

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
No. 2009018149301**

TO: Department of Enforcement
Financial Industry Regulatory Authority ("FINRA")

RE: Jay Sheldon Potter, Jr. Respondent
General Securities Representative and Limited Representative - Investment Banking.
CRD No. 1585351

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, I submit this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, FINRA will not bring any future actions against me alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. I hereby accept and consent, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of FINRA, or to which FINRA 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 FINRA:

BACKGROUND

Jay Sheldon Potter became registered with FINRA as a Direct Participation Programs Representative (Series 22) in 1989. From September 13, 1996 to July 29, 2009, Potter was registered with Nexcore Capital, Inc. as a General Securities Representative and General Securities Principal and served as the firm's CEO and President. FINRA expelled Nexcore, effective August 18, 2009, for failure to pay fines associated with a Letter of Acceptance, Waiver and Consent entered in January 2009.

From July 17, 2009 to the present, Potter has been associated with Allied Beacon Partners, Inc. and its predecessor, American Beacon Partners, Inc. (collectively "Allied Beacon") as a General Securities Representative and Limited Representative - Investment Banking.

RELEVANT DISCIPLINARY HISTORY

On September 30, 2009, Potter signed a Letter of Acceptance, Waiver and Consent in which he agreed to the imposition of a 15 business day suspension and a \$5,000 fine for causing a Nexcore Capital to operate in violation of the books and records and net capital provisions of the Exchange Act. Potter failed to ensure that the firm's FINOP was aware of certain liabilities and that these liabilities were properly recorded on the firm's books and records. Potter also caused the firm to conduct a securities business while not maintaining its required net capital.

OVERVIEW

While associated with Nexcore Capital, Potter failed to amend his Form U4 to disclose that he had been named in an investment related, consumer initiated, written complaint, which (i) involved a claim for compensatory damages of more than \$5,000, and (ii) alleged that Potter was involved in misappropriation or conversion of funds. When Potter later associated with Allied Beacon, he failed to cause his Form U4 to be updated to disclose that same complaint.

In February 2010, Potter was named in a San Diego Superior Court Lawsuit whose allegations, in part, coincided with the subject of a FINRA investigation. Potter entered into a settlement agreement in December 2010, which was later reduced to a Judgment. That agreement violated FINRA rules because it improperly restricted certain persons from communicating with FINRA staff.

The written complaint and the investigation described above arose out of Potter's sales of Envirepel Energy, Inc. shares purportedly held by a Nexcore affiliate, Fulcrum Enterprises. In October 2008, Potter sold more than 100,000 shares to eleven investors and received proceeds of \$128,125.00. Although Potter made representations about Fulcrum's ability and authority to deliver the shares and although Potter immediately spent the sale proceeds, he was unable to deliver, or caused to be delivered, certificated shares and failed to offer or provide refunds.

FACTS AND VIOLATIVE CONDUCT

I. FACTS RELEVANT TO ALL VIOLATIONS

A. Background

Jay S. Potter, Jr. was President, Chief Executive Officer and an equity owner of former FINRA member Nexcore Capital ("Nexcore" or the "Firm"). From at least 2005 through late 2008, Potter and Nexcore were actively involved in raising

funds for Envirepel Energy, Inc. (“Envirepel”). Envirepel was a California corporation, formed in July 2004, to design, develop, own and operate renewable energy facilities for the production of electricity across the state of California.

From at least August 2005 through 2008, Nexcore and Envirepel entered into a series of Selling Agreements whereby Nexcore sold Envirepel shares on a best-efforts basis. In that same period, Potter served on Envirepel’s Board of Directors and Nexcore affiliate, Fulcrum Enterprises (“Fulcrum”), performed “investor relation services” on Envirepel’s behalf.

Potter’s relationship with Envirepel, and its CEO, Anthony Arand, deteriorated in the latter half of 2008 when Nexcore was no longer able to supply capital, and Envirepel terminated Nexcore’s Sales Agreement.

