

NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT

20042000039-01

**TO: Department of Market Regulation
NASD**

**RE: C.E. Unterberg, Towbin, LLC, Respondent
Broker-Dealer
CRD No. 24790**

Pursuant to Rule 9216 of NASD Code of Procedure, C.E. Unterberg, Towbin, LLC ("CEUT" or "firm") submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described in Part II below. This AWC is submitted on the condition that, if accepted, NASD will not bring any future actions against the firm alleging violations based on the same factual findings.

The firm understands that:

1. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by NASD's Market Regulation Department and National Adjudicatory Council ("NAC") Review Subcommittee or Office of Disciplinary Affairs ("ODA"), pursuant to NASD Rule 9216;
2. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against the firm; and
3. If accepted:
 - a. this AWC will become part of the firm's permanent disciplinary record and may be considered in any future actions brought by NASD or any other regulator against the firm;
 - b. this AWC will be made available through NASD's public disclosure program in response to public inquiries about the firm's disciplinary record;
 - c. NASD may make a public announcement concerning this agreement and the subject matter thereof in accordance with NASD Rule 8310 and IM-8310-2; and

- d. the firm may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any allegation in this AWC or create the impression that the AWC is without factual basis. Nothing in this provision affects the firm's testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which NASD is not a party.

The firm also understands that its experience in the securities industry and disciplinary history may be factors that will be considered in deciding whether to accept this AWC. That experience and history are as follows:

CEUT has been a member of NASD since October 16, 1936. The firm has the following relevant disciplinary history:

- On January 28, 2003, NASD censured the firm and fined it \$14,000 for violations of the recordkeeping, free riding and Order Audit Trail System ("OATS") rules, SEC Rule 17a-3 and NASD Rules 3110, 2110, IM-2110-1 and 6954, respectively.
- On January 5, 2002, NASD censured the firm, fined it \$20,000 and ordered it to pay \$22,219.94 in restitution for violations of the firm quote, best execution and supervision rules, SEC Rule 11Ac1-1 and NASD Rules 2110, 4613(b), 2320 and 3010, respectively.

I.

WAIVER OF PROCEDURAL RIGHTS

The firm specifically and voluntarily waives the following rights granted under NASD's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against it;
- B. To be notified of the Formal Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the NAC and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, the firm specifically and voluntarily waives any right to claim bias or prejudgment of the General Counsel, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

The firm further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

II.

ACCEPTANCE AND CONSENT

This matter arose out of two examinations, MRD200238740 and MRD200343959, conducted by the staff of NASD's Department of Market Regulation (the "staff"). For MRD200238740, the staff reviewed, for trade dates November 19 and 20, 2002 (unless otherwise stated):

- 25 customer sale transactions, for compliance with NASD Rules 3110 and 3370, and SEC Rule 10a-1;
- 25 proprietary sale transactions, for compliance with the NASD Rule 3370 and SEC Rule 10a-1;
- 50 sales in Nasdaq National Market ("NNM") securities, for compliance with NASD Rule 6130;
- 17 short sales in NNM securities, for compliance with NASD Rule 3350;
- 50 limit orders in securities in which CEUT made a market, for compliance with NASD Rules 2110, IM-2110-2, 2320 and 6440, and SEC Rule 11Ac1-4;
- 50 limit and market orders executed in a principal or riskless principal capacity, for compliance with NASD trade reporting and ACT rules;
- 25 principal trades reported as riskless principal or trades receiving soft dollar credits, for compliance with the SEC Section 28(e) safe harbor on soft dollar compensation;
- 25 transactions reported in which CEUT made a market, for compliance with SEC Rule 11Ac1-5;
- statistics concerning four order types and 30 total orders published monthly by CEUT for compliance with SEC Rule 11Ac1-5;
- data published by CEUT for fourth quarter 2002 concerning its order routing practices, for compliance with SEC Rule 11Ac1-6;
- the firm's establishment and implementation of a review of the execution quality of orders sent by CEUT to other market centers for execution, for compliance with NASD Rules 2320 and 3010;

