companies, respectively. Dornfeld thus had responsibility for supervising CIBC’s relationships with mutual funds and annuities. The dealer-agreements provided notice that CIBC’s brokers were to sell the mutual fund and annuity products in conformity with the terms of the products’ prospectuses and in conformity with the

federal securities laws. At the same time, Dornfeld was informed repeatedly of the CIBC's brokers' efforts to deceive mutual funds in order to facilitate market timing. Despite being alerted that both mutual funds and annuity companies objected to the brokers' deceptive market timing practices, and being told that the brokers' customers' trading violated the terms of the products' prospectuses, Dornfeld failed reasonably to respond with a view to preventing the brokers' deceptive market timing activity. Dornfeld, therefore, failed reasonably to supervise the brokers.

CIBC's Brokers Utilized Deceptive Trading Practices

6. A broker at CIBC, as well as a number of other brokers who worked in his group, had a large, successful market timing business in which they executed mutual fund orders on behalf of their customers, including market timing hedge funds. CIBC and the brokers' market timing group received over 1000 letters and emails from mutual funds regarding the brokers' customers' market timing trading activities. These letters and emails indicated that the brokers' customers' market timing trading violated prohibitions on trading set forth in the funds' prospectuses and harmed the funds' performance, and therefore the funds were rejecting the brokers' customers' trades. The brokers repeatedly ignored these letters and emails. Instead, the brokers worked with their customers to implement their market timing strategies up until the point when mutual funds threatened to terminate their relationship with CIBC. Even then, the brokers did not always stop, resulting in a number of mutual funds terminating their dealer-agreements with CIBC or refusing to accept any trades from the branch office to which the brokers were assigned.

7. Among the deceptive practices that the brokers utilized on behalf of their customers were the following: (1) creating new accounts for blocked customer accounts; (2) creating new registered representative identification numbers to disguise timers and their brokers from mutual funds; (3) trading in smaller amounts in order to avoid detection by mutual funds; (4) using annuities to market time; and (5) using other broker-dealer firms that had other trading platforms, such as Charles Schwab & Co., Inc. ("Schwab") and FMR Corp. ("Fidelity"), to continue market timing mutual funds that had blocked their customers' trading through CIBC.

8. As a result of the conduct described above, the brokers violated, among other provisions, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and aided and abetted violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5.

Dornfeld Failed Reasonably to Supervise the CIBC Brokers

9. As the Head of Financial Services at CIBC, Dornfeld supervised the mutual fund marketing and annuity groups at CIBC, which were responsible, respectively, for obtaining dealer agreements with mutual funds and annuity companies. The dealer-agreements generally required CIBC to sell the mutual fund and annuity products in conformity with the terms of the products' prospectuses and the securities laws.

10. During the course of his duties, Dornfeld became aware that the brokers were using deceptive market timing techniques. Dornfeld saw “kick out” letters from mutual funds and annuity companies indicating that the brokers’ trading practices violated the terms of mutual funds’ and annuity companies’ prospectuses. Dornfeld was also repeatedly alerted that both mutual funds and annuity companies objected to the brokers’ abusive market timing practices. Dornfeld also knew that the brokers were using Schwab and Fidelity accounts to continue market timing mutual funds that had blocked their customers’ trading through CIBC. For example, after learning that one mutual fund had detected the brokers’ market timing trades through Schwab accounts, Dornfeld emailed the Head of Private Client Services, telling him that the fund’s discovery “proves that the Schwab account isn’t as concealing as we think.” Despite this, Dornfeld did nothing to stop the brokers’ market timing activities until a mutual fund or annuity company threatened to (or in fact did) terminate its relationship with CIBC. Only then would Dornfeld exercise his power to stop the brokers’ abusive market timing of that mutual fund.

11. For example, after a mutual fund objected to the brokers’ timing on behalf of a customer through CIBC, the brokers directed the customer’s market timing through Schwab. The same mutual fund, however, then detected market timing through Schwab and determined that the trading was done by the CIBC brokers and their customer. The mutual fund then emailed CIBC about its discovery and threatened to terminate its marketing relationship with CIBC if the brokers’ “timing activity with [that particular fund] is allowed to continue.” Dornfeld received this email. Only upon reading the mutual fund’s threat to terminate its marketing relationship with CIBC did Dornfeld direct the brokers to stop timing that particular fund.

12. Dornfeld was also aware that, at the brokers’ request, CIBC established numerous selling agreements with underwriters for mutual fund families that previously had no relationship with CIBC. The mutual fund marketing area that Dornfeld supervised was responsible for obtaining these agreements. Dornfeld understood that the brokers wanted these agreements so that his team’s customers could then time these funds. Despite this understanding, in some of the selling agreements, CIBC made representations that its brokers did not provide market timing services to its customers. Dornfeld approved those agreements.

13. For example, in the agreement allowing CIBC to sell one particular fund, when asked “does your firm employ market timing services or utilize a market timing strategy,” CIBC responded “No.” That response was false. Despite this, Dornfeld approved CIBC’ dealer-agreement with that particular mutual fund underwriter.

