SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 8333 / November 7, 2003

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 48758 / November 7, 2003

Admin. Proc. File No. 3-9954

In the Matter of

RICHMARK CAPITAL CORPORATION
5525 North MacArthur Boulevard
Irving, Texas 75038

and

DOYLE MARK WHITE

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDINGS
CEASE-AND-DESIST PROCEEDINGS

Ground for Remedial Action

Failure to Disclose Material Facts

Registered broker-dealer and its vice president failed to disclose to investors to whom they recommended and sold a security that respondents were selling their own shares of that security at the same time. Respondents also failed to disclose that they had a financial incentive to sell the security because of the stock and options they received under an investment banking agreement with the issuer. Held, it is in the public interest to suspend for 90 days broker-dealer's registration and vice president from association with a broker or dealer, to impose civil money penalties of $275,000 on broker-dealer and $55,000 on vice president, to order joint and several disgorgement of the broker-dealer's gross commissions from the sale of the security, and to impose a cease-and-desist order.

APPEARANCES:

Frank C. Razzano and J. Tara Holubar, of Dickstein Shapiro Morin & Oshinsky LLP, for RichMark Capital Corporation and Doyle Mark White.

Jeffrey B. Norris, for the Division of Enforcement.

Appeal filed: June 18, 2002
Last brief received: August 7, 2002
Oral argument: September 17, 2003

I.

RichMark Capital Corporation ("RichMark" or "the firm"), a registered broker-dealer, and Doyle Mark White, who during the relevant period was RichMark's vice president, secretary, and treasurer, appeal from an administrative law judge's initial decision. The law judge found that, during the period July through September 17, 1998, Respondents violated Section 17(a)(1) of the Securities Act 1/ and Section 10(b) of the Securities Exchange Act 2/ and Rule 10b-5 3/ by failing to disclose that they were selling their own shares of PCC Group, Inc. ("PCCG") at the same time they were recommending that their customers buy the stock. The law judge further found that Respondents violated Sections 17(a)(2) 4/ and 17(a)(3) 5/ of the Securities Act by negligently failing to disclose in or with a PCCG corporate profile that RichMark distributed to its customers RichMark's investment banking agreement with PCCG and the firm's financial incentive thereunder to recommend PCCG stock. 6/

The law judge suspended for a period of 90 days RichMark's broker-dealer registration and White from association with any broker or dealer. In addition, he assessed civil money penalties of $275,000 against RichMark and $55,000 against White, held RichMark and White jointly and severally liable for the disgorgement of $25,617.86 plus prejudgment interest, and imposed a cease-and-desist order on Respondents. We base our findings on

1/ 15 U.S.C. § 77q(a)(1).

2/ 15 U.S.C. § 78j(b).

3/ 17 C.F.R. § 240.10b-5.

4/ 15 U.S.C. § 77q(a)(2).

5/ 15 U.S.C. § 77q(a)(3).

6/ Although the order instituting these proceedings made broader charges of deficient disclosure, the law judge based his findings of violation in this respect on Respondents' failure to make adequate disclosure in or with the PCCG corporate profile. The Division of Enforcement did not appeal that determination.

an independent review of the record except with respect to those findings not challenged on appeal. 7/

II.

In 1998, RichMark, with corporate headquarters in Texas, was a wholly-owned subsidiary of RMC Holdings, Inc. ("RMC"). White and Richard Monello, RichMark's president, each owned 50% of RMC. During the relevant period, RichMark's flagship branch office, located in La Jolla, California, accounted for about 50% of the firm's retail brokerage business. Monello was in charge of the La Jolla office, while White presided over the firm's headquarters in Texas. Monello was in frequent contact with White, and solicited his input on all major decisions. RichMark's trades were sent from the La Jolla office to Texas for White's review before being forwarded to First Southwest Company ("FSW"), RichMark's clearing firm, for execution.

