UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9023 / April 9, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 59739 / April 9, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13436

In the Matter of **MARK TUMINELLO,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Mark Tuminello ("Respondent" or "Tuminello").

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 and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of

1933, and Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

This proceeding arises out of materially misleading statements and omissions in offering documents in connection with a private securities offering backed by a portfolio of regional aircraft manufactured by Bombardier, Inc. ("Bombardier"). RASPRO Trust 2005 ("RASPRO"), a special purpose entity created by Bombardier, sponsored the $1.67 billion offering and Wachovia Capital Markets, LLC. ("Wachovia") served as the underwriter. On September 23, 2005 the offering closed. Within the first three months after closing, Bombardier discovered that RASPRO would have to draw on a liquidity reserve to make the first payment on one of the three tranches of securities involved in the offering, the B Notes, and that a guarantor would have to step in and purchase the B Notes in the fifth year of the 18 year transaction.

Respondent Tuminello, a managing director, headed the Commercial Aviation Team of Wachovia's Structured Asset Finance Group. Respondent and the two other members of the Commercial Aviation Team were aware of the potential shortfalls as early as July, 2005, but did not tell anyone else at Wachovia. Instead, the Team manipulated certain payment assumptions used in running the transaction cash flow models. Although the cash flow models themselves were not part of the offering memorandum the false and misleading payment assumptions used in, and false outputs from, the cash flow models were included in the offering memorandum. It was not until after the RASPRO transaction closed that others involved in the transaction, both at Wachovia and elsewhere, became fully aware of the B Notes' imminent liquidity issue.

Respondent

Respondent Tuminello, age 53, currently resides in Massapequa, New York. During the relevant time period, Tuminello was a Managing Director at Wachovia on the Commercial Aviation Team in the Structured Asset Finance Group. Tuminello supervised the Team's two other members – a vice president and a junior associate, who were responsible for preparing the cash flow models and the payment assumptions for the RASPRO offering. At the time, Tuminello held Series 7 and Series 63 licenses. On December 22, 2005, Tuminello was placed on administrative leave by Wachovia. On July 31, 2006, Tuminello resigned from Wachovia. Until recently, Tuminello was a registered representative and held a Managing Director position with a New York securities firm.

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[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.

Other Relevant Entities

RASPRO is a Delaware special purpose trust organized on September 14, 2005 by Bombardier for the purpose of purchasing, leasing and owning a portfolio of 70 aircraft manufactured by Bombardier. RASPRO is located in Wilmington, Delaware and is governed by six trustees. On September 23, 2005, RASPRO issued a $1.67 billion exempted asset-backed bond offering to "Qualified Institutional Investors" pursuant to Rule 144A and Regulation D of the Securities Act, the proceeds of which were used to purchase 70 regional aircraft from Bombardier. The offering involved three tranches of securities: (1) $905 million in senior G Notes; (2) $275 million in leverage lease equity; and (3) $485 million in junior B Notes.

Wachovia, during the relevant time period, was an indirect wholly-owned subsidiary of Wachovia Corporation. On January 1, 2009, Wachovia Corporation became part of Wells Fargo & Co. Wachovia is a registered broker-dealer incorporated in Delaware and an affiliate of Wachovia Bank NA. Wachovia's principal place of business is in Charlotte, NC. Wachovia was the lead underwriter and sole lead manager of the RASPRO offering.

Bombardier is a Canadian manufacturer of aircraft and rail transportation equipment and a foreign private issuer under Section 12(g) of the Exchange Act. Its primary offices are located in Montreal, Quebec, Canada, but it has U.S. offices in Vermont and Kansas.

Background

The RASPRO Offering

Bombardier created RASPRO, a special purpose entity, to finance the manufacture and sale of 70 regional aircraft. Bombardier sold the 70 aircraft to RASPRO, which leased the 70 aircraft to four airline companies. To finance the purchase of the 70 aircraft from Bombardier, RASPRO issued $1.67 billion in securities and leveraged lease equity in a private offering.

The Asset Side of the Transaction: Once Bombardier transferred the 70 new passenger airplanes to RASPRO, those aircraft were RASPRO's assets.[2] RASPRO leased the 70 aircraft to four different airline companies in return for regular lease payments. In addition to these regular lease payments, airline companies also made a one-time additional payment, payable at the same time the first regular payment was due. When RASPRO received the airline companies' payments, it placed them into a collections account. The incoming payments remained in this account for 15 days, except that the one-time additional payment stayed in the collections account longer – for a total of 105 days. While held in the collections account, the lease-payment funds earned interest.