B. The Fulcrum Sales

In October 2008, Potter, through Nexcore, solicited existing Nexcore customers to purchase Envirepel shares, purportedly held by Nexcore affiliate, Fulcrum Enterprises, at a discounted price. Although Envirepel had previously sold its shares at prices ranging from \$1.50 to \$2.00 per share, the discounted shares were offered at \$1.25 per share.

Between October 15, 2008 and October 28, 2008, eleven Nexcore customers (“Discounted Share Purchasers”) paid \$126,875 to purchase a total of 101,500 Envirepel shares at \$1.25 per share. Potter, through Fulcrum, immediately used the proceeds, primarily, to cover expenses incurred by Nexcore’s affiliates.

In connection with each purchase, Potter, as Fulcrum’s President, executed a Stock Purchase Agreement (“SPA”) which provided that Fulcrum would deliver certificates representing the shares sold pursuant to each SPA. Fulcrum, through Potter, represented and warranted that: (i) it owned the shares and would transfer, or have Envirepel’s transfer agent register and deliver, good and valid title to the shares, free and clear of any liens or encumbrances; (ii) it had power and authority to enter into the SPA; and (iii) the execution, delivery and performance of the SPA had been duly authorized by all necessary action its part.

Potter never told the Discounted Share Purchasers that Fulcrum neither had certificated Envirepel shares nor a written contractual right to a specific number of Envirepel Shares. He also failed to disclose that he had not asked Envirepel to reregister Fulcrum’s purported shares in the Discounted Share Purchasers’ names, and had not informed Envirepel of the Discounted Share Purchasers’ identities.

In April 2009, during a proxy battle for control of the company, Envirepel wrote to Potter, denied that Fulcrum had ever been issued any Envirepel shares, inquired about the discounted sales, and requested copies of the SPAs.

C. T.F.'s Purchase and Refund Requests

Nexcore customer T.F. was a Discounted Share Purchaser. On October 24, 2008, T.F. executed a SPA for the purchase of 10,000 Envirepel shares and paid \$12,500.00.

Several weeks later, when T.F. inquired about the status of his shares, a Nexcore representative informed him that a certificate had not been issued because of a "disagreement" between Nexcore and Envirepel. In late January or early February 2009, when T.F. requested the return of his funds, a Nexcore representative stated that a refund was "off the table."

On March 24, 2009, Potter emailed T.F., stating "You have paid for 10,000 shares of Envirepel. Fulcrum Enterprises owes you these shares and will deliver on them." In that same email, he also solicited T.F. to support his CEO candidate in a proxy fight for control of Envirepel.

On May 2, 2009, Potter emailed T.F., referenced the ongoing proxy battle, and stated that "the discounted Fulcrum shares you purchased (that I have been unable to deliver) are being used as a subversive attempt by [Envirepel CEO] to discredit me and eliminate my votes in favor of change. . . "

On May 8, 2009, T.F. emailed Potter demanding a refund of the \$12,500 that he had paid for the discounted shares. Potter had no further contact with T.F. and never refunded his money.

D. Potter Learns of T.F.'s Written Complaint Reportable on Form U4

On May 21, 2009, seven months after his purchase, T.F. filed a complaint with FINRA alleging that, on October 24, 2008, he entered into an SPA with Nexcore affiliate, Fulcrum Enterprises, but that Nexcore/Fulcrum had not delivered shares and refused to refund his money. T.F.'s complaint identified "Jay S. Potter" as the involved individual.

On May 30, 2009, T.F. filed a second complaint with FINRA alleging that: (i) on October 24, 2008 he invested \$12,500 for 10,000 shares of Envirepel Energy, with Fulcrum Enterprises, a Nexcore affiliate; (ii) Nexcore and Fulcrum are owned by the same broker, Jay Potter; (iii) he had not received his stock certificates; and (iv) he had requested a refund and had been "brushed off." He also reported that he had complained by email and telephone to Nexcore. His complaint reported the individual involved was "Jay S. Potter."

