

NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT

20050001370-01

TO: Department of Market Regulation
NASD

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

James Thomas Whipple, Respondent
CRD No. 1417979

Andrew Arno, Respondent
CRD No. 1021807

Pursuant to Rule 9216 of NASD Code of Procedure, C.E. Unterberg, Towbin, LLC ("CEUT" or "firm"), James Thomas Whipple ("Whipple") and Andrew Arno ("Arno") (collectively, "Respondents") submit 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 Respondents alleging violations based on the same factual findings.

Each of the Respondents 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 Respondents; and
3. If accepted:
 - a. this AWC will become part of each Respondent's permanent disciplinary record and may be considered in any future actions brought by NASD or any other regulator against any of the Respondents;

- b. this AWC will be made available through NASD's public disclosure program in response to public inquiries about the disciplinary record of any of the Respondents;
- 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. none of the Respondents may 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 Respondents' testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which NASD is not a party.

Each of the Respondents also understands that its/his 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.
 - On February 13, 2003, NASD censured the firm and fined it \$7,500 for violations of the Limit Order Display Rule, SEC Rule 11Ac1-4.
 - 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.
- Whipple is currently associated with CEUT as a General Securities Representative and a General Securities Principal. He became registered as a General Securities Representative with CEUT in October 1999 and as a General Securities Principal in March 2004. He has been in the securities industry since at least December 1979. Whipple has no disciplinary history.
- Arno is currently associated with CEUT as a General Securities Representative and a General Securities Principal. He became registered as a General Securities Representative with CEUT in November 1989 and as a General Securities Principal in October 1998. He has been in the securities industry since at least January 1987. Arno has no disciplinary history.

WAIVER OF PROCEDURAL RIGHTS

Each of the Respondents 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/him;
- 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, each of the Respondents 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.

Each of the Respondents 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 a review, 20050001370 (formerly, MRD200343944), and an investigation, 20050006780 (formerly, MRD200447492), conducted by the staff of NASD's Department of Market Regulation (the "staff"). For 20050001370, the staff reviewed the firm's compliance with the Limit Order Display Rule, SEC Rule 11Ac1-4, during the third quarter of 2003. For 20050006780, the staff reviewed the firm's compliance with NASD registration rules during 2003 and 2004.

A. The Respondents hereby accept and consent, 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:

1. On 40 occasions during the period from July 1, 2003 through September 30, 2003, CEUT failed to display immediately 40 customer limit orders in Nasdaq securities in its public quotation, when each such order was at a price that would have improved CEUT's bid or offer in each such security; or when the order was priced equal to CEUT's bid or offer and the national best bid or offer for each such security, and the size of the order represented more than a *de minimis* change in relation to the size associated with CEUT's bid or offer in each such security.
2. The conduct described in paragraph one constitutes separate and distinct violations of SEC Rule 11Ac1-4.
3. During the third quarter of 2003, CEUT transmitted to OATS 42 reports that contained inaccurate, incomplete, or improperly formatted data. Specifically, the reports contained inaccurate route times.
4. The conduct described in paragraph three above constitutes separate and distinct violations of NASD Marketplace Rule 6955(a) and a violation of NASD Conduct Rule 2110.
5. Since approximately June 2002, Whipple has functioned as a principal in supervising CEUT's sales personnel. On February 7, 2003, NASD staff advised CEUT and Whipple that Whipple needed to register as either a General Securities Principal or as a Limited Principal - General Securities Sales Supervisor in order to supervise the sales force. NASD reminded Whipple and CEUT of the need for Whipple to register as a Principal on at least two subsequent occasions during 2003 and on each occasion was assured that Whipple would shortly be registered as a General Securities Principal. Nevertheless, and although CEUT continued to allow him to function as a principal, Whipple did not register as a General Securities Principal until March 19, 2004.
6. The conduct described in paragraph five above constitutes a violation of NASD Membership and Registration Rule 1021 and NASD Conduct Rule 2110 by Whipple and CEUT.

7. During the period from approximately April 2003 until approximately March 2004, Whipple functioned, and CEUT allowed Whipple to function, as CEUT's Head Trader with direct supervisory responsibility for the execution of equity transactions. As noted above in paragraph five, Whipple was not registered as a General Securities Principal during this period. In addition, Whipple was not registered as a Limited Representative - Equity Trader, as required by NASD Membership and Registration Rule 1032(f) for those with direct supervisory responsibility for the execution of equity transactions.
8. The conduct described in paragraph seven above constitutes a violation of NASD Membership and Registration Rules 1021 and 1031 and NASD Conduct Rule 2110 by Whipple and CEUT.
9. Since at least June 2002, Arno has been responsible for the direct supervision of Whipple. By no later than February 2003, CEUT was notified of the need for Whipple to register as either a General Securities Principal or as a Limited Principal - General Securities Sales Supervisor. Nevertheless, Arno and CEUT allowed Whipple to function as a principal without the appropriate registration until March 19, 2004. In addition, CEUT and Arno allowed Whipple to directly supervise the execution of equity transactions without first registering as a General Securities Principal or as a Limited Representative - Equity Trader. As a result, both Arno and CEUT failed to reasonably and properly supervise the activities of Whipple so as to detect and prevent violations of NASD Membership and Registration Rules 1021 and 1031.
10. The conduct described in paragraph nine above constitutes a violation of NASD Conduct Rules 2110 and 3010 by Arno and CEUT.

B. The Respondents also consent to the imposition, at a maximum, of the following sanctions:

- CEUT is censured and fined \$62,500 (consisting of \$12,500 for the Limit Order Display Rule violations, \$10,000 for the OATS violations, \$20,000 for the registration violations and \$20,000 for the supervision violations. Of the \$20,000 fine for the registration violations, \$10,000 is joint and several with Whipple and of the \$20,000 fine for the supervision violation, \$10,000 is joint and several with Arno).
- Whipple is suspended from association with any member firm for a period of 15 business days and, as noted above, fined \$10,000 jointly and severally with CEUT.
- Arno is censured and, as noted above, fined \$10,000 jointly and severally with CEUT.

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

III.

OTHER MATTERS

- A. Each of the Respondents understands that it/he may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Each of the Respondents understands that it/he 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. Each of the Respondents agrees to pay any monetary sanctions imposed on it/him 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/he proposes to pay any fine imposed. Each of the Respondents specifically and voluntarily waives any right to claim that it/he is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.
- C. Each of the Respondents specifically and voluntarily waives any right to claim that it/he is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.
- D. Whipple understands that if he is barred or suspended from associating with any NASD member, he becomes subject to a statutory disqualification as that term is defined in Section 3(a)(39) of the Securities Exchange Act of 1934, as amended. Accordingly, Whipple may not be associated with any NASD member in any capacity, including clerical or ministerial functions, during the period of the bar or suspension. (See NASD Rule 8310 and IM-8310-1.)

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NASD MARKET REGULATION

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Each of the Respondents certifies that it/he 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 any of the Respondents to submit it.

2 August 2005
Date

Respondent
C.E. Unterberg, Towbin, LLC

By: [Signature]
Name: Howard R. Sutherland
Title: Managing Director

Respondent
James Thomas Whipple

[Signature]

Respondent
Andrew Arno

[Signature]

Reviewed by:

[Signature]
Counsel for Respondents

Accepted by NASD:

10/7/05
Date

[Signature]
Thomas R. Gira
Executive Vice President & Deputy
Department of Market Regulation

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