The Liability Side of the Transaction: After the incoming lease payments accrued interest in the collections account, RASPRO then used these funds to pay various fees. After paying these fees, RASPRO used the incoming funds to satisfy its other liabilities, in descending

[2] RASPRO kept ownership of some of the planes and sold-and-leased-back others.

order of priority, including interest payments due to the classes of note holders. The transaction included a $41.4 million liquidity reserve that could be used in the event RASPRO did not have sufficient cash at any given time to pay the noteholders.

The $1.67 billion private placement involved three tranches. The first, and most senior, tranche consisted of $905 million in G Notes, which were purchased by 19 investment banks and other sophisticated institutional investors. The second tranche consisted of $275 million leveraged lease equity and was purchased by Wachovia Bank, N.A. The third, and most junior, tranche was $485 million in B Notes. A New York commercial and investment bank purchased the B Notes. The B Notes were guaranteed by Investissement Quebec (IQ), and Financial Security Assurance Inc. (FSA).[3] If the incoming cash flows and liquidity reserve were insufficient to fund interest payments for the B Note holders, then IQ would make timely interest payments of up to $48.5 million. If the $48.5 million in interest payments were exhausted, IQ would be required to purchase the B Notes in their entirety.[4]

The G Notes and B Notes paid investors a monthly coupon rate (that is, the interest rate on the note) of LIBOR plus a fixed percentage.[5] In order to protect against fluctuations in LIBOR rates and give RASPRO and the note holders certainty about the monthly interest payment amounts, RASPRO entered into two separate interest rate swap agreements with Wachovia – one for the G Notes and one for the B Notes. In each case, RASPRO swapped the floating LIBOR interest rate income stream for a fixed rate income stream on the G Notes for the life of the transaction and on the B Notes for the first six years of the transaction. As a result of the swap agreements, RASPRO agreed to make fixed monthly payments to the G Note holders for the life of the transaction and the B Note holder for the first six years.

Knowledge of the Early Draw

Wachovia was the sole structuring, underwriting and placement agent for the RASPRO offering. Tuminello and the other members of the Commercial Aviation Team, were responsible for preparing the cash flow models used in structuring the transaction. Although the models themselves were not part of the offering memorandum, the outputs (or results) from the models and the payment assumptions used in the models were included in the offering memorandum (in a section titled "Payment Assumptions"). The Commercial Aviation Team was responsible for preparing that section of the offering memorandum.

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[3] The B Notes were rated A1 as to timely payment of interest and principal and shadow rated B- or B3 as to timely payment of interest and principal.

[4] IQ had a counter-guarantee from Bombardier. If IQ were required to purchase the B Notes, it could seek reimbursement from Bombardier for 10% of the total outstanding guarantees between IQ and Bombardier, which would cover most or the entire amount owed on the B Notes. If IQ sought reimbursement under the counter-guarantee, Bombardier would likely be required to consolidate RASPRO onto its balance sheet, which would significantly increase Bombardier's debt and make it difficult for Bombardier to finance the cost of manufacturing aircraft. Bombardier hired a consultant to perform an analysis under Financial Accounting Standards Board Interpretation No. 46 ("FIN 46") to determine whether it needed to consolidate RASPRO on its balance sheet.

[5] "LIBOR," or the London InterBank Offered Rate, is the average interest rate charged when banks in the London interbank network lend to each other. LIBOR rates are used internationally as a benchmark for pricing, among other things, debt instruments and securities.

The Commercial Aviation Team modeled "base case" and "stress scenarios" for the offering memorandum. The "base case" cash flow model assumed that all of the airlines made their lease payments throughout the life of the transaction with no defaults. The "stress scenarios" assumed that certain airlines defaulted on their lease payments at certain times or that there were percentage reductions in the gross lease revenues received in the transaction.

Tuminello, and the other Team members, knew as early as July 2005 that there could be an early draw on the B Note guarantee in the transaction even in the base case. In July 2005, the junior associate in the Team informed Tuminello that the transaction models were showing an early draw on the B Note guarantee. According to the junior associate, Tuminello instructed him that the models could not show such a draw in the base case and told him to consult with the vice president. Tuminello and the junior associate spoke separately to the vice president. The vice president suggested making changes to the payment assumptions in the offering memorandum on the liability side of the transaction because it was too complicated to make changes on the asset side of the transaction and there was time pressure on the transaction.

