

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 20090205463**

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

RE: Gary I. Purcell, Respondent
CRD No. 368850

Pursuant to Rule 9216 of FINRA's Code of Procedure, Gary I. Purcell submits 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 the Member alleged violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

The Respondent hereby accepts and consents, 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

Gary I. Purcell ("Purcell") was born in March 1945. He first became employed in the securities industry in 1969, when he became a registered representative with FINRA-regulated entity Sherman, Fitzpatrick & Co, Inc. Purcell left that firm in 1984 and thereafter worked at a series of FINRA-regulated firms. He became a registered representative with Basic Investors, Inc. ("Basic" or the "Firm") in April 2000, and remained at that FINRA-regulated entity until his retirement in October 2008. Purcell has not been employed in the securities industry since that date.

OVERVIEW

From January 1, 2006 through December 31, 2007 (the "Relevant Period"), Purcell executed customer sell orders for 14,142,900,000 unregistered shares of Universal Express, Inc. ("USXP") stock, in violation of Section 5 of the 1933 Securities Act ("Section 5") and NASD Rule 2110. No exemption applied to the sale of these shares. Purcell's customers were permitted to deposit large blocks of unregistered shares in certificate form and immediately liquidate the positions for total net proceeds of approximately \$2.5 million, resulting in approximately \$17,200 in

000070028 2010

commissions for the Firm. Purcell was a partner of the Firm, and did not receive commissions from the activity he conducted in his customer accounts.

FACTS AND VIOLATIVE CONDUCT

Universal Express, Inc. (USXP)

USXP was a publicly-traded Nevada corporation, with offices in New York and Florida, purportedly involved in the businesses of shipping and transportation. On March 24, 2004, the U.S. Securities and Exchange Commission (the "SEC" or "Commission") filed a complaint seeking a temporary restraining order and other emergency relief against USXP and others for their alleged involvement in the distribution of USXP common stock in violation of Section 5. The Commission's allegations included that from April 2001 through January 2004, USXP issued more than 500 million shares of unregistered stock for distribution to the public, issued a series of false press releases regarding funding commitments for the company, and made other false and misleading statements. The shares were issued purportedly as compensation under consulting agreements to co-defendants named in the lawsuit who sold to the public over 470 million shares of USXP for \$17.9 million. On February 21, 2007, the SEC successfully moved for summary judgment in *SEC v. Universal Express, Inc. et al*, 475 F. Supp. 2d 412 (SDNY 2007), *aff'd in a summary order sub nom., SEC v. Altomare*, 2008 U.S. App. Lexis 23408 (2d Cir. Nov. 13, 2008), *cert denied*, 129 S. Ct. 2745, 2009 U.S. Lexis 413 (June 1, 2009), which found that Universal Express violated Section 5 and that no exemption applied.

Purcell's Customer Accounts sold Unregistered Securities

During the Relevant Period, Purcell executed customers' sale orders for over 14 billion unregistered shares of USXP. No exemption applied to the sale of these shares. None of the USXP certificates that Purcell's customers deposited into their accounts contained any restrictive legends. The liquidation of these shares provided the account holders with approximately \$2.5 million in proceeds.

The Firm made a market in USXP and the commissions it received from each sale in the customer accounts discussed below ranged from one to five percent to five percent. Because the Firm was a corporation and Purcell was a shareholder and officer, all commissions earned by the Firm were put into one account used to pay the Firm's operational expenses. Any excess funds remaining in the account were used to pay the salaries of Purcell and the other officers.

Regarding the deposits of USXP shares at the Firm, the typical due diligence was to obtain USXP's 10Ks, 10Qs, and 8Ks from the Commission's EDGAR system. In addition: (1) Corporate resolutions were obtained from USXP stating that the shares were free trading; (2) the transfer agent was called to verify that the certificates were free trading and not restricted; and (3) the clearing firm reviewed all corporate resolutions and other documents provided and cleared each certificate. The clearing firm also required an IB Equity Authentication Form ("IB Equity Form") to be completed and signed by the customer for all deposits of more than one million shares of a particular stock. The IB Equity Form was used to collect background information, including: name of the issue, name on the certificate, certificate number, number of

shares, tax ID number, total shares outstanding, visible legend, date of issue, and account name/number. It also asked whether there were any stops, holds, or additional lockups or encumbrances, whether the current owner was an affiliate or nominee to become an affiliate, whether the current owner had anything to do with capitalizing the company, how the current owner acquired the stock and from whom, and the date the stock was acquired and the form of payment.

Purcell's general practice was to have the customer complete the IB Equity Form required by clearing firm and to ask the transfer agent if the certificates were free trading.

EA account

During the Relevant Period, EA, a limited liability company, deposited 46 stock certificates in its account at the Firm. The 46 certificates contained a total of 5,288,900,000 shares of unregistered USXP stock. A majority of these USXP shares were deposited into the EA account after the Commission was granted summary judgment on February 21, 2007. Between April 2007 and July 2007, EA deposited a total of 3.9 billion shares of USXP into its account and sold off these shares almost immediately through a series of sale transactions. All of EA's USXP activity during this time followed a similar pattern: (a) depositing large amounts of USXP stock; (b) liquidating the shares within days of the deposit; and (c) depositing more shares once all or virtually all of the shares from the previous deposit were liquidated.

Each IB Equity Form submitted by EA stated that the USXP shares were acquired in a private placement, had no stops, holds or additional lock-ups and were free from all encumbrances. On all but one IB Equity Form, the spaces provided to indicate whether the shares were registered in an offering or, alternatively, clearing under an exemption from registration (the "Section 5 Questions") were left blank.

