

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of :
:
MICHAEL BRESNER, : INITIAL DECISION
RALPH CALABRO, : November 8, 2013
JASON KONNER, and :
DIMITRIOS KOUTSOUBOS :

APPEARANCES: Edward G. Sullivan, W. Shawn Murnahan, and Natalie Brunson for the
Division of Enforcement, Securities and Exchange Commission

Peter J. Anderson and Jaliya S. Faulkner of Sutherland Asbill & Brennan
LLP for Respondent Michael Bresner

Adam D. Cole of Cousins Chipman & Brown LLP for Respondent Ralph
Calabro

Eric S. Hutner of Hutner Klarish, LLP, for Respondent Jason Konner

Paul J. Bazil of Pickard & Djinis LLP for Respondent Dimitrios
Koutsoubos

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision finds: (1) Ralph Calabro (Calabro) churned the JP Turner (JPT) account of Dudley Wayne Williams (Williams) and did not churn the JPT accounts of Henry Gail Moore (Moore) or Waldo Wayne Willhoft (Willhoft); (2) Jason Konner (Konner) churned the JPT account of James Carlson (Carlson) and did not churn the JPT account of Gordon Miller (Miller); and (3) Dimitrios Koutsoubos (Koutsoubos) churned the account of Teddy Dale Bryant (Bryant) and did not churn the JPT account of Bruce Wayne Mills (B. Mills) and Pamela Leehans Mills (P. Mills) (collectively the Mills). This Initial Decision also finds that Michael Bresner (Bresner) failed to reasonably supervise Konner and Koutsoubos.

This Initial Decision orders: (1) Calabro, Konner, and Koutsoubos to cease and desist from committing or causing violations and any future violations of Section 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder; (2) bars Calabro, Konner, and Koutsoubos from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; (3) imposes a supervisory bar against Bresner; (4) orders Calabro to disgorge \$282,000 plus prejudgment interest, Konner to disgorge \$55,000 plus prejudgment interest, and Koutsoubos to disgorge \$30,000 plus prejudgment interest; and (5) imposes civil penalties of \$5,000 against Bresner, \$150,000 against Calabro, \$150,000 against Konner, and \$130,000 against Koutsoubos.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission or SEC) issued its Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on September 10, 2012, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, Section 9(b) of the Investment Company Act of 1940 (Investment Company Act), and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). Respondents filed their Answers to the OIP by October 25, 2012.

Seventeen days of hearing were held between January 28 and February 20, 2013, in Washington, D.C. The parties filed a Joint List of Admitted Exhibits on April 9, 2013, and the admitted exhibits are listed in the Record Index issued by the Commission's Office of the Secretary on October 22, 2013.¹ The Division of Enforcement (Division) and Respondents submitted their post-hearing briefs by April 15, 2013, and their reply briefs on May 10, 2013.²

B. Summary of Allegations

The instant proceeding concerns Calabro's, Konner's, and Koutsoubos' alleged churning between January 1, 2008, and December 31, 2009 (Churn Period), of the JPT accounts of seven customers (collectively, Customers) by engaging in excessive trading for their own gains in

¹ Citations to the Division's, Bresner's, Calabro's, Konner's, and Koutsoubos' exhibits will be noted as "DX. __," "MBX. __," "RCX. __," "JKX. __," and "DKX. __," respectively.

² Citations to the transcript of the hearing are noted as "Tr. __.". Citations to Bresner's, Calabro's, Konner's, and Koutsoubos' Answers are noted as "Bresner Answer at __," "Calabro Answer at __," "Konner Answer at __," and "Koutsoubos Answer at __," respectively. The Division's post-hearing brief is noted as "Div. Br. at __." Citations to Bresner's, Calabro's, Konner's, and Koutsoubos' post-hearing briefs are noted as "Bresner Br. at __," "Calabro Br. at __," "Konner Br. at __," and "Koutsoubos Br. at __," respectively. The Division's reply brief is noted as "Div. Reply Br. at __." Citations to Bresner's, Calabro's, Konner's and Koutsoubos' reply briefs are noted as "Bresner Reply Br. at __," "Calabro Reply Br. at __," "Konner Reply Br. at __," and "Koutsoubos Reply Br. at __," respectively.

disregard of the Customers' investment objectives and risk tolerances.³ OIP at 2. The OIP alleges that Calabro, Konner, and Koutsoubos generated commissions, fees, and margin interest totaling approximately \$845,000, while the defrauded Customers suffered aggregate losses of approximately \$2,700,000. Id.

The OIP also alleges that, during the Churn Period, Bresner was responsible for supervising Konner and Koutsoubos as it related to review of the activity in three accounts and taking any appropriate actions. Id. at 5. The OIP alleges that Bresner failed to reasonably supervise Konner and Koutsoubos, with a view to preventing violations of the federal securities laws and rules thereunder. Id. at 5-6

The Division seeks cease-and-desist orders, disgorgement and prejudgment interest, civil penalties, and direct and collateral industry bars against Calabro, Konner, and Koutsoubos. Div. Br. at 72-80. The Division seeks civil penalties and a supervisory bar against Bresner. Div. Br. at 78-80.

Bresner denies that he became the supervisor of Konner and Koutsoubos and states that their supervisor was always John Williams (J. Williams). Bresner Answer at 5, 7. Bresner admits that the most restrictive supervisory action he took was to impose commission restrictions on the accounts managed by Konner and Koutsoubos. Id. at 8. Bresner asserts that: he did not violate any provision of the securities laws alleged by the Division; the OIP fails to state a cause of action upon which relief can be granted; and the OIP failed to comply with federal statutory deadlines. Id. at 8-9.

Calabro admits he was a registered representative of JPT's Parlin, New Jersey branch office from March 2004 to January 2011. Calabro Answer at 1. He denies knowingly or recklessly engaging in churning, exercising de facto control, and engaging in excessive trading in the JPT accounts of three of his customers. Id. at 2. Calabro denies that he retained a portion of the commissions and fees earned by JPT for the trades and that his customers suffered approximately \$2,300,000 of losses. Id. He asserts that the OIP fails to state a cause of action upon which relief can be granted and that the OIP fails to factor in the "Great Recession and its effect on the broad market." Id. at 4.

Konner admits that he was a registered representative of JPT from September 2006 to December 2011. Konner Answer at 1. He denies knowingly or recklessly engaging in churning, exercising de facto control, and engaging in excessive trading in the JPT accounts of two of his customers. Id. at 2. Konner denies he retained a portion of the commissions and fees earned by JPT for the trades and that his customers suffered approximately \$134,000 in losses. Id. Konner asserts that he: discharged his duties in good faith; exercised at least the degree of care, diligence, and skill of an ordinary prudent person in a similar situation; and did not use any unlawful or improper methods in his business practices. Id. at 4-5. He also asserts that this proceeding is barred by the statute of limitations. Id. at 5.

³ As explained further below, the alleged churn period for each account falls within the OIP's Churn Period, but otherwise varies from account to account.

Koutsoubos admits he was a registered representative at JPT from July 2000 to August 2009. Koutsoubos Answer at 6. He denies knowingly or recklessly engaging in churning, exercising de facto control, and engaging in excessive trading in the JPT accounts of two of his customers. Id. at 2. Koutsoubos denies he retained a portion of the commissions and fees earned by JPT for the trades and that his customers suffered approximately \$193,000 in losses. Id. Koutsoubos asserts that: the OIP fails to state a claim upon which the Commission can take disciplinary action; the statutory deadlines were not met; and the proceeding is barred by laches. Id. at 9-10.

II. FINDINGS OF FACT

The findings and conclusions herein are based on the entire record. I applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered and rejected all arguments, proposed findings, and conclusions that are inconsistent with this Initial Decision.

A. Relevant Entities and Systems

1. JP Turner

JPT is a limited liability company and registered broker-dealer headquartered in Atlanta, Georgia, with two majority owners. Tr. 2509. During 2008 and 2009, JPT had between 180 and 200 branch offices. Tr. 2762. Most branches were small or one-person offices, and many were offices of supervisory jurisdiction (OSJ), that is, offices with at least one on-site principal holding a series 24 license. Tr. 2510-12, 2762. There were approximately five hundred registered representatives in JPT offices in 2008 and 2009. Tr. 2762. The branches contracted with JPT to operate independently licensed JPT offices, with JPT headquarters supporting back office functions. Tr. 2510. Area Vice Presidents (AVPs), most of whom worked at headquarters, performed principal-level roles by supervising non-OSJ offices and their registered representatives according to geographic regions. Tr. 2512-13. The OSJ principals were sometimes also branch managers. Tr. 2513-14. AVPs also supervised OSJ principals. Tr. 2513; DX. 171. AVPs reported to the Executive Vice President (EVP), a position occupied by Bresner, and Bresner reported to JPT's chief operating officer. Tr. 2514; DX. 171.

2. Trade Review Systems

a. Protegent

JPT utilized Protegent as its daily blotter review platform. Tr. 2524. Protegent provided principals access to records of all trades by the registered representatives they supervised. Tr. 2524-2526. Protegent had exception mechanisms, that is, rules and automatic criteria that identified certain trades, indicated by color-coded flags, for heightened review. Tr. 2524. A trade could be flagged as green, yellow, or red, each of which triggered different review requirements. Tr. 2526. A red flag indicated that the trade required principal-level review as well as review by the compliance office. Tr. 2526. The compliance office also reviewed all commissions daily to ensure they fell within JPT's commissions policies. Tr. 2503.

b. Account Activity Review System

On November 14, 2007, JPT launched the Account Activity Review System (AARS), which was sometimes referred to as Compliance Online 2.0.⁴ Tr. 2524; DX. 92. AARS was created by JPT's steering committee, which included both Bresner and Michael Isaac (Isaac), the Chief Compliance Officer, and which had been seeking to reduce JPT's litigation risk. Tr. 2528-29. According to Isaac, JPT chose Return on Investment (ROI) as the primary metric for AARS because ROI would best identify accounts whose performance and activity increased the likelihood of the customer leaving or suing JPT. Tr. 2520. ROI was measured by adding all charges to the account, including fees, commissions, and margin interest, and dividing that total by the average market value over the twelve preceding months. Tr. 2521-22, 2619-20.

AARS generated quarterly reports based on trailing twelve-month measurements of ROI, supplemented by turnover rates, which were measured by multiplying the "amount of times the entire proceeds of a particular account were purchased" in a twelve-month period. Tr. 2521-22, 2530. AARS did not directly measure or report the number of trades in an account, but that data was available when reviewing trades. Tr. 2531. AARS and the written supervisory procedures (WSPs) described the mechanisms for AARS review, but did not dictate the substance of reviews. Tr. 2537.

AARS categorized account activity levels based upon thresholds of ROI percentages. Tr. 2549; DX. 172. Four levels of review were established, beginning with an ROI greater than ten percent, and each level required increased supervisory scrutiny. Tr. 2532, 2549, 2571-72; DX. 92; DX. 172. The reviews required different levels of supervisors to log in, complete reviews, and save their dispositions and notations. Tr. 2535-41. Failure to complete reviews on accounts would result in trading restrictions on the accounts, which blocked purchases in the account but allowed sales. Tr. 2533. The compliance office entered trading restrictions for failure to timely complete reviews. Tr. 2533. The compliance office did not review the principals' and executives' review actions, but conducted spot checks to determine whether the reviews were being conducted in accordance with AARS procedures. Tr. 2539-40.

Level 1 review was triggered for accounts with ROI greater than ten but less than fifteen for the prior twelve months. Tr. 2551; DX. 172. Emails identifying accounts flagged for Level 1 were sent to the principal and AVP for the account. Tr. 2541, DX. 172. For branch offices without a Series 24-licensed principal, the AVP acted as both principal and AVP. Tr. 2513, 2804. The principal was required to review the accounts' data and history. Tr. 2550-51. Principals were required to explain any actions taken by noting them in AARS. Tr. 2541; DX. 92. Actions taken, if any, were supposed to reflect "concern for future activity" and could include, among other things, talking to the registered representative responsible for the account or requiring due diligence files on investment recommendations. Tr. 2545; DX. 92. If the account appeared at Level 1 more than once in a twelve-month period, no new action was required, but if it appeared again after twelve months, it would be listed again in an email to principals and AVPs and would require a new principal-level review. Tr. 2554; DX. 172.

⁴ At around the same time as AARS was rolled out, JPT changed its account numbering system. Tr. 2902-04. DX. 88 is an account number concordance.

Level 2 review was triggered for accounts with ROI greater than fifteen and less than twenty or for accounts with an ROI between ten and fifteen accompanied by a turnover rate of six or greater. Tr. 2557; DX. 172. Accounts flagged for Level 2 review were sent by email to principals, AVPs, and the compliance office. Tr. 2545, 2559. Principals had to review the accounts and could select an action from a menu of options. Tr. 2560; DX. 92; DX. 172. Possible actions included restricting commissions, computing a profit and loss statement, discussing the account with the registered representative, and contacting the customer. DX. 92. A selection of “other” from the menu of options required explanation in the notes. DX. 92. Additionally, AARS automatically generated an Active Account Suitability Questionnaire (AASQ) and Active Account Suitability Supplement (AASS) to be sent to the customers whose accounts were listed in Level 2, and which the customer was required to sign and return. Tr. 2545-46. Failure to receive the signed AASQ or AASS would result in account restrictions. Tr. 2545-46. The AASS described the risks of heightened account activity, which customers would have to authorize, and the AASQ asked customers to determine suitability levels. Tr. 2545. Changes in suitability levels could result in account restrictions, when account activity was inconsistent with suitability. Tr. 2546. No specific information regarding the customer’s account activity was provided to the customer in the AASQ or AASS. Tr. 2547. If the account appeared within the Level 2 thresholds more than once in a twelve-month period, no new action was required, but if the account appeared again after twelve months, the Level 2 review would have to be repeated. Tr. 2560; DX. 172.

AARS triggered Level 3 review for accounts with ROI greater than twenty and less than twenty-five. Tr. 2565; DX. 172. As with Level 2, lists of accounts flagged for Level 3 were sent to principals, AVPs, and the Compliance Office. Tr. 2565; DX. 172. According to Isaac, Level 3 did not require that an AASQ or AASS be sent to customers, but for accounts that skipped past Level 2 review, an AASQ and an AASS would be sent. Tr. 2567. For each account flagged under Level 3, AARS required a profit and loss analysis. Tr. 2566; DX. 172. AVPs were responsible for Level 3 review and were required to input notes and indicate dispositive decisions for the accounts by selecting from a menu of options, which included restricting commissions, discussing the account with the registered representative, closing the account, and contacting the customer. Tr. 2567; DX. 92; DX. 172. Unlike Level 2, accounts meeting the Level 3 thresholds could reappear in the quarterly reports any number of times. Tr. 2566; DX. 172.

AARS triggered Level 4 review for all accounts with ROI greater than twenty-five. Tr. 2570; DX. 172. Like Levels 2 and 3, AARS generated lists of Level 4 accounts and emailed them to principals, AVPs, and the compliance office. Tr. 2570; DX. 172. Level 4 accounts were also emailed to the EVP, which was Bresner in 2008 and 2009. Tr. 2570-71; DX. 172. According to Isaac, AVPs were required to conduct reviews of Level 4 accounts in the same way that they were for Level 3 reviews, but the EVP was required to review the AVP decisions for those accounts and document whatever actions were taken in AARS. Tr. 2570-71; DX. 172. Bresner could, and did occasionally, delegate his Level 4 review responsibilities to AVPs. Tr. 2573-74. AARS did not require review of Bresner’s actions. Tr. 2574.

B. Respondent Testimony

1. Bresner

Bresner lives in Atlanta, Georgia, is age sixty-nine, and is divorced. Tr. 2737. He attended Cornell University for one year, followed by City College of New York, where he received a bachelor of business administration in 1966. Tr. 2740. He also attended Bernard Baruch Graduate School of Business, between about 1966 and 1971 or 1972, without taking a degree. Tr. 2741; DX. 89 at 6. He holds Series 4, 7, 24, 27, 53, 63, and 66 securities licenses. Tr. 2742. These correspond to, respectively, options principal, general securities, general securities principal, financial and operations principal, municipals principal, blue sky, and registered investment adviser. Tr. 2742-45. He has held a Series 24 license since the early 1980's and has been in the securities industry for forty-five years. Tr. 2745, 2751.

In 2004, when Bresner was president of National Securities, NASD filed an action against National Securities alleging failure to see supervisory red flags. Tr. 2749-51; DX. 89 at 5. The matter was settled, and resulted in a thirty-day supervisory suspension and \$25,000 fine against Bresner. Tr. 2750. This is the only time his supervisory license has been suspended. Tr. 2751-52.

Prior to working at JPT, Bresner was president of National Securities from June 1998 to January 2005, a position which oversaw the firm's compliance department. Tr. 2756-57; DX. 89 at 8. Prior to that, he served as chief operating officer of Olympic Cascade Corporation for six months. Tr. 2757; DX. 89 at 6. Prior to that, he served as a managing director of H.J. Meyers. Tr. 2757-58; DX. 89 at 8.

Since March 2012 he has been senior vice president of due diligence at JPT. Tr. 2739. He no longer has any supervisory responsibility over sales practices. Tr. 2739-40. Between February 2005, when he started at JPT, and March 2012, he was JPT's executive vice president. Tr. 2739, 2752, 2756; DX. 89 at 8. Although he never formally held the title "head of supervision," Bresner was the "de facto head of supervision" at JPT in at least 2008 and 2009. Tr. 2752, 2756. He agreed that the president of JPT, William Mello, advised the Commission that Bresner was "head of the supervision department," and that JPT's chief operating officer, Dean Vernoia (Vernoia), described Bresner's position as "head of supervision." Tr. 2753-54. The WSPs dated January 2008 stated that he, the compliance department, and the branch managers were responsible for supervising active accounts. Tr. 2991-92; DX. 79 at JPTURNER-SEC-ATL 033086-87.

Bresner also served on JPT's hiring, steering, and investment and new product committees. Tr. 2754-55. His work on these three committees, plus his supervision of AVPs, comprised seventy-five to eighty percent of his work at JPT. Tr. 2755-56. Bresner was compensated in 2008-2009 by salary and bonuses, including a recruiting bonus in at least 2009, and has never had any ownership interest in JPT. Tr. 2792-93, 2990.

His most important and time-consuming responsibility, taking up about 65% of his time, was supervision of the AVPs, whom Bresner has referred to as "AVPs of supervision," and all of whom reported to him, except one in 2009. Tr. 2752, 2760-62, 2771-72. JPT had approximately fifty or sixty OSJ offices in 2008 and 2009, and each OSJ had a new or different AVP every

couple of years. Tr. 2763-64. Bresner was responsible for assigning AVPs, and he changed their branch assignments pretty much every year, typically around year end. Tr. 2764-65. The only JPT employees Bresner supervised as a first line supervisor were the AVPs. Tr. 2765. Except Jim McGrath (McGrath), who was physically located in the northeast U.S., all of the AVPs Bresner supervised in 2008-2009 were at JPT headquarters in Atlanta. Tr. 2772. He spoke to McGrath almost every day. Tr. 2772. Bresner had the authority to hire AVPs on his own, but he always had others at JPT interview candidates. Tr. 2774.

JPT's hiring committee discussed disciplinary actions and other adverse actions to be taken against JPT's registered representatives. Tr. 2768. The hiring committee in 2008 and 2009 had the authority to admonish, fine, and require a "sit-down" with registered representatives. Tr. 2770. It could also recommend termination to Vernioia, who attended most of the hiring committee meetings but was not a voting member. Tr. 2770. To Bresner's knowledge, during 2008 and 2009, the hiring committee took no disciplinary action against Calabro or Koutsoubos, and in 2008 it took no disciplinary action against Konner. Tr. 2768-69. However, every year Bresner sat on the committee, at least one registered representative was terminated for various reasons. Tr. 2771.

When Bresner first reported to JPT, nothing was being done to review active accounts. Tr. 2992. He determined that JPT's online compliance system, which went into effect shortly after he arrived, was "useless" for reviewing active accounts, and at the end of 2005 he told Vernioia about his concerns. Tr. 2993, 2999. He also started using a combination of Protegent and Streetscape to identify accounts that needed to be looked at by an AVP. Tr. 2993-94. It was very cumbersome but continued until 2007. Tr. 2994. JPT in the meantime started having meetings to see what it could do about improving the system, which ultimately led to the implementation of AARS. Tr. 2994-95. Bresner participated in these meetings. Tr. 3002, 3007, 3010.

The WSPs stated that accounts at Level 4 will be managed at the discretion of the executive vice president, which meant to Bresner that he could determine what the process would be. Tr. 2995-96; DX. 79 at JPTURNER-SEC-ATL 033088. That process initially involved AVPs reviewing accounts with local supervisors, local supervisors speaking with the registered representatives, AVPs determining a course of action, and AVPs submitting to Bresner a sheet with notes as to their recommendations. Tr. 2996-97; MBX. 22. AVPs noted certain actions taken for an account in AARS by a number code, although the number code did not indicate who performed the actions. Tr. 3025-27; DX. 98 at 1. Bresner then reviewed the recommendation sheets, examined the accounts, and if he disagreed with the AVP he talked to the AVP. Tr. 2997; MBX. 22. His account examination sometimes included performing a profit and loss analysis. Tr. 2997-98. Eventually Bresner decided whatever action was taken, and entered it in AARS. Tr. 2997-98. He tried to complete this process within a week or two of when the quarterly report issued. Tr. 3070.

When AARS was under development, the proposed trigger ROIs for various reviews were, in Bresner's opinion, too high. Tr. 3002, 3013. Bresner complained about this as recently as November 2008. Tr. 3012-13. After the investigation leading to this proceeding started, the level triggers were reduced. Tr. 3073. AARS also lacked, and continues to lack, a method for

analyzing profit and loss. Tr. 3007. Profit and loss analysis has to be performed using other databases. Tr. 3007-08. During 2008-2009, Bresner performed such profit and loss analyses and made handwritten notations on a list of accounts, and also noted ROI and commissions by hand on the same list. Tr. 3018-20; MBX. 22 at BRESNER EX 022-0013. AARS initially had a glitch which resulted in AASQ and AASS forms being issued to customers only at Level 2, so that an account that went straight to Level 3, and bypassed Level 2, would not have active account forms sent out. Tr. 3065-66. This glitch was corrected in about October 2008. Tr. 3066. There was no ability in AARS, other than brief remarks, to note that a supervisor had called a customer when investigating an account. Tr. 3073-74.

Bresner had the authority to fine registered representatives on his own, but typically consulted with the hiring committee about fines, unless it was dictated by standard operating procedure on a particular matter. Tr. 2774-75. He had the authority to impose commission restrictions on his own, and was the only person who could enter restrictions at Level 4 in AARS. Tr. 2775-76. He did not consider commission restrictions to be disciplinary, because they were beneficial to the customer. Tr. 2780-81. Prior to Bresner's arrival, JPT engaged almost exclusively in equity trading at very high levels. Tr. 3024. Bresner considered commission restrictions to be effective because within three years, forty-eight of the fifty licensees with the highest branch ROIs had left JPT. Tr. 3023-24.

Bresner also had the authority to restrict accounts by stopping all trading in them, although he had to go through the compliance department to do so. Tr. 2785-86. In 2008 and 2009, this was action limited to certain situations, such as failure to return an AASQ. Tr. 2786. JPT's compliance department had the authority to place a registered representative on heightened supervision, which could happen for many reasons. Tr. 2787-89. Heightened supervision involved a special agreement between a registered representative and the compliance department. Tr. 3037. Bresner apparently did not believe that heightened supervision was especially helpful, because the typical supervision arrangement involved doing things, such as calling customers and scrutinizing trades before they happened, that the supervisors were already doing. Tr. 3074-75.

Bresner is not aware of a case where heightened supervision was imposed at JPT for suspected churning or, in 2008-2009, for excessive trading. Tr. 2790-92. Bresner is of the view that if JPT found churning of a particular account, termination would be more appropriate than heightened supervision. Tr. 2790. Bresner believes that in JPT's Brooklyn office (LFA), JPT imposed a "slow-down or preapproval of all trading" in accounts suspected of being churned. Tr. 2791.

In 2008 and 2009, AARS notified supervisors of trading activity on a quarterly basis. Tr. 2777. At some point in 2011, AARS was modified to provide daily reports of trading activity. Tr. 2776-77. This change was motivated, at least in part, by the Commission investigation leading to the present proceeding. Tr. 2777-78. Prior to the 2011 AARS modification, each quarter the pertinent AVP formulated a recommendation on actions to be taken regarding accounts in AARS. Tr. 2779. The AVPs consulted with Bresner, and attempted to reach agreement with him on a course of action, but if agreement was not reached, then Bresner took

action on his own. Tr. 2779. Bresner sought the input of AVPs even when an account was at Level 4. Tr. 2779.

In 2008 and 2009, JPT decided to use AARS, with its use of ROI as the trigger factor, rather than Protegent, which monitored only turnover. Tr. 2795. Bresner felt that AARS was more robust than Protegent. Tr. 2795. AARS was rolled out on November 14, 2007. Tr. 2797; DX. 92. Bresner understood ROI as a measure of the amount of total costs to an investor “versus some definition of the value of the account.” Tr. 2803. Turnover was defined as total paired purchase sale amount over the average end of month market value, plus cash credit, plus market credit. Tr. 2805. Bresner denied that AARS was established to detect churning or possible churning. Tr. 2806. Instead, he testified that it highlighted active accounts at certain levels so that they would garner additional review, and that it replaced a totally ineffective system. Tr. 2806.

Excessive trading is a constant concern throughout the brokerage industry, and was the reason for AARS. Tr. 2807. So are accounts losing money, and accounts losing money while being charged high commissions. Tr. 2808. Churning is a risk in the securities industry, and was a risk at JPT. Tr. 2809. Nonetheless, AARS was not developed as a “bell going off saying this account was churned,” because churning would have to be evaluated in light of numerous other factors, and a determination of churning would be the result of a review by a supervisor. Tr. 2809-10.

Initially, AARS provided quarterly reports over a month after quarter’s end, but by mid-2009 it provided reports within fifteen days after quarter’s end. Tr. 2813. AARS was designed to be self-contained, but it was expected that reviewers would look at additional account information from JPT’s back office. Tr. 2816-17. For example, a profit and loss analysis required entry into JPT’s Streetscape system. Tr. 2817-18. Upon entering AARS, the first screen showed a selection of branches and quarters. Tr. 2819. Selecting a particular quarter and branch led to a screen showing all the associated accounts, and selecting a particular account led to a screen where review entries could be made and which showed various calculated figures, including ROI, average market value, commissions, and turnover. Tr. 2819-21; DX. 98. The commissions entry included fees and margin interest. Tr. 3030-31. ROI and turnover were calculated using a trailing twelve-month period for average market value. Tr. 2821-22. Supervisors, including AVPs, were allowed access only to the branches and registered representatives they supervised. Tr. 2822. However, AVPs could see Bresner’s levels but not make entries, and Bresner and branch principals could see the AVPs’ levels but not make entries. Tr. 2822.

When a manager got an AARS notification in 2008-2009, he or she had twenty days to review the account, although the twenty days may have changed over time, and Dennis Madej (Madej), a compliance officer, could grant a ten-day extension. Tr. 2824. AARS Level 1 required nothing more than checking a box and possibly making a notation, which could be as simple as “reviewed.” Tr. 2823-24, 2830-31. At Level 2, AARS automatically generated a letter from compliance regarding active trading, including the AASQ. Tr. 2825. If the AASQ had not been received within twenty days (thirty days if Madej extended it), then the account was restricted by the compliance department to liquidating trades only; neither Bresner nor any other

supervisor was involved in that process. Tr. 2825-27, 2829, 3000. Bresner admitted that it was possible that the registered representative shepherded an AASQ back from customers. Tr. 2828-29. Additionally, the supervisor was supposed to enter AARS and make a notation that he or she had reviewed the account. Tr. 2826-27. The supervisor at Levels 1 and 2 was generally the same person, and Bresner assumed they did the same work at both levels. Tr. 2830. Supervisors received training in AARS verbally, for example, by having their AVPs go over the system while on the telephone. Tr. 2831-32.

AVPs reviewed accounts at Level 3, and could take whatever action they felt necessary within the firm's policies and procedures. Tr. 2833-34. Bresner was not sure whether profit and loss analyses were required at Levels 2 or 3. Tr. 2833-34. At some point – Bresner is not sure if it was in 2008 or 2009 – he directed AVPs to make sure commission restrictions started at Level 2. Tr. 2834. However, generally Level 3 was the first Level where commission restrictions were used throughout most of 2008-2009. Tr. 2835.

Every quarter Bresner received a message listing the accounts that had reached Level 4 in AARS. Tr. 2835-36; DX. 97. Bresner sent a copy to each AVP, highlighting the branches they were responsible for, and telling them to investigate and come back to him with a recommendation. Tr. 2837. When he decided on a particular action, Bresner entered it into AARS himself. Tr. 2837. He believes he imposed commission restrictions on every account at Level 4 in 2008-2009. Tr. 2838. The average number of accounts at Level 4 each quarter in 2008-2009 was between 300 and 325, and there were more than 100 registered representatives on the list. Tr. 2840, 2896. Many accounts stayed at Level 4 for four quarters, because the system looked at a trailing twelve-month period. Tr. 2840-41. Although it may not have been intended when AARS was designed, the effect was that a Level 4 account did not get downgraded in just a quarter or two, and even a severe commission restriction would not achieve full results (i.e., a downgrading in Level) for three or four quarters. Tr. 2856-57. Bresner does not think he ever closed an account at Level 4 in 2008-2009, or imposed a trading limitation, although he had the authority to do so. Tr. 2841-42. In 2008-2009, Bresner never personally contacted any JPT customers in connection with a Level 4 review, although some AVPs may have contacted customers. Tr. 2843, 2855. It is possible that a commission restriction at Level 4 might create a situation where the registered representative has to trade more often to maintain his income, but it is also possible that a severe commission restriction may make each trade unprofitable, in which case the registered representative would have no financial incentive to trade. Tr. 2858.

In 2008 and 2009, branch managers and AVPs had access to customer questionnaires, which were distinct from AASQs and AASSs. Tr. 2862; DX. 93. Branch managers used them regularly, and Bresner also had access to them. Tr. 2862-63. Nothing prevented Bresner from calling customers when their accounts at Level 4. Tr. 2863. No questionnaire at a Level 4 review was ever done for Carlson, to Bresner's knowledge. Tr. 2865. The AVPs overseeing the Brooklyn branch reported to Bresner that J. Williams regularly called customers of that branch, although not at Bresner's direction. Tr. 2866. Similarly, no questionnaire at a Level 4 review was ever done for Bryant, to Bresner's knowledge, and Bresner understood that J. Williams may have called Bryant as part of a Level 4 review, although not at Bresner's immediate direction. Tr. 2867-68.

Bresner was aware that Konner had accounts at Level 4 in 2008 and 2009. Tr. 2895-96. Bresner personally knew nothing about Konner's strategy for trading in his customer's accounts, and did not speak to Konner personally about his trading strategies. Tr. 2896-97. Instead, he delegated to the AVPs responsibility for investigating and producing a recommendation. Tr. 2896-97. Bresner was aware that Koutsoubos had accounts at level 4 in 2008 and 2009. Tr. 2899. Bresner concluded from his high ROI that Koutsoubos' strategy for trading in his customer's accounts involved looking for short-term profits, but did not speak to Konner personally about his trading strategies. Tr. 2900-01. As with Konner, he delegated to the AVPs responsibility for investigating and producing a recommendation. Tr. 2901. There was no way Bresner could do the work himself in examining "400 accounts and 35 branches and over 100 reps." Tr. 2897, 2924. Bresner had no problem accepting any commission restriction recommended by the AVPs. Tr. 2940-41.

Carlson's account appeared at Level 4 each quarter from the second quarter of 2008 to the third quarter of 2009. Tr. 2909-10; DX. 98 at 1. On April 28, 2009, Bresner noted a commission restriction of \$100 in Carlson's account for the first quarter of 2009 (the first quarter of Carlson's alleged churn period), which was recommended by AVP Herman Mannings (Mannings). Tr. 2911-14; DX. 98 at 1. Bresner made the same notation on July 28, 2009, for the second quarter of 2009. Tr. 2913; DX. 98 at 1. On October 22, 2009, Bresner noted a commission restriction of 1% for the third quarter of 2009, which, again, was recommended by Mannings. Tr. 2914-16. Although a commission restriction of 1% was not necessarily stricter than a commission restriction of \$100 per trade, the decision to impose a 1% restriction was based on the substantial increase in Carlson's account value resulting from his private investment in public entity (PIPE) investment. Tr. 2914-16. The commission on the PIPE transaction was fixed and could not be changed by Bresner. Tr. 2915. Although Bresner did not make the AARS entry for the fourth quarter of 2009, because it had dropped to Level 3 and Mannings had to make the entry, the commission restriction remained at 1%. Tr. 2917; DX. 98 at 1. Prior to the alleged churn period in Carlson's account, that is, in 2008, the account appeared at Level 4 for three consecutive quarters, and in each quarter, Bresner's notation indicated a commission restriction of \$100, as recommended by Lois Cohen (Cohen), the AVP at the time. Tr. 2918-19; DX. 98 at 1. The effect of the commission restriction was to reduce Konner's total quarterly commissions from about \$84,000 in the second quarter of 2008 to at most about \$26,000 in the third quarter of 2009. Tr. 2919-20; DX. 98 at 1.

Bryant's account appeared at Level 4 each quarter from the third quarter of 2007 to the fourth quarter of 2008. Tr. 2934-35; DX. 99 at 1. Bresner felt that he had "zero influence" over trading in the fourth quarter of 2007 because the first AARS report on Bryant's account did not come out until November 2007. Tr. 3032. On May 22, 2008, Bresner noted a commission restriction of \$100 in Bryant's account for the first quarter of 2008 (the first quarter of Bryant's alleged churn period), which was recommended by Cohen. Tr. 2938; DX. 99 at 1. Bresner made the same notation on July 28, 2008, for the second quarter of 2008. Tr. 2939-40; DX. 99 at 1. On October 31, 2008, Bresner noted a commission restriction of \$60 for the third quarter of 2008, which, again, was recommended by Cohen. Tr. 2939; DX. 99 at 1. Bresner made the same notation on February 2, 2009, for the fourth quarter of 2008. Tr. 2942; DX. 99 at 1. The effect of the commission restriction was to reduce Koutsoubos' total quarterly commissions from

about \$33,000 in the fourth quarter of 2007 to \$836 in the second quarter of 2009, the last full quarter in which Koutsoubos was the registered representative. Tr. 2941; DX. 99 at 1. At \$60 per trade, Koutsoubos would have had to do ten to twenty times the trading to maintain the same level of pre-restriction commissions. Tr. 2941. Bryant did not receive an AASQ until May 2009, even though his account had been at level 4 for six consecutive quarters before then. Tr. 2949-50; DX. 99 at 1; DX. 27.

The Mills account appeared at Level 4 from the third quarter of 2007 to the fourth quarter of 2008 (the last of month of which was the first month of the alleged churn period), and in the second and third quarters of 2009, and at level 3 in the first quarter of 2009. Tr. 2958-61; DX. 100 at 1. The account had a \$100 commission restriction from December 5, 2007, to March 24, 2008, a 1% commission restriction from March 24, 2008, to May 22, 2008, a \$100 commission restriction from May 22, 2008, to July 28, 2009, and a \$50 commission restriction starting July 28, 2009. Tr. 2962; DX. 100 at 1.

Bresner analyzed the effect of commission restrictions and concluded that a \$100 restriction would leave a registered representative breaking even or losing money, and a \$50 restriction would leave him “crushed.” Tr. 2975, 3057-59. In Bresner’s view, no churning took place in the three accounts alleged against him (Carlson, Bryant, and Mills), because the front line supervisors (J. Williams and the pertinent AVP) concluded there was no churning and so reported up the chain of command; had they found churning, they were under an obligation to go directly to compliance, and that did not happen. Tr. 2979. AARS did not have an automatic feature notifying its users that churning was taking place in an account, and human intervention was required to make a churning determination. Tr. 3084. Although he was the highest ranking JPT employee who could make entries in AARS, Bresner did not consider himself responsible for making the churning determination. Tr. 3084.

After he testified in the Division’s case, and during his counsel’s cross-examination of expert witness John E. Pinto (Pinto), Bresner furnished to his counsel a six-page document similar to DX. 22. Tr. 3445-46, 3456; MBX. 68. The document, which was admitted as MBX. 68, contains handwritten notations by Bresner and Cohen as to certain accounts, including the Carlson and Mills accounts, for second quarter 2008 and third quarter 2009. Tr. 3440, 3450, 3452-53; MBX. 68. Some of Bresner’s notations memorialized calculations he had performed to analyze the accounts. Tr. 3450-52; MBX. 68. He did not do such calculations on all Level 4 accounts in 2008-2009 because it was too time-consuming, and although he may have analyzed the LFA branch Level 4 accounts one or two other times in 2008-2009, he did not bring their associated notes with him to the hearing. Tr. 3455-56. He maintained MBX. 68 and MBX. 22 in a file cabinet in his office, and produced all his files to JPT’s legal department during the investigation leading to this proceeding. Tr. 3454-55, 3457-58, 3461-62. JPT’s legal department eventually returned them to Bresner, who thereafter maintained them in a file cabinet in his office until he changed offices. Tr. 3462. Bresner does not specifically remember providing MBX. 68 to his counsel before the start of the hearing. Tr. 3467. Bresner has a number of serious medical conditions, none of which affected his mental clarity or his ability to understand questions and respond truthfully during the hearing. Tr. 3939-45.

2. Calabro

Ralph Calabro was born in 1974 and lives in Matawan, New Jersey. Tr. 79. He is married and has two children. Tr. 79. He graduated from high school in 1991, attended community college for less than two years, and has no college degree. Tr. 91-92. He attended courses at the Fashion Institute of Technology. Tr. 92. He has Series 7, 24, and 63 licenses. Tr. 92-94. He began working in the securities industry in 1995, and held jobs at several firms between 1995 and 2004, generally as a registered representative, although he received his Series 24 (securities principal) license in 2000. Tr. 94-103. For at least two of these firms, he worked out of his home office. Tr. 103.

He joined JPT in 2004 and left in 2011. Tr. 104-05. He now works at National Securities as a registered representative but not a securities principal. Tr. 105. While at JPT, he acted as a principal and registered representative in JPT's Parlin, New Jersey office (Parlin office), which he opened. Tr. 114-15, 121. The branch code was LFF. Tr. 115. His customer base increased from ten in 2004 to seventy in 2010. Tr. 185-86. The Parlin office was an OSJ and Calabro supervised multiple registered representatives. Tr. 122-23. Calabro reported to an AVP, whose identity changed from time to time, although during the period in suit, it was either Lois Cohen or Jim McGrath. Tr. 123-25. Neither of these AVPs were located in the Parlin office. Tr. 125-26. Calabro spoke with his AVP at least once or twice per week. Tr. 126.

Calabro was called upon quarterly to address accounts in AARS which had reached Levels 1 through 4. Tr. 128. Calabro could access the first two Levels, Levels 1 and 2, although he testified that he accessed them in a system called Sunguard, which was different from AARS. Tr. 128-29, 4212. As for Levels 3 and 4, Calabro discussed the relevant accounts with the AVP. Tr. 129-31. Calabro has no clear understanding of why a particular account would show up at a particular Level. Tr. 130. Some of his accounts at Levels 3 and 4 were placed on restriction. Tr. 132-33.

Calabro obtained a number of customers by cold-calling, and on the first phone call he normally asked the potential customer if they were conservative or aggressive, and if they preferred speculation in stocks. Tr. 137-41. He typically did not ask if they were actively trading on the first phone call. Tr. 141. He nonetheless sought out customers who were active traders and risk takers. Tr. 143, 180. He asked the potential customers when they last traded, to determine how comfortable they were with short-term trading. Tr. 179-80.

Calabro did not have discretionary authority on any of his customers' accounts. Tr. 196. He testified, confusingly, both that he "get[s] prior authorizations from my client before I do anything" and that that was his "practice," but that he could not "remember 100 percent" whether he ever traded without preauthorization. Tr. 196, 198. His compensation consisted of commissions, a share of "ticket charges," which were a flat \$39 fee per transaction, and 0.1 percent of daily margin balance. Tr. 220-21.

Calabro testified that he recommended trades for Willhoft, Williams, and Moore to make them money, not for the main purpose of generating a commission. Tr. 3946-47. Between late 2006 and November 2007, he recommended purchases, or "longs," to Willhoft and Williams, which was possible because the market was in an uptrend and stocks could be held longer. Tr.

3947-48. As a result, trading activity was lower then than it was after November 2007. Tr. 3947.

In November 2007, Calabro started taking short positions with Willhoft's and Williams' portfolios. Tr. 3949. Short positions generally involve shorter holding periods, because shorting is risky and price drops tend to be rapid. Tr. 3949-51. He also started recommending options for Willhoft and Williams. Tr. 3951. Options are shorter term investments because they expire and they have a high "delta," i.e., they are volatile. Tr. 3951-52. Calabro testified, confusingly, both that a margin account was necessary to short stocks, and that "there were times" when margin trading would be needed for shorting, suggesting that there were times when it was not needed. Tr. 211-12, 214.

Calabro estimated that he has put over 15,000 hours into self-education on financial matters, which included reading numerous books, newsletters, white papers, and websites, and taking classes, although nothing in the context of a university program. Tr. 3954-55, 4191-93. He testified, confusingly, both that he relies on parabola cycle theory in making investment selections and recommendations, and that he has a twofold approach, involving technical analysis and fundamental analysis. Tr. 160, 165, 3949. During the investigation he testified only about the twofold approach; he apparently said nothing about parabola theory. Tr. 167-75. Except in one instance, Calabro never relied on JPT's stock research. Tr. 199.

The parabola cycle, in theory, derives from interactions between the Federal Reserve System and consumers. Tr. 3953. In practice, it assumes that certain market sectors rise and fall consistently at the same point in the business cycle, so that the performance of stocks of companies in those sectors can be predicted by examining macroeconomic factors. Tr. 172-73, 3956-70, 4021; RCX. Demonstrative 4.⁵ He monitors the different market sectors by tracking

⁵ This summary is extremely abbreviated compared to Calabro's actual, lengthy explanation of the parabola cycle, but I believe it captures the gist of what he was saying. Overall his explanation was confusing and at times self-contradictory, so much so that I find that it adversely affects his credibility. For example, he initially stated that the parabola cycle was something the "overall economy will generally adhere to barring government intervention," and then explained that it was a "cycle on how [the Federal Reserve and the consumer] can sometimes react or counter-react to inflation or recession," as if Federal Reserve activity did not constitute government intervention. Tr. 3953. As another example, he testified that "when the economy starts doing bad, the Fed lowers interest rates," and when it "does too well, they would want to protect against inflation." Tr. 3961. However, he also testified, possibly in describing "the school of Austrian economics" – or possibly not, his testimony on this point was entirely unclear – that "it would be more interesting if the Fed raised rates to entice people to put money in the bank . . . as opposed to going deeper in debt . . . [to] increase the savings rate of the country." Tr. 3956-57. As a third example, he testified that the economy both "hit a bottom in 2002" and "finally bottomed out at 2004." Tr. 3962-63. Lastly, his explanation of the meaning of a "commodity" was very strange; although he surely knows what one is, his explanation did not demonstrate such knowledge. Tr. 3965. Calabro's explanation of technical analysis was also confusing, although not as self-contradictory. Tr. 3970-73. On the assumption that his

Exchange Traded Funds (ETFs) which invest in each of the various sectors. Tr. 3967. He testified that, had he wanted to churn his customers' accounts, he would just move money around by repeatedly buying and selling non-volatile stocks, and he would not have put so much time into learning stock-picking theories. Tr. 3957-58.

Calabro explained that he recommended short positions starting in 2007 based on both the parabola cycle and technical analysis. Tr. 3970, 3973-79. Signs of an impending market drop started to appear in July 2007, and by November 2007, Calabro felt that he needed to protect his clients or to recommend short positions, if they were comfortable with that. Tr. 3973-74, 3976-77. Specific short recommendations included Whole Foods, apparently because its business is sensitive to consumer discretion, PepBoys, for no stated reason, DryShips, a transportation company affected by high gasoline prices and low commodity prices, and MBIA, a mortgage lender affected by the declining housing sector. Tr. 3981-83.

Calabro cold called Willhoft in late September or early October 2006. Tr. 3984-86. During their first one or two calls, Calabro explained what sectors and what stocks he found interesting, and suggested Willhoft take a long position in Savient Pharmaceuticals, a biotech stock. Tr. 3986-88. At that time, the economy was at a point where technology companies were doing well and were on the upswing of the parabola cycle. Tr. 3987.