On June 19, 2009, FINRA staff sent Potter a letter, pursuant to FINRA Rule 8210, requesting information relating to the allegation that Fulcrum Enterprises, a business that Potter owned or controlled, sold Envirepel shares to T.F. yet failed to deliver the stock. The Rule 8210 request also enclosed T.F.'s Complaint. The letter specifically asked Potter to "address Mr. [T.F.'s] enclosed complaint, alleging that on or around October 24, 2008, Fulcrum sold him a \$12,500 investment in Envirepel, yet has failed to deliver the stock."

Potter responded on July 17, 2009 claiming that Envirepel was "simply refusing to honor its obligation to transfer the shares. [T.F.] and Fulcrum are the victims."

II. THE VIOLATIONS

A. Failure to Update and Disclose on Form U4 (Violation of FINRA Rules 2010 and 1122, IM-1000-1, and Article V, Section 2(c) of the By-Laws).

Question No. 14I.(2) on Form U4 asks, "Have you ever been the subject of an investment-related, consumer-initiated (written or oral) complaint, which alleged that you were involved in one or more *sales practice violations*,¹ and which: (a) was settled, prior to 5/18/2009 for an amount of \$10,000 or more or; (b) was settled, on or after 05/18/2009, for an amount of \$15,000 of more?

A related question, No. 14I.(3) asks, "Within the past twenty four (24) months, have you been the subject of an investment related, consumer initiated, written complaint, not otherwise reported under question 14I.(2) above, which: (a) alleged that you were involved in one or more sales practice violations and contained a claim for compensatory damages of \$5,000 or more (if no damage amount is alleged, the complaint must be reported unless the firm has made a good faith determination that the damages from the alleged conduct would be less than \$5,000), or (b) alleged that you were involved in forgery, theft, misappropriation or conversion of funds or securities?

T.F.'s written complaints dated May 21, 2009 and May 30, 2009, and delivered to Potter on June 19, 2009, should have, but did not, generate a "yes" answer to Question No. 14I.(3) (a) and (b) on Potter's Form U4. It was an investment related, consumer initiated written complaint; it involved a sales practice violation; it was not reportable under Question 14I.(2); the alleged damages were approximately \$12,500; and it related to misappropriation or conversion of funds or securities.

¹ The Form U4 Explanation of Terms defines "sales practice violations" to "include any conduct directed at or involving a customer which would constitute a violation of: any rules for which a person could be disciplined by any self-regulatory organization; any provision of the Securities Exchange Act of 1934; or any state statute prohibiting fraudulent conduct in connection with the offer, sale or purchase of a security or in connection with the rendering of investment advice."

By failing to update his Form U4 to disclose the T.F. complaint while associated with Nexcore Capital, Potter violated FINRA Rules 2010, IM-1000-1 and Article V, Section (c) of the FINRA By-Laws. By failing to disclose the T.F.T.F. complaint when he associated with Allied Beacon, Potter violated FINRA Rules 2010 and 1122 and IM-1000-1.

B. Confidential Settlement Agreement (Violation of FINRA Rule 2010)

On February 18, 2010, Envirepel shareholder and Chief Executive Officer Anthony Arand, T.F., and others filed a shareholders derivative lawsuit in San Diego Superior Court against Potter (and affiliated entities), entitled, *Anthony Arand, Robert K. Thornton, Gary L. Schultz, Ted S. Farmer, Richard J. Wade, and Arand and Arand all derivatively on behalf of Envirepel Energy, Inc. v. Jay S. Potter, Fulcrum Enterprises, Inc., Nexcore Capital, Inc. Nexcore Financial services, Inc. Greencore Capital, LLC, Greencore Capital Management, LLC, Integra Management Inc. and Envirepel Energy, Inc.*, bearing Case No. 37-2010-00051357-CU-MC-NC ("Shareholders' Lawsuit").