- two customer transactions in Over-the-Counter Bulletin Board ("OTCBB") and/or Over-the-Counter ("OTC") Equity securities, for compliance with NASD Rules 2320 and 3110(b);
- 20 persons that work on the firm's OTC desk, for compliance with NASD registration rules;
- 184 orders for compliance with NASD Rule 3110 and SEC Rules 17a-3 and 17a-4;
- 261 transactions reported to the Automated Confirmation Transaction Service ("ACT"), for compliance with NASD trade reporting and ACT rules;
- 41 customer confirmations, for compliance with SEC Rule 10b-10; and
- the firm's establishment and implementation of a supervisory system and written supervisory procedures concerning the rules applicable to trading and market making, for compliance with NASD Rule 3010.

For MRD200343959, the staff reviewed for trade dates November 19 and 20, 2003 (unless otherwise stated):

- 32 customer sale transactions, for compliance with NASD Rules 3110 and 3370 and SEC Rule 10a-1;
- 18 proprietary sale transactions, for compliance with NASD Rule 3370 and SEC Rule 10a-1;
- 95 customer and proprietary sales in NNM securities, for compliance with NASD Rule 6130;
- 2 short sales in NNM securities, for compliance with NASD Rule 3350;
- 50 limit orders executed as principal, for compliance with NASD Rules 2110, IM-2110-2, 6440, 6541 and 2320, and SEC Rule 11Ac1-1 and 11Ac1-4;
- 10 "non displayed" limit orders and marketable orders in the same securities received while holding the "non-displayed" orders, for compliance with NASD Rule 2320;
- 48 limit and market orders executed in a principal or riskless principal capacity, for compliance with capacity reporting under NASD Trade Reporting and ACT rules;
- for the period two weeks prior to November 19 and 20, 2003, 25 orders for Nasdaq securities in soft dollar accounts and related executions, for compliance with trade reporting rules and the safe harbor limitations of SEC section 28(e);
- for trades reported during November 2003, 25 orders in securities for which the firm was a market center, for compliance with the order size/type classification requirements of SEC Rule 11Ac1-5;
- 28 security/sizc/order data statistics published on the firm's order execution report for October 2003, for compliance with SEC Rule 11Ac1-5;
- data published on the firm's order routing report for the quarter ending December 2003, for compliance with SEC Rule 11Ac1-6;
- 10 customer transactions in OTCBB and OTC equity securities, for compliance with NASD Rules 3110(b) and 2320;

- 243 order/trade records prepared and maintained in connection with the above samples, for general compliance with NASD Rule 3110 and SEC Rules 17a-3 and 17a-4;
 - 250 trades reported to ACT in connection with the above samples, for general compliance with NASD Trade Reporting and ACT rules;
 - 40 customer trade confirmations reviewed in connection with the above samples, for compliance with SEC Rule 10b-10;
 - based on written supervisory procedures in effect for November 2003, the firm's establishment and implementation of "regular & rigorous" reviews of the execution quality of orders sent to other market centers and internalized, for compliance with NASD Rules 2320 and 3010; and
 - based on written supervisory procedures in effect for November 2003, the firm's establishment and implementation of a supervisory system and written supervisory procedures, for compliance with NASD Rule 3010.
- A. The firm hereby accepts and consents, without admitting or denying the allegations or findings, 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, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by NASD:

MRD200238740

1. CEUT failed in seven instances to correctly submit, for the offsetting, "riskless" portion of the transaction, either a clearing only report with a capacity indicator of "riskless principal," or a non-tape, non clearing report with a capacity indicator of "riskless principal," if a clearing report was not necessary to clear the transaction.
2. The conduct described in paragraph one constitutes separate and distinct violations of NASD Marketplace Rule 4632(d).
3. CEUT failed to report through ACT 18 last sale transactions in NNM securities that it was required to report.
4. The conduct described in paragraph three constitutes separate and distinct violations of NASD Marketplace Rule 4632(b) and NASD Conduct Rule 2110.
5. CEUT failed to report to ACT the correct symbol indicating whether the transaction was a buy, sell, sell short, sell short exempt or cross for five transactions in eligible securities.
6. The conduct described in paragraph five constitutes separate and distinct violations of NASD Marketplace Rule 6130.