Willhoft opened an individual account in his own name with Calabro on their second phone call, in October 2006. Tr. 3989. At that time, Willhoft's investment objective was speculation, and Calabro does not remember Willhoft's time horizon. Tr. 3990. Although Calabro is quite certain that Willhoft's investment objective was speculation, he admitted that the account opening application is not of record; he accordingly was relying on memory in so testifying. Tr. 3990, 4198. Calabro went over the questions on the account form with Willhoft using a shortened version of the form, covering investment objectives, risk tolerance, and financials. Tr. 3990-91. Some but not all of the information called for on the account form could be found on the "lead sheets" Calabro bought. Tr. 4196-97. Calabro generally tells clients that risk tolerance is the most important consideration for him. Tr. 3991. He generally goes over the information with the customer again, to make sure it is correct, fills out the form, and informs that customer that he will overnight the account opening form, among other documents, to the customer. Tr. 3994-95. He testified, confusingly, both that he never sends blank account forms for the customer to sign, and that he sometimes does send blank forms, but that doing so causes delays because customers do not fill them out properly, and that compliance sends (apparently blank) forms first. Tr. 235-36, 4205, 4243. In Willhoft's case, Calabro recalls sending him the new account form. Tr. 3996. Calabro then has to forward the various account forms to his AVP for approval, or else the account will eventually go on restriction. Tr. 4297-98. However, Moore's account never went on restriction, even though it never included a completed AASQ. Tr. 4304.

Between October 2006 and February 2007, Willhoft had positions in several stocks in the technology, consumer discretion, and energy sectors, as well as in the New York Stock

explanations of such concepts to his customers was similarly confusing, I conclude that his customers were generally not well- or fully-informed regarding Calabro's trading strategy.

Exchange (NYSE), a position Willhoft selected himself. Tr. 3998-99. Calabro believes his recommendations were appropriate for an account focused on speculation and aggressive growth. Tr. 3999. During this period, Calabro and Willhoft spoke very often, sometimes twice per day. Tr. 3999. The trading frequency in Willhoft's individual account at this time was less than it was later, when he took short positions. Tr. 4022. It was Calabro's normal practice to tell his customers about their account activity and to encourage them to "try to be involved in some way, shape or form." Tr. 4000-01.

In early 2007, Willhoft informed Calabro that he wanted a separate trust account devoted to about forty percent stocks and sixty percent income-producing assets (Account 247). Tr. 4022-23. Calabro filled out the account application, using the same procedure as with the first account, and signed it on February 1, 2007. Tr. 4023-24; RCX. 1. Calabro explained to Willhoft that his desired mix of assets would be consistent with a moderate risk tolerance, which is reflected in the account application. Tr. 4025; RCX. 1. The listed investment objectives were capital appreciation as number one, followed by trading profits and income, with speculation not checked. Tr. 4039-40; RCX. 1. Calabro initially testified that he believed that speculation was the number two priority, although he "might have" misspoken, and later testified (and was impeached on the point) that he thought that speculation had been checked. Tr. 4039-40, 4199-4201; RCX. 1. Calabro sent Willhoft the application, Willhoft signed it on February 5, 2007, along with his wife, and Willhoft sent it back to Calabro. Tr. 4025-26; RCX. 1.

Because he did not feel comfortable putting together a bond portfolio, Calabro referred Willhoft's account to a colleague, who prepared a fifteen page proposal for investing the income portion of the account. Tr. 4027-28. Calabro sent Willhoft the proposal, with which Willhoft was dissatisfied because he was looking for higher income levels. Tr. 4028-29. Calabro then explained that higher income implied higher risk, and, in part because Willhoft was familiar with real estate, suggested investing in a nontraded, nonpublic, nonliquid real estate investment trust (REIT). Tr. 4029-32. On March 6, 2007, Willhoft purchased interests in two very similar REITs using direct wire transfer, outside of Account 247, which in effect substituted for the sixty percent of Account 247 that was to be focused on income production. Tr. 4033-36; RCX. 21; RCX. 22. Calabro testified that if he had wanted to churn Willhoft's account, he would not have recommended an investment that could not be traded. Tr. 4040.

Willhoft funded Account 247 in June 2007. Tr. 4037; RCX. 71. Prior to that, Willhoft indicated that he wanted to liquidate his Ameritrade account and invest it all with Calabro by purchasing NYSE stock. Tr. 4042. Calabro advised Willhoft that such a plan was inconsistent with a moderate risk tolerance and capital appreciation as the first investment objective. Tr. 4043-44. Accordingly, in April 2007 Calabro filled out an AASQ with speculation marked as an investment objective, along with growth, trading profits, and short-term trading. Tr. 4044-46; RCX. 9. Also, because Willhoft explained that his net worth was actually \$8 million, rather than \$3 million, and his liquid net worth was \$3 million, Calabro wrote in those numbers on the AASQ. Tr. 4044-46. Calabro denied that Willhoft told him, at any time prior to late 2009, that the money funding Willhoft's first two accounts came from his wife, who was more conservative than Willhoft. Tr. 4202, 4296.

In June 2007, Account 247 had positions in four stocks, two of which were Willhoft's suggestions. Tr. 4047-52. The other two were Calabro's idea and were consistent with the parabola cycle. Tr. 4047-52. Similar trades were made in both of Willhoft's accounts. Tr. 4052-53.

In September 2007, Calabro visited Willhoft in California. Tr. 4053. A portion of Willhoft's garage was set up as an office, with a television and a computer with dual monitors. Tr. 4053-54. During the visit, Calabro set up Willhoft's computer for online access to his JPT account, which Willhoft did not have at the time, although he may have just forgotten his password. Tr. 4054-55. The two then went over Willhoft's account, and Willhoft demonstrated that he was familiar with how to navigate his account online. Tr. 4055. Thereafter, sometimes when Calabro and Willhoft spoke, Willhoft was logged into his online account and Calabro was able to show him things in the account. Tr. 4057. According to Calabro, this happened a number of times, not just a few, as Willhoft testified. Tr. 4057.

In October 2007, Williams visited Willhoft while he was on the telephone with Calabro, and Willhoft introduced Williams to Calabro. Tr. 4059. Calabro told Williams they should talk privately later in the week, and then asked Willhoft for his permission to discuss some of Willhoft's portfolio with Williams, as an example of how Calabro liked to approach investing. Tr. 4060. When Calabro later spoke with Williams, he explained his approach and suggested four stocks. Tr. 4061-63. Calabro's account of when he next spoke to Williams varied; during the Division's case, he testified that Williams called him two days in succession after Willhoft recommended him, and during his own case he testified that Williams got on the phone during a call with Willhoft, and at some time thereafter Williams either called Calabro or Calabro called Williams. Tr. 210, 4059-60.

As with Willhoft, Calabro filled out Williams' account application over the telephone. Tr. 4063-64; RCX. 43. Although Calabro's signature on the application is undated, Williams' is dated October 31, 2007, which would have been about three days after Calabro went over the form with Williams over the telephone. Tr. 4064; RCX. 43. The application lists speculation, trading profits, and capital appreciation as the first, second, and third investment objectives, respectively. Tr. 4066; RCX. 43. Calabro described the meaning of those objectives to Williams, who seemed very knowledgeable and who stated that he wanted to take risks. Tr. 4066-69. The application also lists a risk tolerance of aggressive, and Calabro explained that tolerance, as well as conservative and moderate tolerances. Tr. 4069-70; RCX. 43. The listed net worth and investable assets reflect what Williams told Calabro on the phone. Tr. 4071; RCX. 43. Calabro testified that he sent Williams the entire account application, not just the signature page. Tr. 4230-31; RCX. 43.

At this time, in October 2007, Calabro was still recommending long positions. Tr. 4073. He spoke to Willhoft and Williams between one and three times per week, generally a little more often with Willhoft than with Williams. Tr. 4071-72. Calabro always discussed their accounts' performance with them, and wanted them to understand what was going on in their accounts. Tr. 4072.

In November 2007, after monitoring the stock market in light of the parabola cycle and technical analysis, Calabro became concerned and recommended stop losses to Willhoft and Williams, i.e., orders to buy or sell if a stock reaches a particular price. Tr. 4074-78. Calabro also explained the possibility of shorting to Willhoft, who had previously taken short positions in a few stocks with Calabro. Tr. 4078. Calabro had explained to Willhoft, as he did with all his clients, how shorting worked and the fact that short positions involved short holding periods and, therefore, active trading. Tr. 4078-82. Willhoft said that he wanted to take short positions. Tr. 4083. Willhoft's accounts then became more actively traded by virtue of the short positions, and Calabro was "sure" he told Willhoft that they were actively traded, but does not recall when he told him. Tr. 4208-09. Calabro also called Williams, who agreed to stop loss orders. Tr. 4084.

Calabro kept track of his customers' accounts using Streetscape, JPT's back office system, as well as profit and loss spreadsheets. Tr. 4086-87. When Calabro received RCX. 47, Williams' handwritten profit and loss calculations, he considered it important and time-stamped it. Tr. 4087-88; RCX. 47. He also did his own calculations and came up with results different from Williams, as reflected in his corrections to the document. Tr. 4089-90; RCX. 47. He also called Williams immediately thereafter and explained that Williams had made some minor errors. Tr. 4090-91. Williams explained that he had sent the document because his calculations showed essentially no net gain between November 2007 and February 2008, and he wanted to know if Calabro was still confident in Williams' positions. Tr. 4092; RCX. 47. After further discussion, in which Calabro stated that the short positions were still good, Williams agreed to take a "wait and see" approach, and to not change positions. Tr. 4092-94. Within three months, Williams had a considerable gain. Tr. 4094.

In January 2008, Willhoft opened a new account (Account 805). Tr. 4095; RCX. 2. Calabro discussed the application with Willhoft, filled it out, and sent the entire application overnight it to Willhoft, who signed it on January 6, 2008 and returned it to Calabro. Tr. 4095-96, 4232; RCX. 2. Account 805 was the successor to Willhoft's original, individual account, and he transferred that original account's funds into Account 805. Tr. 4096. As of January 1, 2008, both Account 247 and Account 805 contained short positions and were margin accounts. Tr. 4096-97. They were also dual margin accounts, meaning they were treated as one account for purposes of margin accounting, because they were both titled as "Willhoft trust account." Tr. 4099-100. Like Williams, Willhoft had a considerable gain in early 2008. Tr. 4100. Williams withdrew \$200,000 in July 2008 to buy a home for his child. Tr. 4173.

Willhoft and Williams continued to make money in 2008 by shorting bank stocks, on Calabro's recommendation. Tr. 4104. Both customers were short in their positions as of September 19, 2008. Tr. 4105. On that day, at about 9:00 pm Eastern time, the Commission announced that it was banning short selling on certain stocks, including bank stocks. Tr. 4105. Calabro called Willhoft and Williams at about 8:30 am Eastern time the following morning. Tr. 4105-06, 4264. Willhoft and Williams were Calabro's biggest clients at that time, and he called them before calling any other clients. Tr. 4106. He informed them that they had unrealized gains the day before, but now had losses. Tr. 4106-07. He explained various courses of action, including shrinking their portfolios and taking positions in options. Tr. 4107-10. They both agreed to shrink their portfolios, or "lighten up." Tr. 4108-09.

Calabro explained the risk and short time horizon associated with options to both Willhoft and Williams. Tr. 4116-18. Willhoft seemed like he already had an understanding of options. Tr. 4110. Calabro spoke to Williams about options trading multiple times, and went over the option trading agreement and options suitability questionnaire. Tr. 4113-15; RCX. 45. Williams signed both documents on September 24, 2008. Tr. 4113; RCX. 45. Calabro understood that speculation and growth, which were the indicated investment objectives, were the objectives of the account. Tr. 4115; RCX. 45. The combination of short positions and options was successful, and by February 2009 Williams' account had made \$1 million overall after commission. Tr. 4118.

Based on a referral, Calabro met Moore in North Carolina in early November 2008. Tr. 4121-22, 4131. The meeting was definitely in November, not December, because in early December 2008 Calabro was in California making funeral arrangements for his father. Tr. 4131. Their first meeting, which included Michael Uckar (Uckar), another registered representative in Calabro's office, lasted one hour to ninety minutes, during which Calabro gave a presentation regarding his trading strategy. Tr. 4123-24. Moore was very pessimistic about the economy, and continued to be pessimistic at later meetings. Tr. 4124-25. Calabro did not bring new account forms with him, and returned to New Jersey the next day. Tr. 4128-29.

Later, Calabro took down Moore's new account information during a telephone call, and passed it to Uckar, who filled in the forms. Tr. 4128, 4130. Calabro was careful to get the information correct, because alienating a referral could lead to loss of both the referring customer and the referred customer. Tr. 4127. Calabro explained risk tolerance and otherwise went through the forms with Moore, as he did with Willhoft and Williams. Tr. 4130. Calabro sent Moore all the forms in their entirety, and Moore signed them on December 2, 2008, and returned them to Calabro. Tr. 4130-31, 4236-37; RCX. 24. Moore also signed an option trading agreement on December 2, 2008, following the same procedure as with Willhoft and Williams. Tr. 4131-32; RCX. 26. Moore never signed an AASQ, and his account never went on restriction. Tr. 226-27, 4304. Calabro testified, confusingly, both that JPT sent Moore an AASQ because his account was to be actively traded, and that Moore did not need to sign it because his account had not been funded at the time. Tr. 226-27. Moore transferred to Calabro stocks in his IRA from another brokerage account, and funded his individual account in December 2008, with his last deposit occurring in July 2009. Tr. 4224, 4304-05.

From time to time, Moore sent Calabro emails describing his political and economic views and stocks he wanted to bring to Calabro's attention. Tr. 4134-35, 4138. Two examples date from March 2009 and November 2009. Tr. 4138-39, 4145; RCX. 29; RCX. 35. Moore had an understanding about the state of the economy in March 2009, and came to visit Calabro in March 2009. Tr. 4138, 4221. Calabro's recollection of their March 2009 meeting was quite different from Moore's. Tr. 270, 273, 4221-23. Calabro spoke to Moore no less than three times per week, and sometimes three times per day. Tr. 4139. They spoke about a number of different things, including updates on Moore's account. Tr. 4139. Moore also made many trade suggestions to Calabro, some of which Calabro turned down. Tr. 272.

Moore referred multiple potential customers to Calabro, including his ex-wife, Christy Gates (C. Moore). Tr. 616, 4139-40, 4276-77. Moore opened up an account for her, and told

Calabro to contact her to confirm the trades, but to trade in the account the same way Calabro was trading in Moore's account. Tr. 4141, 4277. Moore also told Calabro to buy two ETFs for C. Moore's account, which were already in Moore's account upon Calabro's recommendation. Tr. 4141-42. Moore told Calabro to fund C. Moore's account with \$50,000 and try to grow it, although Calabro gave differing growth goals, at first testifying it was \$1 million and later testifying it was around \$500,000. Tr. 289-91, 4142-43. Moore did not tell Calabro that the money was for a divorce settlement or child support payment. Tr. 289-90, 4143-44. Another referral was Moore's lawyer, whom Moore referred at a time when Moore's account was down by \$400,000. Tr. 4277.

Willhoft signed an AASQ and an AASS on March 13, 2009. Tr. 4146-50; RCX. 6. Much of the form was filled in by Uckar, who filled in the form while Calabro was on the phone with Willhoft and told Uckar the numbers; Calabro did not put an "X" by the joint holder signature lines, because Willhoft, as trustee, had full authority over the account. Tr. 4149, 4226-28; RCX. 6. There was no need for Willhoft's wife to sign or otherwise fill in the joint holder signature lines. Tr. 4149-50. The forms were initially sent directly by JPT in February 2009, and by mid-March 2009 Willhoft had not returned it, so Calabro called him, filled out the forms, and sent them to him. Tr. 4152-54. The listed investment objectives were growth, speculation, short-term trading, and trading profits. RCX. 6. Calabro sent the same forms to Williams. Tr. 4154. He went through the forms with Williams and explained that his account was considered active and generated more commissions. Tr. 4166-68. Williams signed his forms on March 18 and 19, 2009. Tr. 244-45; DX. 10.

Between late 2008, when Calabro started recommending short positions, and March 2009, the Dow Jones index (Dow) fell from 14,700 to 6,500, and had high volatility. Tr. 4158. Calabro's plan was to maintain short positions until the Dow dropped another 700 points, and then cash in, or liquidate all positions. Tr. 4159-60. At about this time, the Financial Accounting Standards Board voted to rescind the "mark to market" asset pricing rule, so that banks could price their assets based upon good faith estimates rather than market values. Tr. 4157, 4160. This caused bank stocks to rise, and the Dow went from 6,500 on March 9, 2009, to about 8,000 on March 24, 2009. Tr. 4160-62.

In June 2009, the market started dropping again, and Calabro's customers sold their options, and then the market started rising, and Calabro's customers' accounts went down very quickly. Tr. 4145, 4162-63. In calendar year 2009, Willhoft's two accounts combined lost approximately \$530,000 and paid approximately \$212,000 in commissions and fees, of which approximately \$176,000 went to Calabro. Tr. 264; DX. 155 at 7-10. In calendar year 2009, Williams lost over \$1,000,000 and paid approximately \$297,000 in commissions and fees, of which approximately \$248,000 went to Calabro. Tr. 249-50. Williams closed his JPT account in May 2010, with a closing balance of \$363,000. Tr. 241, 251-52. Moore's account opened with a short position and dropped in value for five months, even though he kept adding money to continue shorting. Tr. 4220. Between February and November 2009, Moore lost approximately \$805,000 and paid approximately \$119,000 in commissions and fees, of which approximately \$94,000 went to the registered representatives, Calabro and Uckar. Tr. 280-81. Moore closed his account in approximately March 2010, but continued talking to Calabro thereafter. Tr. 277, 294.

Sometime in early 2009, McGrath (Calabro's AVP) called about certain of Calabro's accounts which, Calabro initially testified, were at Level 3 in AARS, although Calabro later testified that some were at Level 4. Tr. 4169, 4294. Calabro explained about his trading strategy involving short positions, and eventually he sent McGrath his research so that McGrath could verify it. Tr. 4170-71. McGrath called two or three of Calabro's clients, and so informed Calabro. Tr. 4172. Calabro also had a few calls with Bresner, and explained his strategy to him. Tr. 4172-73. Calabro felt that McGrath and Bresner understood his strategy, and they did not tell him to stop. Tr. 4173. Nonetheless, and despite the fact that his customers' accounts were up at the time, Bresner and McGrath imposed commission restrictions on some of his accounts. Tr. 4295-96. Although Calabro testified that the restriction was one percent or one and one half percent, he also testified that his commission was "1 percent going in" and averaged between one and one and one half percent; in fact, the commission restriction on all restricted accounts at issue was either two or two and one half percent. Tr. 216, 4215, 4299; DX. 174.

Calabro settled the arbitration filed against him in Idaho for \$75,000, because he felt he had no choice. Tr. 81-89, 111, 4174. That arbitration was based on allegations of churning and unsuitability, and was filed in 2008. Tr. 81-89. Calabro was also sued in an arbitration in 2000, over unsuitability allegations, and JPT was sued in an arbitration in 2012 over unsuitability and churning allegations pertaining to Calabro's conduct, both of which settled. Tr. 89-91, 108-09. All three customers in the present proceeding who testified against Calabro have filed claims against him, which are still pending. Tr. 111-114; DX. 101.

Calabro had \$1 million to \$1.5 million under management in 2006. Tr. 4181. By 2009 he had about \$17 million under management. Tr. 4181. In 2008 and 2009, Calabro was JPT's top grossing representative, with more than \$3 million in commissions in that period. Tr. 295-96; DX. 202, 203. His commissions grew between 2006 and 2008, but in 2009 they were half what they were in 2008. Tr. 4182. His commissions dropped again in 2010, to about \$340,000, of which he took home between forty-eight and fifty-five percent. Tr. 4182-83. By January 2011 he could not afford to operate his branch office, and he left JPT on good terms and went to work for National Securities. Tr. 4184-85.

Calabro had, at times, access to Levels 1 and 2 in AARS, but was not able to determine the breakeven percentage. Tr. 4211-12. Although Calabro agreed that the breakeven percentage was something a customer would want to know, he also agreed that the only way they could determine it would be by calling their broker or doing the math themselves. Tr. 4215-17. Calabro probably never told Willhoft his breakeven percentages, and it is possible he told Williams his breakeven percentages. Tr. 4213, 4219. Calabro's office had no separate compliance staffer, and was not required to have one. Tr. 4229.

3. Konner

Jason Konner was born in 1973 and was age thirty-nine at the time of the hearing. Tr. 304. He has lived in Brooklyn, New York, his entire life and has lived in his current home since September 2006. Tr. 304. He is married and has two children. Tr. 304; 4355. He graduated from high school in 1991 and attended community college for three months. Tr. 305-06. He did

not earn a degree from community college, nor did he take any business, accounting, or finance courses there. Tr. 306. He obtained a Series 7 license in 1994 and also holds a Series 63 license. Tr. 307.

Konner began working in the securities industry in May 1994, and worked at several firms from then until 2006. Tr. 309-10. He was employed by JPT as a representative in its Brooklyn North branch (branch code LFF)⁶ between September 2006 and December 2011. Tr. 308-09, 317-18. He was hired by James Sideris (Sideris). Tr. 308; DX. 15 at JPTURNER-SEC-ATL 010845. He currently works at DPEC Partners. Tr. 312.

Konner settled a 2006 case alleging unauthorized trading, for \$3000. Tr. 310-11; DX. 16 at JPTURNER-SEC-ATL 010868-69. He testified that he did not conduct the trading, and that he was involved only because he shared commissions with another trader. Tr. 312. The Mills filed a FINRA arbitration against Konner in August 2012, alleging churning, among other violations. Tr. 313-14; DX. 14 at 15. Konner testified that this claim came from the account of “another broker” (presumably Koutsoubos), which he took over, and he knows nothing about the factual claims except what is in the FINRA report. Tr. 313-14. In 1998, Konner resigned from his employer, Millennium Securities, although the circumstances are disputed by Konner; his FINRA report states that he was “permitted to resign.” Tr. 314-15; DX. 14 at 17. Konner nonetheless testified that he has never received a customer complaint that criticized him for his conduct. Tr. 4355.

The managers of JPT’s Brooklyn North branch were Sideris and J. Williams; J. Williams also served as the branch’s compliance officer. Tr. 318. Konner interacted with Sideris and J. Williams several times per day. Tr. 318. Konner’s desk was about fifteen feet from J. Williams’, and about twenty feet from Sideris’, and both could hear and observe Konner’s work. Tr. 4365-66. Konner started at JPT with about twenty clients, and by 2010 he had about 200. Tr. 318-19. His brother, Chad Konner, also worked at the JPT Brooklyn North branch as a registered representative. Tr. 320. At some point, Konner started receiving a flat sixty-five percent commission rate. Tr. 317. This was not his take home pay, because he had various charges, including FedEx fees, fees for leads, a portion of the sales assistant’s salary, and a desk fee of approximately \$1500 per month. Tr. 455-56. His work consisted of updating clients, managing client accounts, and generating new business, or “prospecting.” Tr. 319-21.

As part of generating new business, Konner purchased sales leads using his own money, and then called the leads on the telephone. Tr. 321. On days he prospected, he sometimes made 200 calls or more. Tr. 324. Konner initially testified that he looked for customers who were business owners or land owners, but stock investors were better. Tr. 321. He admitted that he had previously testified that he sought customers with cash “that looked to speculate in the market with prior experience.” Tr. 323. He later testified that he sought out customers with the “money and the mindset and the wherewithal to speculate with a very small portion of their money that didn’t involve their nest egg.” Tr. 325. Even later, he testified that he looked for customers with experience investing. Tr. 4419. He would normally not do business with

⁶ Some witnesses referred to this branch simply as the Brooklyn branch. This Initial Decision refers to the branch interchangeably as Brooklyn and Brooklyn North.

customers who could not afford to speculate, and he looked for customers who were comfortable with the possibility of trading actively. Tr. 325, 328. Konner wanted customers who wanted to find tomorrow's Microsoft. Tr. 4352-53. Konner did not "recommend" a trading strategy, he conducted a type of investing and looked for customers who were willing to go along with it. Tr. 4425-26. Not every potential customer was appropriate for Konner. Tr. 4354.

When Konner talked to potential customers on the phone, he typically asked them: how many years of experience they had in investing, including options, CDs, bonds, and stocks; their investment objectives; their risk tolerance; what they did for a living; their age; whether they were financially secure for retirement; their net worth; and their other securities accounts. Tr. 325-27. He asked prospective customers whether they had ever actively traded in the past and informed them that the risk of active trading is that an investor could lose everything. Tr. 329-30. He always told customers the downside of investing, including the fact that the customer's entire account is always at risk. Tr. 4357-58. He wanted to insure that a prospective customer had money that could be used solely to speculate, so that if the money were lost it would not change the customer's life. Tr. 331. Konner never discussed the turnover ratio or breakeven rate with customers. Tr. 332-33. Although his customers knew about the commissions and fees charged, he never informed them of the cumulative effect of such commissions and fees, although he would have if asked. Tr. 333-34. Konner kept notes from his prospecting calls on index cards locked in a box in the JPT office, and does not know why they were never produced by JPT. Tr. 327-28.

Two of Konner's customers were Carlson and Miller. Tr. 339. Konner knows he asked both whether they had done speculative trading, but does not remember their answers. Tr. 340. Before conducting any trade in their accounts, he discussed with both Carlson and Miller the number of shares, the price, the cost of the entire trade, and the commission and charges. Tr. 341. He explained to both Carlson and Miller that they needed to factor in commissions to determine if they were making a profit on a trade. Tr. 342. Konner spoke to Carlson about five times before he opened his account, and to Miller between three and five times before he opened his account. Tr. 4332-33.

When a customer opened an account, Konner went over the account application with them and wrote down what the customer told him, so that what the customer received in the mail already had some information filled in. Tr. 342-43. Either J. Williams or Sideris would review the documents he sent his customers. Tr. 4330. He told customers to correct any errors on the account form, initial it, and send it back along with their check. Tr. 343. AASQs would also go out to customers, and if no AASQ was ever sent, Konner would revisit the customer's investment objectives and risk tolerance. Tr. 344-45. Konner occasionally kept notes of his conversations with customers. Tr. 344-45. He never had discretionary authority over any customer account, and typically recommended trades and got trade authorizations over the phone. Tr. 346-47. He never recommended margin trading unless the customer asked if there was a way of buying more stock than the customer had money in the account. Tr. 348-49. Konner initially testified that he negotiated commissions on every trade, but later testified that it was not really a negotiation, he just quoted a commission and fee and the customer agreed to it. Tr. 349-50, 353. His commission ranged from zero to five percent, and neither Carlson nor Miller ever complained about it. Tr. 350. Konner calculated the customer's basis and

commission to determine if a trade was profitable, and shared the result of the calculation with the customer. Tr. 353-54. Konner selected stock recommendations based on his own research, Sideris' research, and research JPT provided. Tr. 354-55, 4367-68. Konner presented mutual funds and a REIT to both Carlson and Miller, and both turned down his recommendation. Tr. 4380-82.

Konner made approximately \$200,000 in 2009. Tr. 359. Although all of his earnings came from commissions in 2008 and 2009, he did not keep track of which account was generating the most commissions, although he kept mental track of whether his accounts were up or down. Tr. 360. JPT's monthly account statements did not report commissions or fees paid. Tr. 361. Konner received copies of temporary trade confirmations issued by his office, but not of confirmations from JPT's clearinghouse. Tr. 360-61. Temporary trade confirmations, at least in some instances, did not report commissions and fees separately, but reported the total trade amount, from which a customer could calculate the commission and fee charged. Tr. 363-64; DX. 170.

The active trading in some of Konner's accounts led to commission restrictions, including in Carlson's account. Tr. 366. Carlson never complained about the commissions he paid. Tr. 458-59. Konner initially did not remember if there was a commission restriction in Miller's account, but later testified that he thought there was one, and that his first rejected trade under restriction may have been one for Miller. Tr. 366, 4376, 4417-18. On each trade, Konner told Carlson about the commission he was paying, until it got tiresome and Konner started just telling Carlson if the commission exceeded \$100. Tr. 4375. He had the same practice for Miller. Tr. 4376. He informed his customers when there was a commission restriction in their account, and initially testified that he does not recall if he ever explained why the restriction had been imposed, but later denied explaining the purpose of the commission restriction to Carlson. Tr. 367-68, 4444-45. Konner's commissions in Carlson's account were reduced because of a high ROI, which made Konner upset. Tr. 4372-73. Nobody told him that the commission restriction was disciplinary, and he did not change his practices as a result. Tr. 4373. If Konner traded more, it was because of the market, and not because of his commission. Tr. 4374.

In contrast to his practice with account applications, Konner did "[n]ot necessarily" write down the information on his customer's AASQs based on a phone call. Tr. 342-43, 371-72. In Carlson's case, Konner did not fill out the AASQ or AASS sent to Carlson, and does not recognize the handwriting on them. Tr. 371-72; DX. 52; DX. 53. Konner agreed that neither the AASQ nor the AASS disclosed that if the commission on a trade exceeded the profit, then the customer would lose money. Tr. 374-76. J. Williams sent out the AASQs and AASSs. Tr. 376. If they were not returned by the customer within a certain time, no trades would be permitted in the customer's account. Tr. 376-77. In such a case, Konner called the customer and asked why the forms had not been returned, although that was not an issue with Carlson or Miller. Tr. 377-78.

Carlson's margin account application, signed May 1, 2008, listed a net worth of \$2.5 million. Tr. 406-07; DX. 51. Konner initially testified that he did not fill in the figures on the margin Account Application, and did not know where the information came from, and later testified that the form looked like it had been filled out by one of his sales assistants. Tr. 407;

4394. Carlson's first AASQ, signed March 23, 2009, listed a net worth of \$2 million, which appears to have been a correction from the original figure, \$2.5 million. Tr. 380-81; DX. 52; DX. 53. When asked if someone in Konner's office filled in the \$2.5 million figure, and the other figures in the form sent to Carlson, he replied, "[i]t could be, yes." Tr. 379-80. Later, Konner testified that Carlson filled in the "bulk" of the AASQ, and that a sales assistant "must have" filled in the personal information, although he did not know who filled in the income and net worth figures. Tr. 4342, 4346, 4435-36. He does not recall noting at the time that Carlson filled in "4 a week" for frequency of trades. Tr. 383; DX. 53.

Konner was strikingly inconsistent when questioned about the source and accuracy of Carlson's net worth figure. When first questioned about it, he testified that: he does not know if he had a conversation with Carlson about his net worth, his recollection of what Carlson told him was "what was put down on the form he signed," he remembered what Carlson told him "[i]f that is what is put down there," and Carlson "ha[d] a two million dollar net worth as he stated to me." Tr. 380-82. Later, Konner testified that Carlson was worth a lot more than the amount included on the account application but apparently did not want to disclose that fact to Konner at first. Tr. 386. Konner stated that he told Carlson that "at some point in time" Carlson would have to tell the truth. Tr. 386. Konner had to update the account information because Carlson had "200,000 in the market with over 200,000 in the stock account." Tr. 389, 403. He initially denied telling Carlson that the numbers on the AASQ did not matter. Tr. 381-82. Even later, Konner remembered a conversation about the 2009 AASS, in which he told Carlson: "I don't care what you put there. You can put whatever you want. Just do it to the best of your knowledge." Tr. 4343, 4431-32; JXX. 34. He also testified at that time that J. Williams or Sideris called Carlson and changed the net worth figure from \$2 to \$2.5 million. Tr. 4345. At other times, he testified that Carlson wrote in the \$2 million figure. Tr. 382, 4435-36. According to Konner, Carlson knew a lot about the markets and had "more in the market" than what he initially disclosed to Konner. Tr. 386-87; DX. 49. In Konner's experience, it is not uncommon for customers to not disclose their complete financial information at first, and to become more forthcoming as they develop a rapport with him. Tr. 464-65.

Carlson's second AASQ, signed February 21, 2010, listed a net worth of \$800,000, which Konner agreed had been filled in by Carlson himself. Tr. 383-84; DX. 54. Konner did not know what was meant by the liquid assets entry of \$1000, which was also filled in by Carlson. Tr. 384; DX. 54. Konner denied telling Carlson how he should mark the entries for investment objectives and risk tolerance on the AASQ and AASS, although he does not recall explaining the meaning of an aggressive risk tolerance. Tr. 387-88, 390. He testified that he "marked everything as the client asked me to." Tr. 389. He denies that Carlson told him he was not a wealthy man and could not afford to lose money. Tr. 390.

Konner kept notes regarding Carlson's account, which consist of eight pages over the entire life of the account up to 2009; Konner is not sure if all pages were produced. Tr. 394; DX. 112. Konner did not produce the notes for his accounts, they were produced by staff at JPT, although Konner provided his client book to his manager. Tr. 462, 468-69. All of his notes for 2009 appear on two pages. Tr. 396. The notes indicate that Carlson had an IRA account at Wells Fargo in the amount of \$200,000-\$300,000. Tr. 395. They also memorialize certain trades and note on September 19, 2008 that the government intended to restrict short selling. Tr.

397-400. Konner does not recall any of the stocks Carlson asked him to buy, but he always told Carlson that if he asked Konner to buy stock he would be better off going through Ameritrade because the fees were less. Tr. 400-01. Konner believes he and Carlson managed his account together. Tr. 402. The vast majority of trades were done at Konner's recommendation, however. Tr. 419. Carlson repeatedly said that he wanted Konner to "just make me some money." Tr. 4378. Carlson was looking for "the big hit." Tr. 4379-80.

In June 2009, Konner recommended that Carlson invest in PIPE offerings. Tr. 407. Konner discussed with him the definition of accredited investor, which meant an annual income of at least \$200,000 or \$300,000, or a net worth of \$1 million, not including his home. Tr. 408; DX. 59 at 11. Carlson invested \$150,000 total in one PIPE offering, Quantum Fuel. Tr. 410, 4386; DX. 58; DX. 118. Carlson had to certify in the Quantum Fuel subscription agreement that he was an accredited investor. DX. 59 at 10. By September 30, 2009, the Quantum Fuel stock was worth over \$325,000, and Carlson was "[e]cstatic." Tr. 4390; JKX. 66 at JPTURNER-SEC-ATL 004360.

Miller became Konner's customer as a result of prospecting, although Konner does not recall if he was prospected by Konner or a member of Konner's staff. Tr. 432. Konner knew that Miller was an Iowa farmer, and as with Carlson, Konner filled out Miller's account application based on what Miller told him. Tr. 433-34. Miller signed and dated his account application on May 29, 2009, and it indicated an income of \$150,000, investable assets of \$100,000, speculation and trading profits as the first and second investment objectives, an aggressive risk tolerance, a short time horizon, and extensive general investment knowledge. DX. 19. He signed and dated an AASQ and AASS on December 18, 2009, which indicated a trade frequency of two per week, and liquid assets of \$200,000, but was otherwise generally consistent with his account application. DX. 20. Konner initially testified that he did not recall explaining aggressive risk tolerance to Miller, although he typically did that with customers, and he later testified that he did explain to Miller the risks of his trading approach. Tr. 438, 4423-24. Konner does not recall any complaints from Miller about inaccurate investment objectives on any account documents, and believes Miller understood what was on his account opening documents. Tr. 4337-38, 4340.

Konner kept notes regarding Miller's account, which consist of three pages; Konner is not sure if all pages were produced. Tr. 440-41; DX. 102. Konner did not make notes every time he executed a trade for Miller. Tr. 442-43. One such note, dated November 23, 2009, cited Miller as stating that he did not "need to buy dividend stocks" because he was already a millionaire, and instead he "wanted to speculate." Tr. 443; DX. 102 at JPTURNER-SEC-ATL 012950-51. This accurately reflected what Miller told Konner, that is, that Miller liked to speculate. Tr. 445, 4404, 4406. Another note, with an uncertain date, reads "short term trades only for spec plays," and indicates that Miller's computer was "on the frits." Tr. 445-46; DX. 102 at JPTURNER-SEC-ATL 012950. Konner did not know what Miller meant about his computer, and does not recall talking to Miller about his computer access. Tr. 4399-400. Miller approved the purchases and sales in his account, but Konner does not remember if Miller ever declined a trade or initiated a trade himself. Tr. 452. Konner never brought up margin trading with Miller because Miller always decided how much he wanted to invest in something, and there was never a need to trade on margin. Tr. 4392-93. Although Konner does not dispute that

he recommended virtually all of Miller's trades in 2009, he does not recall how often Miller declined one of his recommendations. Tr. 4426-27.

Konner had a large number of "reneges," i.e., failures to pay for trades, because he opened the most accounts at his branch. Tr. 4349. As a result, and as a result of the market's turmoil, J. Williams and Sideris began confirming trades in Konner's new accounts. Tr. 4350-51. This became his office's procedure thereafter. Tr. 4351. Konner did not know he was on special or heightened supervision until J. Williams testified in this proceeding. Tr. 4351. Neither Carlson nor Miller ever "renege." Tr. 4363-64.

4. Koutsoubos

Koutsoubos was born in 1976 and was age thirty-six at the time of the hearing. Tr. 472. He has lived in Ocean Township, New Jersey, for two years and prior to that lived in Brooklyn, New York. Tr. 472, 4554. For a time, until late 2010, he split his residency between New York and Florida. Tr. 473. He graduated from high school in 1994, and attended community college and Fairleigh Dickinson University, without taking a degree. Tr. 473-74. He has never been married. Tr. 473.

Koutsoubos obtained Series 7 and 63 licenses in 1999.⁷ Tr. 474-75. He worked at Dean Witter as a trainee for just under a year, and then started at JPT in November 1999. Tr. 475-77. He left JPT in July or August 2009. Tr. 475, 4537. He left JPT on good terms, voluntarily, because he wanted to move into private equity. Tr. 4537-38, 4540. He was never disciplined by JPT, and was not asked to leave. Tr. 4539.

His testimony about his employment between August 2009 and June 2011 was oddly confusing and inconsistent. He initially testified that he was unemployed during that period, because he "never received compensation." Tr. 477. He then testified that he solicited investments for Find.com, a search engine in the developmental stage, and then solicited investors for bidthatproject.com for a little less than a year. Tr. 477-80. He worked at Find.com in September and October 2009, and then left because he was not compensated. Tr. 483. Koutsoubos stayed in contact with the Mills after leaving JPT, and they invested money in Find.com. Tr. 478-79. Miller invested in bidthatproject.com, although Koutsoubos testified that he found Miller from a lead rather than from his experience at JPT. Tr. 4565-67. Koutsoubos' title at bidthatproject.com was director of marketing, and he solicited his former JPT customers while at that company. Tr. 481. He then testified that he received a salary at bidthatproject.com, plus a quarterly commission, as early as late 2010. Tr. 481. He later characterized his pay as a salary against commission. Tr. 4563. Koutsoubos then testified, when questioned by me, that he was first paid by bidthatproject.com in June 2011. Tr. 484-85. He then testified that he spent six days in November 2010 as vice president of global sales at London Metals Market, although minutes later he testified that he "never worked there." Tr. 485, 488. Initially, he testified, apparently, that "never worked there" meant that he never solicited any investments there. Tr. 487-88. He then testified that he "spoke to a couple of people" while at London Metals Market, including former JPT customers, which may have included Miller; he does not recall speaking to

⁷ The transcript states "Series 3," which is plainly a typographical error. Tr. 474.

Bryant. Tr. 489-90, 578. He was not compensated for his time at London Metals Market. Tr. 491. In his own case, Koutsoubos testified again that he “never was compensated” at the “two” places he worked, and then immediately testified that he later found out that he actually had been compensated by one employer. Tr. 4540. He further testified that he did not remember when he was paid by bidthatproject.com, that he worked there from July or August 2010 to the end of 2010, and that he worked at bidthatproject.com after working at London Metals Market, that is, after November 2010. Tr. 4588-90. He did not remember previously testifying that bidthatproject.com first paid him in June 2011. Tr. 4590-91.

After two years in private equity, Koutsoubos “went broke.” Tr. 4552. Eventually he moved to Caldwell International Securities, where he now works as a registered representative. Tr. 494. He has about fifty customers and works on commission only. Tr. 494. His commission is a flat forty-five percent. Tr. 495. He has a negative net worth and no retirement savings. Tr. 4554.

The Mills filed a claim against JPT in October 2012 alleging, among other things, excessive trading by Koutsoubos. Tr. 492; DX. 24 at 12. The matter was settled in mediation and JPT sued Koutsoubos for contribution, a case that is apparently still pending. Tr. 493-94.

Between 2007 and 2009, Koutsoubos worked in JPT’s Brooklyn, New York, and Fort Lauderdale, Florida, offices.⁸ Tr. 4471. The branch code for Brooklyn was LFA, where his supervisors were initially Robert Manalla and later J. Williams and Sideris, and the branch code for Fort Lauderdale was LHG, where his supervisor in Florida was Steve Doukas (Doukas) (although Sideris was the licensee of both branches). Tr. 497-98, 4484. During a typical work day, he got up around 5:45 am, turned on CNBC to see how the markets were doing, and got to the office by 8:30 am for the morning meeting. Tr. 4471-72. The morning meeting was held by Sideris at 8:30 to go over current events or anything Sideris wanted the representatives to know. Tr. 4472-73. After the morning meeting, Koutsoubos checked a variety of reports and sites, and then begin calling clients, either to update existing clients or to make cold calls. Tr. 4473. Koutsoubos did his independent research for about an hour or hour and a half in the mornings, and also after work. Tr. 4479. He read Morningstar and Daily Graphs. Tr. 4477-79. He considered Investors Business Daily, particularly William J. O’Neil and his CAN SLIM theory, to be the most helpful research report. Tr. 524-25, 4475-77. He also relied on JPT’s own research. Tr. 525-26. He shared his research with his customers for every transaction, and determined whether a particular stock was suitable by looking at the customer’s financials and talking to the customer. Tr. 530, 4480.

Although Koutsoubos knew of AARS, he had no access to it. Tr. 498-99. Information about or from AARS, including whether one of Koutsoubos’ accounts appeared on AARS, came from J. Williams and Doukas. Tr. 499-500. The reports Koutsoubos received included the name, the account number, and a Level of 1 through 4. Tr. 500. He understood that different Levels corresponded to different account restrictions, and that accounts at Levels 3 and 4 were

⁸ The office moved twice while Koutsoubos worked there, including to Deerfield Beach, Florida. Tr. 4483. This Initial Decision refers to the office interchangeably as the Deerfield Beach office and the Fort Lauderdale office.

actively traded. Tr. 500-01, 503. When an account came up on AARS, J. Williams spoke to him about it. Tr. 501. Also, J. Williams or someone at JPT in Atlanta sometimes called his customers to ask about their accounts and how they felt about Koutsoubos. Tr. 502-03. Most of the time he was not on these calls. Tr. 503. JPT's compliance department was responsible for sending out active account forms, and Koutsoubos only received a notice regarding the active account forms if they were not returned by the customer. Tr. 544-45. Koutsoubos then contacted the customer and, if necessary, asked to have another set of forms sent to the customer. Tr. 545-46. Active account forms were sent out with the entries already filled in, based on what the customer told Koutsoubos or J. Williams. Tr. 547, 550.

Both Bryant's account and the Mills' account reached Level 4 in AARS, and received commission restrictions. Tr. 504-05, 4618-19. During almost his entire testimony, up until he was cross examined by Bresner's counsel when testifying in his own case, Koutsoubos never mentioned that his commission restrictions in the Bryant and the Mills accounts went as low as \$50 or \$60. Tr. 4618-19. At that commission level, he did not make money trading. Tr. 4620. At the \$100 commission level, by contrast, he made \$26 less expenses, or about \$22. Tr. 600, 4620. Koutsoubos was never disciplined or reprimanded by JPT, and he does not believe he ever spoke to Bresner. Tr. 505. He did not know who Bresner was while he was at JPT. Tr. 505.

Koutsoubos prospected for customers, bought leads, and had a staff who made cold calls. Tr. 506-07. He looked for accredited investors, although not all his customers were accredited. Tr. 507. He determined whether a potential customer was accredited by asking them about their income and net worth. Tr. 507. He also asked their age, investment history, occupation, other securities accounts, experience with specific types of investments, and whether they were financially secure for retirement. Tr. 508, 510-11. He "guessed" he also asked about investment objectives and risk tolerance. Tr. 510. If a call was successful, he walked the customer through the account opening form, and if necessary, he defined the different categories of investment objectives and risk tolerance. Tr. 511-13. Koutsoubos then filled out the form and gave it to the sales assistants to type up and send to the customer. Tr. 513. Sometimes a customer filled out the form personally. Tr. 514.