The Shareholders' Lawsuit alleged, among other things, that Nexcore: improperly sold certain shares thereby diluting the founding stockholders' interests; improperly sold shares purportedly owned by Fulcrum Enterprises when, in fact, no Envirepel shares had been issued to Fulcrum; improperly sold "investment" shares issued to Nexcore, including but not limited to the sale of 10,000 shares to T.F.; as of March 2008, ceased any meaningful effort to raise funds. It also alleged that after Envirepel terminated Nexcore's financing arrangement, Potter implemented a plan to overthrow Envirepel's management team and interfered with various transactions in order to enhance his chances of a hostile takeover. The Complaint asserted various claims including fraud, conversion, and breach of fiduciary duty and sought compensatory and exemplary damages as well as injunctive relief.

During the pendency of the Shareholders' lawsuit, Potter was the subject of a FINRA investigation involving the sales of Envirepel shares purportedly owned by Fulcrum Enterprises. On August 19, 2010, Potter and his related entities, Nexcore and Fulcrum Enterprises, filed a Cross-Complaint in the Shareholders' Lawsuit. The Cross-Complaint had a plethora of allegations involving Arand's purported mismanagement of and false representations relating to Envirepel. It also alleged that Fulcrum Enterprises held more than 500,000 Envirepel shares; Fulcrum lawfully sold Envirepel shares to several investors, including T.F.; and Arand refused to record the transfers on Envirepel's records and refused to provide Envirepel certificates.

On December 8, 2010, Arand and Potter (individually and on behalf of all parties named in the litigation) signed a Settlement Agreement, drafted by counsel, in the Shareholders' Lawsuit. The Agreement purported to resolve all claims between

the parties, but required that, “All Plaintiffs and Cross-Defendants will agree to cease all communications with FINRA and any other government agency in the absence of a duly issued subpoena.” The Agreement further provided that its “Terms [were] enforceable under [California Code of Civil Procedure] § 664.6.”

On June 27, 2011, the Superior Court of California, County of San Diego, entered an Order granting Potter’s motion for entry of judgment pursuant to California Code of Civil Procedure § 664.6. The Judgment, filed September 29, 2011, among other things, required the parties to execute confidentiality agreements with a \$50,000 liquidated damages provision. It specifically required that, *“Anthony J. Arand and Envirepel Energy, Inc shall cease all communications with the Financial Industry Regulatory Authority (“FINRA”) and any other government agency concerning Jay S. Potter, Fulcrum Enterprises, Inc., Nexcore Capital, Inc., Nexcore Financial Services, Inc. Greencore Capital, LLC, Greencore Capital Management, LLC, or Integra Management, Inc., in the absence of a duly issued subpoena.”*

More than twenty years ago, the United States Securities and Exchange Commission noted that:

[A]n integral aspect of the statutory scheme for regulating broker-dealers and protecting broker-dealers and protecting investors is the responsibility of self regulatory organizations . . . to investigate allegations that members and their associated persons have engaged in misconduct and to impose sanctions when appropriate. To fulfill this responsibility properly, [FINRA] must not be impeded from obtaining the cooperation of customers in its investigation, as well as that of members and their associated persons.¹

FINRA has repeatedly reminded its members that: (i) settlement agreements must be written to expressly allow persons to respond, without restriction or condition, to any inquiry about the settlement or its underlying facts and circumstances by any regulator; and (ii) settlement agreements that impeded, or have the potential to impede, investigation and enforcement actions are serious violations of just and equitable principles of trade.² Members have been specifically advised that settlement agreements that require regulatory authorities to obtain a subpoena before parties are permitted to disclose settlement terms or underlying facts are

¹ William Edward Daniel, Exchange Act Rel. No. 28408, 50 S.E.C. 332 (1990).