7. CEUT, on one occasion when it acted as principal for its own account, failed to provide written notification disclosing to its customer that it was a market maker in the security.
8. CEUT failed on seven occasions to provide written notification disclosing to its customer that each transaction was executed at an average price.
9. CEUT failed on 25 occasions to provide written notification disclosing to its customers its correct capacity in each transaction.
10. The conduct described in paragraphs seven through nine above constitutes separate and distinct violations of SEC Rule 10b-10.
11. For the month of November 2002, CEUT made available a report on the covered orders in national market system securities that it received for execution from any person. This report included incorrect and incomplete information as to classification of orders as "covered" or "not covered."
12. The conduct described in paragraph 11 constitutes a violation of SEC Rule 11Ac1-5(b).
13. For the fourth calendar quarter of 2002 CEUT made available a report on its routing of non-directed orders in covered securities. This report included incorrect information as to the identity of the ten venues to which the largest number of total non-directed orders was routed for execution, and the percentage of total non-directed orders routed to those respective venues.
14. CEUT failed to provide annual written notice to its customers that details regarding the routing destinations of customer orders are available upon request.
15. The conduct described in paragraphs 13 and 14 constitutes separate and distinct violations of SEC Rule 11Ac1-6.
16. CEUT failed, on three occasions, to make and preserve in an accessible place copies of confirmations of all purchases and sales of securities.
17. CEUT failed to show the order receipt time on the memorandum of one brokerage order.
18. CEUT failed to show the correct order receipt time on the memorandum of three brokerage orders.
19. CEUT failed to show the correct order receipt and execution times on the memorandum of one brokerage order.

20. CEUT failed to show the time of cancellation on the memorandum of one brokerage order.
21. The conduct described in paragraphs 16 through 20 constitutes separate and distinct violations of SEC Rules 17a-3 and 17a-4, and NASD Conduct Rule 3110.
22. CEUT failed, on five occasions, to preserve in an accessible place copies of account statements sent to customers for purchases and sales of securities.
23. The conduct described in paragraph 22 constitutes separate and distinct violations of SEC Rule 17a-4 and NASD Conduct Rule 3110.
24. CEUT's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations, and the Rules of NASD, concerning: the registration of persons with NASD; the SEC's Limit Order Display Rule; the Limit Order Protection Interpretation; SEC Rules 11Ac1-5 and 11Ac1-6; the duty of best execution; the requirement, under the duty of best execution, to assess the quality of competing markets and market centers trading securities; NASD's Three Quote Rule; the anti-competitive practices identified in IM-2110-5; NASD's affirmative determination rule; NASD's Bid Test Rule; the prohibition concerning locked and/or crossed markets; the SEC's and NASD's Firm Quote Rules; the rules applicable to the Order Audit Trail System; and Chinese Walls. Specifically, the firm's supervisory system did not include written supervisory procedures providing for one or more of the following: (1) the identification of the person(s) responsible at the firm to ensure compliance with the applicable rules; (2) the step(s) such person(s) should take to ensure compliance therewith; (3) how often such person(s) should take such step(s); and (4) how enforcement of such written supervisory procedures should be documented at the firm.
25. The conduct described in paragraph 24 constitutes a violation of NASD Conduct Rules 2110 and 3010.

MRD200343959

26. On November 19, 2003, at approximately 10:25:10, CEUT received a market order to sell 100 shares of DCLK. CEUT did not execute this order until 10:40:38, at which time it bought the 100 shares at \$8.42. While this order was awaiting execution, the national best bid in DCLK was as high as \$8.45. CEUT failed to execute this order fully and promptly so that the resultant price to its customer was as favorable as possible under prevailing market conditions.
27. On November 19, 2003, at approximately 10:25:11, CEUT received a market order to sell 300 shares of HLIT. CEUT immediately executed 100 shares of

this order at \$8.09, but did not execute the remainder of the order until 10:41:52 at which time it bought the 200 shares at \$8.06. For the duration of this order, another market maker was displaying a bid of \$8.09 for 300 shares. CEUT failed to execute this order fully and promptly so that the resultant price to its customer was as favorable as possible under prevailing market conditions.