Once someone had agreed to open an account, Koutsoubos regularly talked to them about their investment objectives, risk tolerance, and financial situation. Tr. 517. He kept notes of his conversations in a broker book, which J. Williams sometimes reviewed. Tr. 518-19. An example was the broker book for the Mills, which consisted of a record of various trades and about a page and a half of notes between about September 2008 and December 2009. Tr. 520; DX. 145 at JPTURNER-SEC-ATL 012901-02. In 2008 and 2009, he believes he managed over 100 accounts at JPT. Tr. 520-21. Koutsoubos never had discretionary authority over any accounts except his own, but recommended a lot of trades. Tr. 521. He always talked about a trade with the customer before entering an order, typically by telephone. Tr. 521-22. Koutsoubos spoke quickly – and also did so during his testimony – but testified that he did not rush any customers to make a decision. Tr. 523-24, 549, 4556.

In the Fort Lauderdale office, Doukas entered all trade orders himself, sometimes called customers, and was the only person with access to the fax machine. Tr. 4485-86, 4488-89, 4491-92. In the Brooklyn office, Koutsoubos was not allowed to use the fax machine, and J. Williams

reviewed documents before they were sent to customers, sometimes called customers, and sometimes checked Koutsoubos' account notes. Tr. 519, 546-49, 605-06. Koutsoubos testified that Sideris was very strict in his supervision, and J. Williams was "direct" and not "soft spoken." Tr. 4492-94.

When Koutsoubos called a customer to recommend selling a stock, he calculated the customer's profit or loss and discussed it with the customer. Tr. 526. He also discussed his commissions, which he had to calculate himself because the back office tracking system did not do it for him. Tr. 526-28. He did not record his commissions in his account notes. Tr. 528-29. He did not typically recommend trading on margin, but he did not frown upon it, and if a customer asked about it he would explain it. Tr. 535-36. He discussed the risks of margin trading with Bryant and the Mills. Tr. 536-37. Bryant's account was already on margin when he inherited it, and B. Mills asked to put his entire account on margin and invest it all in Apple. Tr. 536-38.

Koutsoubos denies entering trades in his customers' accounts without authorization from each customer. Tr. 530-31, 603-04. Some of the activity in Bryant's account during the alleged churn period was based on Koutsoubos' recommendations, and some was based on Bryant's recommendations. Tr. 533. Oddly, Koutsoubos testified that the vast majority of Bryant's trades during 2008 were based on Koutsoubos' recommendations, and then moments later testified that "some" of the trading activity was based on his recommendations. Tr. 533. Koutsoubos testified that Bryant had a commodities account and made recommendations regarding certain commodities, such as copper, but he cannot remember any particular trade Bryant recommended for his JPT account. Tr. 569, 572. Bryant declined some of Koutsoubos' recommendations, although Koutsoubos does not know how frequently Bryant did so. Tr. 575. Bryant's account was inherited from another representative, so his commission was thirty-five percent of JPT's commission rather than sixty percent. Tr. 598-99, 4536. Koutsoubos testified that he worked just as hard for a \$100 commission as for a \$1000 commission. Tr. 4480.

Bryant signed an account application on February 23, 2005. Tr. 567; DX. 32. Bryant's risk tolerance at that time was medium and his investment objective was growth only. Tr. 567-68; DX. 32. Koutsoubos did not consider Bryant to be an unsophisticated investor. Tr. 568-69. Bryant signed an Account Update Form on March 15, 2007, which was not counter-signed by Koutsoubos and which Koutsoubos did not discuss with Bryant. Tr. 570-71; DX. 143. Bryant executed an AASQ and AASS on May 8, 2009, which he signed and initialed. Tr. 551-52; DX. 27. Koutsoubos initially testified that his handwriting was otherwise on the forms, but later testified that some of the notations were in the handwriting of J. Williams and others unknown to him. Tr. 551-52, 608-10; DX. 27. The indicated frequency of trades was "6/monthly." Tr. 553; DX. 27. Koutsoubos exceeded that frequency in at least August and October of 2008, although some of the trades were based on stop loss orders, that is, two related transactions: an order to buy and an order to sell at a particular price, without having to enter the sell order. Tr. 553-56, 4482-83, 4515; DX. 25.

Koutsoubos explained the pattern of trading in Bryant's account as follows. The account lost almost half its value in the first month of the alleged churn period (January to December 2008) when one stock dropped. Tr. 4507-08. He spoke to Bryant, who agreed to diversify the

account and use stop losses, and the account value rose until May or June 2008. Tr. 4508-09. Starting in August or September 2008, the market started to drop, and despite stop loss orders and hedging with ETFs, Bryant's account lost money. Tr. 4510-17. Koutsoubos felt "horrible," and initially denied telling Bryant that he wanted to day trade in Bryant's account to make up for Bryant's losses. Tr. 574, 4517. Later, he testified that he "had the day trading conversation with [Bryant] and the diversification day trading conversation," and that Bryant initially made money using that strategy, although "in the end, with the market crash, it didn't help anybody." Tr. 4575. He admitted that Bryant may have asked him to cash out his account, but Koutsoubos always felt like he was able to "educate" Bryant and convince him not to. Tr. 4572-74, 4610.

The Mills had an account where the commissions were split between Koutsoubos and Konner, with each representative getting about thirty percent of JPT's commission. Tr. 534, 542. Koutsoubos initially testified that he did not bring them to JPT, although he was primarily the representative making recommendations, but later testified that he opened their account and did not remember if he prospected them. Tr. 534-35, 578. B. Mills made trade recommendations for the Mills' account, and Koutsoubos made recommendations. Tr. 589-91. An example was L'Oreal, which Koutsoubos bought on their recommendation, even though special forms had to be filled out because L'Oreal was traded on a non-U.S. exchange. Tr. 592. B. Mills declined a lot of Koutsoubos' recommendations, and Koutsoubos declined "a lot" of B. Mills' recommendations. Tr. 588, 592-93. Koutsoubos sometimes negotiated commissions with B. Mills, although not after the Mills account was restricted. Tr. 607, 4613. Koutsoubos' notes for the Mills account include notes made by Konner. Tr. 585, 587.

The Mills signed an account application on September 30, 2006. Tr. 579; DX. 144. It was Koutsoubos' practice to send applications to his customers already completed. Tr. 579. He considered the Mills to be sophisticated investors. Tr. 581. The Mills signed an AASQ and AASS on September 7, 2007. Tr. 557; DX. 28. Koutsoubos denied telling P. Mills what to put on the forms. Tr. 557-58. The indicated frequency of trades was "6-8/month." Tr. 558; DX. 28. Koutsoubos exceeded that frequency in at least September and October of 2007, although some of the trades were based on new deposits of money in their account. Tr. 559-63; DX. 149. The Mills signed another AASQ and AASS on March 20, 2009. Tr. 563; DX. 29. None of the handwriting on the forms is Koutsoubos'. Tr. 564. Again, Koutsoubos denied telling P. Mills what to put on the forms. Tr. 564. The indicated frequency of trades was "4/wkly." Tr. 564-65; DX. 29. Koutsoubos exceeded that frequency in at least March and April of 2009, although some of the trades constituted profit-taking. Tr. 565-66; DX. 149.

Koutsoubos explained the pattern of trading in the Mills account as follows. In the first few months of the alleged churn period, the market had collapsed, and there was not much trading. Tr. 4496. The representatives had numerous meetings to discuss the situation, and were exercising caution. Tr. 4496-98. Koutsoubos spoke to the Mills at this time sometimes a few times per day, despite the low trading activity. Tr. 4498. B. Mills wanted to trade more actively in early 2009. Tr. 4500-01. When the market picked up in March 2009, the Mills' trading activity increased, particularly in short-term investments in ETFs. Tr. 4501-05. Thereafter, the Mills made a lot of money, so that they had a slight gain over the entirety of the alleged churn period. Tr. 4505-06. Koutsoubos denies apologizing to the Mills about what happened in their

JPT account. Tr. 593. The Mills wanted to stay in touch with Koutsoubos after he left JPT. Tr. 601.⁹

C. Investor Witness Testimony

1. Teddy Bryant

Bryant was born in 1957 and was fifty-five years old at the time he testified. Tr. 844, 887. He lives in Holly Springs, Mississippi, a town just outside Memphis, Tennessee. Tr. 845, 901, 958. He attended high school in Tennessee, and attended University of Tennessee at Martin for one semester. Tr. 846. While at University of Tennessee, he did not take any finance, accounting, or economics classes. Tr. 888. He is self-employed as the owner, with his wife, of Teddy's Discount Building Supply, Inc., (TDBS) in High Point, Mississippi. Tr. 846-47, 889. He has owned TDBS for twenty-two years and currently has about twelve employees. Tr. 847, 891. He also owns Grisham Lumber & Supply, Inc., in Blue Mountain, Mississippi. Tr. 890. He is a licensed builder in Tennessee and Mississippi, but has only built two homes in the past five years. Tr. 890.

Bryant's house is worth approximately \$339,000. Tr. 901. He built or remodeled two other houses in the past several years, in Holly Springs, Mississippi, and Bolivar, Tennessee, and then sold them. Tr. at 908. Bryant carries the mortgages on those two houses. Tr. 908-10. He also owns fourteen lots adjacent to a golf course, and a separate plot of forty-four acres located in Holly Springs. Tr. 912-14. All of Bryant's assets were included in the net worth number on his JPT forms in 2005. Tr. 1021.

Bryant does not consider himself a sophisticated investor. Tr. 847. He has brokerage accounts with JPT and Lipscomb & Pitts ING (Lipscomb). Tr. 847-48. The Lipscomb account was originally with J.C. Bradford, and Bryant moved his money to Lipscomb after his registered representative left J.C. Bradford. Tr. 847-49, 897-98. The Lipscomb account has about \$60,000 in it. Tr. 848. He also had an account with Sky Capital, with between \$5,000 and \$10,000 in it, until early 2007. Tr. 849, 899, 915. He closed the Sky Capital account because it was not making money. Tr. 919. He does not remember if he informed Koutsoubos about his Sky Capital account. Tr. 919. He never made any stock recommendations for his Lipscomb account and recalls making one recommendation for his Sky Capital account, to buy shares of La-Z-Boy. Tr. 848-50. Neither of these accounts was actively traded. Tr. 878. Bryant thought that an investor bought a stock, held it, sold it for a profit, and then bought another one. Tr. 878. Bryant does not watch investment news shows or subscribe to any investing magazines. Tr. 850.

Bryant opened his JPT account in February 2005 after a cold call from Jay Bergen (Bergen). Tr. 850-51, 920, 925; DKX. 16; DX. 105 (noting name as John Bergen). He opened the account because Bergen "called with high pressure, couldn't get off the phone type deal." Tr. 921. His account representative was Albert Medina, although he believed it was Bergen. Tr.

⁹ I have considered Koutsoubos' extensive testimony about his interaction with the Mills after he left JPT, but except to the extent it has been cited above, I find it to be largely irrelevant. Tr. 4542-52, 4568-72, 4602-06, 4625-30.

925; DX. 148 at Bates JPTURNER-SEC-ATL-555550. The account may have initially been joint with his wife, but eventually her name was removed from the account. Tr. 920-21. He did not tell Bergen what his investment objectives were. Tr. 921.

A few months after opening the account, Koutsoubos became Bryant's registered representative. Tr. 851. When Koutsoubos took over the account, he told Bryant that the account would make a lot of money. Tr. 853. At that time, Bryant did not tell Koutsoubos about his investment experience. Tr. 853-54. Koutsoubos did not ask about Bryant's investment objectives and did not ask whether Bryant was a sophisticated investor. Tr. 854. Bryant does not recall Koutsoubos asking about risk tolerance. Tr. 854. Bryant and Koutsoubos never really discussed Bryant's other brokerage accounts or brokers. Tr. 956. Bryant testified that he never really had time to ask Koutsoubos questions on the phone, because once Koutsoubos got what he wanted, the call ended. Tr. 997.

Bryant testified that at the time Koutsoubos took over as registered representative, his risk tolerance was conservative. Tr. 854. Bryant shared this with Koutsoubos on more than one occasion, and told him that he wanted to earn money and be conservative. Tr. 855-56. Koutsoubos called Bryant sometimes three times in one week. Tr. 964. Koutsoubos did not send Bryant market research or reports very often. Tr. 970. Bryant sometimes complained to Koutsoubos about unauthorized trades, but he did not complain to any supervisors at JPT. Tr. 974-75. Bryant testified that he monitored his account but did not do a good job of paying attention to it. Tr. 966, 992.

Bryant signed an account application on February 23, 2005, before Koutsoubos took over as registered representative. Tr. 924-25; DX. 32. The risk tolerance listed on the account application is "Medium," but Bryant testified that his risk tolerance was more conservative than that when he opened his account. Tr. 857; DX. 32. It is possible that Bryant told Koutsoubos that his investment objective was growth, as indicated on the account application. Tr. 857. Short-term trading and speculation were not his objectives, nor were they listed as such on the account application. Tr. 857-58; DX. 32. His annual income, net worth, and liquid net worth, as of February 2005, were accurately reflected on the account application. Tr. 858. His social security number is incorrect; two numbers are transposed. Tr. 922, 927; DKX. 16. Bryant testified that he probably conveyed the accurate information on the application by telephone to the person who filled it out. Tr. 926.

Bryant testified that he did not read the account application despite the affirmation at the bottom of the form stating that the signer understands, agrees to, and has read the "Customer Agreement" and "Certification Statement." Tr. 897, 923-24. Bryant did not fully read "a whole bunch" of such documents. Tr. 924. If Koutsoubos filled out a document and Bryant signed it, then Bryant does not know what is in the document. Tr. 924. Koutsoubos did not fill out the February 2005 account application. Tr. 924-25.

Bryant signed a "Customer's Margin Agreement" (margin agreement) and "Suitability Supplement Margin Account Agreement" (margin agreement supplement) on February 23, 2005. Tr. 928, 931; DKX. 17; DKX. 18. He did not have a margin account at J.C. Bradford or Lipscomb, and does not remember if he had one at Sky Capital. Tr. 928-29. Bryant testified that

except for the signature on the margin agreement, the handwriting is not his. Tr. 929-30. Bryant did not read the margin agreement or ask about it before signing it. Tr. 929. Bryant testified that no one explained the risks of margin trading to him over the phone, but admitted on cross examination that the risks of margin trading had been explained to him in writing, in DKX. 17. Tr. 930-31, 939. Bryant did not read the margin agreement supplement before signing it. Tr. 932. Bryant does not recall having any conversations with Koutsoubos about margins. Tr. 877.

Bryant signed a “Supplemental Application for NFS Margin Privileges” in July 2006. Tr. 948; DKX. 20. Koutsoubos told him he needed to sign it because JPT was changing clearinghouses and because it was necessary in order for Koutsoubos to continue making Bryant money. Tr. 948-49, 951.

Bryant signed an Account Update Form on March 15, 2007. DX. 143. Bryant testified that the only information on the form in his handwriting was his name, address, signature, and initials. Tr. 859-60. Usually when Koutsoubos sent Bryant forms, Koutsoubos said to just sign where the stars were and Koutsoubos would take care of the rest. Tr. 859-61. Bryant does not know if the Account Update Form was filled out when he signed it, but it is a “real good possibility” that it was blank because it contains incorrect information, including that he had investment knowledge regarding bonds. Tr. 859, 963; DX. 143. Although the form states that his risk tolerance was aggressive and one of his investment objectives was speculation, Bryant stated that he never told that to Koutsoubos or anyone else at JPT. Tr. 861-62; DX. 143. The Account Update Form also states that Bryant’s general investment knowledge was good, but it should have said limited. Tr. 862; DX. 143.

Bryant signed and initialed an AASS on May 8, 2009. Tr. 870-71; DX. 27. Bryant does not remember if any of the blanks on the form were filled in when he signed it. Tr. 871. Although he does not remember whether he signed this form before or after Koutsoubos told him he needed to day trade, his trading losses were already substantial when he signed the form. Tr. 872. There is no evidence that an AASS was ever completed by Bryant or for Bryant’s account prior to May 8, 2009.

Bryant had no retirement funds as of March 2007, at the time Koutsoubos took over the JPT account. Tr. 823. Over the life of his JPT account, Bryant invested about \$250,000. Tr. 864. This was approximately twenty-five percent of his liquid net worth. Tr. 876. Bryant testified that he told Koutsoubos on a number of occasions that he wanted him to manage his account conservatively, and Bryant testified that he was not interested in trading frequently. Tr. 865. Bryant estimates that about ninety-eight or ninety-nine percent of the trades in his account were recommended by Koutsoubos. Tr. 866. According to Bryant, Koutsoubos told him that he wanted to be able to trade without first getting approval from Bryant, because he had trouble reaching Bryant; Bryant agreed and Koutsoubos thereafter traded without advance approval “some.” Tr. 865-66.

Bryant testified that he would not have traded often in his account if he was not relying on Koutsoubos’ recommendations. Tr. 868. When the market started to drop, Koutsoubos called and told Bryant that he wanted to day trade to regain lost profits. Tr. 869. According to Bryant he was not comfortable with day trading, but he agreed to it because Koutsoubos said that was

the way to regain his profits. Tr. 869, 1025, 1028. Prior to this, Bryant had instructed Koutsoubos to withdraw from the market and sit on the sideline until the market settled down, but Koutsoubos assured Bryant that the market would turn around. Tr. 869-70.

Koutsoubos called Bryant on his cell phone one day, and during the conversation, a second JPT representative joined the call to talk to Bryant. Tr. 870, 1013. Bryant does not know the name of the man he spoke to but the man asked if Bryant knew that his account was being actively traded. Tr. 870. Bryant was aware of that at the time. Tr. 870. The man did not ask about his investment objectives or risk tolerance. Tr. 870, 1013.

Bryant testified that he put the trade confirmations he received in a three-ring binder and sometimes reviewed them before doing so. Tr. 873. Koutsoubos did not tell Bryant how much commission Bryant paid, but the commissions charged were disclosed in the trade confirmations. Tr. 873, 982-84; DKX. 26. When Koutsoubos started day trading, he told Bryant he would waive his commission. Tr. 873-74. Koutsoubos did not waive his commission, which Bryant discovered when he filed his taxes and looked at his year-end statement. Tr. 874. Bryant noticed that he was paying \$100 in commissions and \$49 in fees, but does not remember when he noticed that, or if he ever paid more than \$100 in commissions. Tr. 1016, 1018. Bryant eventually spoke to a George Legakis (Legakis), who Bryant assumed was a supervisor at JPT, and Legakis said that Koutsoubos did not have authority to waive his commissions. Tr. 874. Bryant learned at the end of 2009 that Koutsoubos had left JPT when he called to speak with him about when he was going to start making money. Tr. 874.

Bryant testified that between January and December 2008, he paid \$53,000 in commissions. Tr. 876, 1018. Bryant does not recall when he last put money into his JPT account, but he refused to put money into the account when Koutsoubos called him and said they had a margin call. Tr. 876-77. As of August 2009, the registered representatives on Bryant's account were "Legakis/Konner," and the portfolio value was \$6,419.08. DX. 148 at Bates JPTURNER-SEC-ATL 007818. At some point, Legakis called Bryant and tried to convince him to put more funds into the account, but Bryant refused, and the account, at the time of his testimony, had between \$3,000 and \$4,000. Tr. 878-79.

Koutsoubos called Bryant once or twice after he left JPT, but Bryant told him that he would not invest anything with him. Tr. 879-80. Bryant is not pleased with how Koutsoubos managed his account, because he did not have \$250,000 to lose. Tr. 881. Every time Koutsoubos called Bryant, he told Bryant he would make money, and one time he said he would get Bryant to New York and they would "party, party, party." Tr. 881. Koutsoubos was a great "cheerleader" who once said that "we're on a roll" and "we're going to hit it big time now." Tr. 975, 980. Koutsoubos said that he intended to use stop loss orders to "stop the bleeding" when the market was not doing well. Tr. 982. Bryant feels like Koutsoubos misled him. Tr. 881.

FIGURE ONE

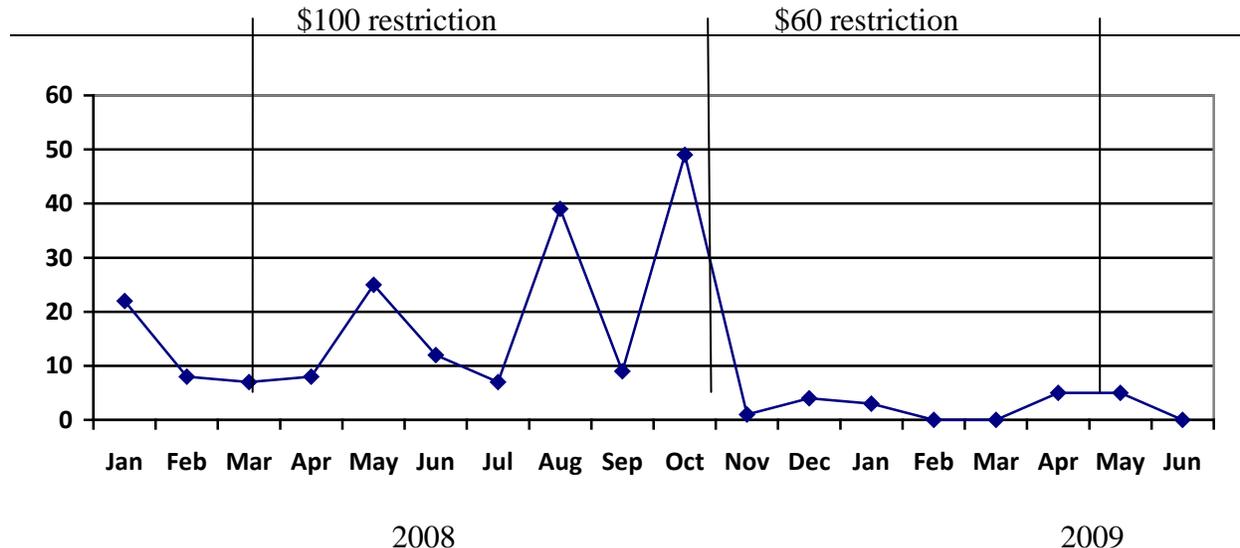


Figure one is a line chart showing the number of monthly trades in Bryant’s account over the alleged churn period, i.e., January 2008 to December 2008, and continuing until the end of June 2009, the last full month in which Koutsoubos handled Bryant’s account. The number of trades are taken from Bryant’s monthly account statements, and are the sum of the number of “securities purchased” and number of “securities sold.” DX. 148. Stop loss orders are not taken into account. During the period January 2008 to June 2009, Koutsoubos started out with a commission restriction of one percent, a \$100 commission restriction was imposed on March 18, 2008, a \$60 commission restriction was imposed on October 31, 2008, and the \$100 commission restriction was restored on May 6, 2009. DX. 99 at JPTURNER-SEC-ATL 418984. The changes in commission restriction are shown on Figure one by vertical lines. Bryant’s account was at AARS Level 4 during the entire period shown, except for the first quarter of 2009, when it was at Level 3. Id.

2. James Carlson

Carlson was born in 1952 and was age sixty-one at the time he testified. Tr. 1652. He lives in Winfield, Iowa. Tr. 1652. He graduated from high school and received a bachelor’s degree in animal science from Iowa State. Tr. 1654-55. He did not take any courses in finance, business, or accounting, nor has he had any course work since college. Tr. 1655. He is self-employed as a grain farmer, and his wife works as a secretary. Tr. 1653, 1655. He has been a farmer since the late 1970’s. Tr. 1656. He rents all the land he farms, and does his own taxes, with occasional help from an accountant. Tr., pp. 1760-64. He does not often sell his crop on the futures market, and instead puts it in his grain bin or the elevator. Tr., p. 1762. His wife owns a computer, but he spends very little time on it. Tr. 1656.

Carlson does not consider himself a sophisticated investor, and he does not feel he has the knowledge or expertise to trade stocks on his own. Tr. 1656-57. Prior to July 2007, he had four retirement accounts, both individual retirement accounts (IRAs) and self-employed IRAs (SEP

IRAs). Tr. 1658. Pat McCabe (McCabe) is the registered representative on three of the retirement accounts, and he does not know the representative on the fourth retirement account. Tr. 1658. He relies on McCabe's recommendations for trades, and once in a while he suggests investments, but he does not remember ever investing in anything he brought to McCabe's attention. Id., pp. 1660-61, 1749-52. His retirement accounts invest conservatively in stocks and mutual funds, and the accounts are not actively traded. Tr. 1659-60. Collectively he currently has about \$500,000 in his retirement accounts, including his IRAs. Tr. 1659, 1746.

Carlson opened a brokerage account in the early 1980's, with McCabe as his registered representative. Tr. 1661. It is now at Wells Fargo and has about \$40,000 in it, and had about the same balance in 2008 and 2009. Tr. 1661-62. The account does about four or five trades per year, typically in stocks, but the trading is conservative. Tr. 1663-64. Carlson has occasionally initiated trades in the account himself, but typically trades based on what McCabe says. Tr. 1663. He has never done independent research for that account's investments. Tr. 1663. He reads no investment-related periodicals and watches no investment-related television shows. Tr. 1664.

Carlson opened a JPT account in July 2007, and it is still open today. Tr. 1658, 1664. His registered representative was Konner in 2007, and it is now Frank Mangel (Mangel). Tr. 1658, 1665. Carlson had a conversation with Mangel when Mangel took over the account, and although Carlson was considering closing it, Mangel convinced him to keep it open so it could be "straightened out." Tr. 1665.

Carlson opened the account after a few cold calls from Konner. Tr. 1666. Konner was a good salesman because he convinced Carlson to send him money. Tr. 1667. Carlson listened to what Konner said and assumed that Konner knew what he was doing. Tr. 1668. In their initial calls, he told Konner that he had invested elsewhere but that he had not done his own research. Tr. 1669. Carlson does not recall discussing what other brokerage accounts he had, what his returns were in those accounts, his annual income, his investable assets, or his net worth. Tr. 1669-70, 1673. He remembers telling Konner that he was a farmer, and he assumes that he told Konner his age. Tr. 1670. He told Konner he had a retirement plan, which he did not intend to invest with Konner. Tr. 1671. He told Konner that his investment objective was to make money, which to Carlson meant buying good securities and holding them. Tr. 1672-73. Carlson made it clear to Konner that he did not want to lose money. Tr. 1673. Although Carlson never gave Konner a target trading frequency, he told Konner that if he "saw something good," he wanted to get out of an old investment to get into the new one. Tr. 1685-86. Carlson does not remember Konner ever suggesting that he transfer his retirement accounts to JPT. Tr. 1748.

Konner never discussed with Carlson his trading strategy or an appropriate trading frequency, either initially or later. Tr. 1673-74. Although he assumed that he would buy securities that would appreciate, and then sell them at a profit, he and Konner never discussed speculation. Tr. 1674. He and Konner discussed some PIPE offerings, which involved some risk. Tr. 1674-75. Initially Konner said his commissions would be "little or nothing except for the SEC fees," but after that, commissions were never discussed. Tr. 1675.

By July 2007, Carlson trusted Konner, and so he opened his JPT account with funding of \$6500. Tr. 1675-76. He believed Konner would look out for his interests. Tr. 1676. He thought Konner had new ideas compared to McCabe and was going to make a lot of money in stocks. Tr. 1754-55.

Carlson signed an account application on July 18, 2007. Tr. 1677; DX. 49. Carlson testified that the form was sent by FedEx or UPS and was filled out when he received it. Tr. 1677. He had discussed the form with Konner before receiving it, and discussed it with Konner again after receiving it. Tr. 1678. The listed income and assets, including a listed net worth of \$700,000, were accurate. Tr. 1678-79. The listed investment objectives – trading profits first, speculation second, and capital appreciation third – were accurate for a small investment but not for a large investment. Tr. 1679. For a large investment, he would have marked capital appreciation as one of the investment objectives, had he filled out the form. Tr. 1679-80. He is still not sure of the difference between trading profits and speculation, although he did tell Konner that because he was not sending a lot of money, he could “take a few chances” with the money in his account. Tr. 1679-80. His risk tolerance was listed as aggressive, which was accurate for a \$6500 investment. Tr. 1681; DX. 49. His investment knowledge was listed as good, which may not be accurate. Tr. 1776.

Carlson spoke to Konner whenever Konner telephoned. Tr. 1681. Konner usually called Carlson, and Carlson called Konner very seldom. *Id.* Typically they spoke about Konner’s recommendations for trading in the account, and about sending more money. Tr. 1682-83. Konner did most of the talking. Tr. 1683. There were occasions when Konner did not call before executing trades in Carlson’s account. Tr. 1682. Had Carlson received a call every time a trade was made, he “would have been on the phone all day.” Tr. 1720. In the absence of Konner’s recommendations, Carlson probably would not have traded in the account, and would have waited for Konner to call. Tr. 1684. Once or twice when he recommended a trade, Konner said that the opportunity was time sensitive. Tr. 1685. Konner’s calls typically lasted four or five minutes, and commissions were not discussed, nor did Carlson keep track of Konner’s commissions, although at one point he noticed that in 2008 the commission was \$100 per trade. Tr. 1690, 1899-1900. Because Carlson trusted Konner, he continued using him as his registered representative despite numerous unauthorized trades, and also filled out and signed forms without reading them closely. Tr. 1790-97. JPT sent Carlson trade confirmations, which he typically read, and which he occasionally used to do mental calculations of commissions. Tr. 1835-36, 1847; JKX. 80-83. However, Carlson did not discuss Konner’s total commissions with Konner. Tr. 1845-46. Additionally, Konner never mentioned that an actively traded account would have a high frequency of trades. Tr. 1908-09.

Carlson sometimes spoke to Chad Konner, Konner’s brother, but that was the only other person at JPT that Carlson spoke to while Konner was his registered representative. Tr. 1727. Nobody at JPT ever called Carlson to ask if he understood the risks associated with his account’s trading activity, nor did anyone at JPT’s compliance department ever contact him in 2008 or 2009 about the trading in his account. Tr. 1727.

Carlson found it hard to keep up with the activity in his account in 2008 and 2009, because there were so many trades and so many companies he knew nothing about. Tr. 1686.

When Carlson pointed out, on a few occasions, that things were not going well in his account, Konner said it would “go the other way,” and Carlson believed him. Tr. 1687. In 2009, Carlson did not do any independent investment research, mainly because he was not familiar with how to do it on the internet. Tr. 1687-88. Carlson only invested in one stock which Konner did not recommend, CMEX, which someone else had brought to his attention. Tr. 1726. Once in a while, Konner sent some research, but he did not typically do it before recommending a trade, and instead Carlson only had the information Konner conveyed over the phone. Tr. 1688-89. Carlson relied on Konner’s knowledge and expertise, and Carlson trusted him. Tr. 1689-90. He does not remember ever rejecting one of Konner’s recommendations. Tr. 1870.

In April 2008, Carlson’s account value was about \$200,000. Tr. 1694-95; DX. 128 at JPTURNER-SEC-ATL-004392. The additional invested funds came from grain sales. Tr. 1695. Carlson’s investment objective was essentially the same as it was originally, to not lose money, although the size of the account made him more risk averse. Tr. 1695-97. As of April 2008, Carlson’s account contained about sixty or seventy percent of his liquid assets. Tr. 1697-98. In 2009, Carlson made several deposits totaling \$265,000 into his account. Tr., p. 1691; DX. 129 at JPTURNER-SEC-ATL-554973. This made it difficult to keep track of his account’s performance, but he thought the account would turn around. Tr. 1691-92. In 2008 he became concerned about his account’s drop in value, and in the account’s level of activity, although he did not convey his concerns regarding activity level to Konner. Tr. 1839-40.

Carlson signed an account update form on April 6, 2008. Tr. 1693; DX. 50. The form was filled out when he received it, although Carlson did not know who filled it out or why he received it. Tr. 1693-94. He spoke to Konner on the phone about the form, but does not recall if they discussed the numbers on it. Tr. 1694. He does not recall speaking to Konner about his risk tolerance, but if he had received a blank form, he would have marked moderate, rather than aggressive, as the form actually indicated. Tr. 1698-99; DX. 50. Similarly, as to investment objectives, he would not have told Konner that his primary objective was speculation, and had the form been blank, he would have marked capital appreciation or trading profits as his first priority, rather than speculation, as the form actually indicated. Tr. 1699-1700; DX. 50.

When Carlson opened his account in July 2007, he had a net worth of \$700,000 and investable assets of \$200,000 (which did not include his retirement accounts). Tr. 1700-02; DX. 49 at JPTURNER-SEC-ATL-004059. On the April 2008 account update form, his net worth was listed as \$2.5 million and his investable assets as \$750,000. Tr. 1700-01; DX. 50. The April 2008 numbers were inaccurate, and he told Konner so. Tr. 1700-01. Carlson nonetheless initialed by the numbers on the April 2008 form, because Konner told him the net worth figure “doesn’t really mean anything.” Tr. 1702; DX. 50. Although Carlson would not have filled out the form the way it appeared if it had been blank, today he does not take issue with anything on the form except the net worth. Tr. 1698-99, 1788.

Prior to opening his JPT account, Carlson had heard of margin trading but had never done it. Tr. 1702-03. Konner suggested margin trading so that Carlson could buy more stocks. Tr. 1703. Carlson understood the risks of margin trading, although not necessarily because Konner explained them to him. Tr. 1875. Carlson discussed his margin account application with Konner before receiving it, but did not read it closely when he did get it. Tr. 1704. Carlson signed the

margin account application on May 1, 2008. Tr. 1704; DX. 51. The numbers on the application were filled in by someone at JPT, and Carlson initialed next to them, because Konner said they “didn’t mean that much.” Tr. 1704-06; DX. 51 at JPTURNER-SEC-ATL-004080. Carlson did not believe that his initials were a confirmation of the accuracy of the numbers, including, again, an inflated net worth of \$2.5 million, although he could have changed that number himself if he had desired. Tr. 1873-74; DX. 51.

Carlson signed an AASQ and AASS on March 23, 2009. Tr. 1711; DX. 53. Much of the form was filled out when he received it, including annual income, net worth, and investment objectives of speculation and short term trading. Tr. 1706-10; DX. 52-53. When he signed the form, Carlson filled in the entries for employer, occupation, liquid net worth, prior investment experience, and size of trades. Tr. 1711-12; DX. 52-53. The net worth figure was altered from \$2.5 million to \$2.0 million, but it was still inaccurate and Carlson did not alter it, because he would have altered it to show no more than \$1 million. Tr. 1712, 1903. The liquid net worth figure of \$750,000 was accurate, although he does not remember discussing it with Konner before writing it in. Tr. 1712. Carlson does not remember how he selected the frequency of trades and size of trades figures. Tr. 1712-13. He made one correction, to the “Stocks” line, but the other changes were not made by him; had he made the changes, he would have crossed out the original number and written in a new one. Tr. 1712. Again, Carlson signed the form because Konner told him the form “doesn’t really mean anything.” Tr. 1714. Carlson does not remember discussing the form with Konner before receiving it, although he remembers Konner telling him JPT was sending it. Tr. 1708-09. He does not remember anyone from JPT calling to confirm his answers, although J. Williams’ initials are on both the signed and unsigned versions of the AASQ. Tr. 1714; DX. 52-53. Carlson admitted that the representation on the AASS, that he read and understood the AASS, was false. Tr. 1798, 1800; JKX. 34. Carlson knew at the time that there was a lot of activity in his account. Tr. 1805.

In 2009, Konner recommended two PIPE offerings, in Quantum Fuel Systems and Irvine Sensors Corporation. Tr. 1718-19. Carlson initially did not recall discussing the concept of an accredited investor with Konner, and assumed that it meant that “your check was probably good,” but eventually agreed that Konner discussed it with him. Tr. 1718, 1877, 1879-80, 1882. Carlson signed a PIPE offering Confidential Qualification and Non-Disclosure Agreement (NDA) on June 11, 2009. Tr. 1876; JKX. 75. He read the NDA carefully because it was different from the other forms Konner had him sign. Tr. 1877. He signed other NDAs on June 16 and August 24, 2009. Tr. 1878; JKX. 76-77.

Carlson signed another AASQ and an AASS on February 21, 2010. Tr. 1714-15; DX. 54. He accurately filled out the entries for annual income and net worth, and is not sure if he circled trading profits as his investment objective. Tr. 1715-16; DX. 54. He indicated two weekly as his trading frequency, and informed Konner that he wanted to pursue more of a buy and hold strategy. Tr. 1716-17, 1814; DX. 54. Carlson admitted that the representation on this second AASS, that he read and understood the AASS, was false. Tr. 1810-11; JKX. 35. He signed a third AASS on January 24, 2011, which also falsely stated that he had read the form. Tr. 1820; JKX. 36. However, by that time he was aware of the liabilities of active trading. Tr. 1820-21. The third AASS indicated a trading frequency of four times per week, and there continued to be a substantial level of activity in his account at that time. Tr. 1824-25; JKX. 36.

Although Carlson did not have a conservative risk tolerance initially, by April 10, 2011, Carlson's risk tolerance had changed and become conservative, which he represented to the Commission in a written declaration. Tr. 1903-05, 1908. On August 5, 2011, Carlson signed a JPT New Account Form, which came to him already filled out, and which indicated an investment objective of speculation and a risk tolerance of 100 percent. Tr. 1904-05, 1911; JKX. 37. When he signed the form, Carlson did not even realize the "100%" figure was there. Tr. 1911; JKX. 37.

Carlson considered closing his JPT account while Konner was his registered representative, but did not because he thought things were going to turn around. Tr. 1758. He has not yet spoken to a private attorney about his JPT account, and understood from Division counsel that he might get his brokerage fees back as a result of the present proceeding. Tr. 1768-69.

3. Dudley Wayne Williams

Williams was born on April 19, 1937, and currently lives in Claremont, California, where he has resided for the past forty-four years. Tr. 1390-92. Williams is married to Alice Williams and together they have two children, a son age forty-five and a daughter age forty-three. Tr. 1393-1394. Williams has been retired since 1995. Tr. 1392. Prior to retirement, Williams worked as a professor at California Polytechnic State University (Cal Poly) where he taught statistics, quantitative management, introduction to business, and production management. Tr. 1393, 1399. Since retiring, Williams has done a little self-employed construction work, including refurbishing a three-bedroom condominium. Tr. 1401-02. Williams does not hold a general contractor's license. Tr. 1401-02. Alice Williams was a high school teacher for over thirty years before retiring in 1995 or 1996. Tr. 1393-1394.

Williams attended high school in Fontana, California. Tr. 1397. After graduating from high school in 1955, Williams attended San Bernardino Valley College where he received his associate degree before transferring to Cal Poly in Pomona, California. Tr. 1397-98. He graduated from Cal Poly with a bachelor's degree in business management and graduated from the University of Southern California with an M.B.A. in 1967. Tr. 1398. In college, Williams took courses in economics, marketing, and accounting. Tr. 1399. During his career as a professor at Cal Poly, Williams never taught a finance or investment related course. Tr. 1400. The quantitative analysis courses that Williams taught focused on production and were not related to stock market investments in any way. Tr. 1633-34.

Williams testified that he does not currently hold a professional license and has never held a securities license or a professional, financial, or insurance-based designation. Tr. 1400. Williams does not consider himself a sophisticated investor. Tr. 1402. Williams opened a brokerage account with Smith Barney (S&B) in 1991 and held the account for approximately fifteen years before opening an account with Calabro at JPT. Tr. 1406. In late 2007, Williams transferred the funds from S&B to JPT, and closed the S&B account soon after the account at JPT was opened. Tr. 1406-08. Williams later opened an account at Newbridge Securities (Newbridge). Tr. 1403, 1568. This was Williams' most recently opened brokerage account and was closed just a few months before Williams' testimony. Tr. 1403.

Williams testified that he never bought or sold options or commodities in the S&B account, and that prior to opening his JPT account, Williams never traded on margin. Tr. 1409-10. Williams testified that he “relied entirely upon the broker” when buying stocks. Tr. 1410, 1560-61. Bill Grant (Grant) was Williams’ registered representative at S&B. Tr. 1408. John Quinn (Quinn) was Williams registered representative at Newbridge. Tr. 1403-04. Williams dealt solely with Calabro for the entire time he invested with JPT. Tr. 1447-48. Williams currently has an arbitration proceeding against Calabro pending with FINRA, relating to Williams’ account at JPT. Tr. 1396.

Williams was introduced to Calabro through Willhoft. Tr. 1413-14. Williams described himself as a neighbor and a friend of Willhoft. Tr. 1391. Williams lives “two to three” miles from Willhoft and over the years has built a “good little relationship” with him. Tr. 1391. Williams has known Willhoft for over forty years and during that time, their children grew up together, they bought land together, and overall “just happened to hit it off.” Tr. 1391. Other than the joint purchase of land, Williams and Willhoft never entered into business together. Tr. 1391-92. Willhoft was aware of Williams’ situation at S&B and knew that Williams was having problems with his account.¹⁰ Tr. 1414. Willhoft mentioned he had a broker that he liked and suggested that Williams “talk to him sometime.” Tr. 1414. Williams was introduced to Calabro over the phone when Willhoft handed the phone to Williams after talking with Calabro. Tr. 1414. Williams’ initial conversation with Calabro lasted only three or four minutes. Tr. 1415. Sometime the following week, Calabro called Williams at home to get some basic information to fill out the account opening forms for JPT. Tr. 1415-16.

By late November or early December 2007, Williams received his first invoice from JPT and began to fund the account. Tr. 1416. The first trade was for approximately \$200,000; however, Williams did not remember if he deposited the \$200,000 all at once or just paid the amount listed on the initial invoice. Tr. 1416-17. Over the next several years, Williams invested a total of \$1.7 million with JPT. Tr. 1418. Williams testified that there were probably seven or eight deposits over time that added up to the \$1.7 million, and for each deposit he simply paid the amount listed on the invoice. Tr. 1418. In their initial conversations, before Williams opened his account with JPT, Williams told Calabro that he had \$1.5 million invested with S&B. Tr. 1419-20.

When Williams invested with S&B, he was satisfied with how Grant handled his account, because the commissions were low, Grant invested in “good stuff that [Williams] could rely on,” and Grant did not trade often, so that stocks were held for an average of ten years. Tr. 1423. Williams does not consider himself a speculative investor now, nor has he ever been a speculative investor. Tr. 1432. Williams invested with S&B with the objective of earning “a fair return” on his money. Tr. 1432. Williams’ objective while investing with JPT was the same, and he testified that his purpose in opening an account with JPT was to “keep from losing any more money and to make a reasonable return on the investment.” Tr. 1420, 1431-32.

¹⁰ Williams decided to close his S&B account when Grant retired and nobody stepped in to fill his place. Tr. 1408.

Williams testified that he and Calabro never discussed the fact that Williams does not consider himself to be a speculative investor. Tr. 1433.

Calabro never asked Williams what his investment objectives were. Tr. 1430. Williams initially testified that Calabro never told him his strategy for investing his funds, but later testified that he at least knew that Calabro was planning to engage in short sales to manage a down economy; Williams had a basic knowledge of how a short sale worked but did not fully understand the process. Tr. 1426-27, 1428-31. According to Williams, Calabro's investment strategy changed in mid-2009 when he told Williams that he had been "battling the economy, rather than accepting it" and had come up with a new plan to recoup Williams' losses. Tr. 1427. Prior to this change in strategy, Williams testified that his JPT account had "taken a nose dive" and suffered "severe losses." Tr. 1428. Under the direction of Calabro, Williams lost approximately \$1.3 million in his JPT account in the course of a year. Tr. 1434. Williams had conversations with Calabro when he thought that his investment was deteriorating. Tr. 1434. Calabro provided no comment to Williams' questions except to say that he was hoping it would turn around. Tr. 1434-35.

Before investing with JPT, Williams filled out a number of forms at Calabro's request, including a Supplemental Application for NFS Margin Privileges, a Brokerage Account Application, and an AASQ. Tr. 1445, 1480, 1490; DX. 43, 45, 46. Williams testified that he signed the Supplemental Application for NFS Margin Privileges without reading it fully. Tr. 1492. Williams doubted he would have understood the form even if he had read it, and he just signed it at Calabro's request. Tr. 1492-93. He testified that the Brokerage Account Application and the AASQ were filled out after he signed it. Tr. 1437, 1478. He testified that all three of these forms contain incorrect information that was added without his confirmation. Tr. 1438, 1481-84, 1493-94.

The second portion of the Supplemental Application for NFS Margin Privileges states that Williams' approximate annual income was \$150,000, his estimated net worth was \$3 million, and his investable assets were \$2 million. Tr. 1494; DX. 46. Williams testified that all of these figures were untrue. Tr. 1494. Similarly, the Brokerage Account Application incorrectly states that Williams' income level was \$150,000, his estimated net worth was \$3 million, and his top investment objective was speculation. Tr. 1438-40, 1442; DX. 43.