On March 10, 1998, RichMark and PCCG, a wholesale distributor of microcomputer products, entered into a one-year agreement (the "IBA"), terminable by either party on 30 days' written notice, pursuant to which RichMark agreed to provide PCCG with investment banking services. The IBA provided that RichMark would, among other things, assist and advise PCCG in (a) general strategic planning and corporate finance, (b) making acquisitions, (c) positioning PCCG in the financial community, and (d) introducing and fostering PCCG's relations with broker-dealers. As compensation under the IBA, RichMark received a monthly retainer of $5,000 plus reimbursement of expenses, and 25,000 shares of unrestricted PCCG common stock. It also received options to purchase additional unrestricted stock as follows: (a) 25,000 shares at $2.50 and 75,000 shares at $2.75 upon execution of the agreement, (b) 50,000 shares at $5.00 when PCCG's common stock traded at $5.50 per share for 10 consecutive trading days in which daily trading volume exceeded 7,000 shares, and (c) options to purchase additional shares based on the achievement of certain goals. 8/

7/ Rule 451(d) of the Commission's Rules of Practice permits a member of the Commission who was not present at oral argument to participate in the decision of that proceeding if that member has reviewed the transcript of that argument prior to such participation. Here, the required review has been made.

8/ RichMark was given the option to buy 50,000 PCCG shares at $3.50 upon the funding of a secured line of credit or other financing facility, and the option to purchase 100,000 shares at $4.50 when PCCG stock was listed on the Philadelphia or another exchange. These goals were never (continued...)

At the time the IBA was signed, the closing bid for PCCG stock on the over-the-counter market was 2 7/8. Prior to that time, the stock had been very thinly traded. For the entire month of January 1998, the stock had traded on only two days and, in February, on only three days.

Pursuant to the IBA, RichMark assisted PCCG in retaining Coffin Communications Group as its investor relations firm. At RichMark's suggestion, Coffin prepared a PCCG corporate profile for use in marketing PCCG to the public. The profile, which contained a section entitled "Investment Considerations" listing positive PCCG highlights and the company's future plans, was intended to show "why PCC Group might represent a compelling investment." Monello reviewed the profile before it was finalized, and White also reviewed it at or near the same time. White then arranged for copies of the profile to be sent to the La Jolla office, and also for FSW to mail copies to all of RichMark's customers with their June statements, which FSW sent out in early July. The profile did not mention the IBA.

Immediately after the signing of the IBA, RichMark embarked on a major campaign to sell PCCG stock. Monello exerted strong pressure on RichMark supervisors and salespersons, conducting almost daily sales meetings at which he urged them to sell more PCCG shares. Salespersons were encouraged to "cold call" prospects, and to mail the PCCG corporate profile to customers and prospective customers. Monello predicted that the price of PCCG stock would rise into the teens, and offered salespersons extra compensation for selling it. As one salesman put it, all Monello wanted sold was PCCG. If a salesperson brought Monello a customer order for another stock, he would ask why the customer wasn't buying PCCG instead or, at least, buying PCCG in addition to the stock being purchased.

At the same time, Monello and White strongly discouraged and impeded customer sales of PCCG. Monello admitted that, on "a few" occasions, he may have told salesmen with PCCG sell orders that they had to find a buyer before the stock could be sold. One salesman testified that, when he faxed PCCG sell orders to White, "there [would] always be a struggle to sell the stock." White would call him and ask, "Do you have to sell the stock? Can you find a buyer for the stock?", and tell him that the market couldn't handle the sale. Other salesmen confirmed that Monello discouraged customer sales of PCCG. A La Jolla branch manager stated that, when he questioned White as to why customer sell orders hadn't been executed, White would reply that the market just wasn't liquid enough.

Between March 10, 1998, when the IBA was signed, and April 16, the price of PCCG rose from 2 7/8 to 7 due in no small

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8/ (...continued)
achieved.

measure to RichMark's successful sales efforts. On April 15, RichMark received the 25,000 shares of PCCG that were due under the IBA and, on or about August 13, exercised its option to purchase an additional 25,000 shares at $2.50. From July 9 to August 13, 1998, White and Monello sold 24,200 shares of PCCG at prices ranging from $5.50 to $6.25 for a total of $144,498. 9/ From September 14 to 17, they sold an additional 10,300 shares for a total of $40,412. Although White was telling salespersons that the market was too illiquid to permit customers to sell their stock, Monello testified that he could not recall any problem when it came to selling RichMark's shares. The law judge refused to credit Respondents' explanation that they needed to sell these shares to pay bills. We agree with that assessment.

III.