28. The conduct described in paragraphs 26 and 27 constitutes separate and distinct violations of NASD Conduct Rule 2320.
29. CEUT executed six short sale transactions and failed to report each of these transactions to ACT with a short sale modifier.
30. CEUT failed to report to ACT the correct symbol indicating whether it executed seven transactions in eligible securities in a principal, riskless principal or agency capacity.
31. CEUT failed to report through ACT one last sale report of a transactions in an eligible security.
32. The conduct described in paragraphs 29 through 31 constitutes separate and distinct violations of NASD Marketplace Rule 6130.
33. CEUT transmitted to OATS three reports that contained inaccurate, incomplete, or improperly formatted data. Specifically, the firm's routed order ID numbers failed to match in OATS.
34. The conduct described in paragraph 33 above constitutes separate and distinct violations of NASD Marketplace Rule 6955(a).
35. CEUT failed on six occasions to provide written notification disclosing to its customer that the transaction was executed at an average price.
36. The conduct described in paragraph 35 above constitutes separate and distinct violations of SEC Rule 10b-10.
37. For the month of October 2003, CEUT made available a report on the covered orders in national market system securities that it received for execution from any person. This report included incorrect information as to:
 - a. the cumulative number of shares of covered orders executed at CEUT;
 - b. the cumulative number of shares of covered orders executed at any other venue; and
 - c. the average realized spread for executions of covered orders.
38. The conduct described in paragraph 37 constitutes separate and distinct violations of SEC Rule 11Ac1-5(b).

39. CEUT failed to preserve for a period of not less than three years, the first two in an easily accessible place, copies of five account statements sent to customers.
40. CEUT failed to preserve for a period of not less than six years, the first two in an easily accessible place, memoranda of six brokerage orders.
41. CEUT failed to preserve for a period of not less than six years, the first two in an easily accessible place, copies of seven confirmations sent to customers.
42. The conduct described in paragraphs 39 through 41 constitutes a violation of SEC Rule 17a-4 and NASD Conduct Rule 3110.
43. CEUT failed to show the time of execution on the memorandum of one brokerage order.
44. CEUT failed to show the time of receipt on the memorandum of five brokerage orders.
45. The conduct described in paragraphs 43 and 44 constitutes separate and distinct violations of SEC Rules 17a-3 and 17a-4, and NASD Conduct Rule 3110.
46. The firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations, and the Rules of NASD, concerning the limit order display, limit order protection, disclosure of order execution and routing information, best execution, anticompetitive behavior, trade reporting, short sale, locked and crossed markets, OATS and recordkeeping rules. Specifically, the firm's supervisory system did not include written supervisory procedures providing for: (1) identification of the person(s) responsible for supervision with respect to the rules specified above; (2) a statement of the supervisory step(s) to be taken by the identified person(s) with respect to limit order display, limit order protection, order execution, order routing, trade reporting, locked and crossed markets and recordkeeping rules as well as the regular and rigorous, three quote and crossing requirements of the best execution rule; (3) a statement as to how often such person(s) should take such step(s) with respect to the order routing, locked and crossed markets and trade reporting and recordkeeping rules and the regular and rigorous, crossing and three quote requirements of the best execution rule; and (4) a statement as to how the completion of the step(s) included in the written supervisory procedures should be documented with respect to the disclosure of order execution and routing information, locked and crossed markets, crossing orders and three quote requirements of the best execution, anticompetitive behavior, trade reporting and short sale rules. The firm's written supervisory procedures also did not reflect actual procedures that the firm had to monitor for compliance with the best execution rule. In addition, the supervisory steps specified in the written supervisory procedures

regarding the reviews for best execution, trade reporting, anticompetitive conduct, the "down tick" and OATS rules were not reasonably designed to achieve compliance with those rules. In particular, the supervisory steps for monitoring compliance with the best execution, trade reporting, "down tick" and OATS rules called for only monthly reviews, when such reviews should have occurred more frequently. And, the review for anticompetitive conduct did not include two-way monitoring of telephone conversations. Finally, there was no evidence that CEUT enforced its written supervisory procedures with respect to the disclosure of order execution information, anticompetitive conduct, affirmative determination, "down tick", locked and crossed markets and OATS.