14. The brokers also market timed mutual funds through variable annuities. Hedge funds and other customers purchased variable annuities to market time the underlying mutual fund portfolios. Assets invested through variable annuities are used to purchase securities, including mutual funds. In general, the annuity contracts allow the contract owner to place securities orders with the variable insurance company. These orders are then aggregated and transmitted to the mutual fund complex on a net basis. Because issuers of variable annuities aggregate trades in their contracted fund complexes and transmit the trades on a net basis, trading through variable annuity contracts can hide the identity of timers, facilitating their timing activity.

15. Dornfeld's subordinate from the Oppenheimer Life Agency told him that the brokers' deceptive timing through annuities was straining relationships with the annuity companies. Indeed, Dornfeld's subordinate requested that, in light of the annuity companies' complaints, Dornfeld stop the brokers from timing through annuities. Dornfeld, however, refused her request. Rather, he approved the brokers market timing of annuities, provided the brokers did not time through annuities issued by the top seven annuity companies with which CIBC did business -- so as not to harm CIBC's relationships with those firms.

16. If Dornfeld had responded reasonably to the red flags reflecting the CIBC brokers' conduct, he could have detected and prevented the brokers' securities law violations. As a result of the conduct described above, Dornfeld failed reasonably to supervise the brokers with a view to preventing their violations of the federal securities laws.

Failure to Supervise

17. Section 15(b)(4)(E) of the Exchange Act provides for the imposition of a sanction against a broker or dealer who "has failed reasonably to supervise, with a view to preventing violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision." Section 15(b)(6)(A)(i) incorporates by reference Section 15(b)(4)(E) and provides for the imposition of sanctions against persons associated with a broker or dealer.

18. As a result of the conduct described above, Dornfeld failed reasonably to supervise the brokers with a view to preventing their violations of the federal securities laws.

19. Although Dornfeld was not a line supervisor for the brokers, the Commission has recognized that a non-line supervisor can be charged with failure to supervise when the non-line supervisor had the power to control the conduct at issue, was aware of red flags of the RR's conduct, and unreasonably failed to take action. In the Matter of John H. Gutfreund, 51 S.E.C. 93, 1992 WL 362753.

20. Here, Dornfeld oversaw mutual fund marketing and annuities. His subordinates frequently told Dornfeld that the brokers were deceptively market timing mutual funds, in violation of the mutual funds' and variable annuity companies' prospectuses, thus causing CIBC to breach its dealer-agreement with the underwriters for these companies. Moreover, these deceptive tactics violated the federal securities laws. Dornfeld, however, did not take reasonable steps to stop this conduct. Because of his power and responsibilities, Dornfeld "was uniquely positioned to exercise effective supervisory control in the specialized area of mutual fund sales," yet failed to do so when presented with red flags of potential violations. In the Matter of Robert J. Check, 49 S.E.C. 1004, 1988 WL 902613 at *4 (holding that Check, the manager of the mutual funds for Advest, Inc. failed to exercise reasonable supervision over salesmen with a view to preventing their failure to grant customer mutual fund breakpoints, despite the fact that Check, who was aware of red flags, was a non-line supervisor and that others were also responsible for ensuring that salesmen complied with applicable breakpoint requirements). Consequently, Dornfeld failed reasonably to supervise the brokers under Section 15(b)(6) of the Exchange Act, which incorporates by reference Section 15(b)(4)(E).

Undertakings

21. Ongoing Cooperation by Dornfeld. Dornfeld undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in this Order. In connection with such cooperation, Dornfeld has undertaken:

A. To produce, without service of a notice or subpoena, any and all documents and other information reasonably requested by the Commission's staff;

B. To be interviewed by the Commission's staff at such times as the staff reasonably may request and to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be requested by the Commission's staff; and

C. That in connection with any testimony of Dornfeld to be conducted at deposition, hearing or trial pursuant to a notice or subpoena, Dornfeld:

- i. Agrees that any such notice or subpoena for his appearance and testimony may be served by regular mail on his counsel, Theodore Snyder, Krebsbach & Snyder, One Exchange Plaza, 55 Broadway, Ste. 1600, New York, NY 10006; and
- ii. Agrees that any such notice or subpoena for his appearance and testimony in an action pending in a United States District Court may be served, and may require testimony, beyond the territorial limits imposed by the Federal Rules of Civil Procedure or the Commission's Rules of Practice.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Dornfeld's Offer.

Accordingly, pursuant to Section 15(b) of the Exchange Act, it is hereby ORDERED that:

A. Respondent be, and hereby is, suspended from association in a supervisory capacity with any broker or dealer for a period of 12 months, effective on the second Monday following the entry of this Order.

B. IT IS FURTHERED ORDERED that Respondent shall, within 30 days of the entry of this Order, pay disgorgement of \$1, and a civil money penalty in the amount of \$100,000 to the Securities and Exchange Commission. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial

Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Dornfeld as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Helene Glotzer, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Northeast Regional Office, 3 World Financial Center, New York, NY 10281.

C. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that he shall not, after offset or reduction in any Related Investor Action based on Respondent's payment of disgorgement in this action, argue that he is entitled to, nor shall he further benefit by offset or reduction of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Nancy M. Morris
Secretary