When a securities dealer recommends stock to a customer, it is not only obligated to avoid affirmative misstatements, but also must disclose material adverse facts of which it is aware. That includes disclosure of "adverse interests" such as "economic self interest" that could have influenced its recommendation. 10/ It is clear that Respondents had a strong economic motive to promote the sale of PCCG stock. By increasing the stock's market price, they enhanced the value of RichMark's shares. In order to maximize the value of those shares, they concealed the fact that they were selling their own shares of PCCG, and discouraged and impeded customer efforts to sell the stock.

By recommending the purchase of PCCG stock without disclosing their own concurrent sales, Respondents omitted material information, an omission that prevented customers from making an informed investment decision. Respondents had a clear obligation to disclose to investors that, in furtherance of their own self-interest, they were taking action contrary to their recommendation of PCCG. No such disclosure was made.

Respondents do not contend that they had no obligation to disclose their sales of PCCG. Instead, they insist that they made appropriate disclosure. They point to the back of the confirmations that FSW sent to RichMark customers which, among other things, stated as follows:

9/ The sales were effected through an RMC account opened at FSW.

10/ See Chasins v. Smith Barney & Co., Inc., 438 F.2d 1167, 1172 (2d Cir. 1970) ("The investor . . . must be permitted to evaluate overlapping motivations through appropriate disclosures, especially where one motivation is economic self-interest"). See also Gilbert A. Zwetsch, 50 S.E.C. 816, 818-819 (1991); Paulson Investment Company, Inc., 47 S.E.C. 886, 888 (1983).

> First Southwest Company, its representatives, officers or directors may from time to time have a long or short position and buy or sell securities of this company.

Respondents claim that this statement constituted adequate disclosure to investors of RichMark's sales of PCCG since RichMark was a representative of FSW. There is no basis for this claim. FSW's vice president of clearing services and its compliance director both testified unequivocally that RichMark was not a representative of FSW. Moreover, the Division of Enforcement's expert witness stated that the quoted language applied to FSW, not RichMark, and was FSW's means of protecting itself by advising customers that it might have an adverse interest in a transaction (which, as the clearing broker, it would not have recommended). The expert further stated that, in the securities industry, an introducing broker is not considered to be a representative of its clearing broker unless specifically designated as such in the clearing agreement. RichMark's clearing agreement with FSW contained no such designation. 11/

We cannot accept Respondents' further claim that any failure to disclose their conflict of interest was at most negligent. We agree with the law judge that Respondents were at least reckless. 12/ We note that Richard Lundgren, who was La Jolla branch manager until July 1998, testified that it was rumored in the office that RichMark was selling shares of PCCG, and he questioned White and Monello about it. Both of them denied any such sales.

We conclude that, by failing to disclose to customers to whom they were recommending the purchase of PCCG stock that RichMark was selling its own shares of that stock at the same time, Respondents violated Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5.

IV.

As noted above, the law judge also found that Respondents violated antifraud provisions by failing to disclose in or with

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11/ Even assuming that RichMark were a representative of FSW (which it was not), the disclosure on the back of customer confirmations was inadequate. While "generic" disclosure of this type might be appropriate in some circumstances, it was clearly inadequate in the case of a firm like RichMark that was conducting a sales campaign in a single security.

12/ The law judge twice stated that Respondents acted with "an intent to deceive and defraud," but also stated that they acted "recklessly." While we are inclined to agree with the initial formulation, we conclude that Respondents' conduct was at least reckless.

the PCCG profile, which they distributed to investors, RichMark's investment banking agreement with PCCG and Respondents' financial incentive thereunder to recommend PCCG stock. The law judge concluded that, in light of the efforts at disclosure that Respondents did make (as described below), their failure to make adequate disclosure in this regard was merely negligent.

A. Respondents argue that the IBA was not material. We do not agree. A fundamental purpose of the federal securities laws is to "substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities business." 13/ In order to achieve that standard, investors must be provided with all material facts relating to their investment decisions. A fact is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." 14/ As an economic interest adverse to that of investors, Respondents' strong financial motivation in promoting the sale of PCCG, a consequence of their compensation under the IBA, was certainly material to investors trying to make an investment decision. Disclosure of that motivation would have enabled investors to weigh the extent to which RichMark's recommendation might have been based on the personal economic benefit of its principals. 15/

Respondents further assert that we need not look to the hypothetical reasonable investor to determine materiality but should consider investor reaction in this case. They claim that, when investors were informed of RichMark's relationship with PCCG, they were indifferent and made no further inquiry, demonstrating that the information in question was not material.