47. The conduct described in paragraph 46 constitutes a violation of NASD Conduct Rules 2110 and 3010.

- B. The firm also consents to the imposition, at a maximum, of the following sanctions:

- a censure;
- a fine of \$83,000 (consisting of \$15,000 for trade reporting, \$5,000 for Rule 10b-10, \$10,000 for Rule 11Acl-5, \$5,000 for Rule 11Acl-6, \$15,000 for recordkeeping, \$25,000 for supervision, \$5,000 for best execution, and \$3,000 for OATS violations);
- restitution to the customers involved in the transactions described in paragraphs 29 and 30 in the total amount of \$9 — \$3 and \$6, respectively — plus interest at the rate set forth in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), from the date of the violative conduct until the date this Letter of Acceptance, Waiver and Consent is accepted by the National Adjudicatory Council. Within 30 business days of acceptance of this AWC by the NAC, a registered principal of the firm shall submit to the COMPLAINT ASSISTANT, LEGAL SECTION, MARKET REGULATION DEPARTMENT, 9509 KEY WEST AVENUE, ROCKVILLE, MD 20850 satisfactory proof of payment of the restitution, or of reasonable and documented efforts undertaken to effect restitution. If for any reason, Respondent cannot locate any customer after reasonable and documented efforts within such period, or such additional period agreed to by the staff, Respondent shall forward any undistributed restitution and interest to the appropriate escheat, unclaimed-property or abandoned-property fund for the state in which the customer last resided; and

- an undertaking that CEUT shall retain, within 60 days of the acceptance of the AWC, an outside consultant not unacceptable to NASD's Department of Market Regulation ("DMR") to review and make recommendations concerning the areas described in paragraphs 24 and 46. No later than 120 days after CEUT retains the consultant, the consultant will provide an initial report to CEUT and to DMR containing recommendations, if appropriate, for the adoption of policies and procedures by CEUT with respect to its supervisory system. Within 30 days after the report is delivered, as to any recommendation that CEUT determines is unduly burdensome or impractical, CEUT shall propose an alternative procedure designed to achieve the same objective, and submit it in writing to the consultant and to the staff of DMR. Within 30 days thereafter, the consultant shall reasonably evaluate any alternative procedure proposed by CEUT and determine whether it will achieve the same objective as the consultant's original recommendation. The consultant will provide CEUT with a written decision reflecting his or her determination. CEUT will abide by the consultant's ultimate determination with respect to any recommendation and shall adopt all recommendations deemed appropriate by the consultant and not unacceptable to the staff. Within 90 days after the initial report is delivered, CEUT shall adopt all recommendations made by the consultant, as modified, and provide the staff of DMR with a report attesting to, containing documentation of, and setting forth the details of, CEUT's implementation of the consultant's recommendations.

The sanction imposed herein shall be effective on a date set by NASD staff.

III.

OTHER MATTERS

- A. The firm understands that it may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. The firm understands that it may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by NASD, nor does it reflect the views of NASD or its staff.
- B. The firm agrees to pay any monetary sanctions imposed on it upon notice that this AWC has been accepted and that such payments are due and payable and has attached an Election of Payment form showing the method by which it proposes to pay any fine imposed.
- C. The firm specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter

JUL-26-2005 TUE 03:49 PM C.E. UNTERBERG. TOWBIN

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NASD MARKET REGULATION

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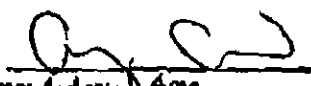
The firm certifies that it has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it, and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein, has been made to induce the firm to submit it.

26 July 2005

Date

Respondent

C.E. Unterberg, Towbin, LLC

By: 

Name: Andrew Arno

Title: Chairman

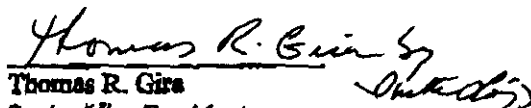
Reviewed by:



Counsel for Respondent

Accepted by NASD:

Date


Thomas R. Gira
Senior Vice President
Department of Market Regulation

Signed on behalf of the Director of
ODA, by delegated authority