Williams testified that, in reality, his true income level was a little over \$100,000, his net worth was only \$2.5 million, and he was more concerned with preservation of capital, income, and capital appreciation than speculation. Tr. 1438-39, 1443. Williams testified that the \$2 million of investable assets listed on the Supplemental Application for NFS Margin Privileges was not there when he originally signed it. Tr. 1440. The Brokerage Account Application lists his risk tolerance as aggressive and general investment knowledge as good, when moderate or conservative risk tolerance and a limited general investment knowledge would have been more accurate. Tr. 1444, 1448.

The AASQ lists Williams' estimated annual income as \$150,000 and his net worth as \$4 million, with a liquid net worth of \$3 million. Tr. 1480-1481; DX. 45. The AASQ also falsely states that Williams' investment objectives were "growth, trading profits, speculation, and short-

term trading,” when Williams would have listed “safety of principal and income” as his objectives. Tr. 1481-82; DX. 45. The AASQ declares that Williams has twenty-five years of prior investment experience and “two-plus” years of prior options experience; Williams testified that his personal investment experience “is virtually zero” and that he had no prior options experience. Tr. 1482-84. The AASQ lists the frequency of trades as “3-6 a month.” Tr. 1484; DX. 45. Williams went over the account statements for the months of April, May, and June of 2009, and counted the total number of transactions, and in each of the months there were over thirty transactions listed, with a high of sixty-eight in one month. Tr.1486-90; DX. 8. Even though Calabro never asked Williams for discretionary authority to trade in Williams’ account, Williams testified that Calabro executed trades without his knowledge. Tr. 1450-51. Williams learned of these unauthorized trades when he received the trade confirmations. Tr. 1451.

Almost a year after Williams began investing with JPT he signed an Option Trading Agreement and Options Suitability Questionnaire. Tr. 1495-96; DX. 47. Calabro described options trading to Williams as a type of insurance to protect a trade. Tr. 1496. Williams testified that because of the way Calabro explained options trading, he did not see any downside to investing in options; as he understood it, options would negate or reduce a loss due to trading. Tr. 1496-97. Williams acknowledged that the Option Trading Agreement attached to the Options Suitability Questionnaire stated that there was risk involved in options trading. Tr. 1622; RCX. 45 at JPTURNER-SEC-ATL 002971; DX. 47. However, he chose not to read the agreement because he was under the impression that Calabro’s expertise would minimize the risks involved with options trading. Tr. 1622. At Calabro’s request, he signed the Options Suitability Questionnaire before it was filled out. Tr. 1497-98. The Options Suitability Questionnaire highlighted speculation and growth as Williams’ investment objectives, and Williams testified that these were not his goals and he would have rather focused on income and safety of principal. Tr. 1498; DX. 47. The Options Suitability Questionnaire also indicated that Williams had over thirty years of investing experience and stated that he made about twenty-five trades per year with an average transaction size of \$450,000. Tr. 1499; DX. 47. Williams testified that this information was untrue and that he had never made a \$450,000 transaction in his life. Tr. 1499-1500.

In April 2009, about five or six months after signing the Options Suitability Questionnaire, Williams signed an Investment Account Application for his Newbridge account. Tr. 1557-58, 1561; RCX. 54. The form was partially typed and partially filled out by hand, and Williams testified that he did not recall filling out the form. Tr. 1558. However, the Newbridge Investment Account Application stated that Williams had an annual income of \$200,000, a net worth of over \$4 million, and a liquid net worth of over \$200,000. Tr. 1559; RCX. 54. It also listed Williams’ investment objective as speculation, with an aggressive risk exposure, and stated that he has over thirty years of investment experience in mutual funds, bonds, and stocks. Tr. 1560; RCX. 54. Williams does not know whether he filled out the Newbridge Investment Account Application. Tr. 1558.

In December 2010, Williams sold his General Electric stock and bought stock in Aurizon Mines, through his Newbridge account. Tr. 1572; RCX. 56 at SEC-NEWBRIDGE-000285. Williams did not consider Aurizon Mines a much more speculative investment than General Electric. Tr. 1573-74. He trusted Quinn’s characterization of Aurizon Mines as “ironclad and

wonderful, wonderful stuff.” Tr. 1513, 1573. In March 2012, Williams wrote a note to Newbridge stating that the information Newbridge had on its forms regarding Williams’ investment history was false. Tr. 1510, DX. 216. He testified that the purpose of the note was to correct the investment objectives of the Newbridge account and make it clear that he was not a speculative investor. Tr. 1512-13. Williams testified that the Newbridge account invested in both stocks and bonds, and overall had little trading activity; a review of the Newbridge account statements confirms this. Tr. 1404-06; RCX. 56.

Williams testified that before he invested with JPT, Calabro never took the time to confirm that the information he had on Williams was correct; Calabro never asked him how much he was willing to risk or what his investment objectives were. Tr. 1435-36. Williams testified that there was “no discussion whatsoever with respect to how the account was going to be handled.” Tr. 1436. His conversations with Calabro occurred once or twice a week when Calabro called to update him on what transactions were taking place. Tr. 1449. Williams testified that he “didn’t have anything to refute [Calabro] or agree with him . . . [the call] wasn’t a request agreement. It was just to tell [Williams] what was going on.” Tr. 1458. During these conversations, Williams accepted what Calabro told him as correct and never tried to change Calabro’s mind. Tr. 1450, 1454-55. He never recommended stocks to Calabro for his account nor did he tell Calabro that he wanted to sell certain stocks that were being held. Tr. 1452. Occasionally, Williams would bring his concerns to Calabro when the stocks were going “the wrong way” and Calabro would reassure him that things would turn around. Tr. 1452-53. He always relied upon Calabro’s recommendations and he never researched Calabro’s individual stock recommendations. Tr. 1456-57.

While he never researched a stock prior to investing, Williams testified that at least once he did his own analysis on his JPT account. Tr. 1470-72; DX. 44. Williams conducted this analysis in early February 2008 and sent it to Calabro because “Calabro sometimes would exaggerate the results of his trading.” Tr. 1472. By doing his own analysis, Williams wanted to show Calabro that the results of his trading were “not as great as what [Calabro] was telling [him].” Tr. 1472, 1477. Williams testified that he never received a response from Calabro, or anyone in JPT, regarding his analysis. Tr. 1477.

Between December 2008 and November 2009, Williams’ account value fell from approximately \$2 million to approximately \$550,000. Tr. 1467-68; DX. 8. During that period he withdrew between \$200,000 and \$260,000, and the remaining drop in value was due to trading losses. Tr. 1468-69. At some point in 2009, Williams started to have concerns about Calabro. Tr. 1459. His concerns arose when he realized, through trade confirmations, that Calabro was trading options without his knowledge. Tr. 1459. Williams also testified that the trade confirmations proved that Calabro was misrepresenting the trades he made. Tr. 1459. Williams recalled Calabro telling him that he sold stock in J.P. Morgan and made \$100,000, while the trade confirmations showed no profit. Tr. 1459.

In mid-2010, Williams closed his JPT account. Tr. 1504. Williams testified that he “trusted [Calabro] up until the very end.” Tr. 1503. After closing the account, Williams wrote a letter to Natalie Brunson (Brunson) at the Commission stating that he suspected he was being

hustled by Calabro. Tr. 1500-02; DX. 48. Williams also brought the active account forms to Brunson's attention, saying that he was "aghast, yet not surprised that [he] signed it." Tr. 1501.

4. Harold Gail Moore

Moore was born on August 31, 1965, resides in Mount Ulla, North Carolina, and has lived at the same address for forty-seven years. Tr. 611-12. Moore is a lifelong resident of North Carolina. Tr. 612. He attended West Rowan High School, but left before graduation. Tr. 612. In 1983, Moore obtained his GED. Tr. 612. He never went to college after receiving his GED, and has never taken a higher education course related to business, accounting, finance, investing, or investment strategy. Tr. 612-13.

Moore is currently unmarried, but has been married and divorced twice. Tr. 615. Moore had been divorced from his first wife, Tammy Deweese, for approximately seventeen years at the time of his testimony. Tr. 616. He has two children from his first marriage: Christy, age twenty-six, and Shane, age twenty-two. Tr. 616. Moore's second marriage, to C. Moore, ended in 2007. Tr. 616. Moore had two children with C. Moore: Tyler, age sixteen, and Sabra, age nine. Tr. 616-17.

Moore is the president of Protech Mechanical Incorporated (Protech), an industrial construction business located in Mount Ulla. Tr. 614-15. Protech is in the steel fabrication business and builds carts, racks, and steel structures for industrial companies like Genentech, Freightliner Corporation, and AO Smith. Tr. 614. Moore founded Protech in 1992 and built the company up himself over the years. Tr. 615. The business is located on the twenty-four acres of land that Moore inherited from his grandfather, and has approximately 105 employees. Tr. 615, 651, 742.

According to Moore, up until late 2008, he never had a brokerage account, never engaged in the buying or selling of stocks or options, and never bought or sold on margin. Tr. 617. Moore opened his first brokerage account with Calabro at JPT in December 2008. Tr. 617. Currently, Moore has a FINRA arbitration proceeding pending against Calabro in relation to Moore's JPT account. Tr. 613-14.

Moore was introduced to Calabro through Moore's accountant, Terry Corriher (Corriher). Tr. 618. In November 2008, Corriher arranged for Moore to meet Calabro and Uckar at Corriher's office. Tr. 618-19. Moore believed Uckar to be Calabro's assistant. Tr. 619. During that initial meeting, Calabro gave a presentation to Moore that lasted approximately one hour and talked about "how he could make money when the market was going down as well as he could make it when it was going up." Tr. 620-21. Moore testified that Calabro never revealed the specific details of his trading strategy, but assured him that "he had a strategy and would make money no matter what the market did." Tr. 623. Throughout his presentation, Calabro talked with Moore about opening a brokerage account with JPT and asked Moore for money to fund the account. Tr. 622. Moore left the meeting without giving Calabro the money he requested. Tr. 622.

Moore testified that Calabro never discussed Moore's risk tolerance in the initial meeting. Tr. 626. Moore nonetheless made it "perfectly clear to [Calabro] that he couldn't afford to lose

this money.” Tr. 626. Moore testified that he repeated his concerns to Calabro multiple times and made it clear to Calabro that he had recently gone through a divorce and he had to make an equitable distribution payment of \$500,000 by July 2013. Tr. 623-24, 628-629. Calabro assured him that his \$500,000 goal could be reached and “it wouldn’t be a problem for him to make that kind of money.” Tr. 626.

Either later that day or the day after the presentation, Calabro and Uckar visited Moore at his office to continue their discussion about opening a brokerage account. Tr. 622. Moore testified that Calabro and Uckar visited for about an hour and a half and that they were in a rush; he believed they were in a hurry to catch a plane. Tr. 630. Moore recalled signing some but not all paperwork to open an account. Tr. 630. Moore testified that, though he should not have, he signed a blank account application form that day because Calabro and Uckar were in a rush and Calabro “needed to have the stuff signed so [he] signed it.” Tr. 631, 647. According to Moore, he never saw the completed form until 2012, when it was sent to him by the SEC or from his attorney in the FINRA arbitration proceeding. Tr. 634, 647-48.

At some point during the initial meeting at Corriher’s office or the following day on Moore’s property, Moore mentioned to Calabro that he had never had a brokerage account before. Tr. 622. Calabro persuaded him to open an account, and Moore agreed to do so because he felt comfortable that Calabro knew exactly what he was doing. Tr. 622-23. Moore considers himself a trusting man by nature and he immediately trusted Calabro as a result of Calabro’s presentation and Corriher’s recommendation. Tr. 648, 817. However, when Calabro and Uckar left after the second meeting, Moore still had not given them money to fund the account. Tr. 622.

A few days after first meeting Calabro, Calabro faxed additional forms to Moore’s office for him to sign. Tr. 633. One of these forms was the JPT Brokerage Account Application. Tr. 632-33; DX. 13. Moore testified that when he signed the Brokerage Account Application he just saw the signature page. Tr. 633-34. Although the Brokerage Account Application form reflects some accurate information, such as Moore’s driver’s license number, the majority of the information is incorrect. Tr. 635-41. The Brokerage Account Application states that Moore was married, when Moore explicitly told Calabro he had just gone through a divorce. Tr. 635; DX. 13 at JPTURNER-SEC-ATL 002701. It lists a tax bracket of twenty-five to twenty-seven percent even though Moore said his true tax bracket was higher. Tr. 637; DX. 13 at JPTURNER-SEC-ATL 002701. It lists an aggressive risk tolerance even though Moore does not consider himself to be a risk taker; conservative would be more accurate. Tr. 627, 640; DX. 13 at JPTURNER-SEC-ATL 002701. In addition to the false information, the Brokerage Account Application listed speculation, trading profits, and capital appreciation as Moore’s investment objectives, but Moore only told Calabro that he needed to make \$500,000, and he considered preservation of his principal an important goal. Tr. 639, 679; DX. 13 at JPTURNER-SEC-ATL 002701. Moore testified that no one asked him for the personal information that appears on the Brokerage Account Application and he did not provide Calabro or Uckar any background information other than his driver’s license. Tr. 634-35, 642-43. Moore testified that he gave Calabro a copy of his application for an S&B account, which listed his net worth as a little more than \$3 million, but he otherwise had no knowledge of how Calabro got the numbers listed on

the form. Tr. 753-54. Moore signed the S&B application in December 2008, around the same time he signed the JPT Brokerage Account Application. Tr. 721-22; RCX. 61.

With the S&B account application, Moore testified that he only saw the signature pages at the time he signed; Pam, a woman who worked in Moore's office, kept the rest of the application elsewhere. Tr. 724-25. On this application Moore wrote down his net worth as \$3.25 million dollars, when he previously testified that the \$3 million dollars listed on the JPT Brokerage Account Application was incorrect and his true net worth was closer to \$1.5 million. Tr. 653, 728. Moore explained that the amount on the S&B Account Application includes the \$1.5 million that Moore gave his ex-wife. Tr. 728.

Moore also signed a Supplemental Application for NFS Margin Privileges in late November 2008. Tr. 650-51; DX. 34 at JPTURNER-SEC-ATL 002705-10. Moore testified that he never had a conversation with Calabro about what it meant to invest on margin. Tr. 659. When Moore signed the Supplemental Application for NFS Margin Privileges, he did so without reading it or fully understanding what buying on margin entailed. Tr. 650, 659. He felt like he did not have to read the form carefully before he signed it. Tr. 650. He trusted Calabro to do what he said he was going to do. Tr. 795. The Supplemental Application for NFS Margin Privileges lists Moore's estimated net worth at \$3 million, but Moore testified that his net worth was lower at that time and if Moore "had filled that number in, it would have been more accurate than a rounded number such as [\$3 million]." Tr. 653-54; DX. 34 at JPTURNER-SEC-ATL 002710. Additionally, the Supplemental Application for NFS Margin Privileges lists Moore's investable assets as \$1 million when Calabro knew that Moore only had \$250,000 available to give him. Tr. 654-55; DX. 34 at JPTURNER-SEC-ATL 002710.

The Options Suitability Questionnaire was the third JPT form Moore signed, and it, too, contained incorrect information. Tr. 655-58; DX. 34 at JPTURNER-SEC-ATL 002712. The Options Suitability Questionnaire was sent with an Option Trading Agreement that disclosed the risks involved in options trading. Tr. 794-98; RCX. 26. Moore believes that he did not read the document and probably just gave it to Pam to file away. Tr. 796. The Options Suitability Questionnaire reflects the same incorrect estimated net worth and liquid net worth as the Supplemental Application for NFS Margin Privileges. Tr. 655. It also states that Moore's investment objectives were speculation and growth, similar to the objectives listed on the incorrect Brokerage Account Application. Tr. 656. Additionally, the Options Suitability Questionnaire states that Moore had been investing for fifteen years, with an average of fifty to sixty trades a year, at an average of \$75,000 per trade. Tr. 656-57. Moore testified that he had never traded before and his listed experience should have been marked as zero. Tr. 656-57. Moore never had a conversation with Calabro regarding options and filling out the Options Suitability Questionnaire; however, he felt like needed to sign the Options Suitability Questionnaire because Calabro told him to. Tr. 658. Moore testified that he "signed a lot of things [he] shouldn't have signed. But [he] went off of what [he] was promised by [Calabro]." Tr. 795. Moore testified that "at one point, [Calabro] told [Moore] that he would fill out the paperwork because he knew what needed to be filled out." Tr. 803.

About a week after Moore signed the JPT Brokerage Account Application, he received an Account Update Form. Tr. 809-10, 823. Moore testified that he never answered questions from

Calabro¹¹ concerning such a form. Tr. 823. The Account Update Form outlined certain changes made to his suitability information. Tr. 823. The Account Update Form states that Moore's annual income was changed to \$250,000, his estimated net worth was changed to \$3 million, and his investable/liquid assets were changed to \$1 million. Tr. 823-25, RCX. 65. Moore does not know where Calabro would have obtained the information to make the updates. Tr. 824-26. The Account Update Form does not have Moore's signature accepting the changes. Tr. 826.

Moore testified that he deposited \$50,000 to fund his JPT account in December 2008, and that over the next three months he made three additional deposits. Tr. 662, 672-73. By the end of February 2009, Moore had deposited all his liquid assets into his JPT account.¹² Tr. 628, 637-38. Calabro knew that he had a line of credit through his business and Calabro repeatedly told Moore he could draw on that for extra cash. Tr. 628, 672, 679. In March 2009, before Moore tapped into his line of credit, Moore went to New York to visit Calabro and see his office, because he felt uncomfortable giving Calabro additional funds without at least seeing where his office was. Tr. 628, 675, 679-80. While meeting with Calabro in New York, he told Calabro that he "couldn't afford to lose this money, especially since [he] was borrowing it" and that preservation of capital was an "absolutely necessary" investment objective for Moore. Tr. 628, 677-79. Moore testified that Calabro assured him that his maximum risk would be \$125,000 and that Uckar appeared to be uncomfortable when Calabro made this assurance. Tr. 628, 678. Moore stated that he thought Calabro "giving [Moore] a dollar amount that was the maximum [he] could lose was what made [Uckar] nervous." Tr. 679.

Moore testified that he felt comfortable with Calabro, and that he was comforted by Calabro's assurance that the most he would lose was \$125,000 on a \$750,000 investment. Tr. 683-84. Two days after returning from New York, Moore testified that he deposited the first \$500,000 from his line of credit into his JPT account, on March 10, 2009. Tr. 686-87; DX. 35. A little over a month later, Moore made a second deposit of \$250,000. Tr. 687; DX. 35. In total, Moore deposited "a million and either 75 or 85,000" into his JPT account. Tr. 672. The first \$200,000 or \$250,000 came from Moore's business operating account, and the remaining funds were pulled from Moore's business line of credit and from his IRA account. Tr. 672. Moore testified that Calabro talked him into sending Calabro the funds from his IRA, and that he thought the IRA funds were going to be placed in a different retirement account, but that he did not believe they actually were. Tr. 646-47.

Calabro was Moore's registered representative and Moore's main contact at JPT. Tr. 642. Moore testified that Calabro made all the decisions regarding what stocks to buy or sell and when to execute the transactions. Tr. 674-75, 704. There were two stocks Moore was interested in investing in, Ford and BB&T; however, Calabro did not follow either suggestion and discouraged Moore from making the purchases. Tr. 701-02. Calabro did not always inform Moore when a stock was purchased in his account and he never asked for Moore's permission

¹¹ The transcript states "Cole," which is plainly a typographical error. Tr. 474.

¹² Moore testified that he deposited \$200,000 before visiting Calabro in New York. Tr. 628. Later on, Moore testified that he deposited \$250,000 before going on the trip to New York. Tr. 637-38, 662, 673, 682.

before executing a trade. Tr. 702, 705. Moore testified that he “didn’t really have any input into what [Calabro] did . . . he just did whatever he wanted to do in [Moore’s] account.” Tr. 705. Moore learned about the trades that Calabro executed through the monthly statements from JPT. Tr. 705.

When Moore received the monthly statements, he would focus on the front page to learn how much money was in his account. Tr. 801-02. From the monthly statements, Moore tracked his account as he lost approximately \$588,000 over the course of nine months. Tr. 692-95. In March of 2009, Moore’s portfolio totaled \$772,974.21, after he deposited \$500,000 from his line of credit. Tr. 692; DX. 5 at JPTURNER-SEC-ATL 002789. Nine months later, in November of 2009, Moore’s portfolio had dropped to \$184,911.47. Tr. 695; DX. 5 at JPTURNER-SEC-ATL 002887. In January 2010, Moore’s portfolio hit a low point of \$150,880.95. Tr. 699; DX. 36 at JPTURNER-SEC-ATL 002907. Originally, Moore had told Calabro that if the account dropped below \$750,000, Calabro should close the account and stop trading. Tr. 827. When Calabro ignored this order, Moore set a new threshold and told Calabro to stop trading if the account dropped below \$500,000. Tr. 827. As the account crossed the \$500,000 threshold, Moore asked Calabro multiple times to close his account and send his money back; however, Moore “often” let Calabro talk him out of doing that. Tr. 690.

From December 2008 to March 2009, Moore and Calabro talked frequently, sometimes multiple times per day. Tr. 804. Moore testified that during these conversations, Calabro told Moore how his account was doing. Tr. 804. According to Moore, Calabro usually spent these conversations trying to calm him down because he was getting nervous at the account’s performance. Tr. 805.

Moore started panicking in April 2009 when his account dropped below \$500,000, but that same month he opened a JPT account for his son with an opening balance of \$250. Tr. 806. Moore explained that the account for his son “was just going to be a little fun account for him, so he could possibly make some money in it. It was just a \$250 account.” Tr. 828. During this time, Moore also gave Calabro the number to his attorney, Mark Wilkinson (Wilkinson). Tr. 807. Although Moore made it clear that he never introduced the two men or recommended Calabro to Wilkinson, he admitted giving Calabro Wilkinson’s number so Calabro could solicit him. Tr. 807-08.

Moore finally withdrew \$140,132.90 to close his JPT account in January or February 2010. Tr. 647, 691, 700. This was the only withdrawal that Moore had made since his account was opened. Tr. 700. After Moore closed his account, he saw in a statement that he had paid Calabro approximately \$118,900 in commissions. Tr. 707. Moore was under the impression that if he was not making money then Calabro would not be either. Tr. 707. When Moore confronted Calabro about the large commissions, Calabro asked Moore if he thought Calabro worked for free. Tr. 707.

Shortly after closing his JPT account, Moore used the money he withdrew to open an online brokerage account with Fidelity. Tr. 732, 777. Moore opened the Fidelity account because he was “desperate to make back the money that [Calabro] had lost.” Tr. 697. The Fidelity account had no broker and was managed by an engineer, Kevin Tesh (Tesh), who

worked for Moore. Tr. 777-78. Tesh was paid hourly for his position as an engineer but was not compensated by Moore for trading in Moore's Fidelity account. Tr. 787. Moore testified that he knew Tesh for ten years, but did not interview him about his financial background before allowing Tesh to trade in the Fidelity account under Moore's name. Tr. 779.

Through Tesh's day trading, Moore lost \$137,000 in the Fidelity account in 2010. Tr. 737-38, RCX. 63. Moore learned Tesh was day trading from meeting with his accountant, but Moore did not try to stop Tesh from day trading. Tr. 738, 784-85. Tesh thought the stocks were going to do well, so Moore continued to approve the trades. Tr. 785. While Moore was aware that Tesh was day trading, he did not realize that Tesh was continuing to trade on margin. Tr. 784. Tesh traded in Moore's Fidelity account for ten months before he was fired. Tr. 785. Tesh was not fired because of the trading in Moore's account; rather, Moore and Tesh parted ways over a job they were doing for the North Carolina Department of Transportation. Tr. 785.

During his testimony, Moore occasionally referred to handwritten notes to refresh his memory concerning specific dates and transaction amounts. Tr. 662, 671-72; RCX. 60. Moore testified that he only referred to the notes for dates he sent Calabro money or dates he visited New York. Tr. 671. Moore's handwritten notes were compiled a few nights before his testimony from a collection of previously made notes, and they are true and correct representations of his recollections. Tr. 818. Moore testified that he could testify without looking at his notes. Tr. 672. Prior to testifying, Moore informed Division counsel that he had notes, but Division counsel did not know that Moore intended to refer to them while on the stand. Tr. 664.

5. Waldo Wayne Willhoft

At the time of testimony, Willhoft was seventy-two years old. Tr. 1031. He was born on December 24, 1940, and lives in Claremont, California in Los Angeles; he has lived at the same address for twelve years and has resided in the Los Angeles area since 1970. Tr. 1031-32. Willhoft was born in San Bernardino County, approximately thirty miles from where he currently resides. Tr. 1033.

Willhoft graduated from Pacific High School in San Bernardino in 1959 and graduated from Cal Poly University (Cal Poly) located in Pomona, California, in 1963 with a Bachelor of Science degree in business. Tr. 1033-34. Willhoft's specific college major was marketing and sales; he took one basic math, finance, and accounting class. Tr. 1034. After graduating from Cal Poly, he attended a summer session of graduate school in Denver in 1963 but did not obtain a degree. Tr. 1249-50, 1362-63. He has never held any securities licenses. Tr. 1034. Willhoft is married to Kathleen Jeanette Willhoft who is sixty-eight years old and is not currently and has never been employed outside the home. Tr. 1038-39. Willhoft has a son, Michael, who is forty-six years old and lives in Oakland, California, and a daughter, Susan, who is thirty-eight years old and lives in San Diego, California. Tr. 1039. Willhoft currently has an arbitration proceeding pending against Calabro relating to the churning allegations in his JPT account. Tr. 1032.

Willhoft has almost always been self-employed and has been retired for the last seven to ten years; he has been partially retired since 2007. Tr. 1034-35. Prior to retirement, Willhoft

bought and sold used cars and build custom homes. Tr. 1035-36. He built his own home in 1968, and approximately six other homes he sold in the Claremont area. Tr. 1036. Willhoft built his last home about twelve years ago. Tr. 1036-38. His construction and home building business was called WWW Construction Company. Tr. 1038, 1258. He also built a car business and at the time of his testimony sold between five and seven cars annually; he does not have a retail address for this business. Tr. 1036-37. Willhoft's first job after school was in 1963, about two weeks after he left Denver, at Jack Coyle Chevrolet in San Bernardino. Tr. 1251-52. He worked there as a car salesman for one year, then returned to Claremont, California, where he sold fine art, pottery, and paintings, and then taught school as a substitute teacher. Tr. 1253-54. Willhoft also sold art on his own, not a business, for about six months. Tr. 1253-54. In approximately 1970, he started selling cars in earnest and was able to buy/sell an average of twelve to fifteen cars each month. Tr. 1255-56. Williams did not consider his car business to be speculation. Tr. 1256-58. Willhoft stated that he would purchase real property and would build a house on it over time, generally subcontracting it out while he acted as owner/builder. Tr. 1259-61. Willhoft also grew and sold Christmas trees and holds other pieces of land in Hesperia, Hot Springs, and Barstow, California. Tr. 1260, 1262-64. He has a business partner. Tr. 1263.

Willhoft does not consider himself a sophisticated investor and does not believe he has the personal knowledge and background to trade stocks on his own. Tr. 1039. Willhoft testified that he currently has two brokerage accounts: an account with S&B in Claremont, California, which has been open for about twenty years, and an account with Ameritrade, which was opened in 2009. Tr. 1039-41, 1043, 1045, 1191. In 2008 and 2009, Willhoft held accounts with JPT and his registered representative was Calabro; Willhoft testified that he opened JPT accounts in 2006, 2007 and 2008, and that he closed them by 2009. Tr. 1040-42, 1055, 1113-1115. Willhoft does not very often watch business related news shows or real investment related periodicals; he does read the local newspaper. Tr. 1048-49.

Willhoft's representative at S&B has made two or three trades a year, which includes both buys and sells. Tr. 1042. Willhoft testified that he relies on his registered representative to initiate trades, and that his trading account was very conservative. Tr. 1043. The S&B account consists of lots of bonds, municipal bonds, school bonds, and some stocks such as Standard Oil, Mobil Oil, and Medtronics; Willhoft stated that he always held investments long term. Tr. 1044-45. He indicated that had interest in local California bonds because they paid a good dividend and it was tax exempt. Tr. 1044. Willhoft uses the S&B account as a checkbook, to pay his bills. Tr. 1045.

Willhoft testified there have been hardly any trades in his Ameritrade account since it was opened; he makes trades about two times a year and holds investments long term. Tr. 1043, 47, 1192. He does not have an account representative for this account and has not traded on his own in this account. Tr. 1045-56. Willhoft does not know how to make online trades in the Ameritrade account and does not own a computer, although he testified that his wife has a computer in their house. Tr. 1046. Willhoft testified that he does not have a computer but later testified that he has an office in his home garage that has a computer, which is not his wife's, that he uses for bidding cars online. Tr. 1227-29. Willhoft does not have an email address and never has had an email address. Tr. 1354-55.

Willhoft recalls Calabro coming to his home and that testified that Calabro showed him how to use the computer to look up the JPT accounts; he acknowledged that it is possible that Calabro showed him how to check his Ameritrade account. Tr. 1229-30. Willhoft stated he forgot how to look up his account online, but admitted that he did do it maybe two or three times but never executed any trades online in his Ameritrade account on any computer. Tr. 1355-57. In 2007, 2008, and 2009, Willhoft did not have experience in personally picking stocks for buy or sale. Tr. 1133. If he wants something done in his account he can call Ameritrade. Tr. 1046. Willhoft's Ameritrade account holds bonds and ETFs. Tr. 1047-48, 1193. Willhoft initially testified that he does not recall whether he traded stocks, as opposed to mutual funds, for the entire period of his Ameritrade account, and that he relies on the recommendations of others when he purchases stock in his accounts. Tr. 1048, 1133, 1192. Willhoft later testified that apparently he did trade stocks in his Ameritrade account. Tr. 1209-10. Willhoft stated that he made about four trades each month but that he believes he called Ameritrade to make these purchases for him. Tr. 1350-51. Willhoft testified that he has never purchased options or commodities. Tr. 1048-49.

After several calls from Calabro, Willhoft chose to buy one of Calabro's recommendations. Tr. 1049-50, 1052, 1264. Willhoft did not know Calabro prior to these phone calls. Tr. 1050-51. During the first phone call, Calabro told Willhoft he could make money by picking good stocks to buy and sell. Tr. 1051. At this time, Willhoft's S&B broker had retired. Tr. 1051. Calabro asked Willhoft to open a brokerage account; Willhoft agreed after the third call from Calabro. Tr. 1052. Calabro opened the account for Willhoft and made the initial trades he had told Willhoft about, and Willhoft believes he made money. Tr. 1052-53. Willhoft opened his first JPT account in late 2006, his second JPT account in Feb. 2007 (Account 247), and his third JPT account in 2008 (Account 805). Tr. 1071, 1074-75, 1113-1115; DX. 37; DX. 38. Willhoft testified that trading strategy was not specifically discussed, but that Calabro said he could make money on an up market or a down market and had lots of contacts to get good tips. Tr. 1054. Willhoft said he put his trust in Calabro and that he had a lot of experience. Tr. 1054.

Willhoft and his wife signed a second Brokerage Account Application for Account 247, dated February 5, 2007. Tr. 1055-56; DX. 37; RCX. 1. Willhoft and his wife funded Account 247 by moving an account from S&B, which was his wife's account, held in both of their names and in their trust; Willhoft told Calabro this. Tr. 1068. Willhoft claimed he did not see all the pages when it was FedExed to him, and he testified that he received the pages, signed the last page, and returned it to Calabro. Tr. 1056-57. Willhoft testified that the first time he saw the complete Brokerage Account Application was when he met the Division in Los Angeles to give testimony. Tr. 1058-59, 1274-75. Calabro signed the first page of the Brokerage for Account 247 on February 1, 2007. Tr. 1059; DX. 37. Willhoft did not recall having a conversation with Calabro about personal information for purposes of completing the Brokerage Account Application, but testified that he must have. Tr. 1059-60. He did not recall whether he gave Calabro a copy of his driver's license and had no knowledge of how citizenship information came to be on the form. Tr. 1060. He did not recall whether Calabro asked him questions relating to the opening of Account 247. Tr. 1060-61.

The Brokerage Account Application for Account 247 listed his annual income as \$50,000 to \$100,000, which Willhoft testified was approximately correct for that time. Tr. 1061-63; DX. 37. His sources of income were dividend, interest income, daily business activities income, and social security for him and his wife. Tr. 1061-62. He did not put any of the notations on the form and does not know who did. Tr. 1062. Willhoft's net worth was listed at over \$500,000, which was accurate, but the precise amount of his net worth was left blank. Tr. 1063-64; DX. 37. He did not recall if he told Calabro his net worth at the time. Tr. 1064.

Willhoft's investment objectives, in order, are listed as: (1) capital appreciation, (2) trading profits, and (3) income. Tr. 1064-65, 1367-68; DX. 37. Willhoft did not recall Calabro having discussions with him about his trading objectives and Willhoft believed he told him that the account was to be very conservative, so he would have assumed capital preservation would have been the first trading objective. Tr. 1064-65, 1368. Willhoft agreed that the objectives listed are fairly conservative and that he is a conservative investor, but they do not reflect his true investment objectives; rather, they should have been capital preservation, income, and capital appreciation. Tr. 1065-66, 1368. Willhoft testified that he told Calabro these were his true objectives. Tr. 1066.

His risk tolerance is listed as moderate, but if Willhoft had filled out the form he would have listed it as conservative. Tr. 1067-68; DX. 37. Willhoft told Calabro he was conservative, but supposes that moderate was acceptable. Tr. 1067. He does not consider himself a risk taker as it relates to trading stocks. Tr. 1067. Willhoft testified that he had a conversation about his true risk tolerance with Calabro and that he told him he was very conservative. Tr. 1076. Willhoft did not have any conversation with Calabro relating to the amount of money he was willing to lose, and the subject never came up. Tr. 1067-68. Willhoft did not consider his investment in oil wells to be risky. Tr. 1276.

The time horizon is selected as six to ten years, intermediate; this was never discussed by Calabro. Tr. 1069; DX. 37. The form indicates "good" general investment knowledge, and Willhoft agreed that this was accurate at that time. Tr. 1069; DX. 37. The form also indicates "good" specific investment knowledge of stocks and bonds, but Willhoft testified that Calabro did not ask questions about Willhoft's knowledge of stocks or bonds and that his only experience with bonds was with tax exempt bonds. Tr. 1069-71. The form indicates that he has no experience with options, which Willhoft admitted was true, and Calabro did not discuss this with him. Tr. 1071.

Willhoft claims to not have read the fine print on the Brokerage Account Application for Account 247 before signing it. Tr. 1073. When he opened Account 247, he had known Calabro for about two or three months and had developed a level of confidence in Calabro, and he was pleased with the trades he did for him, which made money in the early months. Tr. 1073-75.

Willhoft signed an Account Update Form on April 20, 2007, approximately two months after opening the account. Tr. 1076-77. Only the signature and date are in Willhoft's handwriting. Tr. 1077; DX. 39. The Account Update Form was for Account 247 and Willhoft's wife did not sign this form like she did the Brokerage Account Application. Tr. 1078; DX. 39. The information contained on the Account Update Form was different from the information

contained on the Brokerage Account Application in several respects, most notably the annual income and risk tolerance, which were still inaccurate, according to Willhoft.¹³

The Brokerage Account Application and the Account Update Form also contained similarities. Estimated net worth was marked on the Account Update Form as over \$500,000, which was consistent with the information contained on the Brokerage Account Application, except the specific net worth amount was filled in with \$8 million. Tr. 1080-81; DX. 37; DX. 39. Willhoft testified that Calabro did not ask about his net worth in April 2007 and Willhoft told neither Calabro nor anyone else at JPT that his net worth was \$8 million, which Willhoft testified was not accurate. Tr. 1081-82. Willhoft estimated his net worth during his testimony as approximately \$3 million, including his stock accounts, real estate, and home. Tr. 1081-82. Investable assets were listed at over \$500,000 on both the Brokerage Account Application and Updated Account Form, however, on the Updated Account Form Willhoft's investable assets are specified as \$3 million, which Willhoft testified was not a true statement as of April 2007. Tr. 1083; DX. 37; DX. 39.

Willhoft testified he had no intention of being an aggressive investor in his JPT accounts. Tr. 1084. His investment objectives on the Updated Account Form for Account 247 were: (1) speculation, (2) trading profits, and (3) capital appreciation. Tr. 1084; DX. 39. Willhoft testified that this did not accurately reflect his true objectives, and that Calabro did not discuss this change or Willhoft's investment objectives with him in April 2007. Tr. 1084-85. Willhoft testified that his investment objectives would have been capital preservation, income, and capital appreciation. Tr. 1085-86. Willhoft claims that the first time he saw the complete updated form was during his meeting with the Division in December 2010. Tr. 1086, 1097-98.

Willhoft did not have discussions with Calabro about how often he wished to trade his JPT accounts. Tr. 1098. He does not recall Calabro asking him questions about his investment knowledge or past experience with stock trading, and Willhoft did not tell Calabro about his experience with S&B, just that he had the account. Tr. 1098-99. Willhoft testified that he did not give Calabro discretionary authority to trade in his accounts, but that Calabro nonetheless made trades in his account without prior confirmation with him. Tr. 1099-1101. Willhoft learned of these trades when Calabro would mention them two or three days after the transaction. Tr. 1101-02. Willhoft testified that he did not keep close track of the trade confirmations; he is not sure whether he did or did not see the confirmations for the unconfirmed trades. Tr. 1101-02. Willhoft does not know how many times Calabro made trades in his two accounts without getting confirmation first. Tr. 1102-03.

Calabro called Willhoft with trade recommendations about two or three times a week for both accounts, and Willhoft always agreed with Calabro's recommendations. Tr. 1100. When Calabro called to make recommendations, Willhoft generally had not heard of the company, and

¹³ The annual income listed on the Account Update Form is different; it is listed as \$150,000 as opposed to \$50,000 to \$100,000. DX. 37; DX. 39. Willhoft testified that Calabro did not go over an account update with him. Tr. 1079. The risk tolerance is also different on the Account Update Form; it is listed as "Aggressive" instead of moderate. Tr. 1080; DX. 37; DX. 39. Calabro did not ask Willhoft what his risk tolerance was and it was not aggressive. Tr. 1080.

Calabro “kind of explained what the company did and why he thought it was a good bet.” Tr. 1103. Willhoft would go along with Calabro’s recommendation and estimated that 100 percent of the stock picks in his accounts were made by Calabro. Tr. 1103, 1106. Willhoft did not personally research the companies recommended, he did not know how and had never done research of any kind on a computer. Tr. 1104-05. Willhoft recalls at least one time when he made a recommendation to Calabro of a stock that he wished to buy or sell in his JPT accounts. Tr. 1104.

From 2007-2009, Willhoft believed that Calabro was looking out for his best interest in making stock recommendations, and believed Calabro had good intentions, even though the trades did not always work out in his best interest. Tr. 1106. In 2008, Willhoft’s opinion changed because his account balance kept going down. Tr. 1106. Willhoft discussed the decline of his accounts with Calabro, who told him the market was falling off, and Willhoft was never able to get a positive answer as to what was going to be done to correct it. Tr. 1106-07.

Willhoft was aware that commissions were charged because he saw them in the confirmations, but he did not know how they were calculated and whether they were based on performance or transactions. Tr. 1107-08. Willhoft knows he paid commissions on buys and sells in both JPT accounts. Tr. 1108. The confirmations were received by Willhoft by mail typically three or four days after the transaction occurred. Tr. 1109. The commissions that would be paid to Calabro were never discussed prior to the transaction execution. Tr. 1109-10. Willhoft only complained about commissions when Calabro chose a stock that he lost on and Willhoft was charged a commission for the buy and the sell, because he did not think that was fair. Tr. 1109-10. Willhoft occasionally looked at the confirmations he received, and he agreed that they showed a buy or a short, which he could understand, and showed the amount that was bought or shorted, the cost, and the commission. Tr. 1299-1300. He probably could have kept track of his gains and losses on an investment-by-investment basis, but he did not. Tr. 1300.

Willhoft and his wife signed the Brokerage Account Application for Account 805 on January 6, 2008, and it was also signed by Calabro. Tr. 1111-12; DX. 38. The signature page was FedExed to Willhoft, and he signed it and returned it, but he testified that he did not receive the other pages so he does not know whether they were blank or filled in. Tr. 1113. At this time, Calabro knew his basic personal information. Tr. 1113-14. The annual income for Willhoft was marked as over \$100,000, and written in was the amount \$150,000 in handwriting that Willhoft does not recognize; he did not discuss his annual income as of January 2008 with Calabro, and he claims the statement is untrue because he had between \$50,000 and 100,000 as annual income at that time. Tr. 1115-16. His estimated net worth was listed as over \$500,000 and \$8 million was written in as his specific net worth, which was also untrue. Tr. 1117-18. Willhoft does not know who wrote in his net worth, and he did not tell Calabro that was his net worth. Tr. 1117-18. Investable assets were listed as over \$500,000 and \$3 million is written in. Tr. 1118-19. Willhoft does not know who wrote that figure in, it was an untrue statement, and he believes his investable assets at that time were about \$1 million. Tr. 1118-19.

The Brokerage Account Application for Account 805 lists Willhoft’s investment objectives, in order of preference, as speculation, trading profits, and capital appreciation, a preference that was not discussed with Calabro, and which was untrue. Tr. 1119-20. Willhoft

stated that he would have listed preservation of capital, income, and capital appreciation. Tr. 1119-20. His risk tolerance was listed as aggressive, but Willhoft would have listed it as moderate. Tr. 1120-22. The time horizon on the application says intermediate (six to ten years), but Willhoft did not discuss this with Calabro and he does not know the relevance of it. Tr. 1122-23. General knowledge was listed as good and specific knowledge was listed as good, both of which Willhoft testified were fairly accurate. Tr. 1123-24. Knowledge with respect to options trading was listed as limited, and in fact he had no knowledge of them, and variable contracts and limited partnerships were listed as no knowledge, which was true. Tr. 1124. Willhoft would have marked options knowledge as none. Tr. 1124.

Willhoft did not intend Account 247 to be an actively traded account, and he testified that moderate trading was intended in Account 805. Tr. 1133. Willhoft did not closely monitor the trading in his accounts in 2008 and 2009. Tr. 1133. He testified that there were so many transactions in the accounts that they were hard to keep up with. Tr. 1133-34. Willhoft testified that he confronted Calabro about there being too much trading activity in the accounts. Tr. 1134. Willhoft testified that he was easy going, went along with the judgment of Calabro, had confidence in him, and trusted him, and that he did not follow through as well as he could have and should have. Tr. 1135. Willhoft expected Calabro's recommendations to be in line with his stated risk tolerance. Tr. 1135.

Account statements relating to Account 247 and Account 805 were received by Willhoft at his Claremont, California, address for the period December 2008 through November 2009. Tr. 1136-39; DX. 6; DX. 7. Willhoft was not contacted by anyone in 2008 or 2009 regarding the trading activity in either of these accounts, he has not spoken with anyone other than Calabro, and no one at JPT contacted him to determine whether the trading activity was in line with his investment objectives or risk tolerance. Tr. 1139-40. Willhoft testified that he never received any paperwork from JPT indicating that his accounts were actively trading, and he would have known if he had. Tr. 1140.

DX. 9 is an AASQ and AASS signed by Willhoft and dated March 13, 2009, one year after opening Account 805. Tr. 1140-41, 1144. Willhoft's wife's name is printed on the document, but Willhoft did not write it his wife's name and his wife did not sign it. Tr. 1141, 1144-45. Willhoft is not familiar with the terms turnover rate and breakeven rate, and he does not recall any discussions with Calabro about a turnover rate for either of his accounts. Tr. 1141-42. There is writing on DX. 9 stating "dual margin account," which appears to apply to both Account 247 and 805, the only two accounts Willhoft had open in March 2009. Tr. 1142-44. The forms apply to both of Willhoft's accounts, which were joint accounts where both he and his wife had equal access. Tr. 1145. The forms indicate the investment objectives as growth, trading profits, speculation, and short term trading. Tr. 1147; DX. 9. In March 2009, Willhoft did not have any conversations about this document, and speculation was not his true objective. Tr. 1147. Willhoft testified that he signed this form when it was blank, after receiving it by FedEx. Tr. 1147-48. None of the writing on the first page of the document appears to be that of his wife. Tr. 1148-49. The form states "Prior investment experience" as "30 plus years," which was untrue; it states Willhoft has prior margin experience of ten plus years, which was untrue; the size of trades is listed as \$300,000 to \$600,000, but Willhoft testified that is not in his handwriting and he was never asked by Calabro about the size of trades; prior options experience

is indicated as yes; and frequency of trades is ten per month, but Willhoft testified that he did not have discussions with Calabro about the frequency of trades. Tr. 1149-51. Annual income listed on the form as \$150,000, net worth is listed as \$8 million, and liquid net worth is listed as \$3 million, but Calabro did not discuss any of this with Willhoft, and they were not true. Tr. 1157-59. Willhoft did not recall a conversation with Calabro about trading on margin, but acknowledged that he traded on margin in both accounts. Tr. 1159-60. Willhoft testified that the whole of DX. 9 is untrue. Tr. 1161.