We cannot agree. Initially, we note that the reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective. 16/ In any event, the record does not support Respondents' claim. The Division introduced the testimony of eight customers all of whom denied that they were informed about the relationship between RichMark

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13/ SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

14/ Basic Inc. v. Levinson, 485 U.S. 224, 231-232 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

15/ See U.S. v. Eisenberg, 773 F. Supp. 662, 723 (D.N.J. 1991).

16/ TSC Industries, Inc. v. Northway, Inc., supra, 426 U.S. at 445. SEC v. Hasho, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1982) (expectations of individual investors are not relevant).

and PCCG. One customer to whom Respondents point merely stated on cross-examination that her salesman "might have" mentioned the IBA but she did not believe he did. Moreover, the customer testified that she certainly would have wanted to know about the RichMark-PCCG relationship before she purchased PCCG in order to determine whether "someone else's interest [might] be more important than [hers]." A second customer, who Respondents claim was informed of the relationship, merely stated that he might have been told about a Wall Street Journal article that mentioned PCCG (not RichMark), but he could not be sure. He testified, moreover, that he would have considered information about the IBA "extremely important" because he would have wanted to know if his salesman was recommending PCCG because it was a good stock or for other reasons. 17/

In further support of their claim of customer indifference to the IBA, Respondents note that some PCCG confirmations carried the legend "RICHMARK CONSULTS FOR PCCG." They assert that the Division's expert agreed that this statement put customers on inquiry notice about the IBA, but that no investor was moved to inquire. In fact, the Division's expert testified that the legend did not really alert customers to the fact that there might be a "conflict of interest" with respect to RichMark's recommendation, and did not put the customer on notice that there was any reason to question his broker.

B. Respondents contend that the law judge erred by ignoring the facts that RichMark was compensated for performing valuable services under the IBA, not for distributing the corporate profile, and that PCCG was an excellent investment. They also argue that the profile was not a recommendation to purchase PCCG, noting the statement therein that it was "issued solely for information purposes and [was] not to be construed as an offer to sell or the solicitation of an offer to buy." Respondents further assert that the profile was not authored or produced by RichMark, and that it specifically stated that the "opinions expressed [therein were] those of PCC Group, Inc. management."

The quality of the services that RichMark performed under the IBA and the value of PCCG as an investment are not relevant to the issues in this case. Even assuming that RichMark's services were valuable and that PCCG was a good investment, Respondents were still obligated to disclose their financial incentive in recommending PCCG so that investors could make an

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17/ Respondents also note the testimony of a third customer, who testified on their behalf. This customer was a longtime acquaintance and client of White whom White contacted personally. When asked if he considered himself "an ordinary retail customer of RichMark," the customer replied that he really didn't know. The fourth "customer" noted by Respondents was White's lawyer.

informed judgment. The PCCG corporate profile was an integral part of Respondents' recommendation of that security. The profile was the centerpiece of Respondents' sales campaign, and was mailed to customers and prospective customers as an inducement to buy PCCG stock. 18/ Moreover, contrary to their assertion, Respondents were not excluded from the authorship and production of the profile. As noted above, the profile was prepared at RichMark's suggestion, and White and Monello both reviewed it before it was finalized. If Respondents mean to suggest that they could not have disclosed the IBA in the profile, that was not the case. A Coffin manager testified that he was instructed to accept input from RichMark's director of investment banking for inclusion in the profile. In fact, White and Monello discussed whether to include information about the IBA, but did not do so.

C. Respondents suggest that the only rules applicable to their conduct are Exchange Act Rule 10b-10 19/ and Section 17(b) of the Securities Act. 20/ Rule 10b-10, the Commission's confirmation rule, requires a broker-dealer, at or before the completion of a securities transaction, to provide written notification to its customer disclosing information specific to that transaction. Section 17(b) prohibits the distribution of any circular or other communication which, for compensation from an issuer, underwriter, or dealer, describes a security without full disclosure of that compensation.