As a result, the Commercial Aviation Team made several changes to the cash flow model. Taken together these changes had the overall effect of understating liabilities, overstating cash flows, and masking the early draw.

Changes to the Payment Assumptions and Transaction Model

The Commercial Aviation Team changed the payment assumptions and the cash flow model in the following ways: First, the Team did not model the interest rate swap agreements. Accordingly, the payment assumptions in the offering memorandum, which were used to model the transaction, did not reflect the interest rate swap agreements that modified the coupon payments to the G and B Note holders. Instead the assumptions and models assumed a fixed three-month LIBOR rate of 3.66% as the coupon rate for both notes over the life of the transaction. The effect of not modeling the swap agreements and instead using a constant 3.66% LIBOR rate was to understate the liability on the B Notes and overstate expected cash flows. The failure to model the swap agreements had the greatest impact on overstating expected cash flows. It accounted for almost 80% of the aggregate amount of the cash flow overstatement from all four changes, and overstated cash flows by over $3.5 million during the first quarter of the transaction.

Second, the Team used an inflated reinvestment rate for amounts held in the collections account. Cash flows came into the transaction in the form of airline lease payments that were deposited into a collections account. Before payments were made from the collections account to the bondholders, the proceeds in the collections account earned interest for the short reinvestment period during which the cash was in the account. The model used a 5% reinvestment rate for this period when the industry standard, and the standard used in the rating agencies' models, for short-term investments at the time, was closer to 3%. The inflated 5% reinvestment rate had the second greatest impact in overstating expected cash flows, overstating

cash flows in the first quarter by $742,000. This accounted for approximately 15.5% of the aggregate overstated cash flows in the first quarter.

Third, the Team modeled an overly long reinvestment period. The transaction was structured such that the regular incoming airline lease payments accrued interest in the collections account for a 15-day reinvestment period, except for a one-time additional up-front payment that accrued interest in the collections account for 105 days. The payment assumptions in the offering memorandum stated that a 15-day reinvestment period was modeled. However, the model reflected a 105-day reinvestment period for all incoming lease payments instead of a 15-day reinvestment period. The 105-day reinvestment period had the third greatest impact on overstating expected cash flows. Because the first reinvestment period in the transaction was modeled correctly, the false assumption did not impact cash flows until the second quarter. Nevertheless, this false assumption overstated expected cash flows in the second quarter by $606,000, which was approximately 13% of the total first period cash flow overstatement and approximately 12% of the aggregate cash flow overstatement for the second quarter.[6] Taken together, these first three alterations overstated expected cash flows by $78 million during the first four years of the transaction (when the B Note guarantor would have been required to purchase the B Notes).

Fourth, the Team failed to model the acceleration provision. The cash flow models also reflected incorrectly the assumption that no Class B Note acceleration event would occur. Therefore, once the $48.5 million in IQ interest payments were exhausted, the model did not show IQ stepping in to replace the original B Note investor by purchasing the B Notes in their entirety, as the transaction was structured. Instead, the model assumed a continuation of the interest shortfalls. This assumption was added at the end of August, well after the team learned that there would be a draw on the B Note guarantee.

The Early Draw Is Discovered by Bombardier after Closing

On September 23, 2005, the transaction closed and RASPRO issued the bond offering. Nineteen institutional investors purchased the G Notes. Wachovia Bank NA purchased the equity interest with the purpose of selling it to the public. A New York commercial and investment bank purchased the entire B Note tranche.

A few weeks after closing, Bombardier's consulting firm noticed a possible early draw on the IQ interest payments and principal. After further analysis, Bombardier learned that the transaction as structured would result in a draw on IQ's interest payments in month 13 and a draw on the IQ principal in month 63, requiring IQ to purchase the B Notes in their entirety approximately five years after the transaction closed.

[6] The errors in conjunction with each other compound the monetary effect on the cash flows. That is, each of the percentages reflects the effect of the particular false assumption being discussed on the overall cash flows without taking into account the effects of all the false assumptions on each other. So the percentages are correct despite the fact that they exceed 100%.