The June 2009 statement (DX. 6) for Account 805 shows a total of twenty-seven buys and sells. Tr. 1152-53; DX. 6. In July 2009 there were seventeen transactions in the account. Tr. 1153-54; DX. 6. In Account 247 for June 2009 and July 2009 there were twenty-six transactions and nineteen transactions, respectively. Tr. 1155-56; DX. 6. The frequency of trades listed on the AASQ was ten per month, but trades in both accounts exceeded ten per month after the AASQ was signed. Tr. 1157; DX. 9.

Between December 2008 and November 2009, Account 805 performed poorly and Willhoft lost a lot of money. Tr. 1161-62. After having his memory refreshed, Willhoft testified that he paid commissions of approximately \$116,000 and lost \$407,491. Tr. 1162-64, 1167. For the same time period, in Account 247, Willhoft paid approximately \$98,000 in commissions and the account lost \$12,784. Tr. 1167-68. During the period Dec 2008 through Nov 2009, there were 155 securities transactions in Willhoft's Account 805 and 145 securities transactions were executed in Account 247. Tr. 1168-1169.

Approximately one-third of Willhoft's net worth was invested in his JPT accounts, and he did not make additional monetary investments after the initial investment. Tr. 1169. On more than one occasion, Calabro asked Willhoft if he would or could invest additional funds, and Willhoft told him no because he did not have additional funds to deposit. Tr. 1169-70. Willhoft testified that there was a lot of trading, that he could not keep up with the trades, that there was a stack of trade confirmations each day, and that it was overwhelming. Tr. 1170. Willhoft told Calabro that he and his wife were retired. Tr. 1171. On the application form for Account 805, it states source of income as "Investment income" and under occupation lists "retired," so as of January 2008 Calabro knew the Willhofts were retired. Tr. 1171-72; DX. 38. On the application form for Account 247, employment information including source of income are left blank, occupation is listed as "owner," and employer name is written in as "Arrow Sales," which is the name of Willhoft's car business. Tr. 1172-73; DX. 37.

DX. 40 is the Options Suitability Questionnaire relating to Account 805, and although the handwriting on the form is not Willhoft's, he and his wife did sign the form on September 25, 2008. Tr. 1175-76, 1234-35, 1358-59; DX. 40; RCX. 4. The form is dated after Willhoft opened his JPT accounts, and Willhoft testified that prior to the time he opened his first JPT account he did not ever trade options. Tr. 1359. Account 247 at JPT was signed and dated February 4, 2007, and Account 805 was signed and dated January 6, 2008. Tr. 1359-60; DX. 37; DX. 38. Willhoft testified that he did not trade options in his Ameritrade account. Tr. 1361. Willhoft testified that he signed the form when it was blank, he received it by FedEx, signed it as he always did, he trusted Calabro, and sent it back. Tr. 1176. This form was signed approximately nine months after Account 805 was opened. Tr. 1176-77. Willhoft testified that Calabro may

have had a conversation with him about options and why he thought he should be able to trade in them in Account 805 but Willhoft testifies that he maybe didn't understand or absorb information being told to him. Tr. 1177, 1235. DX. 41 is the Options Suitability Questionnaire relating to Account 247, and although the handwriting on the form is not Willhoft's, he did sign it on September 24, 2008, and his wife also signed it and dated it September 25, 2008. Tr. 1177-78; DX. 41. Willhoft does not know whose handwriting is on the forms other than his and his wife's signature. Tr. 1178; DX. 40; DX. 41. Willhoft testified that he did not "have a clue" what trading in options means. Tr. 1179. The statements on the form that Willhoft has thirty-five years of investing experience, average trades per year of fifty, and transaction size of \$200,000 are all untrue. Tr. 1179-80; DX. 41. Willhoft never addressed these inaccuracies on the forms with Calabro because he never saw them until the date of his investigative testimony, that is, December 2010. Tr. 1180-81.

DX. 42 is a Supplemental Application for NFS Margin Privileges for Account 247, listing Calabro as the registered representative. Tr. 1181-82. It has a signature under "principal approval" and is dated March 3, 2008. Tr. 1181-82. The Willhofts both signed this form and dated it January 7, 2008, but they did not read the fine print on page three because it looked too confusing and small. Tr. 1182-83. Willhoft is not sure why he signed the form, except that he trusted Calabro. Tr. 1183. Willhoft had never traded on margin in his life prior to completing this form, and he was not able to describe what margin trading privileges means. Tr. 1183-84. Willhoft does not recall Calabro explaining the benefits or risks of margin trading, or whether it was possible to lose money. Tr. 1184. Willhoft was surprised he ever traded on margin. Tr. 1361-62. Prior to opening his JPT accounts, Willhoft never traded on margin. Tr. 1362.

Calabro came to Willhoft's home when Calabro was in California visiting his father. Tr. 1184, 1186-87. Willhoft knows Williams, who is a good friend of his. Tr. 1185, 1301-02. Williams became a JPT account holder after Willhoft introduced him to Calabro. Tr. 1185-86, 1303. Willhoft does not recall the exact date but it was early in the relationship between Willhoft and Calabro. Tr. 1186. Williams met Calabro at Willhoft's home on one occasion. Tr. 1187, 1303. At the time he recommended Calabro, Willhoft was happy with Calabro. Tr. 1303-04. On occasion he and Williams discussed Calabro. Tr. 1304. Both of them were generally happy with Calabro initially, because their accounts were doing well during 2007 and 2008. Tr. 1304-05. Willhoft learned that the economy was going down from radio shows and business newspapers he read at the time. Tr. 1305-06. Willhoft testified that Williams voluntarily kept track of his account (Account 805) for him. Tr. 1307; RCX. 49. For example, Williams prepared RCX. 49. Tr. 1301-02, 1308-10; RCX. 49. Willhoft does not recall if Williams ever complained about Calabro to him, but he probably would have complained if his account was down. Tr. 1311-12. Willhoft does not recall any comments made by Williams with respect to Account 805, and he does not recall Williams ever making a recommendation about Willhoft's relationship with Calabro. Tr. 1312-13. Willhoft testified that he and Williams did not discuss their JPT accounts a lot. Tr. 1373. In total, Willhoft testified that he lost \$1.1 million in the Accounts 247 and 805. Tr. 1374.

Accounts 805 and 247 both closed down in 2009 or 2010. Tr. 1188. Willhoft still considers himself a conservative investor, which, he testified, he told Calabro from the beginning. Tr. 1188. Willhoft claims to never have been a speculator or gambler. Tr. 1188-89.

Willhoft testified that by the end of 2009, he had lost almost all of his principal, in total about \$1 million, and he became disgusted with the account. Tr. 1314-15. He is not sure if Calabro was still with JPT then. Tr. 1315. Willhoft testified that he thought there were too many trades going on, he could not keep track of them, and they were overwhelming between 2008 and 2009. Tr. 1315-16. Willhoft did not recall complaining to Calabro about his accounts' performance while the account was going down. Tr. 1316.

Willhoft testified that he has never heard of the term parallel account. Tr. 1192-93. Willhoft testified that he never went into his self-directed Ameritrade account to make trades that he wanted Calabro to make but that Calabro would not. Tr. 1193-94. However, Willhoft admitted that he was trading some of the same stocks in his Ameritrade account as were traded in Account 247. Tr. 1223 RCX. 70 is an account statement from TD Ameritrade for June 2007. Tr. 1202; RCX. 70. RCX. 71 is a JPT account statement for Account 247 for June 2007. Tr. 1202-04. The Ameritrade account shows purchases of Geo Group, Tetra Tech, and Maguire. Tr. 1208-09; RCX. 70. Account 247 also shows transactions for Geo Group, Tetra Tech, and Maguire. Tr. 1205-06. These same trades were made in both accounts, and both settled on June 25, 2007. Tr. 1211-12, RCX. 70; RCX. 71. Similarly, in January 2008, Willhoft purchased shares in Oceaneering International in his Ameritrade account within one day of their purchase in Account 247. Tr. 1221-22; RCX. 72; RCX. 73. Willhoft does not recall why he was making the same trades in stocks in his Ameritrade account as were being made in Account 247. Tr. 1212-13, 1353. Willhoft testified that Calabro was making recommendations and Willhoft was relying on those recommendations, but he also testified that he may have recommended certain stocks to Calabro, including Oceaneering International. Tr. 1216-18, 1352. Willhoft thinks he made the recommendation to Calabro to buy Geo Group, but he does not know if he recommended Tetra Tech or Maguire. Tr. 1353-54. Willhoft did not have a registered representative for his Ameritrade account, and did the trading himself. Tr. 1218-21, 1353. Willhoft had margin privileges in his Ameritrade account. Tr. 12180-19; RCX. 72 at 2.

RCX. 20 is a composite of documents relating to Willhoft's Ameritrade account, signed by Willhoft and/or his wife. Tr. 1236; RCX. 20. Included is a Margin/Options Account Upgrade form signed by Willhoft and dated December 5, 2007. Tr. 1239-40; RCX. 20 at SEC-TDA-000769. He signed the Ameritrade form prior to signing the Supplemental Application for NFS Margin Privileges for Account 247 in January 2008. Tr. 1182. The Ameritrade form lists Willhoft's investment knowledge as extensive, an average transaction price of over \$5,000, number of annual transactions as twenty to forty-nine, and investment objectives as growth and speculation. Tr. 1242-43, 1318; RCX. 20 at SEC-TDA-000776. Additionally, "type of activity" lists "write covered calls," which Willhoft testified he does not understand. Tr. 1243-44. Willhoft denied that this Ameritrade form refreshed his memory regarding his options knowledge prior to 2008. Tr. 1244-45. He testified that he does not recall filling out this form and that he must have been "out of [his] mind," because it did not reflect what he believed. Tr. 1318. Willhoft did not recall filing in the form, but admitted he could have. Tr. 1247-49; RCX. 6.

RCX. 75 through RCX. 78 are customer agreements that Willhoft entered into on some of the oil well projects he was involved in, and his signature is on each. Tr. 1279-82. Willhoft has

invested in oil wells for probably twenty years, and does not consider them risky investments. Tr. 1369-70. RCX. 75 is a subscription and customer agreement documenting that he signed and purchased \$120,000 worth of units. Tr. 1283. Willhoft still owns this interest and receives periodic payments. Tr. 1284, 1370-71. Willhoft does not recall whether he received and read a confidential private placement memorandum as indicated in paragraph B; Willhoft does not know what it is but testified that he probably received and read it. Tr. 1285-86. By December 30, 2008, when he signed RCX. 75, Willhoft felt he had the knowledge and experience to make the investment, because he had been an investor in oil wells in the past. Tr. 1286-87. Willhoft represented that he was an accredited investor, but he did not know what that meant. Tr. 1287. Willhoft invested \$60,000, \$120,000, and \$60,000 in other projects, for total investments of \$360,000, which was risk he thought he could assume. Tr. 1288-90; RCX. 76; RCX. 77; RCX. 78.

RCX. 22 is one of the real estate ventures Willhoft invested in with Calabro. Tr. 1290. Willhoft does not believe that he ever received a copy of the agreement. Tr. 1290. His signature is on the bottom of the document, dated March 6, 2007. Tr. 1290; RCX. 22. Willhoft understood the housing investments were a private investment. Tr. 1291-92. He invested \$200,000, and indicated by his initials that he and his wife had a net worth exclusive of home, furnishings, and personal automobiles in excess of \$1 million. Tr. 1291-92; RCX. 22 at 3. His individual income is listed as individually in excess of \$200,000, or jointly in excess of \$300,000, with his initials next to it. Tr. 1292; RCX. 22 at 3. He testified he should not have initialed there and that there are no X's near it to remind him to sign or initial there. Tr. 1292-94. Willhoft wrote that he had previous stock market experience and numerous real estate transactions, as a description of his experience in "financial and business matters." Tr. 1294-95; RCX. 22. Willhoft testified that he did have previous stock market and real estate experience at that time. Tr. 1295. RCX. 21 is another real estate transaction in which he purchased \$200,000 in units, and wrote that he had previous stock market and real estate experience as well. Tr. 1296; RCX. 21. Willhoft states that in the past, at least with respect to his real estate projects and other real estate that he owned, he was willing to incur risk as part of his investment. Tr. 1298. Willhoft testified that Calabro presented the real estate investments as conservative. Tr. 1371.

Willhoft does not recall opening any other accounts besides his Ameritrade and JPT accounts. Tr. 1319. However, on January 12, 2009, he signed an account application and margin agreement for an account at Friedman Schnaier & Associates (Friedman Schnaier). Tr. 1319; RCX. 79; RCX. 80. The account application lists an investment objective of speculation. RCX. 80. Willhoft does not recall opening a new account at Friedman Schnaier, does not recognize the account number, and does not remember executing the account application. Tr. 1344-46. Willhoft testified that this account "might have" been associated with a telemarketer. Tr. 1346. Otherwise, he remembers essentially nothing about the account. Tr. 1344-49, 1377-80.

During the course of his trading with Calabro, Willhoft became aware that his accounts were actively traded, but he never told Calabro to stop trading. Tr. 1380. He told Calabro that there was too much trading going on in the account, but he did not tell him to stop trading. Tr. 1380.

6. Gordon Miller

Miller is eighty-nine years old and was born on December 1, 1923. Tr. 1923. He has two addresses - a legal address in Iowa where he was born and has never been away from for more than a month, and an address where he resides in Paullina, Iowa. Tr. 1923. He has always lived in Iowa. Tr. 1923. Miller married Mildred twenty-three years ago, and they do not have any children together. Tr. 1924. Miller has a daughter from his first marriage and a granddaughter. Tr. 1975-76. At the time of Miller's testimony, Mildred was ninety-three years old. Tr. 1924. Miller and his wife are both retired; Miller retired in 1985. Tr. 1923-25. Prior to marrying Miller, Mildred worked as a bookkeeper for a small feed company. Tr. 1924.

Miller graduated from Rock Valley, Iowa High School in 1941 and did not attend college. Tr. 1924. He took wiring, mechanics, and welding classes at community college. Tr. 1924. He worked as a farmer his whole life, mostly in grain farming, raising corn and soybeans. Tr. 1925, 1931, 1974. Miller first became involved in farming when he was four or five years old when he stripped bundles under the grain binder. Tr. 1925, 1931, 1968, 2103-04.

Miller inherited 426 acres from his parents in approximately 1990. Tr. 1968-69. He purchased 160 acres from his aunt in early 1970. Tr. 1969-70. When he inherited the 426 acres it was not subject to a mortgage; the 160 acres he purchased from his aunt was subject to a purchase contract which took Miller twenty years to pay off. Tr. 1968, 1971-72. Miller still owns the 586 acres and it is an active farm that is rented to tenants on a 50/50 share agreement. Tr. 1970-71. Over the past ten years, the amount of income generated through the 50/50 share agreement has increased due to crop price increases. Tr. 1980-81. In each of the past five years, Miller's farm income was between \$75,000 and \$200,000. Tr. 1981-82.

Miller owns four shares (out of 2,500) in an ethanol plant, located eight miles from his farm. Tr. 1982. In 2008-2009 the ethanol plant made a little money. Tr. 1982. Miller owns shares in a co-op elevator and a gas station. Tr. 1983. He earns, yearly, approximately \$1,000 from the elevator and \$40-50 from the gas station. Tr. 1983. His family has shares in an oil well in Nebraska and they usually got less than \$100 annually, but the shares were sold and they received \$650. Tr. 1983. Miller also receives Social Security benefits. Tr. 1983. In 2010, Miller invested approximately \$40,000 (over time) in a company called BTP Construction. Tr. 2070-72, 2119; JKX. 24. He feels like he got scammed in this investment, he understood the risk associated with it, and he had never heard of the company before 2010. Tr. 2071-73. The shares were sold to Miller by Koutsoubos. Tr. 2073-74, 2117. Miller only spoke with Koutsoubos once face-to-face, with multiple conversations by telephone, in connection with this investment. Tr. 2118. Koutsoubos did not tell him that it was high risk. Tr. 2119. He has not received any money back from this investment. Tr. 2119.

Miller does not currently, and in 2009 did not, own a computer. Tr. 1925. Prior to 2009 he never invested money in securities and he does not consider himself a sophisticated investor. Tr. 1926, 2104. Both in 2009 and at the time of his testimony, Miller did not feel like he had the knowledge or expertise to trade in stocks on his own. Tr. 1926. Prior to 2009, Miller received a free subscription to a magazine called Trader, which did not cover too much in stocks but focused on getting the reader acquainted with the traders in Wall Street. Tr. 1927. He received

Trader for approximately 2 years. Tr. 1927. In 2009, he watched stocks in the newspapers a little bit. Tr. 1926-27. He does not regularly watch any investment-related TV shows or read any investment-related periodicals besides Trader. Tr. 1927.

In May 2009, Miller made his first securities investment by opening an account at JPT. Tr. 1926, 1928. However, for about twelve years, Miller has invested with a grain trader who speculates in the Chicago Mercantile Exchange grain market. Tr. 2002-03. The investment has included futures, options, and hedging, and it has been profitable. Tr. 2003. Jason Konner and Chad Konner were Miller's representatives at JPT. Tr. 1926. Miller opened the account after being contacted by telephone by Konner, who sold him \$900 worth of stock and mailed the paperwork to Miller. Tr. 1928-29, 2027; JKX. 8. Miller asked JPT to close this account when there was one penny in it because "it wasn't doing anything for him." Tr. 1928. He does not recall the date that he asked for the account to be closed or the date when JPT wrote him the closing check. Tr. 1928.

Miller never met Konner, but spoke with him by telephone on many occasions. Tr. 1929, 2108. Konner was a very good salesman, a high pressure one because he never took "no" for an answer. Tr. 1930. Miller recalls Konner saying that the stock market was going to go up and that it would be to Miller's advantage to buy some stock. Tr. 1929. Miller believed Konner to be knowledgeable about investing because "anybody in a brokerage firm in New York would be knowledgeable about stocks." Tr. 1930. Prior to opening the JPT account, Miller had only talked with Konner a couple of times on the phone and he had not developed an opinion of him at that point. Tr. 1935. He felt that a broker would look out for his customers. Tr. 1935.

Miller informed Konner that he was retired from a life of farming, and that he did not have any stock investment experience. Tr. 1930-31. He does not recall discussing his age, which was eighty-five, at the time he opened the account in May 2009. Tr. 1931. Miller does not remember if he discussed his annual income with Konner but thinks the information was included on forms he filled out and sent back to Konner. Tr. 1931-32. Miller does not think he discussed whether he was financially comfortable in his retirement, and he downplayed his net worth to Konner. Tr. 1932. Miller told Konner that his investment objective was to buy stock that would appreciate in value, which is what he was hoping to accomplish. Tr. 1932.

Miller did not bring up, and does not know if Konner brought up, the idea of speculative trading in stocks, but he recalled discussing it with Konner; however, he does not think it was discussed before he opened his account. Tr. 1931, 1933. Miller does not believe that the risks of active trading were discussed. Tr. 1931. Miller told Konner that he thought he had the constitution to sit back and wait for things to change if the market went down. Tr. 1933. He did not discuss with Konner the losses he was willing to risk in his account and Konner did not discuss any particular trading strategy with him. Tr. 1933-34. The frequency of trading was not discussed and Miller does not think that commissions were mentioned in depth. Tr. 1933-34. Miller knew he was paying commission. Tr. 2028-29, 2032. Miller never traded on margin and Konner never suggested it. Tr. 2055.

DX. 18 is Miller's Brokerage Account Application. Tr. 1937; DX. 18. DX. 19 is a signed copy. Tr. 1945. DX. 19 is signed and dated May 29, 2009; it contains Miller's initials

and a correction to his driver's license expiration. Tr. 1945-46; DX. 19; JKX. 1. Apart from the correction, the initials, and his signature, Miller did not fill in any of the information on the form. Tr. 1938-39, 1945-46. Miller does not specifically remember receiving DX. 18. Tr. 1937. The account was registered as an individual account, consistent with Miller's desire, and both of his addresses are listed correctly. Tr. 1993; DX. 18. Miller initially testified that when he sent back the form, unsigned, he did not have speculation marked as his first investment objective. Tr. 2105-06. The form was returned to him when he did not sign it; Konner wanted him to sign it and he finally agreed to after being persuaded to mark speculation, even though some of the information on the form was incorrect. Tr. 1947, 2106; DX. 19. Konner told him that he could do a better job trading for Miller if Miller signed the form. Tr. 1947. DX. 19 was sent to Miller after the conversation with Konner about DX. 18. Tr. 1947. Later, Miller admitted that both the signed (DX. 19) and unsigned (DX. 18) versions of the form have a "1" marked next to speculation, and that Miller refused to sign a form, but it was not an account opening document. Tr. 2128-29.

Miller initially testified that the \$150k annual income, \$4 million net worth, and \$150k investable assets listed on DX. 19 were "a little bit inflated for the time." Tr. 1994. Miller initialed next to each of these numbers; he believed they were safe estimates. Tr. 1996; JKX. 1; DX. 19. Miller later testified that he would not have initialed next to the \$4 million if the form's instructions had been brought to his attention, because it was not his net worth exclusive of his farm and house. Tr. 1940, 2101. Miller and Konner did not discuss inflating his financial numbers, but Miller thought maybe it was something that Konner had to have in his books to look good. Tr. 1995, 2102. The "4 MM" on the form is an approximate value for Miller's estimated net worth in 2009. Tr. 1939. He believed the actual figure was higher and wanted to put a lower figure so Konner would not ask him to trade on a big scale. Tr. 1939, 1995-96. The application form indicated that Miller's net worth, exclusive of his home and farm, was over \$500,000, but Miller disagreed with the accuracy of that and stated that it was "a couple hundred thousand." Tr. 1940-41; DX. 19. Trading objectives were ranked as speculation first, trading profits second, and capital appreciation third. Tr. 1941, 1996; DX. 18; JKX. 1.

Miller's testimony about speculation was confusing and inconsistent. Miller testified more than once that speculation means different things to different people. Tr. 1943, 1956, 2001, 2013. He initially testified that he received a filled-out application marking speculation as his first trading objective, and that he did not understand what any of the marked investment objectives meant. Tr. 1940-42; DX. 18; DX. 19. He later testified that because of his investment with a grain trader, he "certainly did" know what it meant to speculate. Tr. 2004. He admitted that JPT had sent him a definition of speculation in May 2009, which stated that speculation was "[w]ant increase in value of investments - High Risk." Tr. 2012; JKX. 2 at SEC-MILLER-000353. He nonetheless testified that "that's not what I figured that they meant" by speculation. Tr. 2012-13. He agreed that a definition of speculation might be "trading on stocks and speculating that it would go up." Tr. 2000, 2121. He later agreed that his grain investment involved "speculating in a risky market for the purpose of" making money. Tr. 2004. He testified that his brokerage account with his grandnephew was "conservative," but when asked if he considered it to be speculative, he replied: "Well, you hope that the price will go up." Tr. 2082.

JKX. 2 was received by Miller in May or June 2009. Tr. 2008. The letter thanks Miller for opening his account and asks him to review the information on file, to correct and initial any incorrect information, and to return the form. Tr. 2008-09; JKX. 2. Miller read the letter in 2009, and did not make any corrections to the form. Tr. 2009. He testified that he had no need to correct the investment objectives listed, which were speculation, trading profits, and capital appreciation. Tr. 2009; JKX. 2 at SEC-MILLER-000352. In 2009, his actual investment objective was long-term growth with safety, and he believed the market had bottomed out and the only direction it could go was up if one picked the right stocks. Tr. 2009-10. His opinion was based on the newspaper and Trader magazine. Tr. 2010-11. Miller signed the form, indicating that he was willing to invest aggressively and speculatively, because of his belief that the market was poised to take off. Tr. 2012.

Miller knew what was meant by trading profits and he was comfortable with it as his second investment objective. Tr. 2001. If the form had been filled out by Miller himself, he would have put trading profits as his primary investment objective. Tr. 1943. The form indicates an aggressive risk tolerance, and Miller did not type that into the form and did not have a typewriter at the time. Tr. 1944; DX. 18; DX. 19; JKX. 1. Miller did not recall talking to Konner about the risk tolerance choice; if he had filled in the form Miller would have chosen moderate as his risk tolerance. Tr. 1944. The form indicates extensive investment knowledge and good knowledge of stocks, options bonds, and mutual funds, but Miller told Konner he was a novice. Tr. 1944-45.

Miller received and read in 2009 a notice of changes to his JPT account, dated June 2, 2009. Tr. 2016; JKX. 3. The notice states that his annual income changed from over \$100,000 to \$150,000, his net worth from over \$500,000 to \$4 million, and his investable or liquid assets from “100K to 500K” to \$100,000. Tr. 2015; JKX. 3. Miller did not make the changes and does not know why the form was sent to him. Tr. 2015. The account detail section includes his investment objectives, with speculation first, and references a definition of speculation. Tr. 2015-16.

After opening the JPT account, Konner recommended stocks. Tr. 1948. Konner called Miller at least every couple of weeks. Tr. 1948. Miller called Konner a couple of times to sell stock and ask for funds. Tr. 1948. Miller did not have any direct conversations with Konner about account management or trading frequency, because Miller felt that Konner was the one with the expertise. Tr. 1948-49. The pretrade calls were high pressure, and Konner did not want to take no for an answer. Tr. 1949, 1951. Konner did most of the talking, he did “not really” ask Miller any questions, and Miller asked questions only on occasion. Tr. 1949. Commissions were not discussed and Miller did not keep track of them. Tr. 1950-51. Miller would not have traded as frequently in the absence of Konner’s recommendations. Tr. 1950. As far as Miller knows, Konner always called him before executing a trade. Tr. 1949.

DX. 134 is an AASQ and AASS with Miller’s information on it, with no date but with a handwritten notation “out via Fedex 12/17/09.” Tr. 1952; DX. 134. This document has Miller’s account number, name, and address on it. Tr. 1952-53. Miller believes that the document was prepared by someone at JPT for him. Tr. 1953. Miller did not fill it out, does not know who filled it out, and did not understand why JPT was asking for his information. Tr. 1953-54. The

\$150,000 annual income was a “little excessive but it wasn’t too far off,” the \$4 million net worth was accurate but must have included his home and farm, and the \$3-4 million liquid net worth was accurate only if he had sold some land, which he had no intention of doing. Tr. 1954-55. Miller had no interest in selling land to raise money for investment and Konner never asked him to sell any land. Tr. 1954, 1979-80.

The AASQ lists speculation, trading profits, and growth as investment objectives. Tr. 1955; DX. 134. Miller disagreed with speculation as an objective and stated that he tried to tell JPT that he wanted to hold back from doing some of the trading that was being done. Tr. 1955. Miller testified that the questionnaire misstates his risk tolerance as aggressive, because he was actually moderate in 2009. Tr. 1956. The questionnaire incorrectly states that Miller had twenty-plus years of investment experience. Tr. 1956; DX. 134. Miller did not know how the “frequency of trades” of two per week was selected, and did not discuss it with anyone at JPT. Tr. 1957. Miller preferred trading less often than two per week. Tr. 1957. Nonetheless, Miller initialed next to the investment objectives, risk tolerance, and frequency of trades lines. Tr. 2024; JKX. 4.

Miller discussed with Konner the size of his trades, because he sometimes had to borrow from the bank to cover them, and he did not like to do that. Tr. 1958. He told Konner he disliked borrowing money. Tr. 1958. He does not know how the size of trades on the AASQ was selected and does not think Konner asked him what trading size he was comfortable with. Tr. 1958. He did not think he ever discussed the value of his farm with Konner, but assumed that the \$3 million entry under “investment real estate” referred to the farm. Tr. 1959. The AASQ does not include any information about commissions or level of trading. Tr. 1959. Miller never heard of and did not discuss the terms breakeven rate or turnover ratio. Tr. 1959.

DX. 20 (JKX. 4) is a signed version of DX. 134 and is dated Dec. 18, 2009. DX. 20; JKX. 4. Miller signed it based on a “pep talk” from Konner, but he does not recall what Konner said. Tr. 1960-61, 2018. Miller read the document. Tr. 2019. Miller did not contact Konner, his supervisor, or JPT’s compliance department to explain the document. Tr. 2019. Miller read it and thought it did not pertain to him because his stocks were going up. Tr. 2020. Miller initially testified that in December 2009, he was receiving transaction confirmations and monthly account statements, and was not dissatisfied in any respect with how the account was handled. Tr. 2021-22. Shortly thereafter, Miller testified that he did not realize there was a loss because the trades were going so fast. Tr. 2022-23. Miller was unhappy because the account was unprofitable, not because of the way the account was being managed. Tr. 2023.

DX. 136 is a compilation of Miller’s JPT monthly account statements for June through November 2009. Tr. 1961; DX. 136. Miller typically reviewed his statements when he received them. Tr. 1961. As of October 2009, Miller’s portfolio value was \$150,000. Tr. 1961-62. In October 2009, there were twelve purchases and eight sales, which were recommended by Konner. Tr. 1962; DX. 135. Miller only recognized two of the companies and Konner did not tell him anything specific about or send him information about the companies. Tr. 1963. Miller did not do any independent research, and at the time Miller did not know how to perform independent research on stocks. Tr. 1963-64. Miller purchased the stocks based on Konner’s recommendation; he trusted him at that time. Tr. 1964-65. In 2009, Miller never initiated a

purchase or sale of stock, and always followed Konner's recommendation. Tr. 1965. Miller received and read the compilation of confirmations of each of the transactions in his account in 2009. Tr. 2025, 2033; JKX. 8. He is unsure whether he understood them. Tr. 2025. He understood that they were a recap of the details of a particular purchase or sale of stock. Tr. 2025-26. He did not understand the difference between service fees and commissions in 2009. Tr. 2111. He received transaction confirmations for the trading activity in 2010. Tr. 2044; JKX. 9.

Miller never called Konner, but tried to impress upon him, by not being enthusiastic, that he thought he was going a little fast when he talked to him about trades. Tr. 2045. Miller testified both that he never said "I do not want to make this trade," and that he tried a couple of times to decline a trade, but Konner always talked him into making it. Tr. 1965, 2045, 2112-13. The trades kept getting done because Miller never told Konner to stop. Tr. 2046. Miller continued funding the account when additional funds were required for the purchase of securities. Tr. 2046.

Miller received temporary confirmations and recalls that they required him to remit a certain sum of money to pay for a stock purchase. Tr. 2046-47; JKX. 10. Miller would send a check to the clearing firm for JPT when he received these notices. Tr. 2048-49. Based on the fact that he was required to assess JPT's bills, look at the documentation, and send a check when needed, he was very much aware of the trading activity in his account. Tr. 2051-52.

Miller never called Konner with any questions about anything that appeared on his monthly statements. Tr. 2058-59. Even after all the activity he observed in the account confirmations in 2009, he was still willing to invest and remit more money in 2010 to purchase additional stock. Tr. 2060-62; JKX. 21.

Miller has professionals prepare his tax returns, but provides all the necessary records relating to his business and personal affairs. Tr. 1977-78. He does not recall any of his tax preparers saying anything to him about the level of activity or number of trades in his JPT account in 2009. Tr. 2065. He looked over his tax return in 2010, which included a schedule of the sales of stock in his account. Tr. 2062-66; JKX. 7. Miller was aware in early 2010 that over \$1 million worth of stock had been sold in his JPT account in 2009, but he did not call Konner or anyone else at JPT about it. Tr. 2066-67; JKX. 7. Miller was aware in early 2010 that there was a pattern of short-term trades in his JPT account. Tr. 2069; JKX. 7.

Miller invested in London Metals Market, LLC, in 2010. Tr. 1965; DX. 47. Koutsoubos was the salesman that contacted Miller for purposes of this transaction. Tr. 1966. Koutsoubos, and later Isaac Grossman, Koutsoubos' employer, told Miller the investment was not risky and that the metal market was going to go up. Tr. 1966-67. Miller viewed silver as an aggressive and speculative investment. Tr. 2083. He invested \$40,000 in silver in November 2010 through London Metals Market. Tr. 2084-85; JKX. 25 at SEC-MILLER-000435. Konner had nothing to do with Miller's investments in London Metals Market or BTP Construction. Tr. 2128.

Miller closed his account with Konner but maintains a separate account at JPT in Tinton Falls, New Jersey, with Anthony Joslin (Joslin). Tr. 2076-78. The account with Joslin was

opened about six months after he opened his account with Konner. Tr. 2077. The account includes stock in Denison Mines, which prospects for uranium. Tr. 2078. At the time of his testimony, the stock was worth approximately \$113,000. Tr. 2078. This stock was proposed by Joslin. Tr. 2079. Miller also has an account with his grandnephew valued at \$70,000, which is one of the more conservative accounts he has. Tr. 2082. Miller opened it after opening the account with Konner at JPT. Tr. 2120. That account is traded maybe once every six months. Tr. 2120.

Miller invested in Big and Little Management, a company owned by Tom Daley (Daley), that was in the housing market and which Daley was trying to bring it public. Tr. 2085-86. Miller knew it was a speculative investment. Tr. 2086-87. He invested approximately \$100,000. Tr. 2087. The account is not traded because it is not public yet. Tr. 2120.

Miller recalls Konner recommending he invest in a REIT, but Miller did not. Tr. 2087-88. He told Konner he did not need an investment like that because he did not need the income and because he wanted to diversify out of real estate. Tr. 2087-89.

Miller did not have problems getting the proceeds of sales from JPT, for example, when he needed to pay his taxes. Tr. 2094-97. Miller did not have an understanding of whether the number of trades in his account could be a factor in losing money. Tr. 2109-10. Between May and November 2009 the securities sold in Miller's account were approximately \$911,000. Tr. 2115; DX. 136.

7. Bruce Wayne Mills

B. Mills was born in 1944 and lives in Metairie, Louisiana. Tr. 2133. He is married to P. Mills, and they have two adult children.¹⁴ Tr. 2133-34. He graduated from high school in New Orleans, Louisiana. Tr. 2134. He did not attend college, does not currently hold any professional licenses, has no real investment experience, and has never held any securities licenses, although he previously held an insurance broker license. Tr. 2134-36, 2168. B. Mills worked at Liberty Mutual for twenty-three years and AllState for five years; during his time in the insurance industry, he never disclosed how much commission he made to his customers because no customer ever asked him. Tr. 2172, 2299, 2303-04.

After retiring from the insurance business, B. Mills continued to operate a beauty supply and cosmetics business, which included one location in New Orleans and two Alabama locations. Tr. 2169-71, 2180, 2183-84. Four days a week, he was at one of the Alabama locations. Tr. 2169-70. As another source of income, he was the landlord of a commercial lot in Metairie. Tr. 2185-87. That property burnt down sometime in the past eight to ten years, and he received an insurance payment for it. Tr. 2187-89. Generally, however, B. Mills did not know the answers to several questions about his finances, prior business dealings, and handling of

¹⁴ B. Mills admitted that he had discussed with P. Mills what he was likely to testify about in general, namely that he lost a great deal of money and it should not happen again. Tr. 2163. However, he stated that he and his wife did not agree to state anything untrue on the stand. Tr. 2321.

different properties, and repeatedly stated that his wife would know, as she handled such matters. Tr. 2171, 2188, 2195-96, 2202-03, 2206-07, 2250-51, 2255-57.

B. Mills was unsure when he opened his JPT account. He originally testified that it was opened in 2002 or 2003, but after being shown an application with his signature dated 2006, he assumed that 2006 was the correct year. Tr. 2136-37, 2233, 2235; DX. 144. He did not deny signing the application, but had no recollection whether he had previously seen the form. Tr. 2235-36. He testified that he was retired when he opened the JPT account, but then stated that he was still involved in the cosmetics business. Tr. 2135, 2168-71. He opened his JPT account because a friend recommended he invest in Apple stock, and Koutsoubos (with whom he had no prior dealings) contacted him about opening an account. Tr. 2138, 2233-34, 2247.

B. Mills testified that he thought he and his wife were doing small trades in the account, “predominantly based around Apple.” Tr. 2157-58. He confirmed that he had Koutsoubos buy Apple stock without a recommendation by Koutsoubos, but he was unable to confirm whether it was his idea to buy \$22,937 worth of Apple stock in April 2008 or \$51,674 worth of Apple stock in June 2008 (as reflected in trade confirmation reports), stating that his wife would have to be asked about those transactions. Tr. 2253-54, 2256-58; see DKX. 14 at 25, 74.

B. Mills did not deny receiving account statements and confirmed that the statements reflected his understanding of what was going on in the account and its value, but he testified that he never looked at the statements, as that was something his wife would do if she had the time. Tr. 2156-57, 2259-61; DKX. 7; DX. 26; DX. 149. When shown the statements, he was unable to confirm whether certain deposits to, and withdrawals from, the account were made, stating that his wife may have done those transactions or she would have to be asked. Tr. 2262, 2333. With respect to a defunding of the JPT account in 2007, B. Mills confirmed that this transfer of assets was not Koutsoubos’ idea and that it was totally within the control of the Mills. Tr. 2263-65.

According to B. Mills, he would talk with Koutsoubos more than once a week and, although he would sometimes argue with Koutsoubos over his trade suggestions, he would go with those suggestions because he figured Koutsoubos knew what he was talking about. Tr. 2145, 2147, 2157-58, 2314-15. He testified that he “think[s]” there were occasions when Koutsoubos entered into trades in his account without confirming them with him, and that he did not give Koutsoubos the authority to do so. Tr. 2145-48.

B. Mills confirmed that he signed a September 2007 AASQ and stated that the handwriting of \$100,000 (as estimated annual income) looked like his, but he did not recall writing that income figure on the form and did not recognize any other handwriting on the form as his. Tr. 2150-51, 2274-76, 2281; see DX. 28. He testified that he did not recall seeing an AASQ or looking at the document before signing it, stating that he would sign the forms based on what his wife gave him. Tr. 2273-74, 2280. At another point, he stated the form was blank when he signed and returned it. Tr. 2307. He also testified that the handwriting of \$2 million net worth on the form was not his and that he did not have any conversations with Koutsoubos about his net worth, but then contradicted himself a few moments later by stating that he was “sure” net worth was discussed and that the \$2 million figure was way out of line. Tr. 2275, 2330, 2336.

B. Mills also confirmed that he signed a March 2009 AASQ, but stated that the handwriting on the form was not his, aside from his signature. Tr. 2152-53, 2285, 2309; see DX. 29. He did not recall whether the form was filled out when he signed it. Tr. 2309-10. However, when asked whether JPT's home office could have relied upon his signature on both the September 2007 and March 2009 AASQs as attesting to the information contained in those forms, he testified that he "feel[s] very comfortable in stating that [he] signed it before all of this was filled in." Tr. 2319-20.

After Koutsoubos left JPT, Konner became the registered representative for the Mills account around July 2009. Tr. 2267-68, 2291; see DKX. 7 at 236. B. Mills continued to do business with Koutsoubos after he left JPT, as Koutsoubos presented an opportunity to invest in a "new program" to help B. Mills make back the money he lost in the JPT account. Tr. 2158-59, 2218, 2222-24. B. Mills testified that he never filed a complaint against Koutsoubos and continued to be involved with Koutsoubos after he left JPT because he "really believed" Koutsoubos, and Koutsoubos would always tell him how he was "going to make it up . . . [and] do better." Tr. 2336; see Tr. 2291, 2293.

8. Pamela Leehans Mills

P. Mills was born in 1948 and lives with her husband B. Mills. Tr. 2339-40. She graduated from high school, she did not attend college, and does not currently hold, and has never held, any professional or securities licenses. Tr. 2340-41. She retired in 2009, having worked in the beauty supply business for seventeen years and as a legal secretary for twenty-two years. Tr. 2341-42, 2395-96. She characterized her investment background and knowledge of the stock market as zero. Tr. 2342.

In 2006, her husband opened the JPT account. Tr. 2343; DX. 144. Koutsoubos was the registered representative, and initially her husband primarily communicated with Koutsoubos about the account. Tr. 2343-45. At the time that the account was opened, P. Mills did not have any discussion with Koutsoubos about investment objectives or risk tolerance, and she does not recall having a conversation with Koutsoubos about investment objections or risk tolerance at any time. Tr. 2345-46, 2349. She recognized her 2006 account application and confirmed that she signed it, but testified that she did not write on the application that her investment objectives were speculation and trading, or that her risk tolerance was aggressive. Tr. 2345-50; DX. 144. She does not think she knew what these terms meant or that they were her investment objectives when she signed the form. Tr. 2345-50.

P. Mills initially invested \$4,000 in the JPT account and, over the life of the account, she invested over \$300,000, which represented twenty to thirty percent of her liquid net worth. Tr. 2353-54. She recalled having lost over \$150,000 throughout the time she had the account (i.e., from the time it opened in 2006 until it closed in 2010). Tr. 2451. She and her husband had authority to authorize trades in the JPT account, although ninety-five percent of trade recommendations were made by Koutsoubos. Tr. 2355-56.

According to P. Mills, Koutsoubos talked them into buying into certain stocks, but she declined to buy into a REIT and stated that there may have been a handful of other instances

when she declined Koutsoubos' recommendations. Tr. 2356-57. As to unsolicited trades, her husband "constantly" asked Koutsoubos to buy Apple stock, and in 2007 P. Mills asked to buy L'Oreal stock. Tr. 2356, 2426-31; DKX. 10. Although she did not recall the transaction amount, the record shows that she purchased \$66,359 of L'Oreal stock. Tr. 2428; see DX. 149 at JPTURNER-SEC-ATL-555824. In 2007, P. Mills withdrew about \$112,000 from her JPT account to buy property in Alabama, which was her husband's decision. Tr. 2412-15.

P. Mills confirmed that she filled out certain items on a September 2007 AASQ (including her employment background and the size of trades) and signed the form, and believed that she circled the investment objectives (which the form states were speculation, trading profits, and short-term trading). Tr. 2360-61; see DX. 28. However, the items stating that the Mills' estimated income was \$100,000 and that they had a liquid net worth of \$2 million "per client" were not her handwriting. Tr. 2363, 2432. Koutsoubos helped her fill out the form, but she did not know what the investment objectives meant when she signed the form. Tr. 2362, 2365-66. At the time she signed the form, she had one year of investment experience; although twenty years of investment experience is listed on the form, she testified that may have been filled in because her husband had twenty years of insurance (not investment) experience.¹⁵ Tr. 2366. She testified that she did not understand what was meant by the form's question related to investment experience, but relied on what Koutsoubos told her to do. Tr. 2367. She also stated that she probably read the attached AASS, which contained risk disclosures, before she signed that form. Tr. 2433-34.

P. Mills also confirmed that she signed a March 2009 AASQ and filled out certain items; although she assumed that she circled the items under investment objectives, she did what Koutsoubos told her to do. Tr. 2369-73; see DX. 29. She also confirmed that she signed the attached AASS and that, by signing it, she was affirming that she read and understood the form. Tr. 2439-41. P. Mills testified that she did not carefully review the AASQ and AASS forms before signing them, as Koutsoubos would ask for them back in a rushed manner. Tr. 2479-81. But, she acknowledged that it would have been reasonable for JPT's home office to have relied on her signatures on the forms indicating that she had read and understood the documents. Tr. 2450.

Further, P. Mills confirmed that she signed a January 2007 document entitled Supplemental Application for NFS Margin Account Privileges, and that Koustoubos tried to explain what the margin account agreement meant. Tr. 2421-43; DKX. 5. She also confirmed that she signed an August 2007 Limited Trading Authorization form, which authorized her daughter to make certain investment decisions related to the account. Tr. 2423-25; DKX. 6. Although P. Mills did not recall specifically why she signed the form, she stated that it had to be related to the fact that the Mills were going overseas for a two-week period. Tr. 2423, 2478-79.

¹⁵ P. Mills testified that, when she was a legal secretary, she had a self-directed IRA account in which she made her own decisions with certain guidance. Tr. 2397-98.

The Mills account closed in 2010.¹⁶ Tr. 2426. Prior to speaking to an attorney sometime around 2011 or 2012, and gathering her account documents in connection with that representation, P. Mills was unaware of the number of trades that had occurred in the account. Tr. 2357-59, 2390-91, 2452. In response to a question about when either she or her husband first became aware that Koutsoubos had purchased securities without preapproval, she stated it was not until after the account was closed. Tr. 2458-60. She never contacted anyone at JPT's management to complain that Koutsoubos had bought stocks in the account without permission. Tr. 2459. She testified that she did not know that there were a lot of trades because she was checking the account online, which showed only the total value of the account, not the transactions. Tr. 2460.