The Preliminary Note to Rule 10b-10 states that "[t]he requirement under this section that particular information be disclosed is not determinative of a broker-dealer's obligation under the general antifraud provisions . . . to disclose additional information to a customer at the time of the customer's investment decision." Courts have also recognized that Rule 10b-10 is not a shield from liability under the general

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18/ In support of their claim that the profile was not a recommendation, Respondents cite certain Commission releases dealing with suitability requirements. However, those releases are inapposite and do not support Respondents' contention. Respondents' distribution of the PCCG corporate profile was not simply the general mailing of a research report that, viewed in isolation, might not in and of itself constitute a recommendation. Instead, the profile was part and parcel of Respondents' PCCG sales campaign.

19/ 17 C.F.R. § 240.10b-10.

20/ 15 U.S.C. § 77q(b).

antifraud provisions. 21/ Similarly, Section 17(b) does not shield Respondents from liability under those provisions for conduct that is not covered by its terms, including the conduct at issue here.

D. Respondents claim that in various ways they made appropriate disclosure of the IBA to customers, as follows.

1. Respondents assert that they instructed salespersons to make point-of-sale disclosure to investors about the investment banking relationship. However, the law judge did not credit the testimony of White and Monello that they gave such instructions, and the record fully supports that conclusion. Two La Jolla branch managers and three of the office's salesmen testified that they were never instructed to disclose the PCCG-RichMark relationship to customers. Respondents point to a fourth salesman, Andrew Yaros, who testified that he was so instructed. However, as Respondents themselves note, the instruction came from branch manager Lundgren who considered the relationship a selling point.

Monello asked Chad Weigand, who became La Jolla branch manager in July 1998, to create a "pitch sheet" for PCCG that salespersons could use in recommending the stock to clients and prospective clients. Weigand prepared such a sheet, which did not mention the IBA, and showed it to Monello. Monello made no changes in the sales pitch. Even more significantly, at some point in August or September, Monello "pulled" Weigand into his office and stated, "the SEC's [angry] at us . . . because [the profile] was sent out with the [customer] statements . . . . We probably ought to start telling clients that we have an investment banking relationship with [PCCG]."

Salespersons were generally aware that RichMark was PCCG's investment banker, but were not provided with any details of the relationship. While some of them stated that they mentioned the relationship to clients, its disclosure was hardly a uniform practice as evidenced by the customer testimony adduced by the Division. Moreover, customers had no inkling of Respondents' strong financial incentive to promote the sale of PCCG resulting from the stock and options they received under the IBA.

2. Respondents note that, in April 1998, Coffin issued a press release announcing the IBA (which gave no details of the agreement) and that, as a result, the IBA received one-sentence mentions in a Wall Street Journal article and a Dow Jones Online News report dealing with NASDAQ stocks and the small-cap

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21/ Ettinger v. Merrill Lynch Pierce, Fenner & Smith, Inc., 835 F.2d 1031, 1036 (3d Cir. 1987); Krome v. Merrill Lynch & Co., Inc., 637 F. Supp. 910, 916 (S.D.N.Y. 1986).

market. 22/ At the same time, RichMark sent a letter to PCCG shareholders announcing the IBA. 23/ We agree with the law judge that the press release and the brief mentions of the IBA in mid-April media reports were not part of the "total mix" of information reasonably available to RichMark's PCCG customers during the relevant July-September period. 24/ Nor was RichMark's letter to PCCG shareholders. The Division's customer witnesses never saw the press release, never read the news articles, and were never furnished with copies of the articles. In any event, none of these items provided adequate disclosure of Respondents' financial incentive to sell PCCG stock.

3. On June 24, 1998, PCCG filed a Form S-3 registration statement with this Commission covering the stock and options given to RichMark under the IBA. Both the IBA and RichMark's compensation thereunder were described in that document. Respondents cite the registration statement as further evidence that the IBA was disclosed to investors, noting that it was "a public document." However, neither RichMark's salespersons nor its customers were informed of the registration statement's existence, much less furnished with copies. Under the circumstances, including the fact that RichMark was recommending securities in which it had an economic interest adverse to its customers, the filing of this document with the Commission did not place it in the "total mix" of information reasonably available to PCCG investors. 25/ When a securities recommenda-

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22/ According to Respondents, the IBA was also mentioned in a televised CNBC story on PCCG. The record contains no details concerning this story.