NA account

During the relevant period, NA, a corporate entity, deposited 68 stock certificates in its account at the Firm. The 68 certificates contained a total of more than 8,854,000,000 shares of unregistered USXP stock. A majority of these USXP shares were deposited into the NA account after the Commission was granted summary judgment on February 21, 2007. Between February 2007 and June 2007, NA deposited approximately 7,512,500,000 shares of USXP into its account at Basic and sold off each deposit almost immediately through a series of sales transactions. All of NA's USXP activity during this time followed a similar pattern: (a) depositing large amounts of USXP stock; (b) liquidating the shares within days of the deposit; and (c) depositing more shares once all or virtually all of the shares from the previous deposit were liquidated.

Each IB Equity Form submitted by NA stated that the shares were acquired in a private placement, had no stops, holds or additional lock-ups and were free from all encumbrances. On all but two IB Equity Forms, the spaces provided for the two Section 5 Questions were left blank.

During the Relevant Period, Purcell failed to ensure that each IB Equity Form he obtained from EA and NA was complete when he submitted it to the clearing firm, and should have performed a more thorough due diligence inquiry to ascertain whether the shares of USXP were registered or exempt from registration, particularly since most of the trades occurred after the grant of summary judgment to the Commission was made public.

Purcell Violated NASD Rule 2110 by Selling Unregistered Securities in Violation of Section 5

Brokers are responsible for performing a critical gatekeeping function in order to prevent unregistered securities from illegally entering the public trading markets. Brokers who delegate their duty to inquire to others, including clearing firms and/or transfer agents, "do so at their peril."¹ Section 5 prohibits the offer or sale of any security unless there is a registration in effect as to that security or there is an exemption available for that securities transaction. To establish a *prima facie* case of a violation of Section 5, Enforcement must show that (1) no registration with the SEC was in effect; (2) the respondents sold or offered to sell the security; and (3) respondents used the means of interstate commerce in connection with the offer or sale.² Although "[t]he provisions of section 5 shall not apply to ... brokers' transactions executed upon customers' orders or any exchange or in the over-the-counter market but not the solicitation of such orders,"³ this exemption is available only when the broker has conducted a "reasonable inquiry" of the circumstances surrounding the customer's sale.⁴

The SEC has imposed responsibilities on brokers, because of their responsibilities under certain circumstances to act as gatekeepers to the public markets, to conduct a "searching inquiry" to ensure they are not in violation of Section 5:

[A] dealer who offers to sell, or is asked to sell a substantial amount of securities must take whatever steps are necessary to be sure that this is a transaction not involving an issuer, person in a control relationship with an issuer or an underwriter. . . . [W]here the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, then searching inquiry is called for.⁵

¹ *John A. Carley*, Initial Decision Release No. 292, 2005 SEC LEXIS 1745 at *110-111 (July 18, 2005); *see also Wonsover v. SEC*, 205 F.3d 408, 411-412 (D.C. Cir. 2000); *Stead v. SEC*, 444 F.2d 713, 716 (10th Cir. 1971); *DOE v. Midas Securities, LLC*, No. 2005000075703, 2009 FINRA Discip. LEXIS 32 (O.H.O. May 12, 2009) (Hearing Panel held that brokers could not rely on clearing firms to determine if the shares they received for liquidation could be sold without violating the registration requirements of the Securities Act).

² *SEC v. Ralston Purina*, 346 U.S. 119 (1953); *SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980).

³ 15 U.S.C. § 77d(4).

⁴ 17 C.F.R. § 230.144(g)(4); *Wonsover v. SEC*, 205 F.3d 408, 415 (D.C. Cir. 2000).

⁵ *Distribution by Broker-Dealers of Unregistered Securities*, Securities Act Rel. No. 4445, 1962 SEC LEXIS 74 (Feb. 2, 1962) (quoting *SEC v. Culpepper*, 270 F.2d 241, 251 (2d Cir. 1959)).

During the Relevant Period, Purcell offered and sold through the means of interstate commerce approximately 14,142,900,000 unregistered shares. No exemption applied to the sale of these unregistered shares. Purcell thus participated in a distribution of unregistered shares in violation of Section 5 and NASD Rule 2110.

VIOLATIONS

As a result of the conduct described above, Purcell violated the following rules:

1. Purcell violated NASD Rule 2110, by selling unregistered securities in violation of Section 5 of the Securities Act of 1933.

SANCTIONS

Purcell consents to the imposition of the following sanctions:

1. A censure;
2. A fine of \$2,500;
3. A suspension from associating with any FINRA-regulated firm in all capacities for a period of twenty (20) business days.

The fine shall be due and payable either immediately upon reassociation with a FINRA-regulated firm following the twenty (20) business day 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.

Purcell specifically and voluntarily waives any right to claim that he is unable to pay, now or at any time hereafter, the monetary sanction(s) imposed in this matter.

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

II.

WAIVER OF PROCEDURAL RIGHTS

Purcell specifically and voluntarily waives the following rights granted under FINRA'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 National Adjudicatory Council ("NAC") and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, Purcell 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.

Purcell further specifically and voluntarily waives 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

Purcell understands 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 the Member; and
- C. If accepted:
 - 1. This AWC will become part of the Member's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against the Member;

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 8310 and IM-8310-3; and
4. Purcell 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. The Firm 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.

The undersigned certifies that he has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it, has 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 him to submit it.

Date

1/7/10

Gary I. Purcell

Reviewed by:



Counsel for Respondent

Charles M. O'Rourke

Attorney-At-Law

2 Swenson Drive

Woodbury, NY 11797

Accepted by FINRA:

1-27-10
Date

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

Suzanne Elovic

Suzanne Elovic

Chief Counsel

FINRA Department of Enforcement

14 Wall Street

New York, NY 10005