P. Mills acknowledged that she received monthly account statements in the mail and, if she had opened those documents, she would have had the information at her disposal to see exactly what trades were made in her account. Tr. 2441-45, 2455. She also conceded that she received confirmations of trades after a purchase or sale in her JPT account, but testified that such documents went into a folder ninety-nine percent of the time unopened. Tr. 2373. Prior to speaking with the Division's staff, she had no reason to believe that anything was done wrong in her account, aside from knowing that she had lost money and feeling like she had been "taken." Tr. 2391-92.

D. Expert Witness Testimony

1. Louis Dempsey

The Division called Louis J. Dempsey (Dempsey) as an expert to offer opinions and provide testimony related to excessive trading or churning.¹⁷ DX. 155 at 2. He was asked to

¹⁶ After Koutsoubos left JPT, he contacted P. Mills and her husband about an investment opportunity in Find.com. Tr. 2386-87. B. Mills wanted to invest in the company, but P. Mills was against the idea. Tr. 2387. Ultimately, the Mills invested in the company because that is what B. Mills wanted to do, which P. Mills now believes was a mistake because they lost money, and she also believes that Koutsoubos was buying and selling stock so he could make excessive commissions. Tr. 2387-89.

¹⁷ Counsel for Calabro, Konner, and Koutsoubos conducted lengthy voir dire of Dempsey and argued that he was not qualified to serve as an expert witness in this proceeding. Tr. 3150-52. Based on his experience in examining and investigating churning, I determined that he was qualified to offer an expert opinion in this case. Tr. 3153. Dempsey received a bachelor's degree in economics from Florida State University in 1990. DX. 155, Ex. 2. He was employed by the Florida Department of Financial Services, Office of Financial Regulation, Division of Securities, as a Financial Examiner/Analyst and then as a Financial Specialist from July 1990 through June 1995. Id. Dempsey worked for the Commission in its Miami, Florida, regional office as a Compliance Examiner, Staff Accountant, and then Senior Staff Accountant from June 1995 through August 1999. Id. In August 1999, Dempsey joined BISYS Regulatory Services in Boca Raton, Florida, and held various positions until December 2003. Id. Between December 2003 and February 2006, Dempsey returned to the Commission's regional office in Miami, Florida, as a Branch Chief in Regulation. Id. From February 2006 until the present, Dempsey

review and verify the Division's technical analysis related to alleged churning in eight customer accounts (comprised of seven customers) by Calabro, Konner, and Koutsoubos. Id.

Dempsey opined in his expert report that the trading activity conducted by Calabro, Konner, and Koutsoubos in the accounts of the seven customers exhibited elements of churning, including overtrading in the customers' accounts, as evidenced by extremely high turnover ratios and cost equity factors, as well as significant losses to the customers. DX. 155 at 4. Dempsey opined that the majority of the transactions in the accounts of the seven customers were marked solicited by Calabro, Konner, and Koutsoubos, thereby implying an element of control over the trading activity in the accounts. Id. Dempsey based his opinion on: his review of the documents provided to him by the Division; his review and verification of the analysis prepared by the Division that included an independent analysis of the customer account statements, transaction confirmations, account agreements, correspondence, and testimony obtained during the Division's investigation; and publicly available information. Id.

In his expert report, Dempsey opined that churning occurs when a broker induces trading in a customer's account, without regard to the customer's interests, for the purpose of generating commissions. DX. 155 at 5. According to Dempsey, the two prevailing tests to measure excessive trading in an account are the average annualized portfolio turnover rate (turnover rate) and the break even or cost to equity maintenance factor (cost equity factor). Id. The turnover rate measures the number of times the average equity in the account turns over during the period of activity; it is expressed on an annualized basis and is calculated by dividing the total dollar amount of purchases during a time period by the average monthly account equity and annualizing the results. Id. The cost equity factor is the return that the account would have to generate to cover the cost of commissions, fees, and margin interest in the account, and is calculated by dividing the total costs of trading activity by the average equity. Id. Dempsey opined in his expert report that it has generally been accepted in retail securities accounts that for a conservative investor, an annualized turnover rate of two is suggestive of churning, four is presumptive of churning, and six or more is conclusive evidence of excessive trading. Id. Dempsey's expert report states that trading practices that require an account to appreciate in excess of twenty percent just to cover costs are indicative of excessively traded or churned accounts. Id. at 6.

Dempsey determined that Calabro, Konner, and Koutsoubos collectively engaged in over 1,500 transactions in the accounts of the seven customers, generating approximately \$834,000 in commissions. DX. 155 at 6. The turnover rates in the accounts ranged from 8 to 56, the cost equity factors ranged from 22.9 percent to 73.3 percent, and that margin interest incurred by the customers was approximately \$14,600. Id.

has been the President, Chief Executive Officer, and Founder of Renaissance Regulatory Services, Inc., in Boca Raton, Florida. Id. Dempsey testified that his wife currently works for the Commission in the Miami, Florida, regional office's trial unit and he did not feel there was a conflict of interest when he accepted the engagement. Tr. 3116.

Dempsey opined that there were significant commissions generated for JPT and Calabro, Konner, and Koutsoubos from the activity in the customer accounts. DX. 155 at 6. It is Dempsey's opinion that Calabro, Konner, and Koutsoubos exercised significant control over the trading in the customer accounts, as exhibited by the fact that the majority of the transactions in the customer accounts were solicited by the representatives. Id.

a. Calabro

With respect to Calabro, Dempsey stated in his expert opinion that his review of the trading activity in the Willhoft family trust accounts, the Moore account, and the Williams' account confirmed the Division's technical analysis. DX. 155 at 7. Dempsey reviewed a Willhoft Family Trust account (Account 247), which was established in February 2007, for trading that occurred between December 1, 2008, and November 30, 2009, and he concluded that during that time Calabro executed 68 sales transactions totaling \$2,544,060.77, and 77 purchase transactions totaling \$2,990,786.24, and these trades resulted in losses of over \$123,000. Id. This trading resulted in an equity turnover of ten on an annualized basis and the cost equity factor was 31.8 percent. Id. Dempsey's report stated that this trading generated commissions and fees to JPT of approximately \$98,146 and the majority of the transactions were marked as solicited. Id. at 7-8. Based on Calabro's testimony that his payout ratio was 95% of gross commissions, Dempsey stated in his report that Calabro earned commissions of over \$90,000 as a result of this activity.¹⁸ Id. at 8. Dempsey concluded that the trading activity in Account 247 was indicative of churning and his review of the evidence revealed that Calabro exercised control over the trading in the account by virtue of the fact that virtually all of the transactions were solicited. Id. at 9-10.

Dempsey reviewed a second Willhoft Family Trust account (Willhoft 805), which was established in January 2008, for trading activity that occurred between December 1, 2008, and November 30, 2009, and he concluded that during that time Calabro effected over 73 sales transactions totaling \$2,763,384.51, and 82 purchase transactions totaling \$3,725,840.96, and these trades resulted in losses of over \$407,491. DX. 155 at 7, 10. Dempsey's expert report stated that these trades resulted in an annualized turnover of nine, and the cost equity factor was 29.3 percent. Id. at 10. Dempsey's report stated that commissions and fees generated by this trading were \$116,162, and based on Calabro's testimony, he would have earned commissions of over \$110,000 as a result of this activity. Id. Dempsey's expert report concluded that the trading activity in the Willhoft 805 account exhibited elements of churning, and his review of the account statements revealed that Calabro exercised control over the trading in the account by virtue of the fact that virtually all of the transactions were solicited. Id. at 12.

Dempsey reviewed the Moore account, which was opened at JPT in December 2008, for trading that occurred between February 1, 2009, and November 30, 2009, and he concluded that during that time Calabro executed over 99 sales transactions totaling \$3,496,252.95, and over

¹⁸ Dempsey noted that his analysis identified immaterial differences in the Division's original analysis; for August 2009 there was a \$39 overstatement of fees and for October 2009 there was a \$1,000 understatement of sales, and the Division adjusted their analysis based on these findings. Id. at 8 n.1.

123 purchase transactions totaling \$4,469,011.82, and these trades resulted in losses to the account of approximately \$805,337. Id. at 12-13. The expert report stated that these trades resulted in an annualized equity turnover of thirteen, which was indicative of churning, and a cost equity factor of 29.3 percent. Id. at 13. The trading activity generated commissions and fees to JPT of \$118,917, and based on Calabro's testimony, he would have earned commissions of over \$110,000 as a result of this activity. Id. Dempsey's expert report concluded that Calabro's trading activity in this account was indicative of churning, and his review of the account statements revealed that Calabro exercised control over trading in the Moore account by virtue of the fact that he solicited virtually all of the transactions in the account. Id. at 15.

Dempsey reviewed the Williams account, which was opened at JPT on or about October 31, 2007, for trading that occurred between December 1, 2008, and November 30, 2009, and he concluded that during that time Calabro executed over 122 sales transactions totaling \$8,588,124.41 and over 149 purchase transactions totaling \$11,015,161.13, and the trading activity resulted in losses to the Williams' account of approximately \$1,026,546. Id. The expert report stated that these trades resulted in an equity turnover of eight, and the cost equity factor was 22.9 percent. Id. The trading activity generated commissions and fees to JPT of approximately \$297,515, and based on Calabro's testimony, he would have earned commissions of over \$282,000 as a result of this activity. Id. at 15-16. Dempsey's expert report concluded that Calabro's trading activity in this account was indicative of churning, and that Calabro exercised control over the trading in the Williams' account by virtue of the fact that he solicited virtually all of the transactions in the account during the review period.¹⁹ Id. at 17.

On cross-examination, Dempsey testified that he had not reached an opinion as to the legal issue of control or reached a legal or factual determination regarding scienter as to Calabro. Tr. 3243. Dempsey agreed that options were meant to be short-term investments and that there would be a different churning analysis for an account that traded in options. Tr. 3244. Dempsey did not view, for example, Account 247 as a pure options account because there were long positions in the account, although Dempsey agreed that the account appeared to be in a short position most of the time. Tr. 3245, 3247, 3253. Dempsey did not separate the options trading from the other trades to see how it impacted the turnover rate. Tr. 3245-46.

During cross-examination, counsel for Calabro took Dempsey through several examples related to calculation of turnover rates. Dempsey calculated the turnover rate by dividing the value of the purchases during the alleged churning period by the average equity in the account. Tr. 3249-50. If an account purchased \$100 worth of securities, and those securities were later sold for \$100, and the average equity in the account was \$100, Dempsey agreed the turnover rate would be equal to one. Tr. 3250. Next, Dempsey agreed that if an account purchased \$100 worth of securities, and those securities were later sold for \$50, and the approximate average equity in the account was \$75, the turnover rate would be 1.3. Tr. 3250-51. Finally, if an account with a short transaction had an opening transaction worth \$100 and the stock price rose

¹⁹ Dempsey's analysis identified immaterial differences in the Division's original analysis for May 2009; there was a \$39 understatement of deposits and a \$10 understatement in sales, and the Division adjusted their analysis based on that finding. Id. at 16 n.2.

\$50, and the average equity in the account was \$75, Dempsey agreed the account would have to purchase \$150 worth of securities to close the account and the turnover rate would be \$150 divided by \$75 or 2.²⁰ Tr. 3252-53. Although there was the same movement in the stock in these examples, Dempsey agreed that the turnover rate was modified; Dempsey made no adjustment for this in his expert report because Calabro's accounts²¹ were mixed with options, long positions, and short positions. Tr. 3253-54.

Dempsey agreed that it would be possible to use the opening position in a short transaction and divide that position by the average equity to calculate the turnover rate, as is done with a long transaction. Tr. 3255. Using the opening position for a short transaction could impact the turnover rate, according to Dempsey, and it could have a big impact in an account that had an alleged churning period during a very large upward spike in the marketplace. Tr. 3255-56. Specifically, if Dempsey had used the value of the open positions, i.e., the value of sales rather than the value of purchases, in calculating the turnover rate, the rate would have been 6.6 rather than eight. Tr. 3273-75. On re-direct examination, however, Dempsey testified that he stood by the annualized turnover rate of eight that he calculated for the Williams account, that he calculated that figure the typical way it was done in the industry, and that a turnover rate of 6.6 would still exceed the presumptive level for churning. Tr. 3285-86, 3289.

Also during cross-examination, Dempsey testified that he had previously seen a December 22, 1978, Report of the Special Study of the Options Markets to the Securities and Exchange Commission by the House Committee on Interstate and Foreign Commerce (House Committee Report), and that he had previously seen it cited in churning cases. Tr. 3256-57; RCX. 83. Dempsey agreed that the House Committee Report concluded that turnover rate is not an accurate way to calculate turnover in an options account. Tr. 3257; RCX. 83. The House Committee Report described using the Looper formula to calculate turnover rate and Dempsey testified that he used a modified version of the Looper formula in his expert report. Tr. 3259; RCX. 83 at 451. Dempsey agreed with the following statements in the House Committee Report: "the use of such a turnover rate could be misleading if the user believes that this rate measures the activity in the whole account"; "if the values of portfolio securities change significantly, the [Looper] formula will not accurately reflect the ratio of the amount of purchases to the amount of total capital available for investment"; the limitation in calculating turnover rates "is particularly significant when an account includes highly leveraged options positions which are subject to substantial price fluctuation"; and, when referring to the Looper

²⁰ Dempsey agreed that when a customer invests in a short transaction, the customer, in essence, borrows the stock from another person or entity and then sells that stock to the market. Tr. 3246. In a short transaction, the opening transaction is the borrowing and shorting of the stock and the closing transaction is the repurchase and return of the securities. Tr. 3248. In a long position, the opening position is the purchase of shares in the marketplace and the closing position would be the ultimate sale of the shares. Tr. 3248-49.

²¹ Calabro's counsel, and Dempsey in response, refer to the Calabro "account." E.g., Tr. 3253. In context, it appears that Dempsey meant all four of Calabro's accounts in suit, including Account 247, to which Calabro's counsel referred immediately prior to this line of questioning. Tr. 3253-54.

and modified Looper formulas, “neither of these conventional formulations adequately measures the impact of options trading on the activity in customer accounts since they completely ignore the effect of the sale of options contracts.” Tr. 3261-62; RCX. 83 at 452-53.

On re-direct examination, Dempsey testified that he believed that the House Committee Report addressed pure options accounts and he did not treat Calabro’s accounts as pure options accounts; however, on re-cross examination, he acknowledged that the study did not just focus on trading in options accounts, but was broader and included accounts that had options trading in them. Tr. 3290, 3319. Dempsey agreed that he did not use the alternative methods set forth in the House Committee Report to measure activities in accounts which include options, such as focusing on options alone by calculating the number of contracts bought or sold in opening transactions per every thousand dollars invested. Tr. 3319; RCX. 83 at 453. Dempsey believed that the House Committee Report concluded that the preferred measure for analyzing churning when there are options in the account is the cost equity factor rather than the turnover ratio. Tr. 3290.

With respect to the Williams account, Dempsey agreed that when he calculated the turnover rate of eight as set forth in his expert report, he did not consider approximately \$300,000 in account withdrawals, which theoretically could impact the turnover rate because withdrawals reduced the average equity. Tr. 3271-72. Dempsey testified he had not seen withdrawals taken into account in calculating the turnover rate in practice and that withdrawals would have a higher impact on calculations based on a shorter time period because withdrawals typically should smooth out over a longer time period. Tr. 3272.

Dempsey testified that an account that declines rapidly can impact the return on equity calculation. Tr. 3278-79. Dempsey understood that the Williams and Willhoft accounts were “generally . . . up” during 2008 because they held short positions during a “very long slide in the marketplace.” Tr. 3279-80. Dempsey therefore agreed that profits were already embedded in the Williams account by the time the time period he examined was reached. Tr. 3280. If Dempsey calculated the cost of equity ratio for the Williams account using the beginning balance for account equity, rather than using the average equity, assuming the Williams account balance stayed the same throughout the entire period and the market stayed the same, Dempsey agreed that the cost of equity for the alleged period was 18 percent rather than 22.9 percent, the amount included in Dempsey’s expert report. Tr. 3280-83.

Dempsey testified that the profit and loss calculation included in his expert report for the Williams’ account did not include withdrawals from the account, i.e., the expert report reflected a profit of \$85,881 for December 2008, but if you took into account the \$40,000 customer withdrawal during that month, the profit for that month would be approximately \$125,000. Tr. 3322. Dempsey agreed that if the profit for the Williams account was approximately \$120,000 in December 2008, the account would have covered the commissions for that month, which were approximately \$34,000, by quite a bit. Tr. 3323. Dempsey agreed that the same principle applied to the Williams account for January and February 2009 – if withdrawals were included in the profit calculation, the account’s profit would rise and commissions would be covered during those months by quite a bit. Tr. 3323. Dempsey agreed that beginning in March 2009, the Williams account dropped rapidly for approximately three months before it started to flatten out.

Tr. 3324. Dempsey agreed that the Williams account was an example of a “big drop” at the beginning of the period in the equity in the account and that the account would need quite a bit of time to smooth out. Tr. 3324.

With respect to the Moore account, for which the churning allegations pertained to less than a twelve-month period, Dempsey annualized the turnover rate; Dempsey agreed that if he had calculated the turnover rate for the ten months presented in the account, assuming that the account did not decrease in value and deducting commissions and charges, the turnover rate would have been 5.36 instead of thirteen. Tr. 3275-78. On re-direct examination, Dempsey testified that if he annualized the calculation he did to arrive at the turnover rate of 5.36, the annualized turnover would be 6.72, which would still exceed the presumptive level for churning. Tr. 3287-88. Dempsey testified that he did not have any concerns about the way he originally calculated turnover in the Moore account and he stood by his calculation. Tr. 3289.

b. Konner

With respect to Konner, Dempsey stated in his expert report that his review of the trading activity in the Carlson and Miller accounts confirmed the Division’s technical findings. DX. 155 at 18. Dempsey reviewed the Carlson account, which was opened at JPT on July 18, 2007, for trading that occurred between January 1, 2009, and December 31, 2009, and he concluded that during that time, Konner executed over 118 sale transactions totaling \$4,163,638.86, and over 134 purchase transactions totaling approximately \$4,419,365.84, and the trading activity resulted in losses of over \$54,119. Id. at 18-19. Dempsey’s expert report stated that these trades resulted in an equity turnover of seventeen times on an annualized basis and the cost equity factor was 34.6 percent. Id. at 19. The trading activity generated commissions to JPT of \$87,686, and based on Konner’s testimony that his payout ratio was 65% of gross commissions, Konner would have earned commissions of over \$55,000 as a result of this activity. Id. Dempsey’s expert report concluded that Konner’s trading activity in this account was indicative of churning, in that there were high turnover ratios and cost equity factors and significant losses to the customer. Id. at 21. Dempsey’s review revealed that Konner exercised control over the direction of trading in the account by virtue of the fact that virtually all of the transactions were solicited. Id.

Dempsey reviewed the Miller account, which was opened at JPT on June 2, 2009, for trading that occurred between June 1, 2009, and November 30, 2009, and he concluded that during that time, Konner executed over 26 sale transactions totaling \$911,730.91, and over 37 purchase transactions totaling \$1,134,017.40, and the trading activity resulted in losses of approximately \$80,497. Id. at 21. Dempsey’s expert report stated that this trading resulted in an equity turnover of eighteen on an annualized basis and a cost equity factor of 28.2 percent. Id. The trading activity generated commissions to JPT of \$35,700, and based on Konner’s testimony, Konner would have earned commissions of over \$23,000 as a result of this activity.²² Id. at 21-22. Dempsey’s expert report concluded that Konner’s trading activity in this account

²² Dempsey’s analysis identified a minor difference in the Division’s original analysis for November 2009 where there was a \$7 understatement of foreign tax paid; the Division adjusted its analysis based on that finding. Id. at 22 n.3.

was indicative of churning, in that there were high turnover rates and cost equity factors and significant losses to the customer. Id. at 23. It was Dempsey's opinion that Konner exercised control over the trading in the account based on the solicited trades in the account. Id. Dempsey's expert report also stated that according to the account paperwork provided by the Division, the objectives for the Miller account were marked as speculation, trading profits, and capital appreciation, with an aggressive risk tolerance, and a time horizon of five to ten years, which Dempsey found unusual because Miller was eighty-six years old at the time the forms were completed.²³ Id. at 21.

On cross-examination, Dempsey agreed that a churning claim included three separate issues: excessive trading, control, and scienter. Tr. 3160-61. Dempsey testified that his expert opinion focused on excessive trading and did not include any conclusions regarding scienter. Tr. 3160-61. Dempsey's expert report did not offer an opinion as to whether Konner had de facto control over the Miller and Carlson accounts because that was a legal conclusion; rather, he opined that Konner had control over the direction of the trading activity in those accounts and that opinion was based solely on the fact that the transactions were solicited and did not take into account any other facts. Tr. 3168-69, 3187-88. Dempsey agreed that determining whether de facto control existed required an analysis of all the relevant facts that pertained to the relationship between the broker and the customer. Tr. 3166-67. Dempsey testified that "control of the direction of trading activity" meant "the selection of transactions and the frequency of the transactions in the account" and he agreed that this inquiry was just his observation. Tr. 3170, 3197. He also agreed that customer objectives were irrelevant to his opinion that Konner exercised control over the direction of trading. Tr. 3170-71. Dempsey agreed that if a customer signed a document that said the customer understood the risks associated with active trading, it would be one indicator as to the customer's thoughts of the appropriateness of a high level of trading in their account. Tr. 3172-73.

With respect to Miller, Dempsey testified that he did not take into account Miller's age, investment objectives, net worth, annual income, willingness to take risks, or other investments, or Konner's notes of his discussions with Miller for purpose of his analysis. Tr. 3192-93. With respect to Carlson, Dempsey testified that Carlson's acknowledgment during the hearing that he received transaction confirmations and understood the commissions and the significance of markups and markdowns did not affect his conclusion that Konner controlled the direction of trading in Carlson's account because Konner, by soliciting the transaction, was directing trading, and Carlson represented that he relied on Konner to make investment decisions for the account. Tr. 3197-98. Carlson's acknowledgment that he understood what margin was and that he signed multiple documents relating to his investment objectives, net worth, annual income, and risk tolerance similarly did not play any part in Dempsey's analysis. Tr. 3198.

Dempsey agreed that he was present during the hearing when Bresner's counsel presented Carlson with an analysis of trading activity reflecting a profit in Carlson's account for 2009; however, Dempsey did not agree with that analysis and he concluded that Carlson incurred a net loss for 2009. Tr. 3176-77; DX. 155 at 19. In his expert report, Dempsey showed customer

²³ Dempsey agreed during cross-examination that this was just an observation and did not relate to his analysis of the control of trading in the Miller account. Tr. 3187.

deposits in the Carlson account of approximately \$401,000 for September 2009. Tr. 3179; DX. 155 at 20. That deposit amount was the sum of a \$75,000 deposit plus the value of securities that were transferred into Carlson's account that month. Tr. 3179. Dempsey agreed that the \$75,000 deposit was canceled out by a \$75,000 withdrawal that same month. Tr. 3178-79. He also agreed that for purposes of his analysis, he took the month-end value of the securities that were deposited into the account, or \$325,000, and considered that to be a capital contribution into the account. Tr. 3180-81.

With respect to the securities deposited into the account, Carlson had invested \$150,000 in a PIPE offering of Quantum stock. Tr. 3181-82; JKX. 76, 77. Dempsey agreed that what he had recorded as a capital contribution of \$325,000 into the account actually referred to an unrealized gain of \$175,000 on the stock. Tr. 3183. Dempsey agreed that Carlson did not lose approximately \$54,000, but actually gained \$121,000 in 2009, if you took that outside investment in Quantum stock into account, although he testified that including such a gain is not typically how a churning analysis is conducted because investments outside the account are not included in the analysis. Tr. 3183-84, 3306. Dempsey also testified that the Quantum stock was restricted with a limited ability to sell, and so the value of Quantum shares may have been lower at the end of the period. Tr. 3306.

Dempsey's expert report reflected \$263,831 in average equity in the Carlson account for the relevant period, which was calculated by dividing the sum of the equity in the account each month over the entire period by twelve. Tr. 3307-08; DX. 155 at 20. Dempsey agreed that if you removed the \$175,000 profit on the Quantum stock from the calculation, the average equity in the Carlson account would be substantially lower. Tr. 3308. Dempsey further agreed that the Profit & Loss/Average Equity figure included in his expert report for the Carlson report would be very different if he had included the \$175,000 in profit from the Quantum stock, and Carlson would have doubled his money during the alleged churning period if you factored in the profit on the Quantum stock. Tr. 3309; DX. 155 at 20. Dempsey agreed that Konner was the broker for the Quantum investment and that the investment was part of his relationship with Konner. Tr. 3184. Dempsey testified that he used an established methodology for performing the calculations in the Carlson account, he was not aware of any methodology that would "set aside any earnings" as was suggested, and he stood by his calculations for the Carlson account. Tr. 3325. Dempsey also agreed that if margin is utilized, it has the effect of increasing turnover in a retail brokerage account, and that Carlson used margin. Tr. 3203.

During cross-examination, Dempsey further agreed that he was instructed by the Division to focus on what they characterized as the relevant period, and with respect to the Miller account, he was instructed to focus on June through November 2009. Tr. 3189. Dempsey had trading records available to him for December 2009 and the succeeding months, but his work was limited to the period given by the Division. Tr. 3190.

Dempsey testified that he did not think it was misleading for him to have stated in his report that for conservative investors it has been generally accepted that in retail securities accounts an annualized turnover rate of two is suggestive of churning, if he did not know whether the investor was in fact conservative. Tr. 3201. According to Dempsey, the Commission has used that number as a benchmark or a starting point for many years, and he has

seen cases where churning has been found with lower turnover numbers in conservative accounts, and where churning has been found in speculative accounts. Tr. 3297. Dempsey testified that he did not recall seeing calculations where the turnover rate thresholds for churning activity changed along the spectrum from conservative to speculative investors. Tr. 3297, 3303-05.

Dempsey agreed that as account value goes down, turnover ratio goes up if all other things are equal. Tr. 3201-02. He also agreed that if an investor is investing in stocks and losing money, the same level of activity yields a higher turnover ratio than if the investor was making money, and if the investor was removing money from the account, it would increase the turnover ratio assuming the level of activity remained the same. Tr. 3202.

c. Koutsoubos

With respect to Koutsoubos, Dempsey stated in his expert report that his review of the trading activity in the Bryant and Mills' accounts confirmed the Division's technical findings. DX. 155 at 24. Dempsey reviewed the Bryant account, which was opened at JPT on February 23, 2005, for trading activity between January 1, 2008, and December 31, 2008, and he concluded that during that time Koutsoubos executed over ninety-nine sales transactions totaling \$4,202,728.03, and over ninety-two purchase transactions totaling \$4,032,172.11, and these trades resulted in losses in the account of approximately \$189,801. Id. Dempsey's expert report stated that this trading resulted in an annualized equity turnover ratio of fifty-six and a cost equity factor of 73.3 percent. Id. The trading activity generated commissions to JPT of \$47,000 and margin interest of over \$6,000, and based on Koutsoubos' testimony that his payout was sixty-five percent of gross commissions, Koutsoubos would have earned commissions of over \$30,000 as a result of this trading. Id. at 24-25. Dempsey's expert report concluded that Koutsoubos' trading activity in this account was indicative of churning, in that there were high turnover ratios and cost equity factors, as well as significant losses to the customers. Id. at 26-27. It was Dempsey's opinion that Koutsoubos exercised control over the direction of trading in the account based on the fact that virtually all of the transactions were solicited.²⁴ Id.

Dempsey reviewed the Mills account, which was opened at JPT on October 6, 2006, for trading activity between December 2008 through July 2009, and he concluded that during that time Koutsoubos executed over eighty-seven sale transactions totaling \$1,588,555.91, and over 100 purchase transactions totaling \$1,506,355.95, and these trades resulted in losses in the account of approximately \$3,902. DX. 155 at 27. Dempsey's expert report stated that this trading resulted in an equity turnover ratio of twenty-eight on an annualized basis and a cost equity factor of 41.2 percent. Id. The trading activity generated commissions to JPT of approximately \$31,486 and margin interest was approximately \$1,533. Id. Dempsey's expert report concluded that Koutsoubos' trading activity in this account was indicative of churning, in view of the high turnover rate and cost equity factor, as well as significant losses to the customer.

²⁴ Dempsey's analysis identified a minor difference in the Division's original analysis; for January 2008 there was a \$27 understatement of purchases, and the Division adjusted its analysis based on that finding. Id. at 25 n.4.

Id. at 29. It was Dempsey's opinion that Koutsoubos controlled the trading activity in the account based on the number of the transactions in the account that he solicited. Id. at 29.

On cross-examination, Dempsey agreed that with respect to the Mills and Bryant accounts, he referred to control in the context of reflecting the direction of trading in the accounts and was not referring to control as an element of the definition of churning. Tr. 3205-06. In preparing his expert report, Dempsey was not asked to consider the customers' ages, the relationship between the customer and the broker, the frequency of broker communications, or the customers' risk tolerances, investment objectives, annual incomes, or net worth disclosures. Tr. 3209-11. For purposes of his technical analysis, Dempsey only considered the defined time periods the Division asked him to review and he did not consider other periods of time in the accounts. Tr. 3211.

Dempsey did not recall seeing an unsolicited acknowledgement letter noting that the purchase of certain shares was entered into solely of the Mills' own volition and with full understanding of the risks involved. Tr. 3220-22; DKX. 10. Dempsey testified that if there were many other similar letters, it would have factored into his determination as to whether the broker exercised control over the direction of trading, but if the letter was an isolated incident it would not affect his determination. Tr. 3220-22. Dempsey testified that learning of the one acknowledgment letter did not make any difference to the opinion he offered in his expert report. Tr. 3301. Dempsey agreed that with the exception of declarations written by the Division and signed by the investors, the Division did not provide him with one document signed by the Mills or Bryant indicating that their investment objectives or risk tolerance were conservative. Tr. 3226-27. Dempsey testified that such documents would not have affected his churning analysis. Tr. 3301.

Dempsey calculated that there was a loss in the Mills' account by determining the difference between the account equity at the beginning and end of the alleged churning period and adjusting for customer deposits or withdrawals during that time. Tr. 3227-28. Dempsey calculated that the Mills' account lost money during the alleged churning period largely because of a customer deposit of \$9,653 in 2008. Tr. 3229-30. Dempsey agreed that he treated the \$9,653 the Mills' account received as a taxable income item on their ProShares investment as a customer deposit even though it was a distribution to the Mills on a security they had already bought. Tr. 3231-32; DX. 149 at JPTURNER-SEC-ATL 003664; DX. 155 at 29. Dempsey also agreed that if the \$9,653 were treated as an appreciation of the Mills' account and not as a contribution, the Mills' account would have increased in value during the alleged churning period. Tr. 3233-34. Dempsey did not agree that the fact the account would have increased in value was a contraindication of churning. Tr. 3233-34. According to Dempsey, gains and losses would be one of the factors to look to when developing a churning case, although churning can take place even in an account with a gain. Tr. 3302, 3305.

Dempsey's statement in his expert report that Koutsoubos received sixty-five percent of gross commissions was based on Koutsoubos' investigative testimony. Tr. 3236. Dempsey did not review Koutsoubos' actual commission statements and he did not believe he had access to those statements when he was preparing his report. Tr. 3237-38. Dempsey agreed that he recalled testimony during the hearing that the commission rate for the Bryant account was

actually between thirty and thirty-five percent and he did not have any reason to doubt that figure. Tr. 3239. Dempsey did not know whether the thirty to thirty-five percent payout applied to Koutsoubos for every month. Tr. 3303, 3312-13.

Dempsey testified that he believed that he had received all of the documents he needed from the Division to reach the opinion he reached in his expert report as to the technical numbers. Tr. 3300.

2. John Pinto

The Division called John E. Pinto (Pinto) as an expert witness to render an opinion concerning the adequacy of Bresner's supervision of the trading activity in the accounts held by Carlson, Mills, and Bryant (three accounts), which reached a Level 4 classification in JPT's AARS. Tr. 3330; DX. 156 at 5. Pinto has forty-three years of senior management regulatory and compliance experience in the securities industry, including service as the executive vice president for regulation of NASD (now FINRA); he also has testified before Congress on behalf of NASD and served as an expert witness in other proceedings on behalf of regulators.²⁵ Tr. 3328, 3347-49; DX. 156 at 3-5, Ex. A at 24-25, Ex. B. at 26-28.

Pinto's report states that JPT implemented AARS as its primary source to track actively traded customer accounts. DX. 156 at 8. Further, under JPT's WSPs,²⁶ all Level 4 accounts

²⁵ Pinto received a Bachelor of Science degree from Rutgers University. He currently is the managing director of the Washington, D.C., office of Renaissance Regulatory Services, Inc., where he provides consulting and support to the financial services industry. DX 156, Ex. A at 24; Tr. 3328.

²⁶ NASD Rule 3010 provides that member firms:

shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of NASD.

NASD R. 3010(b). As noted by Pinto, NASD has provided the following guidance under this rule:

[A] supervisory system may include elements such as automated exception reports and surveillance programs that monitor for unusual trading activity in customer accounts. The written supervisory procedures would instruct the supervisor on which reports produced by the surveillance system the supervisor is to review as part of his or her supervisory responsibilities, including a description of how often these reports should be reviewed, the steps to be taken if suspicious activity is discovered, and how to document the supervisor's oversight activities.

were Bresner’s direct supervisory responsibility “to review and take appropriate actions, the latter being an undefined and unspecific term in [JPT]’s written supervisory procedures.” *Id.*; see DX. 79 at 268 (“Customers with an activity ratio for Level IV will have their accounts managed at the discretion of the EVP.”).

Based on his review of documents provided to him by the Commission, Pinto concluded that Bresner—as the executive vice president and head of supervision—failed to reasonably meet his responsibilities to personally supervise and perform a review of all customer accounts that reached an ROI greater than twenty-five percent (i.e., a Level 4 account), and to take appropriate action. DX. 156 at 5-6, 9, Ex. C. Pinto opined that Bresner, as the person with frontline supervisory responsibility for the three accounts, ignored and failed to follow up on “red flags” that warranted his immediate attention and review, such as that trading activity in these accounts was excessive, far exceeded the levels of trading frequency defined as acceptable by customers, and was not appropriate in light of the customers’ investment experience, risk tolerance, and investment objectives. *Id.* at 6, 17.

In concluding that Bresner failed to reasonably supervise, Pinto reasoned that Bresner failed to recommend to JPT’s chief compliance officer that Koutsoubos or Konner be placed on heightened supervision or recommend any other disciplinary action against them for excessive trading activity in any Level 4 account, when such action was warranted under the circumstances. Tr. 3368-71, 3550-51; DX. 156 at 6, 19. Pinto found that Bresner never restricted trading or took any supervisory action (e.g., he never imposed any restrictions relative to the extent or frequency of trading) to address the excessive trading activity in the three accounts, other than that he imposed limits on per trade commissions, which Pinto deemed inadequate.²⁷ DX. 156 at 6, 20; see Tr. 3522-23. Pinto opined that lowering per trade commissions could exacerbate the problem of excessive trading by leading to an increase in the velocity of trading activity, in order to compensate for the lower commission rates. DX. 156 at 9; Tr. 3595-96. Last, Pinto found that Bresner failed to develop and follow policies or procedures as to what actions he would take to review customer activity in Level 4 accounts, or to set forth the types of actions deemed appropriate in follow up. DX. 156 at 6, 20-21.

On cross-examination, Pinto emphasized that although Bresner could have delegated functions to others subject to his review and assessment, Bresner had sole, direct, and ultimate responsibility for Level 4 accounts, pursuant to JPT’s WSPs. Tr. 3351-53, 3501. Such responsibility included, according to Pinto, reviewing the involvement of the registered representatives that were assigned to those accounts. Tr. 3351-52.

On the other hand, when asked whether Bresner should have imposed limits on the number of trades that were taking place in any quarter for nondiscretionary account holders who

NASD Notice to Members 99-45 (2009); see DX 156 at 7 & n.1.

²⁷ In AARS, Bresner noted “true” under EVP review in the Mills account. Pinto, however, stated that he did not know what “true” meant and that there was no information besides the commission restrictions noted in the system. Tr. 3400-03; see DX 100.

indicated that their objectives were short-term trading or trading profits, Pinto responded “No.” Tr. 3551. Pinto also acknowledged that Bresner could not be responsible “for calling 300 customers every quarter.” Tr. 3389. However, Pinto opined, where the circumstances were “extraordinary”—three accounts at Level 4 for extended periods—Bresner needed to be a little more personally involved. Tr. 3389-90. Pinto also stated that Bresner should have conducted an in-depth review of the three accounts and discussed with the customers whether the amount of actual trading reflected their account objectives, which may have led him to impose an additional restriction, such as preapproval of all trades. Tr. 3552. Finally, although acknowledging that the customers had stated investment objectives that were “far more aggressive than what a conservative investor would be” and that broker-dealers and registered representatives are entitled to rely on such representations, Pinto concluded that Bresner should have taken further action if there were “inconsistencies,” such as when the trading activity exceeded the level of trading activity defined as acceptable by the customers.²⁸ Tr. 3565, 3570, 3574; see also Tr. 3529-31, 3574-75, 3578-79.

3. Henry Sanchez, Jr.

Henry Sanchez Jr. (Sanchez) testified as Bresner’s expert witness, rendering an opinion as to the competency of Bresner’s supervision of the three accounts. Tr. 3815. Sanchez has thirty years of experience in the securities industry, including high-level compliance positions at financial services firms, law-firm practice concentrating in corporate and securities matters, and service as a regulator with the Commission, NASD, and NASD Regulation.²⁹ Sanchez Ex. 1 (SX) at 1-2, 8-10; Tr. 3818-40.

In his report, Sanchez concluded that Bresner neither had direct supervisory responsibility over Konner or Koutsoubos nor did he fail to reasonably supervise them. SX at 3, 5, 7. Rather, Sanchez opined that J. Williams was the responsible supervisor of Konner and, at times, Koutsoubos, and that Mannings was responsible for monitoring accounts for churning. Id. at 6. Based on Bresner’s testimony, Sanchez concluded that Bresner reviewed Level 4 accounts and “worked with the AVP to follow up with the representatives on the accounts, imposing

²⁸ Pinto acknowledged that his report should or could have discussed Carlson’s April 2008 Account Update Form (submitted around the time when Carlson’s account was raised to level 4), which represented Carlson’s risk tolerance as aggressive and that his primary investment objective was speculative. Tr. 3406-10, 3493; see DX 156 at 11-12; JKK. 32. Pinto stated that if Bresner had looked at this Account Update Form when Carlson’s account was initially raised to level 4, he “would have concluded that that’s what the customer was looking to do, assuming that the customer understood what all these terms meant.” Tr. 3410.

²⁹ Sanchez received a Bachelor of Arts degree from Richard Stockton State College, a law degree from Rutgers University School of Law-Newark, and an LLM degree in securities regulation from Georgetown University. SX at 2, 11. He currently is an associate director of Oyster Consulting, LLC, a financial services consulting firm. Id. at 1, 8.

commission restrictions, when necessary.” *Id.* at 4. Sanchez stated that imposing commission restrictions alone did not make Bresner a direct supervisor of Konner or Koutsoubos.³⁰ *Id.*

On cross-examination, Sanchez acknowledged that Bresner “was a supervisor,” but disagreed with Bresner’s characterization that the imposition of per trade commission limits was a supervisory action, stating that it was a disciplinary action. Tr. 3858, 3877-79. Sanchez further acknowledged that Bresner had sole responsibility in AARS for Level 4 accounts and could not delegate responsibility as to those accounts. Tr. 3896-97.

Sanchez testified that he was not saying that Bresner’s imposition of commission restrictions was adequate supervision, but that it was “adequate under [JPT’s] procedures.”³¹ Tr. 3856. However, he also stated that JPT’s WSPs were “vague enough that [Bresner] didn’t have to do anything” if he reviewed the account activity and determined that nothing needed to be done; but, he declined to characterize JPT’s WSPs as deficient and found them reasonable. Tr. 3854-55, 3901, 3915-16. Sanchez conceded that Bresner was required to establish criteria and procedures for conducting active account reviews, but nevertheless did not establish any written procedures and JPT’s procedures did not expressly mandate that any written criteria be formulated. Tr. 3890-91, 3914-15; *see* DX. 79 at 267-68. Last, Sanchez agreed that one of the most important things that a brokerage house can do is have its supervisors contact customers to verify information on file for such customers, such as whether the customer’s recorded information accurately reflects his or her true investment objectives and risk tolerance. Tr. 3847-48.

E. Other Relevant Testimony³²

1. John Williams (J. Williams)

John Williams (J. Williams) lives in Brentwood, New York. Tr. 3599. He was educated at New York Institute of Technology, where he earned a bachelor of science and a master’s degree in finance, and New York University, where he earned an unspecified certificate. Tr. 3599-3600, 3725.

J. Williams has worked in the securities industry for about fifteen years. Tr. 3601, 3664. He does not currently hold any securities licenses, but he previously held Series 4, 7, 24, 63, and 66 licenses. Tr. 3600. He has had one disciplinary event, related to his having allegedly impeded an investigation by the State of Utah in 2000. Tr. 3600-01.

³⁰ On cross-examination, Sanchez acknowledged that the Commission was not alleging that Bresner was a frontline supervisor for Konner and Koutsoubos, but rather that the alleged failure to supervise related to his responsibility over the Level 4 accounts. Tr. 3854, 3857-58.

³¹ According to Sanchez, restricting per trade commissions would be significantly effective in regulating the activity of a registered representative, whereas trade restrictions would have been inappropriate because that would have had “an immediate direct detrimental effect” on customers and raised more complaints than what was done in this case. Tr. 3917, 3919.

³² Isaac’s testimony is generally summarized above, in the section discussing AARS.

J. Williams was employed with JP Morgan (JPM) at the time he testified. Tr. 3601. However, JPM had officially laid him off, and he understood his termination would be effective April 9, 2013. Tr. 3601-02. At JPM, J. Williams worked as a research analyst. Tr. 3602. He anticipated working a registered representative and financial advisor at Southeast Investments, once the processing of his securities licensing was complete. Tr. 3602.

Prior to JPM and Southeast Investments, J. Williams worked as a consultant for a restaurant. Tr. 3602. Before that, he worked as a consultant at Morgan Stanley. Tr. 3602. Before that, he was a compliance manager at JPT, where he worked from December 2006 to December 2010 in JPT's Brooklyn, New York, branch office, and chief compliance officer at brokerage firm Trident Partners in 2005 and 2006. Tr. 3602-03, 3664-65. Prior to his time at Trident Partners, he did some compliance-oriented work at brokerage firm LH Ross, in 2001 and 2002, and was the chief compliance officer for brokerage firm Europacific Capital in 2005. Tr. 3664-65.

Over J. Williams' years working in compliance, he attended compliance-oriented seminars, including seminars arranged by FINRA and Pennsylvania's securities division. Tr. 3726, 3799. Some of these seminars addressed investment suitability. Tr. 3726-27. He never attended a training specifically focused on excessive trading, but he remembers it being a topic in some courses. Tr. 3783-84.

a. J. Williams' Time at JPT

J. Williams began working at JPT in 2006, and left JPT effective December 31, 2010. Tr. 3664, 3707-08. As a compliance manager, he was responsible for ensuring compliance with supervisory procedures and FINRA rules and regulations at JPT's Brooklyn branch. Tr. 3603, 3663, 3778. The Brooklyn branch had its own compliance officer because, prior to J. Williams' joining JPT in 2006, the State of New Jersey had conducted an audit and had found a sales script, used by JPT registered representatives,³³ which had not been preapproved. Tr. 3633-35. The registered representatives who were using the sales script were terminated. Tr. 3634.

Typically, J. Williams would supervise and review trading activity, supervise account documentation, conduct trade approvals and some account approvals, monitor the "Protegent system," and hold office "compliance meetings." Tr. 3604, 3631-32, 3635, 3654-55. As part of his duties, he also entered order tickets and reviewed the trade blotters on a daily basis. Tr. 3635.

Correspondence from any JPT representative working in its Brooklyn branch was reviewed either by J. Williams or Sideris, the "branch manager." Tr. 3604, 3607, 3632, 3635. J. Williams also had some responsibilities for offices other than the Brooklyn branch; for example, he was required to audit the Deerfield Beach, Florida JPT branch about four times per year, and he conducted audits of other JPT branches about five times per year. Tr. 3604-05, 3642-44, 3739-40.

³³ In his testimony, J. Williams used the terms "registered representatives," "financial advisor," and "broker" interchangeably. 3729.

J. Williams and Sideris were the senior people in JPT's Brooklyn branch. Tr. 3662-63. J. Williams' job description included his compliance officer duties, and he and Sideris additionally agreed that J. Williams would assume responsibility over trade reviews. Tr. 3663-64, 3802. When J. Williams was away from the Brooklyn branch because of audits of other offices, Sideris handled J. Williams' compliance responsibilities in the Brooklyn branch. Tr. 3644.