23/ We do not credit the claim of White and Monello that the letter was also sent to all RichMark clients. The letter was addressed to "Dear Shareholder," and the invoice from RichMark to PCCG seeking reimbursement for RichMark's outlay describes the item in question as a "2000 piece mail-out to shareholders."

24/ See United Paperworkers International Union v. International Paper Company ("United Paperworkers"), 985 F.2d 1190, 1199 (2d Cir. 1993) ("[T]he mere presence in the media of sporadic news reports" does not make them part of the "total mix" of available information). See also Fisher v. The Plessey Company, Ltd., 559 F. Supp. 442, 446 (S.D.N.Y. 1983) ("Of paramount importance . . . is the direct availability to the investors of the information in question.").

25/ See United Paperworkers, supra (Merely filing a document with a regulatory agency does not place the document in the (continued...)

tion is made to a customer, it is necessary that full disclosure be made of all material facts. A broker may not satisfy that obligation by pointing to bits and pieces of information that appeared in the media or elsewhere and were never brought to the customer's attention. 26/

4. As additional evidence of their disclosure, Respondents point to the above-noted legend, "RICHMARK CONSULTS FOR PCCG," which, on advice of counsel, Respondents arranged to have FSW place on the confirmations of customers who purchased PCCG. 27/ However, as Respondents concede, due to "mistakes" the legend appeared on only about half of PCCG confirmations during the relevant period. In undertaking to place this "trailer" on confirmations, FSW notified RichMark that it was RichMark's responsibility to review confirmations "to make sure the trailer [was] printed on them." White admitted that, "early on in the game," he discovered that the trailer wasn't being placed on every PCCG confirmation. However, he did nothing to cancel and reissue deficient confirmations because he felt that "there was enough public disclosure out there."

We agree with the law judge that the trailer gave no meaningful information about the RichMark-PCCG relationship and disclosed nothing about RichMark's financial incentive to sell PCCG stock. One RichMark customer stated that she didn't recall seeing the trailer on her confirmations but, in any event, wouldn't have known what it meant. A second customer also stated that he hadn't noticed the trailer but that, if he had, he would not have understood what it had to do with his investment.

We conclude that the IBA and the terms of Respondents' compensation thereunder should have been disclosed in or with the corporate profile that was sent to RichMark customers. That information was clearly material. Without its disclosure, investors were prevented from weighing the extent to which RichMark's recommendation of PCCG was motivated by the firm's own

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25/ (...continued) "total mix" of information reasonably available to investors. "[T]he Company's 10-K Report [was not] part of the reasonably available mix. That report was filed with the SEC, not distributed to shareholders. Nothing in any of the documents sent to shareholders highlighted the 10-K Report.").

26/ See Koppel v. 4987 Corp., 167 F.3d 125, 131-132 (2d Cir. 1999); Klein v. PDG Remediation, Inc., 937 F. Supp. 323, 327-328 (S.D.N.Y. 1996); Fisher v. The Plessey Co., Ltd., supra, 559 F. Supp. at 445-448.

27/ When the legend appeared on a customer confirmation, it also appeared on the customer's monthly account statement.

financial interest rather than the investment value of the security. The disclosure made by Respondents was wholly inadequate. However, as noted above, the law judge concluded that Respondents' deficient disclosure in this regard was merely negligent and not reckless. 28/ We agree that Respondents were at least negligent. We accordingly conclude that they violated Sections 17(a)(2) and 17(a)(3) of the Securities Act.

28/ The Division of Enforcement did not appeal the law judge's conclusion.

V.

A. Respondents point to the fact that, in various consent orders, we have stated that, in applying the term "willful" in Commission administrative proceedings, we evaluate "whether the respondent knew or reasonably should have known under the particular facts and circumstances that his conduct was improper." 29/ They argue that, under that standard, their misconduct was not willful. We do not agree.

As we recently pointed out, we make an objective assessment of a respondent's culpability. 30/ We have found that Respondents acted at least recklessly in failing to disclose to customers to whom they were recommending the purchase of PCCG that they were selling their own shares of that stock at the same time. We have also found that Respondents' disclosure of the terms of the IBA in connection with their distribution of the PCCG corporate profile was wholly inadequate. Under the circumstances, we have no difficulty in concluding that, in both these respects, Respondents knew or should have known that their conduct was improper. Thus we think it clear that their violations were willful.