² See Notice to Members 04-44 (June 2004); Notice to Members 95-87 (October 1995); Notice to Members 86-36 (May 1986); and NASD Regulatory and Compliance Alerts (June 1994 and July 1995).

particularly problematic because SROs do not have legal authority to compel cooperation from persons who are not subject to the SRO's jurisdiction.¹

By entering into a Settlement which restricted the parties' abilities to communicate with regulatory authority, Potter impeded and/or potentially impeded a regulatory investigation and thereby violated FINRA Rule 2010.

C. Failing to Deliver Shares Sold Pursuant to a Stock Purchase Agreement

Between October 15 and 28, 2008, Potter through Nexcore Capital, sold discounted Envirepel shares, purportedly owned by Nexcore affiliate, Fulcrum Enterprises, to at least eleven investors, including T.F. In connection with those sales, Potter represented that: Fulcrum had good and valid title to the shares; Fulcrum had full power and authority to enter into the agreement; and execution, delivery and performance of the Agreement had been duly authorized by all necessary action on its part.

In fact, all necessary action had not been taken. Potter did not disclose that Fulcrum had neither certificated shares nor a written contract for Envirepel shares. Moreover, he failed to promptly disclose the identity of the discounted share purchasers to Envirepel. For more than three years, Potter neither caused the shares to be delivered nor refunded money to customers who purchased, but did not receive, the discounted shares.

Such acts, practices, and conduct constitute separate and distinct violations by Potter of FINRA Rule 2010.

B. I also consent to the imposition of the following sanctions:

- An 18 month suspension in all capacities from associating with any FINRA member firm and a \$10,000.00 fine.

The fine shall be due and payable either immediately upon reassociation with a member firm following the 18 month suspension noted above, or prior to any application or request for relief from any statutory disqualification resulting from this or any other event or proceeding, whichever is earlier.

I specifically and voluntarily waive any right to claim that I am unable to pay, now or at any time hereafter, the monetary sanctions imposed in this matter.

I specifically and voluntarily waive any right to claim that I am unable to pay, now or at any time hereafter, the monetary sanction imposed in this matter.

¹ Notice to Members 04-44 (June 2004).

I understand that if I am barred or suspended from associating with any FINRA member, I become subject to a statutory disqualification as that term is defined in Article III, Section 4 of FINRA's By-Laws, incorporating Section 3(a)(39) of the Securities Exchange Act of 1934. Accordingly, I may not be associated with any FINRA member in any capacity, including clerical or ministerial functions, during the period of the bar or suspension (see FINRA Rules 8310 and 8311).

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

II.

WAIVER OF PROCEDURAL RIGHTS

I specifically and voluntarily waive the following rights granted under FINRA's Code of Procedure:

- A. To have a Complaint issued specifying the allegations against me;
- B. To be notified of the 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 National Adjudicatory Council ("NAC") and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, I specifically and voluntarily waive 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.

I further specifically and voluntarily waive any right to claim that a person violated the ex parte prohibitions of FINRA Rule 9143 or the separation of functions prohibitions of FINRA 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.

III.

OTHER MATTERS

I understand that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs (“ODA”), pursuant to FINRA Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against me; and
- C. If accepted:
 - 1. this AWC will become part of my permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against me;
 - 2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about my disciplinary record;
 - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
 - 4. I 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 finding in this AWC or create the impression that the AWC is without factual basis. I may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects my right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.
- D. I may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. I understand that I 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 FINRA, nor does it reflect the views of FINRA or its staff.

I certify that I have read and understand all of the provisions of this AWC and have been given a full opportunity to ask questions about it; that I have agreed to its provisions voluntarily; and that

no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce me to submit it.

October 18, 2012
Date (mm/dd/yyyy)

[Signature]
Jay S. Potter, Jr. Respondent

Reviewed by:

[Signature]
R. Craig Zafis, APC
9201 Spectrum Center Blvd.,
Suite 210
San Diego, CA 92123
Tel: 858.784.7380

Counsel for Respondent Jay S. Potter

Accepted by FINRA:

11/19/12
Date

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

[Signature]
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