For most of his time at JPT, J. Williams reported to Isaac, who was the chief compliance officer, and with whom he communicated one or two times per month. Tr. 3605-06, 3669. Just before J. Williams left JPT, he was reporting to Gary Wachs, who served as chief compliance officer after Isaac. Tr. 3605. Sideris reported to J. Williams. Tr. 3632-33.

J. Williams also communicated with JPT's AVPs in the compliance department—Herman Mannings and Lois Cohen—about once or twice per week while at JPT. Tr. 3605-06. He was a salaried employee of JPT, and never earned income relating to the Brooklyn branch's sales performance. Tr. 3727. In 2010, his salary at JPT dropped from \$85,000 annually to \$60,000 annually, because JPT's revenues had dropped. Tr. 3784.

b. AARS

J. Williams AARS “the Levels”; AARS was the JPT program used to manage compliance that showed account activity, trading activity, and commissions, among other things. Tr. 3610, 3651, 3723. There were five Levels of review in the Levels, 0 through 4, with a 4 being assigned to the most active accounts. Tr. 3610-11, 3723. He considered his role reviewing accounts with high Levels to be important. Tr. 3695.

J. Williams had no responsibility for Level 0, 3, or 4 accounts. Tr. 3611-12, 3723. For a Level 1 or 2 account, he reviewed the account and its activity, spoke to the responsible registered representative alongside Sideris, and sometimes conducted a profit and loss assessment. Tr. 3611, 3723-24. For Levels 1 and 2, J. Williams did not recall whether he contacted the relevant customers, but was “pretty sure” he did for “active account suitabilities.” Tr. 3612. If he had any concerns about trading in the accounts, he was required to notify the compliance department—something that he never did. Tr. 3613. For a Level 3 or 4 account, J. Williams would discuss the account with the AVP, but he was otherwise never responsible for Level 3 or 4 accounts. Tr. 3612-13, 3642, 3723. The compliance personnel in the corporate headquarters in Atlanta handled Level 3 and 4 accounts. Tr. 3723; see Tr. 3703.

During customer communications, J. Williams typically wrote notes on the customer forms about which he was calling. Tr. 3614, 3651. He does not recall whether he recorded such notes in AARS for the account types for which he was responsible (Level 1 and 2 accounts), although he thinks he did. Tr. 3614-15.

c. Customer Communications

DX. 93, which reads “Questionnaire” at the top, is an AASQ that JPT provides to compliance employees, such as J. Williams, to use during communications with JPT customers; JPT does not require compliance employees to use this AASQ during such communications. Tr. 3613-14. J. Williams followed some of the guidelines listed in the AASQ. Tr. 3614.

d. Active Trading Forms

The AASQ and AASS are documents that either the compliance department or a JPT branch office sent to customers so that the customers would acknowledge that they were in “active trader” status, and so that JPT could notify them of the risks involved and ensure that their investment objectives were current. Tr. 3615-16; DX. 182, App. A. However, the materials were typically sent by the compliance department at company headquarters. Tr. 3637. When J. Williams sent these documents to customers from the Brooklyn branch, he included the cover letter, AASS, and AASQ.³⁴ Tr. 3615-16, 3635.

Sometimes the Brooklyn branch sent an AASQ to a customer prefilled, and reflecting what the customer told the registered representative during an earlier conversation. Tr. 3616-17, 3638. In such cases, JPT asked the customer for confirmation that the customer agreed with the prefilled information on the form. Tr. 3617, 3638. The customer provided such confirmation by signing the form. Tr. 3714, 3774-75, 3796. Prefilling might occur because the customer requested it, or to ensure the form was filled out legibly. Tr. 3638-40, 3698-99.

J. Williams acknowledged the risk associated with allowing registered representatives to prefill forms for customers, and acknowledged it would have been “better” for compliance purposes to have customers fill out forms themselves in the first instance. Tr. 3777, 3783, 3789. He did not know whether the WSPs precluded registered representatives from prefilling an AASQ prior to the branch sending it to a customer. Tr. 3638.

J. Williams said it was possible and a “worst-case scenario” that a registered representative could prefill a form, with whatever numbers the representative thought were appropriate for the customer, send it to the customer with instructions to sign and send back, and tell the customers that the numbers did not matter. Tr. 3789-90, 3797. If he ever heard a registered representative relaying such instructions to a customer, he would have spoken with the registered representative as well as the customer, and perhaps raise the occurrence with the compliance department. Tr. 3790. If he became aware that a registered representative filled in wrong information and told the customer to leave it that way, he would raise the issue with the compliance department. Tr. 3798. The only controls in place for him to monitor such improper instructions from a registered representative was his listening to the registered representatives speaking to customers, and personally speaking to some customers about the forms they filled out. Tr. 3744, 3790.

An AASQ was not necessarily sent to a customer only once per year, and the compliance department would determine whether to send it more than once per year, e.g., if the customer was a particularly active trader. Tr. 3641-42.

e. Processing of Client Forms

When the Brooklyn branch sent the forms to a customer, the registered representative put together the packet, and there was some limited review by either J. Williams or Sideris before the

³⁴ J. Williams sometimes refers to the AASQ and AASS together as the “Active Supp.” Tr. 3716-17.

forms were sent. Tr. 3617, 3659, 3676-77, 3736, 3772-73. J. Williams or Sideris initialed the forms before they went out. Tr. 3659; see Tr. 3621, 3625, 3627. The forms could be sent to the customer either by fax or mail. Tr. 3717. If sent by mail, the Brooklyn branch enclosed a preaddressed envelope—addressed to the Brooklyn branch or the Atlanta headquarters—in the mailing. Tr. 3718.

If the forms were sent by fax, it would have to go through either J. Williams or Sideris, because only J. Williams or Sideris had access to the Brooklyn branch’s fax machine, which was located in a locked office. Tr. 3617, 3736-39, 3799. Only Sideris and J. Williams were able to send and receive faxes. Tr. 3617, 3737. The limited access to the fax machine was a control against any tampering or misconduct by registered representatives. Tr. 3775-76. It was the practice of JPT, and all the other brokerage firms where J. Williams worked in compliance prior to joining JPT, to restrict access of fax machines to licensed supervisors. Tr. 3799.

If a completed AASQ was returned from a customer, either by fax or mail, J. Williams or Sideris would fax or otherwise send a copy of the completed form to JPT’s headquarters. Tr. 3618, 3651, 3699, 3737, 3764. J. Williams or Sideris received or opened all mail and faxes incoming from customers, and registered representatives had no opportunity to alter forms after they were returned by a customer. Tr. 3737-39, 3765, 3795.

J. Williams made sure that an AASQ was properly filled out and initialed, and reviewed it for substance. Tr. 3618, 3675, 3748. If he found that the customer had filled out something incorrectly, or failed to initial the form, he called the client to discuss the numbers or omission, and corrected the form himself—making a note that he had spoken to the customer. Tr. 3618-19. In such cases, J. Williams also went over the rest of the form with the customer. Tr. 3619.

J. Williams reviewed AASQs that were returned to the Brooklyn branch. Tr. 3636. His “best practice” was to compare a completed AASQ with the holdings and trade practices documented in AARS or in Streetscape, and he always tried to determine whether the activity in the customer’s account was consistent with the information provided by the customer. Tr. 3636-37, 3659, 3670-71. If the form was related to a new account, he analyzed whether the registered representative was appropriate for the customer, e.g., in terms of the customer’s financial means. Tr. 3679, 3728.

f. Trade Order Approvals

Prior to making a trade, a registered representative in the Brooklyn branch had to submit a trade order for approval by either J. Williams, Sideris, or Doukas. Tr. 3654-55, 3729, 3730. If J. Williams approved an order, he entered the trade or had the registered representative enter it. Tr. 3655. An approval always was marked with either J. Williams’ or Sideris’ initials on the approval request ticket. Tr. 3657-58. He recalls disapproving a trade where the trade was outside the investment objectives of the client. Tr. 3656-57.

g. Trading Review

On a daily basis, and at the end of each day, J. Williams monitored trading for suitability, investment objectives, and financials using the Protegent system. Tr. 3731-32. He also ensured that trades had been approved by either Sideris or himself. Tr. 3732. The compliance

department conducted a secondary review of trading in accounts. Tr. 3731. Only certain trades received this secondary review, e.g., if there was a large dollar amount traded, a secondary review was conducted. Tr. 3731-32.

J. Williams might call a customer to verify account information based on his daily review of trading activity. Tr. 3733. For example, it was his general practice to call a customer for verification if there was a high number of trades in an account on a particular day. Tr. 3733-34. When he made such calls, he did not give the registered representative responsible for the account prior notice of the call. Tr. 3734.

h. Review of Registered Representatives

J. Williams regularly reviewed registered representatives' notes and posting pages. Tr. 3734-35. He also regularly discussed activity in customer accounts with the responsible registered representatives. Tr. 3735. Such discussions related to suitability and the customer's knowledge of trading, among other things. Tr. 3735-36. He spent a good deal of time at the Brooklyn branch on the floor, observing registered representatives and their conversations with customers. Tr. 3744.

i. **Konner**

Konner was a registered representative in the Brooklyn branch. Tr. 3606, 3644. J. Williams reviewed Konner's trades, and Konner often came to him with questions, but Konner did not report directly to him. Tr. 3606-07. Konner's office was about two feet away from the door to J. Williams' office. Tr. 3607, 3666. J. Williams could hear Konner when Konner was on the phone. Tr. 3607. Konner struck J. Williams as loud, but was appropriate toward and projected knowledge to his customers. Tr. 3608, 3666, 3668-69. Konner made investment recommendations to customers, and he favored short-term trading. Tr. 3608, 3648, 3678-79. No customer complaint was made against Konner during J. Williams' time at JPT. Tr. 3665, 3670. J. Williams never heard Konner telling a customer to ignore the information prefilled on a form, and to sign and return it right away, nor did he witness Konner falsifying any customer information. 3797-98, 3803-04.

J. Williams spoke to some of Konner's customers while at JPT. Tr. 3608. For example, he spoke to Carlson, because Carlson changed information on a form, and J. Williams called to verify the change. Tr. 3608, 3675-76. He spoke with Konner about Konner's accounts that appeared in AARS, although he does not have a specific recollection of any such conversations. Tr. 3645-46. He thinks he would have spoken to Konner about the high level of activity in the accounts, as reported in AARS. Tr. 3645-46. He does not recall comparing returned AASQs with the holdings and trade practices reflected in AARS or Streetscape for any customer of Konner. Tr. 3636-37.

Konner was placed on heightened supervision in 2008, when Sideris was Konner's direct supervisor. Tr. 3644-45, 3671. Konner's heightened supervision lasted one year. Tr. 3645. It was not related to excessive trading or churning in customer accounts, but was based on Konner's high rate of clients initially agreeing to take some action on an account or trade, but then renegeing on that commitment by failing to commit the necessary funds. Tr. 3671-73, 3766-

68, 3791-93. Konner was the only person J. Williams was aware of who had been placed on heightened supervision for this reason. Tr. 3771, 3803. When Konner was on heightened supervision, J. Williams or Sideris confirmed newly opened accounts and trades for a Konner customer by calling the customer. Tr. 3673, 3767, 3794.

J. Williams had a friendly relationship with Konner, but the men did not socialize with each other outside the workplace. Tr. 3786.

ii. Koutsoubos

Koutsoubos was a JPT registered representative, who split his time between the Brooklyn branch and the Deerfield branch. Tr. 3608, 3649. Koutsoubos worked at JPT from the time J. Williams joined JPT in 2006, until 2009, when Koutsoubos left JPT. Tr. 3741. Koutsoubos sat near J. Williams in the Brooklyn branch, and J. Williams could hear his phone conversations. Tr. 3609, 3741, 3743-44, 3800. Koutsoubos gave customers the impression that he was knowledgeable, and he discussed strategies with them. Tr. 3609, 3742. Koutsoubos spent a great deal of the work day on the phone with customers, and occasionally he worked late. Tr. 3742-43. He never observed Koutsoubos acting abusive or disrespectful to customers, and never disciplined Koutsoubos for any reason. Tr. 3742, 3744-45, 3785. He never heard Koutsoubos telling a customer to “just sign” a form. Tr. 3801.

J. Williams did not recall specific conversations he had with Koutsoubos’ customers, but he recalls sometimes calling a Koutsoubos customer to verify trading activity. Tr. 3609-10. When he called, the customer verified information; he does not recall any of Koutsoubos’ customers asking him a question or complaining about Koutsoubos or another JPT representative. Tr. 3610. Any customer complaint received in the Brooklyn branch was forwarded to JPT’s compliance department at headquarters. Tr. 3610, 3665. J. Williams would have known about any customer complaints against employees of the Brooklyn branch. Tr. 3665. He does not recall comparing returned AASQs with the holdings and trade practices reflected in AARS or Streetscape for any customer of Koutsoubos. Tr. 3637.

J. Williams had a friendly relationship with Koutsoubos, and the men occasionally socialized together outside the workplace once or twice. Tr. 3786.

i. Investor Witnesses

i. Carlson

J. Williams does not recall a specific conversation with Carlson. Tr. 3646, 3660. He does not recall Konner saying that Carlson stated he was not worth the amount listed on his AASQ, and he does not recall any specific conversation between Konner and Carlson. Tr. 3646-48. He does not recall ever calling Carlson to verify trading in his account. Tr. 3658. He does not recall any complaint from Carlson that Carlson had been given documents with false information. Tr. 3697.

J. Williams’ signature is on the first page of, and Carlson’s signature is on the last page of, JKX. 31 (DX. 49), Carlson’s account application dated July 2007. Tr. 3619-20. J. Williams generally had the client sign the form first, and he signed it when it was returned. Tr. 3698. JPT

completed the typed responses on the form, and it is possible the customer filled out the second page. Tr. 3620. Carlson's signature reflects that he reviewed the account application, and verified that the listed information was correct. Tr. 3620.

J. Williams' and Carlson's signatures appear on JKX. 32 (DX. 50), an account update form dated April 06, 2008, and Carlson's initials are at the top of the page. Tr. 3620, 3699. It was initialed because JPT prefilled the form for Carlson, and JPT asked Carlson to initial next to correct prefilled information. Tr. 3621. This type of document went to customers unsigned by J. Williams, and J. Williams signed it after it was returned with the customer's signature. Tr. 3699-701. Such a form, after being signed by the customer, would be relied on by J. Williams and others at JPT. Tr. 3700-02.

J. Williams' initials are on JKX. 34 (DX. 53), which is an AASS and AASQ dated March 23, 2009. Tr. 3621, 3702. His initials appear twice in the corner at the bottom of the first page, indicating that J. Williams reviewed the document both prior to sending it and after receiving it back. Tr. 3622, 3703. Carlson signed the first page, indicating that Carlson had read the AASS and accepted any liability from active trading. Tr. 3621-22. Carlson also signed the last page, indicating that the represented investment objectives were accurate. Tr. 3622-23. J. Williams' initials appear elsewhere on JKX. 34, likely indicating that Carlson made changes from information previously shared with JPT, and J. Williams typically would have called Carlson to verify the changes were correct. Tr. 3622, 3704-05. J. Williams' initials on JKX. 34 reflect that Carlson changed his net worth from \$2.5 to \$2 million. Tr. 3705-06. J. Williams thinks that he would have asked Carlson what his net worth was to verify the new \$2 million figure. Tr. 3705-06, 3779-80. J. Williams did not sign JKX. 34, but someone in the compliance department at headquarters did. Tr. 3703. This indicates that headquarters, and not the Brooklyn branch, conducted the compliance review. Tr. 3703.

J. Williams' initials or signature do not appear on JKX. 35 (DX. 54), Carlson's AASS and AASQ dated February 21, 2010. Tr. 3706. J. Williams does not recognize the signature of the person who conducted the compliance review. Tr. 3707. He thinks the compliance review was done by someone in headquarters. Tr. 3707.

J. Williams' typed notes on the first page of DX. 98, an AARS snapshot for Carlson's account, read "Active account, updated financials. Open margin account. Sent in 15k." Tr. 3623. These notes indicate that Carlson was an active trader, had sent JPT updated financials, had opened a margin account, and had sent JPT an additional \$15,000. Tr. 3623. J. Williams would have spoken to Konner and Sideris about Carlson's account having high activity. Tr. 3624. In late 2008, Carlson's account was at Levels 3 and 4 in AARS. Tr. 3624.

ii. Miller

J. Williams recalls the existence of Konner's client Miller, but does not recall having any conversations with him. Tr. 3647, 3660, 3778. He does not recall ever calling Miller to verify trading in his account. Tr. 3658. He also does not recall any specific conversations between Konner and Miller. Tr. 3648. Miller never lodged a complaint against Konner or JPT during J. Williams' time at the Brooklyn branch. Tr. 3696-97.

If Miller opened his account when Konner was on heightened supervision, either J. Williams or Sideris would have called Miller to confirm the account opening and trading in it. Tr. 3673. Miller's account was opened in May 2009, but J. Williams was not sure whether that was within Konner's period of heightened supervision. Tr. 3673-74.

J. Williams' initials appear on the bottom right corner of the first page of JKX. 1 (DX. 19), which is Miller's account application. Tr. 3711, 3781. Sideris' signature appears to the left on the first page. Tr. 3711. This is the type of form that JPT sent to customers to sign and to return to JPT. Tr. 3712. On the third page of JKX. 1 is a correction made by Miller, and Sideris' initials are to the right of the correction. Tr. 3713-14. No other information on the form was corrected by Miller. Tr. 3713. On the second page, there is an "account owner profile" section and "investment objectives" section, both with Miller's initials. Tr. 3714-15, 3781.

J. Williams' initials appear in the bottom right corner of page 1 and page 2 of JKX. 4, an AASS and AASQ dated December 18, 2009. Tr. 3717, 3782. J. Williams was unable to tell whether he initialed these forms before or after they were sent to Miller. Tr. 3717. Miller initialed the sections marking his investment objectives as growth, trading profits, and speculation, and his risk tolerance as aggressive. Tr. 3719-20. Aggressive is the highest category of risk tolerance. Tr. 3720.

It was important to J. Williams in his compliance function that clients understand the meaning of investment objective terminology related to their accounts. Tr. 3721.

iii. Bryant

J. Williams did not recall a specific conversation with Bryant, who was Koutsoubos' client. Tr. 3624, 3652-54, 3660. DKX. 21 and 22, however, reflect that J. Williams may have had a conversation with Bryant, and, at the least, he reviewed some of Bryant's forms. Tr. 3625-26, 3654.

Sideris' and J. Williams' initials appear at the bottom of DKX. 21, an account update form signed by Bryant and dated March 15, 2007. Tr. 3625, 3761. These initials indicate that the form was reviewed prior to being sent to and after coming back from Bryant. Tr. 3625, 3761. J. Williams' and Bryant's signatures are on the form. Tr. 3625. Bryant's signature indicates that the numbers on the form reflect his financials and investment objectives. Tr. 3625. J. Williams thinks he would have compared the information on this form with prior information provided by Bryant, before J. Williams signed the form. Tr. 3763-64.

J. Williams' initials appear on DKX. 22 on both of its pages. Tr. 3625-26, 3757, 3788. Bryant's signature and initials appear on the exhibit as well. Tr. 3626. J. Williams thinks the Brooklyn branch prefilled the form for Bryant. Tr. 3758. Bryant's initials indicate that he read and verified the prefilled information. Tr. 3626, 3759-60, 3762.

J. Williams does not recall ever calling Bryant to verify trading in his account. Tr. 3658. He also does not recall trades showing up in Bryant's account that had not been previously approved by either J. Williams or Sideris. Tr. 3732-33. Bryant never complained about Koutsoubos. Tr. 3754.

iv. The Mills

The Mills were Koutsoubos' clients. Tr. 3627. J. Williams believes he had a conversation with the Mills, but does not recall the substance of the conversation or when the conversation occurred. Tr. 3627-28, 3649, 3652, 3660, 3748. If he had made any notes while speaking with the Mills, he would have written the notes on the form about which he was calling or inputted his notes into AARS. Tr. 3649-50. He does not recall ever calling the Mills to verify trading. Tr. 3658. He also does not recall trades showing up in the Mills' account that had not been previously approved by either J. Williams or Sideris. Tr. 3732.

Sideris and J. Williams' initials are at the bottom of DKX. 9, an AASQ and AASS dated September 7, 2007, indicating that they reviewed the forms both before sending them to and after receiving them back from the Mills. Tr. 3627, 3745-46. On the second page, there is a note, "per client" followed by J. Williams' name, indicating that J. Williams filled out the corresponding information for the client. Tr. 3627. Also on the second page, the "2 million per client" followed by "John" is J. Williams'. Tr. 3746. He wrote on this page likely because the Mills left the field blank, and he obtained the missing information from them and filled it in. Tr. 3747. He assumes he spoke with the Mills, and thinks the conversation included him walking the Mills through the information on their AASS and AASQ. Tr. 3748-50, 3787. It was his normal practice to call about missing information within a couple of days of receiving the form from a customer. Tr. 3787-88. The Mills' signatures on the second and third pages of DKX. 9 indicate that the information on the forms was accurate. Tr. 3628.

J. Williams' initials are on DKX. 11, an AASQ and AASS dated March 20, 2009, indicating that he reviewed it either coming or going out. Tr. 3628. The AASQ has, handwritten, "[s]poke to client" followed by "3/23/09," and J. Williams' initials, indicating that he spoke to the client about information the client had left blank. Tr. 3629, 3751-53. He wrote in "100K" of annual income and net worth of "2 million." Tr. 3751. He believes that when he spoke to the Mills about the missing information, he asked if they had previously read and signed the forms. Tr. 3753-54. The Mills' signatures indicate that the information on the forms was accurate. Tr. 3628.

The Mills never complained about Koutsoubos. Tr. 3754.

j. J. Williams' Review of the Carlson, Bryant, and Mills' Accounts

In reference to pages 68 and 69 of MBX. 9 (DX. 79), JPT's WSPs, J. Williams testified that he reviewed customer accounts for the items enumerated, starting at the bottom of page 68, including excessive trading and churning, and had no concerns about either excessive trading or churning in the accounts. Tr. 3630-31. Carlson's, Bryant's, and the Mills' trading activity was consistent with their investment objectives. Tr. 3631. If J. Williams had any concerns about their trading activity, he would have reported his concerns to the compliance department. Tr. 3631.

k. Deerfield Branch's Stephen Doukas

Doukas was the branch manager for the Deerfield branch. Tr. 3729-30, 3740, 3742. Doukas moved to the Brooklyn branch after J. Williams left JPT. Tr. 3740. Similarly to the Brooklyn branch, the fax machine in the Deerfield branch was restricted to employees with a Series 24 license, and was located in Doukas' office. Tr. 3740-41, 3799. Because Koutsoubos was based in the Deerfield branch half of the time, Doukas handled the review of some account forms and trades for Koutsoubos' customers. Tr. 3742.

2. Dennis Madej

Madej was born on July 10, 1947 and was sixty-five years old at the time of his testimony. Tr. 2648. Madej currently resides in Marietta, Georgia and has been located at the same address since 1984. Tr. 2648-49. He graduated from Parma High School in Parma, Ohio, in 1965. Tr. 2649. He worked for a year and a half at a bank prior to enlisting in the military. Tr. 2650. He was in the military for three years, after which he returned to the bank. Tr. 2650. He attended Cuyahoga Community College in Cleveland, Ohio, where he obtained his associate's degree in business management. Tr. 2649-50.

Madej currently holds the following securities licenses: Series 4 for options principal, Series 7 for general securities, Series 9 and 10 for sales supervision, Series 24 for supervisory principal, and Series 99 for operations principal. Tr. 2651-52. He is currently employed as the senior compliance officer at JPT, and held basically the same position in 2008 and 2009. Tr. 2652-53. As the senior compliance officer, Madej is responsible for reviewing anti-money laundering accounts, accounts that have triggered alerts, and options trading, as well as answering questions from the field, approving operational procedures, and handling funds and security movements. Tr. 2653. As part of his job, he worked with the AARS during 2008 and the bulk of 2009. Tr. 2654. AARS provided an increased commissions analysis, and was not a tool for determining whether churning was present. Tr. 2681-82. AARS identified accounts for review that met certain thresholds associated with turnover and return on assets. Tr. 2654. Once an account was flagged, Madej contacted the branch principals and AVPs to notify them that letters were going out, and to instruct them to have their registered representatives contact the customer. Tr. 2657.

To the account holders, JPT's compliance department sent an active account letter containing a cover letter, an AASS, and an AASQ. Tr. 2663-64, 2666, 2669; DX. 20. Neither the AASS nor the AASQ included customer-specific information concerning the level of trading in the account, the amount of commissions and fees charged, or the breakeven and turnover ratios. Tr. 2668-69. In addition to the cover letter that informed the client of the importance of reviewing the AASS and AASQ for accuracy, Madej sent a memorandum to supervisors informing them that the active account letters had been sent out, so they would be able to talk with their customers about their importance. Tr. 2656-57; DX. 183 at JPTURNER-SEC-ATL 148759. If no action was taken within two to three weeks, Madej would restrict an account and halt trading until he had received notice that action was taken. Tr. 2654-55, 2659-60. While he had duties related to accounts flagged at Level 2 of AARS, the EVP was responsible for reviewing accounts flagged at Level 4 of AARS. Tr. 2661-62, 2677-78. From 2008 to 2009, Bresner filled the role of EVP. Tr. 2678.

III. LEGAL DISCUSSION AND CONCLUSIONS OF LAW

A. Churning

“Churning occurs when a securities broker buys and sells securities for a customer’s account, without regard to the customer’s investment interests, for the purpose of generating commissions.” Al Rizek, Initial Decision Release No. 121 (Feb. 24, 1998), 66 SEC Docket 1875, 1891 (internal quotation marks omitted).³⁵ The three elements of churning are (1) control of the account by the broker, including de facto control through acquiescence, trust, or reliance; (2) excessive trading in light of the investor’s trading objectives; and (3) scienter on the part of the broker. J.W. Barclay & Co., Initial Decision Release No. 239 (Oct. 23, 2003), 81 SEC Docket 1630, 1656; Rizek, 66 SEC Docket at 1891.³⁶ Churning is a violation of Section 17(a) of the Securities Act and of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Donald A. Roche, Exchange Act Release No. 38742 (June 17, 1997), 64 SEC Docket 2042, 2049; J.W. Barclay, 81 SEC Docket at 1656, 1671.

De facto control of an account may be inferred from all the facts and circumstances, and requires an inquiry into whether the broker or the customer is responsible for the level of trading. J.W. Barclay, 81 SEC Docket at 1657. “The touchstone is whether or not the customer has sufficient intelligence and understanding to evaluate the broker’s recommendations and to reject one when he thinks it unsuitable.” Id. (citations omitted). Thus, a customer does not give up control of his account if he has sufficient financial acumen to determine his own best interests, even if he acquiesces in the broker’s management of the account. Id. Factors to consider in evaluating de facto control include the investor’s sophistication, the investor’s prior securities experience, the trust and confidence the investor has in the broker, the amount of independent research conducted by the investor, the truth and accuracy of information provided by the broker, and whether the investor “habitually” follows the advice of the broker. Rizek, 66 SEC Docket at 1892; Roche, 64 SEC Docket at 2049 n.14; see also Rizek, 70 SEC Docket at 936 (considering whether the broker explained the trading risks, whether the investor understood the trading risks and the implications of trading on margin, and how often the investor followed the broker’s recommendations).

There is no single precise formula or method for determining when excessive trading has occurred. Rizek, 66 SEC Docket at 1894. Various measures have been used, including turnover rate, cost to equity ratio (also known as cost equity factor or breakeven ratio), commission to equity ratio, and the number of days a security is held. J.W. Barclay, 81 SEC Docket at 1658; Rizek, 70 SEC Docket at 934; Rizek, 66 SEC Docket at 1894; DX. 155 at 5. Turnover rate

³⁵ The Commission issued an Opinion in this case, generally affirming the Initial Decision, but reducing the disgorgement amount and imposing a permanent associational bar. Al Rizek, Exchange Act Release No. 41725 (Aug. 11, 1999), 70 SEC Docket 927, aff’d, Rizek v. SEC, 215 F.3d 157 (1st Cir. 2000).

³⁶ The Commission issued an Opinion in this case, generally affirming the Initial Decision, but without reaching the issue of churning. Edgar B. Alacan, Exchange Act Release No. 49970 (Jul. 6, 2004), 83 SEC Docket 842.

measures the number of times per year the securities in an account are replaced by new securities, and is calculated by dividing the total dollar value of purchases in one year by the average equity. Rizek, 66 SEC Docket at 1895. For an investor who wants to speculate and is interested in aggressive trading, an appropriate turnover rate may be quite high. See J.W. Barclay, 81 SEC Docket at 1658. For a conservative investor, by contrast, a turnover rate in excess of six (sometimes calculated by including any margin extended to the investor in the average equity) is generally presumed to reflect excessive trading. See Shearson Lehman Hutton Inc., 49 S.E.C. 1119, 1121-22 (1989) (finding excessive trading where the turnover rate was 7.4); J.W. Barclay, 81 SEC Docket at 1658; Rizek, 70 SEC Docket at 934; Rizek, 66 SEC Docket at 1895; see also DX, 155 at 5. The cost equity factor and commission to equity ratio measure the “damage done” to an account by excessive trading. Rizek, 70 SEC Docket at 935; Rizek, 66 SEC Docket at 1896-97. Cost equity factor is calculated by determining the percentage return on the investor’s average net equity needed to pay broker commissions and other expenses. Rizek, 66 SEC Docket at 1896; J.W. Barclay, 81 SEC Docket at 1658. Excessive trading has been found where an account had to appreciate fifteen percent to cover transaction costs, even when margin debit balances are included in net equity. Rizek, 70 SEC Docket at 935; see also J.W. Barclay, 81 SEC Docket at 1658 (“A cost-to-equity ratio of 15% to 21% on a conservative account generally indicates churning.”) (citing Rizek, 70 SEC Docket at 935). Commission to equity ratio is calculated by determining commissions paid to the broker as a percentage of average equity. Rizek, 66 SEC Docket at 1897; Rizek, 70 SEC Docket at 935. The Commission has found excessive trading with a commission to equity ratio as low as fifteen percent. John M. Reynolds, 50 S.E.C. 805, 808 (1991). Days held analysis examines the average time a security is held before being sold. Rizek, 66 SEC Docket at 1897. An average holding time of less than sixty days, or a pattern of “in and out” transactions in the face of conservative investment objectives, indicates excessive trading. Reynolds, 50 S.E.C. at 808 n.12; see also Rizek, 66 SEC Docket at 1898 (finding excessive trading where average holding time was fifty-four days); J.W. Barclay, 70 SEC Docket at 1658-59 (finding churning where average holding time was fifteen days). Other factors to consider are the commissions relative to the size of the investment, the amount of interest paid by the investor, and the commissions earned in the allegedly churned account relative to all commissions earned by the broker. See Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 434-36 (N.D. Cal. 1968), aff’d in pertinent part, 430 F.2d 1202 (9th Cir. 1970); 8 Loss, Seligman, & Paredes, Securities Regulation 431 n. 257 (4th Ed. 2012).

In a churning case, scienter may be established by proof that the broker acted with the intent to defraud or with reckless disregard for the investor’s interests. Roche, 64 SEC Docket at 2048. Recklessness is a “highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.” J.W. Barclay, 81 SEC Docket at 1643 (quoting Sunstrand Crop. v. Sun. Chem. Corp., 553 F.2d 1033, 1044-45 (7th Cir. 1977)); Rizek, 215 F.3d at 162. Churning involves a conflict of interest in which a broker seeks to maximize his remuneration in disregard of the interests of his customer. Roche, 64 SEC Docket at 2048. This motivation creates the element of scienter necessary for a violation of the antifraud laws. Id. Scienter, in turn, is what separates churning from mere excessive trading. Id. Factors to consider in evaluating scienter include whether the broker investigated and evaluated the suitability of his recommendations, and whether the recommendations were in fact suitable for

his customers. Rizek, 66 SEC Docket at 1898. Another consideration is the change in portfolio value relative to transaction costs; large portfolio losses, or even small profits, combined with considerable transaction costs, are consistent with churning. Roche, 64 SEC Docket at 2049; Samuel B. Franklin & Company, 42 S.E.C. 325, 328-29 (1964) (portfolio gain of \$3,884 on initial investment of \$118,098, with \$23,694 paid in commissions, held consistent with churning, even though portfolio value would have dropped had there been no trading at all); Behel, Johnsen & Co., 26 S.E.C. 163, 165-66 (1947) (portfolio gain of \$2,400 on initial investment of \$61,731, with \$18,879 paid in commissions, held consistent with churning).

The jurisdictional requirement (which appears to be undisputed by Respondents) is de minimis, and may be satisfied by intrastate telephone calls and even the most ancillary mailings; this requirement was plainly met as to every account. J.W. Barclay, 81 SEC Docket at 1642-43. To prove a violation of Exchange Act Section 10(b) and Rule 10b-5, and Section 17(a) of the Exchange Act, the Division must also prove that any churning was material and “in connection with the purchase or sale of securities.” SEC v. Smart, 678 F.3d 850, 856-57 (10th Cir. 2012) (citing SEC v. Wolfson, 539 F.3d 1249, 1256 (10th Cir. 2008)); see also Weiss v. SEC, 468 F.3d 849, 855 (D.C. Cir. 2006). These requirements are necessarily satisfied upon a sufficient showing of churning. Rizek, 66 SEC Docket at 1875, 1891.

As previously stated, a finding of churning requires the satisfaction of three elements: first, control, either de facto or actual, of the customer account; second, excessive trading in light of the customer’s trading objectives; and third, scienter on the part of the broker. For the reasons set forth below, I find that these three elements are satisfied and that churning occurred in the JPT customer accounts of Bryant, Carlson, and Williams. I find that at least one of these elements is not satisfied, and therefore churning did not occur, in the accounts of Moore, Willhoft, Miller, and the Mills.

1. Bryant

Bryant had a straightforward and matter-of-fact demeanor while testifying, and his credibility was bolstered by evidence that corroborated his hearing testimony, as outlined below.

a. Control

Bryant is not a sophisticated investor and his experience with the securities markets is limited; he did not watch investment shows or subscribe to magazines related to investing, and Koutsoubos did not often provide him with market research papers. Bryant has only held three or four brokerage accounts, and his experience with unsolicited trading is limited to making one recommendation in his Sky Capital account to purchase La-Z-Boy shares. His understanding of investing in the securities markets was to purchase one stock, hold it, sell it for a profit, and then purchase another one. The number of trades, turnover ratio, and cost equity factor in his JPT account are in stark contrast to his understanding of investing and his experience with unsolicited trades in his other brokerage accounts. Koutsoubos recommended ninety-eight to ninety-nine percent of trades in Bryant’s JPT account, and at Koutsoubos’ urging, Bryant agreed to allow Koutsoubos to trade without first getting approval; Koutsoubos did, thereafter, make some trades without advanced approval. Given his limited experience with the securities markets, it is unlikely that Bryant understood the gravity or fully appreciated the nature of giving this

approval. Inasmuch as Bryant and Koutsoubos differ as to whether Bryant gave such approval, I find Bryant to be more credible on this point.

Koutsoubos argues that Bryant retained control of his JPT account at all times, stating that Bryant was an experienced investor capable of exercising his right to say no, and that he had sufficient financial experience and insight to determine his own best interests. Koutsoubos Br. at 35-37; Koutsoubos Reply Br. at 5-6. Koutsoubos asserts that he spoke with Bryant often about investment ideas and that Bryant rejected recommendations as well as made his own investment recommendations. Koutsoubos Br. at 35.

I reject Koutsoubos' arguments as unpersuasive. The fact that Bryant was a business owner with three brokerage accounts does not by itself make him an experienced investor. Bryant did not exercise control over his JPT account merely by rejecting recommendations by Koutsoubos or by making his own recommendations. Rather, as the evidence demonstrates, it is far more reasonable to conclude that Bryant followed the direction and recommendations made by Koutsoubos in the management of his JPT account, and eventually allowed Koutsoubos to trade without advanced approval. Koutsoubos exercised influence over Bryant, acting as a cheerleader, and encouraging investment strategies, such as day trading, by assuring Bryant that he would regain lost profits and that the market would turn around. It is reasonable to conclude that Bryant relied on Koutsoubos' recommendations, despite the fact that they were contrary to his desired strategy, because he trusted Koutsoubos and because Koutsoubos was an experienced professional. Based on the foregoing, I conclude that Koutsoubos exercised de facto control over Bryant's JPT account.

b. Excessive Trading

Analyzing whether excessive trading occurred in a customer account requires a determination of the customer's investment strategy. Prior to Koutsoubos becoming his registered representative, Bryant filed an account application listing his investment objective as growth and his risk tolerance as medium. After Koutsoubos became his registered representative, Bryant signed an Account Update Form listing his investment objective as speculation and his risk tolerance as aggressive. Other than the form itself, there is no evidence to suggest that Bryant desired this drastic change. I credit Bryant's testimony that the updated account form contains incorrect information, including incorrect investment objectives and risk tolerance, that Koutsoubos usually sent him forms with stars where Bryant should sign, and that Koutsoubos took care of the rest. Indeed, this appeared to be standard practice for Calabro and Konner, as well.

Koutsoubos essentially asks that I evaluate the Account Update Form within its four corners. Koutsoubos argues that Bryant repeatedly documented his aggressive risk tolerance and desire to aggressively trade his JPT account. Koutsoubos Br. at 29-30; Koutsoubos Reply Br. at 2. Koutsoubos claims that Bryant's Account Update Form supports a finding that Bryant wanted to engage in active trading and that he understood the higher risk involved. Koutsoubos Br. at 30-32; Koutsoubos Reply Br. at 2, 6. Koutsoubos argues that Bryant's opening of a margin account prior to Koutsoubos' becoming his registered representative, and his knowledge of the risks associated with such an account, lend support for a finding that Bryant was willing and able to take higher risk. Koutsoubos states that Bryant cannot now disavow his written

representations or claim he did not read what was provided to him. Koutsoubos Br. at 30-32; Koutsoubos Reply Br. at 2, 6.

I reject Koutsoubos' arguments. Bryant maintained an investment objective of growth and a risk tolerance of medium until Koutsoubos took over managing his JPT account. A significant change in investment objective and risk tolerance by a customer who had no retirement funds warrants an explanation. The changes that occurred when Koutsoubos took over managing Bryant's JPT account, together with the absence of a plausible explanation for such drastic changes, lend credibility to Bryant's testimony. Accordingly, I conclude that Bryant's investment objective and risk tolerance continued to be growth and medium, respectively, even after Koutsoubos became his registered representative.

I evaluate excessive trading through examination of several factors, such as the pattern of trading, turnover ratio, and cost equity factor. An annualized portfolio turnover rate in excess of six is presumed to reflect excessive trading where the customer's objective is conservative, and a cost equity factor between fifteen and twenty-one percent generally indicate churning on a conservative account. J.W. Barclay, 81 SEC Docket at 1658; see also DX. 155 at 6 (cost equity factor of twenty is indicative of churning). Although Bryant's investment objective was growth and risk tolerance medium, I conclude that Koutsoubos engaged in excessive trading of Bryant's JPT account because of the annualized turnover rate of fifty-six (nine times the rate presumed to indicate excessive trading), a breakeven ratio of 73.3%, and in excess of 190 purchase and sale transactions for the period January 1, 2008, through December 31, 2008.

I find it irrelevant that Bryant was contacted by someone at JPT and that he acknowledged that he was aware that his JPT account was actively traded, because it is unclear from the record when this occurred. Even assuming Bryant made this acknowledgment during the alleged churn period, as an unsophisticated investor relying on the recommendations of Koutsoubos and having no experience with actively traded accounts, Bryant cannot be expected to have understood or appreciated active trading, let alone have provided his consent through such an acknowledgement.

Accordingly, I conclude that Koutsoubos engaged in excessive trading of Bryant's JPT account.

c. Scienter

I am not persuaded by Koutsoubos' argument that he did not act with scienter because he did not try to conceal any information from Bryant. Koutsoubos supports his argument by claiming, among other things, that Bryant received monthly account statements detailing his investment performance and confirming the commissions for each transaction. Koutsoubos Br. At 38. Further, Koutsoubos relies on the fact that there was a \$100 maximum commission restriction on Bryant's JPT account during at least a portion of the alleged churn period. Id. at 37.

Rather, my finding of scienter is supported by the following facts. During the alleged churn period, JPT received a significant amount of commissions, including approximately \$53,000 between January and December 2008. At the same time, Bryant was sustaining large

losses in his JPT account. At a time when the market was dropping and Bryant wanted to withdraw from the market because his JPT account was losing money, Koutsoubos convinced Bryant, who he knew to be an unsophisticated investor, to allow him to day trade, by assuring Bryant the market would turn around and he would regain lost profits. Further, Koutsoubos misled Bryant by stating that he would waive his commissions. In fact, Bryant continued to pay commissions and fees while Koutsoubos engaged in day trading and his account was losing money.

Two factors are particularly probative evidence of scienter. First, Figure One, above, shows an obvious pattern of churning. Trading activity in Bryant's account increased over the course of the alleged churn period, albeit unsteadily, until October 2008, when there were forty-nine trades in the account, which was vastly in excess of anything indicated on any account forms. At the end of that month, Koutsoubos' commission restriction was changed from \$100 per trade to \$60 per trade. The rate of trading thereafter plummeted. Koutsoubos admitted that at \$100 per trade he was making some money, but that at \$60 per trade he was getting "crushed." There is only one plausible explanation for the sharp drop in trading activity: Koutsoubos decided to stop churning Bryant's account. I find Koutsoubos' testimony that his commission made no difference in his trading in Bryant's account to be knowingly false. Second, Koutsoubos did not even bother to ensure that Bryant had adequate documentation on file. There is no AASS or AASQ for Bryant's account prior to March 2009, and Koutsoubos clearly did not document Bryant's desired frequency of trades. I conclude that Koutsoubos acted with the highest degree of scienter in churning Bryant's account.

2. Carlson

I found Carlson's testimony to be generally credible. He was somewhat non-committal, particularly on cross-examination, but his demeanor and matter-of-fact tone bolstered his credibility. Carlson was particularly credible on the subject of his net worth, as explained below.

a. Control

Carlson was not a sophisticated investor. He has spent most of his adult life working as a self-employed grain farmer. Although Carlson has four retirement accounts, each account is managed conservatively without active trading. Lacking expertise or knowledge to trade securities on his own, Carlson relies on the direction and recommendations of his registered representative for each account. Konner initiated frequent contact with Carlson to inform him about recommended trades in his JPT account, or to discuss sending more money for investment. Carlson very seldom reached out to Konner, and I find it credible, given the established pattern of his reliance on registered representatives in all of his retirement accounts, that Carlson would not have traded in his JPT account without being contacted first by Konner and without Konner's recommendation. Tr. 1420.

Konner dismisses as irrelevant the fact that Carlson was a farmer from Iowa, but emphasizes Carlson's ability to run his farming business and prepare his tax returns, and his experience with "numerous investment accounts," as evidence of his sufficient intelligence and understanding of the securities market to evaluate trade recommendations. Konner Br. at 16-17; Konner Reply Br. at 4-5. Konner also argues that by evaluating the totality of the circumstances,

it is evident that Carlson maintained control over his account, as evidenced by the fact that he could, and in fact did, reject conservative investment recommendations and initiated investment recommendations with Konner. Konner Br. at 33-34; Konner Reply Br. at 5.

I discount Konner's arguments. With his extensive experience in the farming industry, it is no surprise that he is capable of running a successful farming business and making successful business decisions relating to it. This does not, however, automatically translate into an ability to understand and evaluate financial markets. Further, it is unclear from the record whether Carlson rejected any of Konner's recommendations. Konner testified that he presented several conservative investment ideas as well as a REIT, and that Carlson rejected these recommendations. Tr. 4379-82. Carlson, on the other hand, testified that he does not recall ever rejecting a trade recommendation by Konner. Tr. 1839-40. Particularly given his demeanor, I find that Carlson's testimony on this point is the more credible.

I find that Carlson passively acquiesced to Konner's trade recommendations, trusting Konner and relying on his knowledge and expertise of the financial markets. Carlson relied to his detriment on Konner's assurances that investments that were not doing well in his JPT account would "go the other way," even after Konner made unauthorized trades in his account because he trusted Konner to act in his best interest. Tr. 1687, 1788-92. Although Carlson invested in one security that was not a trade recommendation from Konner, it was made pursuant to a recommendation of someone else, not on his own accord. Tr. 1726. Carlson lacked familiarity with the companies in his account, he lacked the knowledge and experience required to recommend investments to Konner, and he lacked the knowledge and understanding to conduct internet research. These facts provide overwhelming support for a finding that Carlson lacked the general investment knowledge and sophistication to control his account, which left de facto control of the JPT account in Konner's hands.

b. Excessive Trading

I conclude that the account application form and Account Update Forms were filled out for Carlson by Konner, and that they contain misstatements relating to Carlson's financial information and/or investment objectives and risk tolerance. In short, Carlson's investment objectives and risk tolerance are not accurately reflected. The reason for these errors is not entirely clear, in part because the testimony of Konner, Carlson, and J. Williams all differed. However, it is reasonable to conclude that Konner failed to explain, and Carlson failed to understand, the various types of investment objectives as they apply in the securities industry and that Konner listed incorrect financial information to avoid the attention of the compliance department.