B. Respondents accuse the law judge of bias and prejudgment because he twice permitted the Division of Enforcement to amend its disgorgement calculation after Respondents had pointed out that it contained various errors. Respondents also complain that, in determining the amount of disgorgement, the law judge improperly extended the violative period beyond the time alleged in the order for proceedings ("OIP").

These contentions are baseless. The law judge quite properly concluded that it would be helpful to include an accurate calculation in the record in the event he determined to order disgorgement. Moreover, he ultimately made his own disgorgement calculation. The OIP charged Respondents with violative conduct "from approximately July 1998 through at least August 1998" (emphasis supplied). The law judge based his disgorgement calculation on the period July 1-September 17, 1998 (a period covered by the evidence in this case), finding that the latter date was "within the scope of the OIP." We agree that the disgorgement period used by the law judge does not exceed the parameters of the OIP, which describes an approximate period of violative conduct.

29/ See, e.g., Legg Mason Wood Walker, Incorporated, Exchange Act Rel. No. 44407 (June 11, 2001), 75 SEC Docket 537, 539 n.3.

30/ Feeley & Willcox Asset Management Corp., Securities Act Rel. No. 8249 (July 10, 2003), 80 SEC Docket 2075.

VI.

Respondents argue that the sanctions imposed by the law judge are unduly harsh. They assert, among other things, that RichMark did not operate a "boiler room" or engage in unauthorized trading or a manipulation, that White has never previously been involved in a disciplinary proceeding, that RichMark has taken steps to ensure that the same conduct does not recur, that they relied on advice of counsel, and that there was neither intentional nor reckless misconduct in this case.

In determining appropriate sanctions, we do not consider it mitigative that Respondents did not engage in misconduct that was arguably more serious. Our concern is with the misconduct at issue. Here, that misconduct was Respondents' egregious failure to disclose material information to investors. As the law judge stated, Respondents' "exploited the relationship of trust between RichMark and [its] customers." Contrary to Respondents' assertion, we have found that, in at least one aspect of their misconduct, they acted with a reckless disregard of their duty to disclose. Moreover, rather than rely on counsel, they ignored his advice. George Gordon, RichMark's counsel, testified that he advised White that, in addition to placing a legend on PCCG confirmations, RichMark should be careful to advise each PCCG customer that the firm had an investment banking agreement with PCCG. Respondents made no such effort.

We consider the sanctions imposed by the law judge fully warranted in the public interest. Respondents' claims that lesser sanctions have been imposed for similar misconduct are unavailing. We have consistently pointed out that appropriate sanctions depend on the particular facts and circumstances of each case. 31/ In this instance, those facts and circumstances clearly justify the remedial action taken by the law judge. Indeed, we consider very lenient the 90-day suspensions that he imposed. 32/

Respondents concede that second-tier penalties are warranted if, as is the case here, the misconduct at issue involves

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31/ See, e.g., John Montelbano, Exchange Act Release No. 47227 (January 22, 2003), 79 SEC Docket 1474, 1497, and the authorities there cited.

32/ We grant the Division's motion to adduce additional evidence which reflects that, in 2002, pursuant to an NASD settlement, RichMark was censured and fined $15,000 based on charges that its Bellevue, Washington branch office disseminated false and misleading information about the office's past performance and services through certain websites.

fraud. 33/ However, they complain that the law judge's imposition of "maximum" second-tier penalties is not justified. In light of Respondents' serious misconduct, we do not agree. Moreover, Respondents overlook the fact that the maximum penalties may be imposed "for each [violative] act or omission." Thus maximum penalties could have been assessed for each failure to make the requisite disclosure to a customer.

Respondents argue that no public interest is served by the issuance of a cease-and-desist order. They assert that the time elapsed since August 1999, when this proceeding was instituted, indicates that they pose no threat to the investing public. They further claim that there is no possibility that their misconduct will recur. We do not agree that the stated passage of time obviates the need for a cease-and-desist order, nor are we as sanguine as Respondents about the likelihood that their misconduct will not recur. Although some risk of future violations is necessary to justify the imposition of a cease-and-desist order, the risk need not be great and is ordinarily established when a respondent is found to have violated the law. 34/ That risk is clearly present here. Respondents remain active in the securities business, and RichMark has continued to seek and enter into investment banking relationships.