In the Fall of 2005, Bombardier complained to Wachovia about the early draws that it had discovered. By January 2006, Wachovia had retained outside counsel to conduct an internal investigation. In June 2006, Wachovia agreed to restructure the transaction using corrected payment assumptions and cash flow models. As a result of the restructuring, Wachovia paid an $87 million cash infusion into the transaction to prevent a premature draw on IQ's interest and note payments.[7] Wachovia also paid a $7 million insurance premium and $28.6 million in structuring and placement fees, as part of the restructuring.

Respondent's Conduct

Despite learning in July 2005 of the early draw on the B Note guarantee in the base case, Tuminello did not report this fact to anyone outside of the Commercial Aviation Team that he led. Instead he gave the directive that the models could not show an early draw in the base case. Tuminello was aware of the changes that the Team subsequently made on the liability side of the transaction and that those changes were being made to conceal the fact that an early draw on the B Note guarantee would occur. Specifically, he knew that:

(a) payment assumptions and cash flow model outputs in the offering memorandum and the cash flow model inaccurately reflected a lower interest rate for the G and B Note coupons;

(b) the payment assumptions and cash flow model outputs in the offering memorandum and the cash flow model inaccurately reflected a higher reinvestment rate;

(c) that the payment assumptions and cash flow model outputs in the offering memorandum and the cash flow model inaccurately reflected that no Class B Note acceleration event would occur.

Although he knew them to be faulty, Respondent decided to incorporate these changes into the cash flow models and into the cash flow model outputs that were used in the offering memorandum in order to mask the early draw. Respondent thereafter made no effort to correct the model or disclose these changes or the early draw to anyone outside of the Commercial Aviation team that he supervised.

Legal Discussion

Section 17(a) of the Securities Act, which proscribes fraudulent conduct in the offer or sale of securities, and Section 10(b) of the Exchange Act and Rule 10b-5, which proscribe fraudulent conduct in connection with the purchase or sale of securities, prohibit essentially the same type of sales practices. *See United States v. Naftalin*, 441 U.S. 768, 773 n.4 (1979). Among other things, those provisions make it unlawful to make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, in the offer, purchase or sale of securities. Whether a fact is

[7] Bombardier also made a cash infusion of $23 million in exchange for the rights to share in Wachovia's interest in the leverage lease equity.

material depends upon the significance a reasonable investor would place on the withheld or misrepresented information in making an investment decision. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988).

By virtue of their unique position in the securities industry, underwriters are subject to liability under the antifraud provisions of the federal securities laws for materially false or misleading statements in an offering. *In the Matter of Donaldson, Lufkin & Jenrette Securities Corp.*, Securities Act Release No. 6959, Exchange Act Release No. 31,207 1992 WL 280784, at *7 (September 22, 1992). In a release proposing the adoption of a rule requiring that municipal securities underwriters review and distribute issuer disclosure documents to investors, the Commission reviewed the responsibilities of underwriters and explained that:

> An underwriter, whether of municipal or other securities, occupies a vital position in an offering. The underwriter stands between the issuer and the public purchasers, assisting the issuer in pricing and, at times, in structuring the financing and preparing disclosure documents. Most importantly, its role is to place the offered securities with public investors. By participating in an offering, an underwriter makes an implied recommendation about the securities. Because the underwriter holds itself out as a securities professional, and especially in light of its position vis-à-vis the issuer, this recommendation itself implies that the underwriter has a reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in the offerings.

Municipal Securities Disclosure, Exchange Act Release No. 26,100, 53 Fed. Reg. 37,778, 1988 WL 999989, at *20 (Sept. 28, 1988).

Faulty modeling assumptions can serve as a basis for underwriter liability under the antifraud provisions of the securities laws. *See In the Matter of Michael Lissack*, Exchange Act Release No. 39,687, 1998 WL 67399, at *2-4 (February 20, 1998) (Managing Director of broker-dealer that acted as a underwriter in a county bond offering intended to deceive when he intentionally used faulty and inaccurate modeling assumptions to present financing structure in an artificially favorable light.).

As a result of the conduct described above, Tuminello willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase, offer, or sale of securities.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, and Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that**:**

A. Respondent Tuminello cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent Tuminello be, and hereby is barred from association with any broker or dealer, with the right to reapply for association after two (2) years to the appropriate self-regulatory organization, or if there is none, to the Commission;

C. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $25,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. 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 Tuminello 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 Cheryl J. Scarboro, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-5631.

By the Commission.

Elizabeth M. Murphy
Secretary