The law judge ordered Respondents to disgorge their gross commissions on sales of PCCG stock during the relevant period. Respondents contend that the commissions they paid salespersons should be deducted from that amount, since they would otherwise be penalized by being required to pay those amounts twice. We have refused to allow such deductions in the past, and we decline to do so here. As we have previously stated, permitting such deductions would confer an unwarranted benefit on respondents. 35/

33/ Section 21B of the Exchange Act, 15 U.S.C. § 78u-2.

34/ KPMG Peat Marwick LLP, Exchange Act Rel. No. 43862 (January 19, 2001), 74 SEC Docket 384, 429-430, aff'd, 289 F.3d 109 (D.C. Cir. 2002).

35/ L.C. Wegard & Co., Inc., 53 S.E.C. 607, 617 (1998), aff'd, 189 F.3d 461 (2d Cir. 1999) (Table). See also SEC v. Hughes Cap. Corp., 917 F. Supp. 1080, 1086, 1087 (D.N.J. 1996) (refusing to offset disgorgement by "certain 'legitimate' business expenses [and noting that] the overwhelming weight of authority holds that securities law violators may not offset their disgorgement liability with business expenses"), aff'd, 124 F.3d 449 (3d Cir. 1997); SEC v. Great Lakes Equities Co., 775 F. Supp. 211, 214-215 and n.22 (E.D. Mich. 1991) (declining to reduce disgorgement amount by

(continued...)

As Respondents point out, it appears from the record that the Division agreed that Respondents should not be charged prejudgment interest for the period (from approximately the end of April to the end of September 2000) during which the Division was granted an adjournment of the proceedings due to a medical emergency in the family of Division trial counsel. That adjustment will accordingly be granted. 36/

An appropriate order will issue. 37/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, ATKINS and CAMPOS); Commissioner GOLDSCHMID not participating.

Jonathan G. Katz
Secretary

35/ (...continued)
"overhead, commissions and other expenses"), aff'd without opinion, 12 F.3d 214 (6th Cir. 1993); SEC v. World Gambling Corp., 555 F. Supp. 930, 935 (S.D.N.Y. 1983) (declining to reduce disgorgement amount although it might have been "slightly overstated by overhead and income taxes"), aff'd, 742 F.2d 1440 (2d Cir. 1983) (Table).

36/ We do not deem it appropriate to make a similar adjustment, as requested by Respondents, for the period of another adjournment that was granted because of the unavailability of a hearing room and the parties' desire to engage in additional settlement discussions.

37/ We have considered all of the arguments advanced by the parties. We have rejected or accepted them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 8333 / November 7, 2003

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 48757 / November 7, 2003

Admin. Proc. File No. 3-9954

In the Matter of

RICHMARK CAPITAL CORPORATION
5525 North MacArthur Boulevard
Irving, Texas 75038

and

DOYLE MARK WHITE

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that the registration of RichMark Capital Corporation as a broker and dealer be, and it hereby is, suspended for a period of 90 days, effective at the opening of business on November 24, 2003; and it is further

ORDERED that Doyle Mark White be, and he hereby is, suspended from association with any broker or dealer for a period of 90 days, effective at the opening of business on November 24, 2003; and it is further

ORDERED that RichMark pay a civil money penalty of $275,000 and White a civil money penalty of $55,000; and it is further

ORDERED that RichMark and White cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder; and it is further

ORDERED that RichMark and White jointly and severally disgorge $25,617.86, and pay prejudgment interest as described in 17 C.F.R. § 201.600, with the adjustment noted in the Commission's opinion.

RichMark and White's payments of the civil money penalties and joint and several disgorgement shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) delivered by hand or courier to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312 within thirty days of the date of this order; and (iv) submitted under cover letter which identifies RichMark and White as the respondents in Administrative Proceeding No. 3-9954. A copy of this cover letter and check shall be sent to Jeffrey B. Norris, Counsel for the Division of Enforcement, Securities and Exchange Commission, 801 Cherry Street, Fort Worth, Texas 76102; and it is further

ORDERED that, within sixty (60) days after payment of funds or other assets in accordance with the disgorgement required by this Order, the Division of Enforcement shall submit a proposed plan for the administration and distribution of disgorgement funds in accordance with Rule 610 of our Rules of Practice.

By the Commission.

Jonathan G. Katz
Secretary