This conclusion is supported by the changes to the financial information and the investment objectives contained on the July 2007 Account Application form and the April 2008 Account Update Form, both of which were received by Carlson already filled out and simply required his signature. Tr. 1676-77, 1693; DX. 49; DX. 50. Between July 2007 and April 2008, Carlson had increased his investment in his JPT account significantly, but Carlson's net worth as represented on the account forms increased inexplicably more. Carlson testified that the financial information contained on the July 2007 account application form was accurate, as was the financial information contained on the February 2010 AASQ. Tr. 1714-16. This leaves the

question of why the financial information was inaccurate on the April 2008 Account Update Form. Konner failed to provide a credible explanation for the change in the financial information on the forms or the inaccuracies contained thereon. J. Williams seemed to think nothing of the fact that Carlson's financials had changed so drastically. In the absence of a credible alternative explanation, it is reasonable to conclude that the inaccuracies were input by Konner in an effort to engage in active trading of Carlson's JPT account without drawing the attention of the compliance department. Further evidence of Konner's desire to engage in active trading without drawing attention to Carlson's account is the fact that the primary investment objective was changed from trading profits in July 2007 to speculation in April 2008, following Carlson's increased funding of his JPT account. This is exactly the opposite of what Carlson desired; he indicated that he would be more conservative with a higher account balance.

Konner argues that it is indisputable that Carlson intended to use his JPT account for speculation and aggressive trading in the hopes of generating high returns. Konner Br. at 31. Konner relies heavily on testimony by J. Williams in support of his argument that Konner's aggressive and speculative trading was consistent with Carlson's objectives and goals. Konner Reply Br. at 6-7. In fact, Konner suggests that J. Williams' testimony is more credible as an independent voice, and argues that J. Williams confirmed Carlson's financial information, including that his net worth was \$2 million. Id. at 7. Further, Konner relies on the fact that Carlson had opportunities to speak with compliance and management at JPT about the erroneous information or frequency of trading in his account, but failed to complain or inquire. Id.

I am not persuaded by Konner's arguments or the evidence he relies on. First, I place little weight on the testimony of J. Williams as it pertains to certain crucial points. In reference to a change in Carlson's net worth on the March 2009 AASQ, J. Williams could not specifically recall speaking with Carlson and instead insists it was his general practice to contact clients so he must have done so. Tr. 3705-06. An increase in net worth from \$700,000 to \$2 or \$2.5 million is remarkable, so much so that if a reasonable supervisor had actually taken note of it, he would have investigated. J. Williams clearly neither took note of, nor investigated, Carlson's amazing wealth increase. Lastly, J. Williams had a very poor demeanor. He was timid and quiet, and at one point even the court reported noted how hard it was to hear him. Tr. 3633. When I asked him whether he would be concerned about a registered representative telling a customer that the numbers on the AASQ "don't matter," he hesitated, with a blank expression on his face, as if he had never considered such a scenario before. Although his testimony was generally credible on technical issues, on certain key points he was not credible at all. Accordingly, the credibility of J. Williams' testimony regarding Carlson's March 2009 AASQ is very low.

Perhaps the most relevant piece of evidence and testimony is that Carlson wrote on his March 2009 AASQ a trade frequency of four per week. Tr. 1712. Carlson clearly indicated a trade frequency he found to be tolerable. Despite this, Konner recommended and engaged in significantly more trades than this, including unauthorized trades.

Further, analysis of the pattern of trading, turnover ratio, and cost equity factor in Carlson's account support a finding of excessive trading. Carlson's JPT account had an annualized turnover rate of seventeen (nearly triple the rate presumed to indicate excessive

trading), a cost equity factor of 34.6 percent, and in excess of 250 purchase and sales transactions for the period January 1, 2009, through December 31, 2009. DX. 155 at 18-19.

Based on the foregoing, I find that Konner engaged in excessive trading in Carlson's JPT account.

c. Scienter

Konner argues that the evidence pertaining to what Carlson was looking for from his account and from the money invested in his JPT account establishes that Konner did not seek to take advantage of the situation for his own personal gain or act with scienter. Konner Br. at 35. Konner suggests that the evidence supports a finding that Carlson liked the idea of investing aggressively and was fully on-board with it, and that "the risks were disclosed, the costs were known, and they proceeded voluntarily and deliberately." Id. at 35-36. Konner relies on his return of funds to Carlson for his payment of estimated taxes as evidence that he was not attempting to hold onto Carlson's money to generate more activity and commissions. Id. at 36.

I conclude that Konner acted with scienter. During the alleged churn period, Konner provided pre-filled out forms relating to Carlson's account, and represented, knowing fully the implications of his representations and the fact that Carlson did not, that certain financial information did not really mean anything. Konner, having earned the trust and confidence of Carlson, and knowing he was not a sophisticated investor, directed him to sign various forms without first explaining their meaning or implication, for the sole purpose of generating activity and commission for his personal gain. Carlson engaged in trading activity, including excessive and unauthorized trading, in direct conflict with the actual investment objectives and desires of Carlson.

I find Konner's inconsistent explanations of Carlson's net worth, as documented in JPT account forms, to be particularly probative of scienter. As noted above, Konner was strikingly inconsistent when questioned about the source and accuracy of Carlson's net worth figure. When first questioned about it, he testified that: he does not know if he had a conversation with Carlson about his net worth, his recollection of what Carlson told him was "what was put down on the form he signed," he remembered what Carlson told him "[i]f that is what is put down there," and Carlson "ha[d] a two million dollar net worth as he stated to me." Tr. 380-82. Only later did Konner testify that Carlson was worth a lot more than the amount included on the Brokerage Account Application, but apparently did not want to disclose that fact to Konner at first. Tr. 386. He also testified that J. Williams or Sideris called Carlson and changed the net worth figure from \$2 to \$2.5 million. Tr. 4345. At other times, he testified that Carlson wrote in the \$2 million figure. Tr. 382, 4435-36. According to Konner, Carlson knew a lot about the markets and had "more in the market" than what he initially disclosed to Konner. Tr. 386-87; DX. 49. By contrast, Carlson was emphatic and consistent and had a very persuasive demeanor in testifying that he was not worth anywhere near \$2.5 million. The only plausible explanation for Konner's shifting explanations of Carlson's listed net worth is that he was making it up during the hearing as he went along, and that he made up the numbers when they were placed on the forms. This is powerful evidence of a high degree of scienter.

Based on the foregoing, I find that Konner acted with scienter and churned Carlson's JPT account.

3. Williams

Calabro argues that Williams' testimony was incredible because it was contrived. Calabro Br. at 14. Specifically, Calabro argues: (1) Williams' testimony that he signed blank forms is unreliable because he stated to the contrary two years earlier to Division staff; (2) Williams' testimony that the information contained in the forms was inaccurate is incredible because Williams himself testified that Calabro called him for information "to put on the form"; (3) the documentary evidence does not support Williams' testimony that the JPT forms misstated his investment experience, because the JPT forms contained the same information as forms Williams filled out and signed around the same time period; (4) Williams' testimony regarding his investment objectives is unreliable; and (5) Williams' testimony was incredible because of the inconsistencies between his story on direct examination when the Division was asking leading questions and his answers on cross examination. Id. at 16-21.

I am not persuaded by Calabro's arguments. I found Williams to be a generally credible witness. His demeanor, particularly his tone of voice, bolstered his credibility. Williams' testimony regarding his investment experience, his investment objectives, and his dealings with Calabro, were especially credible. By contrast, Calabro's testimony was inconsistent and sometimes extremely confusing on numerous points. Moreover, even assuming that Williams' pending FINRA arbitration gives him a motive to be untruthful, Calabro's motive is even stronger, because he is faced with potential arbitration awards pertaining to Moore and Willhoft, as well. As between Williams and Calabro, I generally find Williams to be the more credible witness.

a. Control

Calabro argues that Williams had the intellect and business experience to understand and make decisions on Calabro's recommendations. Calabro Reply Br. at 10. Calabro also argues that the trading strategy was disclosed to Williams and that he did nothing to prevent Williams from understanding his recommendations. Id. He asserts that "Williams had the capacity to, and felt comfortable, rejecting a trade recommendation he felt was unsuitable." Calabro Br. at 33. Calabro specifically relies on Williams' educational background and his thirty years of investment experience, as stated in various forms, as evidence that Williams at all times maintained control of his JPT account. Id. at 33-34.

I disagree that Williams maintained control over his JPT account. I find, among other things, that: (1) Williams lacked investment experience and sophistication; (2) Williams had full trust and confidence in Calabro and habitually followed the advice and investment strategy developed by him; and (3) Calabro engaged in unauthorized trading in Williams' account.

Williams is not a sophisticated investor and his experience with the securities markets is limited. Williams admitted that he received an M.B.A and taught business classes, but his education focused on economics, marketing, and accounting and he did not teach courses

relating to finance or investment. The fact that Williams performed a “quick analysis” of his account is not surprising given Williams’ background teaching quantitative analysis. Tr. 1470-72, 1632-33. However, this ability is not evidence of, and cannot be interpreted as, securities trading experience. The ability to conduct a profit and loss analysis does not imply the ability to pick stocks. Indeed, Calabro testified (and on this point I credit his testimony) that Williams made mistakes in his analysis. Williams had limited experience in the securities markets; he had one major brokerage account prior to investing at JPT and his brokerage accounts were managed by representatives of their respective firms. He relied entirely upon his brokers, including Calabro, when buying stocks. Tr. 1410, 1456-57, 1560-61.

Calabro’s arguments that he communicated his investment strategy to Williams and did not prevent him from understanding it, and that Williams did have an understanding of short selling, are beside the point. Calabro unilaterally devised and altered, as necessary, his investment strategies for Williams’ account. Although Williams admitted that Calabro communicated to him his intent to short-sell in his account, the credible evidence shows that Williams merely acquiesced to it. Also, when Calabro’s investment plan did not appear to be working, he altered or changed it, without Williams’ participation. This is persuasive evidence that Calabro usurped control of Williams’ JPT account.

Based on Williams’ credible testimony, I conclude that he never made securities recommendations and that Calabro traded without his knowledge, and without discretionary authority. Tr. 1451. Accordingly, even if Williams was comfortable with rejecting Calabro’s trade recommendations, Calabro usurped control of his account by engaging in unauthorized trading, thereby making it impossible for Williams to evaluate and reject unsuitable recommendations. Additionally, I find Williams’ testimony that Calabro called him just to tell him what trades he was making in Williams’ account, his testimony that he accepted what Calabro told him as correct and he did not try to change Calabro’s mind, and his testimony that he never took it upon himself to research Calabro’s recommendations, credible.

Based on the foregoing, I conclude that Calabro exercised de facto control over Williams’ account.

b. Excessive Trading

Calabro, relying on the new account forms, options forms, and AASQs and AASSs, argues that Williams’ investment objectives were speculation, trading profits, capital appreciation, and growth, and that his risk tolerance was aggressive. Calabro Br. at 31-32; Calabro Reply Br. at 1-3. Calabro argues that Williams understood that Calabro’s investment strategy was short-term and involved high-risk, which Williams confirmed in a handwritten letter to Calabro and on various forms. Calabro Reply Br. at 3-4. Additionally, Calabro argues that Williams’ forms were not blank when he signed them, and that the Division’s evidence of turnover and cost equity factor is unreliable. Calabro Reply Br. at 7-8.

Calabro’s arguments are not persuasive. Williams testified that his risk tolerance was moderate or conservative, that he had limited general investment knowledge, and that his investment objectives were more in line with preservation of capital and capital appreciation than

speculation. Tr. 1438-39, 1443-44, 1448. I find Williams' testimony on these points to be credible and supported by the record. For example, the fact that Williams' S&B account was managed for fifteen years by the same broker, and stocks were held for an average of ten years, supports Williams' testimony.

Calabro argues that Williams' Newbridge account shows Williams' investment objective was speculation and his risk tolerance was aggressive. Calabro Br. at 20. I disagree. The Newbridge account, whatever its associated forms stated, was not traded actively or aggressively, and Williams did not consider its holdings to be risky or speculative. Williams, after becoming aware that he was listed as a speculative investor at Newbridge, sent directives to correct the error. DX. 216. The fact that Williams did not correct his Newbridge forms until years after signing them is not particularly significant, because the account was not active or speculative.

Williams consistently and emphatically testified that his JPT account forms and Newbridge forms contained inaccurate information, including his investment objectives and risk tolerance. Additionally, he credibly testified that his true investment objectives were capital preservation and capital appreciation, and that his risk tolerance was no greater than moderate. Based on the foregoing, I conclude that Williams' investment objectives did not include speculation and that he did not have an aggressive risk tolerance.

Calabro argues that Dempsey's calculations of turnover and breakeven rates are faulty. Calabro Br. at 23-27; Calabro Reply Br. at 8-10. I am not persuaded. I agree that a short-sale strategy necessarily involves short-term trading, and generally leads to higher account trading metrics, but I am not persuaded that this makes a difference here. Short positions are much more inherently risky than long positions, and it is imperative in short selling that the customer be aware that it is necessarily an aggressive and speculative strategy. The result is that, in my view, the "conclusive of churning" triggers, e.g., a turnover rate of six, should actually be lower for short positions than for long positions. In any event, even using Calabro's modified "short" formula, the turnover rate in Williams' account was 6.6, which is conclusive of churning for a conservative account. Calabro Br. at 24. Similarly, the fact that an account with a rapidly dropping value generates rapidly increasing churning metrics appears to be a feature of the metrics, not a bug. An account that maintains its value but increases its trading generates a higher turnover, ROI, and cost equity factor; an account that maintains its trading level but loses account value also generates a higher turnover, ROI, and cost equity factor. Both situations are potentially indicative of churning, the first because of high trading activity, and the second because of account losses, and both situations merit investigation by supervisors and the compliance department.

Williams' account had an annualized turnover rate of eight, a cost equity factor of 22.9%, and in excess of 270 purchase and sales transactions for the period December 31, 2008, through November 2009 (the alleged churn period). These calculations prove that Calabro engaged in excessive trading. Even accepting Calabro's arguments regarding the churning formulas, Williams' AASQ lists a trade frequency of three to six trades each month. For each of the months of April, May, and June 2009, there were a total of between thirty and sixty-eight trades, and for the alleged churn period the trading exceeded the rate of six per month by a factor of

almost four. DX. 8; see also Tr. 1486-90. The evidence is overwhelming that Calabro traded Williams' account excessively.

Based on the foregoing, I find that Calabro engaged in excessive trading in Williams' account.

c. Scienter

Calabro argues that the Division has not proven that he acted with scienter and that the evidence shows that "Calabro's actions were not deceptive or meant to mislead his customers; he explained his strategy to his clients and pursued it, and each customer received multiple documents setting forth the objectives for their accounts." Calabro Reply Br. at 13 n.9. He also argues that scienter was lacking as evidenced by the fact that his trading strategy was reviewed and approved by his superiors. Id. at 15; Calabro Br. at 38-39. Lastly, Calabro contends that the evidence does not prove that he implemented a trading strategy for the principal purpose of generating commissions; rather, his "core interest was to 'work[] very hard and [do] research and [he] tried to make them money.'" Calabro Br. at 37-38.

I am not persuaded. Calabro engaged in unauthorized and excessive trading and he unilaterally devised and carried out an investment strategy contrary to Williams' investment objectives and risk tolerance, which resulted in a substantial gain for Calabro and a massive loss for Williams. That Bresner and Calabro's AVP approved his trading strategy is a red herring, because there is no evidence that Bresner, at least, had any idea what Williams' true investment objectives were. I find Williams' testimony that "Calabro would sometimes exaggerate the results of his trading" credible. Tr. 1472, 1459. To the extent Calabro's testimony is inconsistent with Williams' on these points, I credit Williams; as described above, Calabro's testimony is replete with inconsistencies, changed stories, and general confusion. Calabro was, quite simply, not a believable witness on most crucial points.

Based on the foregoing, I conclude that Calabro acted intentionally, that is, with scienter, and churned Williams' account.

4. Willhoft

Willhoft's testimony was unreliable on certain key points. Willhoft's testimony relating to his investment experience and his investment objectives paint two very different pictures. Willhoft claimed to be an unsophisticated investor with no experience picking stocks, but recalls recommending and picking investment stocks based on information he may have heard on the radio. Tr. 1104, 1133, 1208, 1217-1219, 1227, 1353. Willhoft claimed to be a conservative investor, but had multiple investments in oil wells and "shadow traded" in his Ameritrade account. Tr. 1065-67, 1087, 1188, 1202-1204, 1211-1219, 1223, 1289, 1352-54; RCX. 70-73, 78, 75-77, 80. Willhoft's demeanor was generally good, and I conclude that he was not intentionally or purposefully incredible; rather, his recollection of pertinent facts was caused by a lapse in memory. Nonetheless, his testimony negates a finding of churning.

a. Control

It is undisputed that Willhoft's JPT account was non-discretionary. The Division argues that Willhoft was an unsophisticated investor that surrendered de facto control over his JPT account to Calabro. Div. Br. at 60-64. I disagree. Willhoft had sufficient intelligence and understanding to evaluate Calabro's recommendations and reject ones he thought unsuitable. Particularly compelling is the fact that Willhoft traded in his Ameritrade account by himself. He initially denied shadow trading, and could not readily explain why he traded the way he did not his Ameritrade account, but the documentary evidence shows that he was generally trading the same stocks Calabro bought for him in his JPT account.

The Division argues that Calabro made unauthorized trades in Willhoft's JPT account and that this weighs in favor of finding that Calabro exercised de facto control over Willhoft's account. Div. Br. at 63-64. The only evidence of unauthorized trading in Willhoft's JPT account is his testimony stating that Calabro made trades without prior confirmation from him. Tr. 1100-1101. However, as previously noted, Willhoft's testimony is not entirely reliable and there is no corroborating evidence suggesting that Willhoft did not consent to these trades. In fact, Willhoft was unsure how many unauthorized trades Calabro made in his JPT accounts and that he did not see the confirmations for them. Tr. 1102-1103.

Willhoft was happy with Calabro as his broker, so much so he recommended Calabro to a friend, while his account was trading successfully. Willhoft became dissatisfied with Calabro only after his JPT account began to decline. In sum, Willhoft's unhappiness came as the result of hindsight, not because Calabro usurped control over his JPT accounts.

b. Scienter

Additionally, I find that, even assuming Calabro had de facto control and traded excessively, there is insufficient credible evidence of scienter. As noted, Calabro was generally not a credible witness. However, one of the factors to consider in evaluating scienter is suitability. The fact that Willhoft shadow traded in his Ameritrade account establishes that, for the most part, Calabro's recommendations were suitable to Willhoft. Although I find it to be a close question, I conclude that Calabro did not act with scienter.

Accordingly, Calabro did not churn Willhoft's account.

5. Gordon Miller

a. Excessive Trading

I conclude that the element of excessive trading was not proven as to Miller. Miller testified that he was not unhappy about how Konner was managing his account, but about how it was ultimately unprofitable. Tr. 2023, 2109. Also, Miller admits that he never told Konner to stop the frequent trading, and in fact, Miller continued to provide additional funds when they were required to purchase additional securities. Tr. 2046, 2048-51, 2067; JKX. 10. Miller did not have conservative trading objectives.

The Division argues that Miller's account documents do not accurately reflect his real investment objectives. Div. Br. at 56-57. The Division states that even assuming Miller wanted to manage his account aggressively or speculate, Konner abused the trust and reliance of Miller and engaged in excessive trading. Id. I disagree. Miller's account documents indicate that his investment objective was speculation. I find Miller's testimony on this point confusing and unreliable. As noted above, his understanding of the meaning of "speculation" was very vague, and I am forced to conclude that he wanted to speculate. Any of Miller's testimony to the contrary is fatally undermined by his concession that he was only unhappy with Konner over his losses, and not his trading frequency. Furthermore, Miller had successfully engaged in speculative trading in the past. He testified that he had experience in speculation when he invested money with a grain trader; that he invested in Denison Mines, a uranium prospector, which is surely a speculative investment; and that he invested in Big and Little Management, a company that was trying to go public and that Miller admitted was speculative. Tr. 2001-2002, 2078, 2085-87.

I conclude that the Division failed to prove that Konner engaged in excessive trading of Miller's account relative to Miller's trading objectives.

b. Scienter

Additionally, I find that, even assuming Konner had de facto control and traded excessively, there is insufficient credible evidence of scienter. In sharp contrast to Carlson's account, as to which there is evidence of false statements both in account documentation and on the witness stand, there is little evidence of scienter as to Miller's account. That Konner is a brash, aggressive, high-pressure salesman is not evidence of scienter. Div. Br. at 67. That Konner pursued a speculative and short-term trading strategy is also not evidence of scienter, unless it is knowingly inconsistent with the customer's objectives. Div. Br. at 65. Even assuming that Miller's trading objective was not speculation, if his conversations with Konner were as inconsistent and vague as his hearing testimony was regarding speculation, Konner would have been justified in concluding that Miller desired to engage in the strategy Konner used for his account.

I thus conclude that Konner did not act with scienter, and that he did not churn Miller's account.

6. Bruce and Pamela Mills

I conclude that the Division did not prove that Koutsoubos had de facto control of the Mills' account. I found B. Mills to be generally incredible. Evasiveness and forgetfulness were prominent throughout his testimony, particularly on cross examination. However, to the extent he made statements against his interest, I consider them credible. I found P. Mill's testimony to be generally much more credible than her husband's. P. Mills provided relevant first-hand knowledge of the facts and circumstances surrounding Koutsoubos' handling of the Mills account, and her demeanor was matter-of-fact.

The Division argues that Koutsoubos exercised de facto control over the Mills' JPT account because they relied on and trusted Koutsoubos and could only recall one or two trades

that they suggested. Div. Br. at 62-64. The fact that the Mills generally followed the recommendations of Koutsoubos is not conclusive evidence that they did not maintain control over their JPT account. In fact, the evidence is very persuasive that the Mills had the capacity to, and did in fact, exercise the right to say “yes” or “no” to securities recommendations from Koutsoubos and to make securities recommendations of their own to Koutsoubos. P. Mills testified that she recalls declining a real estate investment recommended by Koutsoubos, and she recalled a handful of times that she declined his recommendations. Tr. 2356-2357, 2426-2431; DKX. 10. Also, B. Mills testified that he often had conversations with Koutsoubos about investing in Apple, a fact corroborated by P. Mills. Tr. 2145. To a much greater extent than any other investor in this proceeding, B. Mills appeared to be very aggressive about pushing his recommendations.

That the Mills’ freely defunded their JPT account in 2007 and replenished it later that year also demonstrates a lack of de facto control. Koutsoubos Br. at 35. In order to defund their JPT account, the Mills had to direct Koutsoubos to sell their holdings, and B. Mills testified that it was not Koutsoubos’ idea, but completely within the control of his P. Mills. Tr. 2264-2265.

The Division also argues that Koutsoubos made unauthorized trades in the Mills’ JPT account and that this weighs in favor of finding of de facto control by Koutsoubos. Div. Br. at 63-64. I do not credit the evidence supporting this assertion. P. Mills testified that she had no reason to believe that anything was wrong in her JPT account before she spoke with the Division. Tr. 2388-89. B. Mills’ testimony that Koutsoubos occasionally entered trades without confirming them with him is not fully credible and is inconsistent with his wife’s testimony; indeed, it is entirely unbelievable that B. Mills would have known of unauthorized trades when his wife did not. Tr. 2145-48. Moreover, the Mills continued to invest with Koutsoubos even after the alleged unauthorized trades.

Based on the foregoing, I conclude Koutsoubos did not have de facto control of the Mills’ account and did not churn it.

7. Moore

I conclude that the Division did not prove that Calabro excessively traded in Moore’s account. Moore’s use of handwritten notes during his testimony severely undermined his credibility. As a result, I find Moore’s testimony less credible than Calabro’s on certain key points. Particularly, I find Calabro’s testimony relating to Moore’s investment objectives and risk tolerance more credible than Moore’s.

The Division argues that the trading in Moore’s account was inconsistent with Moore’s true investment objectives and risk tolerance, and was excessive by any standard. Div. Br. at 55. I disagree. Moore opened his JPT account in December 2008 and sustained losses totaling over \$800,000 between February and November 2009. Despite this, Moore continued to add money and continued shorting stocks in his JPT account. Also, Moore referred potential clients, including his attorney and ex-wife, to Calabro even while he was sustaining significant losses. After his JPT account value declined by approximately \$500,000, Moore opened a brokerage account for his son.

Moreover, Moore maintained a self-directed brokerage account and hired an individual who engaged in day trading in that account after he stopped trading in his JPT account. Moore testified somewhat confusingly that he learned of the day trading and did not try to stop it and later that he was aware of the day trading but not of the fact that the individual was trading on margin. Tr. 738, 784-85. I find little credibility in Moore's suggestion that he was unaware of the day trading in the Fidelity account and even less credibility that he was unaware that there was trading on margin occurring in the account. Moore admitted that he maintained a margin account at JPT. DX. 34. Having previously maintained a margin account at JPT, he was likely familiar with margin account trading and was at least aware of the existence of the margin account at Fidelity.

The credible testimony of Calabro and the supporting documentary evidence suggest that Moore was pessimistic about the state of the economy and political affairs and that he sought to profit by short sales. See RCX. 29; RCX. 35; see also Tr. 4134-35, 4138. RCX. 29 is an email Moore forwarded to Calabro regarding a political issue, but it is consistent with Calabro's testimony that Moore was pessimistic about the economy. RCX. 35 is another email Moore forwarded to Calabro, but is about a particular company with poor performance, and it, too, is consistent with Calabro's testimony that Moore was pessimistic about the economy. Such pessimism corroborates Calabro's contention that Moore wanted to sell short.

In support of its position that Calabro did engage in excessive trading, the Division relies on the expert findings and testimony of Dempsey. Div. Br. at 10-11; Div. Reply Br. at 26-31. Clearly, the number of transactions, the cost-to-equity ratio, and the turnover rate would be elevated in an actively traded account. These elevated figures do not support a finding of excessive trading, however, because Calabro managed and engaged in trading consistent with Moore's investment objectives and risk tolerance.

Based on the foregoing I conclude that Calabro did not engage in excessive trading and therefore, did not churn Moore's JPT account.

B. Failure to Supervise

1. Legal Standards

Under Section 15(b)(6) of the Exchange Act (in conjunction with Section 15(b)(4)(E)) and Section 203(f) of the Advisers Act (in conjunction with Section 203(e)(6)), the Commission may sanction someone who has failed reasonably to supervise—with a view to prevent violations of the federal securities laws, rules, and regulations—another person subject to his supervision who commits such violations, if such sanction is in the public interest. 15 U.S.C. §§ 78o(b)(4)(E), (6)(A)(i), 80b-3(e)(6), (f).

Section 15(b)(4)(E) of the Exchange Act and Section 203(e)(6) of the Advisers Act provide an affirmative defense: no person may be deemed to have failed to reasonably supervise if (1) there have been established procedures, and a system for applying such procedures, to prevent and detect any violation; and (2) the person has reasonably satisfied his duties and

obligations without reasonable cause to believe that the procedures and system were not being followed. 15 U.S.C. §§ 78o(b)(4)(E)(i)-(ii), 80b-3(e)(6)(A)-(B). This affirmative defense does not apply where there are no “established procedures, or a system for applying those procedures, which together reasonably could have been expected to detect and prevent the violations.” John H. Gutfreund, 51 SEC 93, 111 n.20 (1992) (emphasis added).

Neither scienter nor willfulness is an element of a failure-to-supervise charge, although scienter may be considered in evaluating the reasonableness of supervision. Clarence Z. Wurts, 54 S.E.C. 1121, 1132 (2001); SEC v. Geon Indus., Inc., 531 F.2d 39, 53-54 (2d Cir. 1976). A supervisor for purposes of Section 15(b)(4)(E) has been defined as:

a person at the broker-dealer who has been given (and knows or reasonably should know he has been given) the authority and the responsibility for exercising such control over one or more specific activities of a supervised person which fall within the Commission’s purview so that such person could take effective action to prevent a violation of the Commission’s rules which involves such activity or activities by such supervised person.

Patricia Ann Bellows, Initial Decision Release No. 128, 1998 WL 409445, at *8 (July 23, 1998), 67 SEC Docket 1955, 1963-64 (quoting Arthur James Huff, 50 S.E.C. 524, 528 (1991) (Lochner, Schapiro, Commissioners, concurring)), review denied, Exchange Act Release No. 40411, 1998 WL 611766 (Sept. 8, 1998), 67 SEC Docket 2910.

Even when a person has delegated supervisory responsibilities, the supervisor retains the duty to follow up on that delegation. See Johnny Clifton, Securities Act Release No. 9417, 2013 SEC Lexis 2022, at *49 (July 12, 2013) (“[E]ven if we accepted [respondent’s] claim that he delegated . . . authority to review and approve e-mails, [respondent] . . . retained a duty to follow-up on that delegation, which he failed to do[.]”); see also Midas Sec., LLC, Exchange Act Release No. 66200 (Jan. 20, 2012), 102 SEC Docket 50351, 50372 (“It is not sufficient for the person with overarching supervisory responsibilities to delegate supervisory responsibilities to a subordinate . . . and then simply wash his hands of the matter until a problem is brought to his attention.” (internal quotation marks and alteration omitted)).

2. Bresner failed to reasonably supervise

To prove a failure-to-supervise claim, the following must be established: (i) an underlying securities law violation; (ii) association of the registered representative or person who committed the violation; (iii) supervisory jurisdiction over that person; and (iv) failure reasonably to supervise the person committing the violation. See SG Americas Sec., LLC, Exchange Act Release No. 59401, 2009 SEC LEXIS 366, at *35 (Feb. 13, 2009), 95 SEC Docket 14228, 14240. An underlying securities law violation was committed by both Konner and Koutsoubos, who each churned at least one JPT customer account. The second element of a failure to supervise claim is undisputed.

Bresner had supervisory jurisdiction over both Konner and Koutsoubos. Even accepting as true Bresner’s testimony that he never formally held the title of “head of supervision” but

instead was the “de facto head of supervision” in at least 2008 and 2009, Tr. 2752, 2756, Bresner was responsible for the supervision of active accounts, including those on which Konner and Koutsoubos were the registered representative. Bresner testified that he “was at the top of the supervisory food chain,” and also stated that he understood that individuals at JPT, including William Mello and Vernioia, referred to him or described him as the “head of supervision.” Tr. 2753-54, 2951. JPT’s WSPs indicated that Bresner, along with the compliance department and branch managers, were responsible for active account supervision, and the WSPs explicitly state that Level 4 accounts will be “managed at the discretion of the [executive vice president].” Tr. 2991-92; DX. 79 at JPTURNER-SEC-ATL 033086-88. Even accepting as true Bresner’s argument that he delegated supervisory responsibilities of his Level 4 accounts to others at JPT, including AVPs, Bresner was not relieved of his supervisory jurisdiction over Level 4 accounts. Bresner Br. at 11-12. As previously stated, a supervisor who delegates supervisory duties retains a duty to follow-up; Bresner did not lose or give up his supervisory jurisdiction over Level 4 accounts handled by Konner and Koutsoubos merely by delegating certain duties. Sanchez’ opinion to the contrary is utterly unpersuasive.

Having established that Bresner had, and maintained, supervisory jurisdiction during the entire Churn Period over Konner and Koutsoubos, the only remaining issue is whether Bresner failed to reasonably supervise them.

Bresner argues that he “reasonably discharged his responsibilities as Executive Vice President with respect to the accounts appearing at Level 4” and states, “[w]hat may be reasonable discharge of supervisory duties in one case can be unreasonable in another.” Bresner Br. at 10-11. In support of his argument Bresner contends that the language of the WSPs provided guidance on reviewing the Level 4 accounts but the details were at “the discretion of the [executive vice president] and other supervisors.” Id. at 11. Bresner stated that he adopted procedures for the review of Level 4 accounts and that he delegated the review of these accounts to AVPs, who he believed would take all necessary steps to review customer investment objectives and trading activity, and would have discussions with the account representatives, direct supervisors, and customers, where appropriate. Id. at 11-13.

Bresner also claims to have relied on the registered representatives’ direct supervisors to communicate with the representatives and the customers, although Bresner asserts that he conducted his own analysis of many customer accounts and often performed profit and loss analyses. Id. at 13. Bresner acknowledged that he did not document every step of his supervisory actions, but contends that following consideration of the AVPs and based on his own analysis and account review, he “determined that the most effective manner to address the Level 4 accounts was to impose severe commission restrictions.” Id.

The Division asserts that Bresner’s arguments fail for two reasons: first, “there is no documentation to support Bresner’s alleged delegation of his Level 4 responsibility” and his duties are clearly set out in the WSPs; and second, Bresner cannot contend that he “relied on the work of [J. Williams] and the AVPs to meet his responsibilities at Level 4.” Div. Reply Br. at 77-78. The Division argues that Bresner failed to take basic supervisory steps by failing to (1) contact customers to confirm their investment objectives and risk tolerances; (2) contact customers to determine whether they were comfortable with the level of trading in their account;

and (3) place Konner and Koutsoubos on heightened supervision when such action was necessary in light of the number of times their customer accounts appeared at Level 4 and the fact that the level of trading in the Carlson and Mills accounts exceeded the frequency of trades listed on their AASQs. Div. Br. at 70.

The Division also argues that Bresner failed to respond to red flags in the Carlson, Bryant, and Mills accounts. Id. at 70-71. Specifically, the Division asserts that red flags should have been raised for Bresner because (1) the accounts at Level 4 had ROI levels at or exceeding levels where excessive trading is presumed; (2) some accounts repeatedly appeared at Level 4, even after commission restrictions were placed on the accounts; (3) Konner and Koutsoubos each engaged in trading activity exceeding the “frequency of trades” set forth in the AASQs of some of their customers; and (4) one of Koutsoubos’ defrauded customers had no AASQ on file and the account repeatedly appeared at Level 4. Id. at 70-72.

I conclude that Bresner failed to reasonably supervise Konner and Koutsoubos with a view to preventing their violations of the antifraud provisions of the securities laws.

Bresner’s assertion that he delegated supervision of Level 4 accounts to others at JPT, mainly J. Williams and AVPs, is inadequate because there is no evidence that he took steps, or that there were any procedures in place, to verify those to which he delegated duties were adequately reviewing Level 4 accounts. Bresner’s testimony relating to J. Williams’ calls to customers is inadequate because it fails to establish the existence of procedures and direct action, or follow-up, on his part to ensure supervisory duties were being performed by his delegees. See Tr. 2866, 2970. Rather, his testimony suggests a lack of direct knowledge about J. Williams’ client communications. Tr. 2866 (Bresner testified that he “was told” J. Williams made calls to customers), 2970 (Bresner testified, “I was informed” that J. Williams made calls to customers) (emphasis added). A particularly notorious example in this regard is the complete failure of anyone at JPT to document Bryant’s desired frequency of trades, and to timely obtain an AASS and AASQ. Although it may have been the compliance department’s responsibility to ensure that an AASS and AASQ were on file, it is telling that nobody in the supervisory chain of command, including the branch managers and AVPs that Bresner relied on so heavily, even noticed the omission.

Even taking Bresner’s assertion that he delegated supervisory authority to J. Williams and AVPs as true, the record does not support a finding that Bresner undertook meaningful action to ensure the supervisory duties were carried out. See Tr. 2922-23, 2972, 2974 (Bresner acknowledging he did not know the substance of alleged conversations between J. Williams and the customers). J. Williams’ testimony provides little support for Bresner’s arguments, because J. Williams was unable to credibly testify or recall conversations between himself and customers, both substantively and generally, that would support Bresner’s assertions. Tr. 3646-50, 3652, 3654. Additionally, as noted above, J. Williams was generally not credible except on technical issues.

Bresner asserts that those he delegated supervisory duties to with respect to Level 4 accounts were responsible for conducting reviews and making recommendations based on their findings to him. Tr. 2996-98. This misses the point; as a supervisor, Bresner needed to follow

up by checking on the performance of the AVPs. There is evidence that he performed profit and loss analyses, but not consistently and only as to a fraction of accounts. Bresner readily articulated his procedures for review, but they were not documented, which he himself acknowledged during his testimony, and again in his post-hearing brief. Bresner Br. at 11.

Bresner admitted that churning was a concern and risk for JPT and acknowledged that churning was a brokerage industry concern. Tr. 2809-10. He also testified that initially there were glitches in AARS resulting in AASQs and AASSs failing to be issued for accounts above Level 2; he also knew that AARS, until mid-2009, provided quarterly reports over a month after the quarter's end. Tr. 2813, 3065-66. Additionally, AARS did not have an automatic feature to notify users that churning was occurring in an account, and human intervention was required to make the determination. Tr. 2809-10, 3084. It also did not have an automatic feature for performing profit and loss analyses, and still does not, even though profit and loss analyses were required at Level 3. That he knew these severe inadequacies existed in the AARS system conclusively demonstrates that JPT's procedures and systems could not reasonably have been expected to detect and prevent churning, and Bresner's affirmative defense therefore fails.

I accept Pinto's expert opinion that Bresner failed reasonably to supervise Konner and Koutsoubos, and adopt his reasoning as my own. Four additional points merit comment. First, I am shocked at the cavalier attitude Bresner displayed during the hearing toward churning. I was left with the impression that he thought churning is a problem for which he was not responsible, and that it was really for the compliance department to deal with. See Tr. 3061-33. Additionally, as I noted during the hearing, Bresner was at times very confused and disorganized, qualities which are not consistent with being the head of supervision. Admittedly, it may have been his medical condition, but Bresner testified that his medical condition did not affect his ability to testify. Second, I have searched the WSPs in vain for any explicit statement regarding responsibility for churning. Churning is mentioned in the WSPs, but only as something certain supervisors (not including the EVP) should look out for. DX. 79 at 69, 101. Churning should be addressed more prominently in JPT's WSPs, given its seriousness. Third, although it appears to have been an inadvertent success on Bresner's part, Bresner's imposition of a \$60 commission restriction on Koutsoubos in October 2008 stopped the churning in Bryant's account, as shown above in Figure One. For this reason, I conclude that Bresner's failure to supervise Koutsoubos extended only from January 2008 to October 2008, and I have considered this in evaluating sanctions. Fourth, I do not find that Bresner acted with scienter, that is, recklessly or intentionally, and I find nothing in Pinto's opinion inconsistent with that finding.

IV. SANCTIONS

The Division requests cease-and-desist orders, an associational bar, disgorgement, and civil penalties against Calabro, Konner, and Koutsoubos. Additionally, the Division seeks a supervisory bar and civil penalties against Bresner.

In determining sanctions, the Commission considers such factors as:

the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman, 603 F.2d at 1140 (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. Schild Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46.

As to Calabro, Konner, and Koutsoubos, the Steadman factors all weigh in favor of a heavy sanction. The actions of Calabro, Konner, and Koutsoubos were egregious and recurrent. They recklessly disregarded their customers' conservative investment objectives and risk tolerances and pursued an active trading strategy generating thousands of dollars in commissions. Calabro unilaterally devised and executed an investment strategy contrary to Williams' investment objectives; Konner took advantage of Carlson's trust and inexperience as an investor by having Carlson sign forms that only served to generate activity and further Konner's personal gain; Koutsoubos convinced Bryant, an unsophisticated investor, to allow him to day trade in a dropping market while assuring him the market would eventually turn back around. Calabro's, Konner's, and Koutsoubos' violations spanned months and involved hundreds of trades. As noted above, Calabro acted with scienter, Konner with a high degree of scienter, and Koutsoubos with the highest degree of scienter. Calabro, Konner, and Koutsoubos have failed to recognize the wrongful nature of their actions and none of them have made any assurances against future violations. In fact, they insist that no violations occurred. All three continue to work in the securities industry today, so their profession presents opportunities to violate the securities laws again.

As to Bresner, his actions were recurrent and, as I note above in discussing his confusion, disorganization, and attitude toward churning, I consider them egregious. He was negligent, but did not act with scienter. He has failed to recognize the wrongful nature of his actions, has made no assurances against future violations, and continues to work in the securities industry today. The Steadman factors are not unanimous, but they weigh in favor of at least a moderate sanction.

A. Cease-and-Desist Order

Sections 8A of the Securities Act, 21B(e) and 21C(a) of the Exchange Act, and 203(k) of the Advisers Act authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of those Acts or rules thereunder. Whether there is a reasonable likelihood of such violations in the future must be considered. KPMG Peat Marwick LLP, 54 S.E.C. at 1185. Such a showing is "significantly less than that required for an injunction." Id. at 1183-91. In determining whether a cease-and-desist order is appropriate, the Commission considers the Steadman factors quoted above, as well as the frequency of the violation, the degree of harm to investors or the marketplace, and the

combination of sanctions against the respondent. See id. at 1192; see also WHX Corp. v. SEC, 362 F.3d 854, 859-61 (D.C. Cir. 2004).

As to Calabro, Konner, and Koutsoubos, the Steadman factors all weigh in favor of a heavy sanction, their violations were frequent and recurrent, their customers were all significantly harmed, and the combination of sanctions, although severe, does not weigh against a cease-and-desist order. It is in the public interest to order Calabro, Konner, and Koutsoubos to cease and desist from committing or causing violations and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Associational & Supervisory Bars

The Division requests a bar against associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization, as to Calabro, Konner, and Koutsoubos. Such collateral bars are authorized pursuant to Sections 15(b) of the Exchange Act, 203(f) of the Advisers Act, and 9(b) of the Investment Company Act and will be ordered. Calabro, Konner, and Koutsoubos clearly have no business associating with the securities industry in any capacity, and, as discussed, the Steadman factors weigh in favor of a severe sanction. Except for his lack of scienter, a complete direct and collateral associational bar would also be appropriate as to Bresner. Given his lack of scienter, I will only order a supervisory bar as to him.

C. Disgorgement and Prejudgment Interest

Sections 8A(e) of the Securities Act, 21B(e) and 21C(e) of the Exchange Act, 203(j) of the Advisers Act, and 9(e) of the Investment Company Act authorize disgorgement of ill-gotten gains from Respondents. Disgorgement is an equitable remedy that requires a violator to give up wrongfully-obtained profits causally related to the proven wrongdoing. See First City Fin. Corp., 890 F.2d at 1230-32. It returns the violator to where he or she would have been absent the misconduct and deters others from violating the securities laws. Id.; see also Zacharias v. SEC, 569 F.3d 458, 471 (D.C. Cir. 2009).

The amount of the disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation. See Laurie Jones Canady, 54 S.E.C. 65, 84-85 n.35 (1999) (quoting SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996)), petition for review denied, 230 F.3d 362 (D.C. Cir. 2000); see also SEC v. First Pac. Bancorp., 142 F.3d 1186, 1192 n.6 (9th Cir. 1998) (holding disgorgement amount only needs to be a reasonable approximation of ill-gotten gains); accord First City Fin. Corp., Ltd., 890 F.2d at 1231-32. Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden of going forward shifts to the respondent to demonstrate that the Division's disgorgement figure is not a reasonable approximation. Guy P. Riordan, Securities Act Release No. 9085 (Dec. 11, 2009), 97 SEC Docket 23445, pet. denied, 627 F.3d 1230 (D.C. Cir. 2010). The consequence of uncertainty as to the disgorgement amount falls on the wrongdoer whose illegal conduct created the uncertainty. See First City Fin. Corp., 890 F.2d at 1232.

The Steadman factors all weigh in favor of disgorgement and prejudgment interest, and it will be ordered. The Division seeks disgorgement and prejudgment interest against Calabro, Konner, and Koutsoubos. The requested amount is based on the retained portions of the sales commissions that Calabro, Konner, and Koutsoubos received as payment for the trades made during the relevant churn period in the relevant account. Div. Br. at 73. The Division's expert, Dempsey, calculated the requested amounts using the retention percentages that Calabro, Konner, and Koutsoubos testified to in the underlying investigation. Id. at 74. In addition to disgorgement, the Division seeks prejudgment interest and requests that the interest amount be calculated beginning on the first day of the month following each violation as stated under Rule 600 in the Commission's Rules of Practice. Id.

The disgorgement amounts and prejudgment interest sought by the Division will be limited to the accounts of Williams, Carlson, and Bryant. In the Division's post hearing brief, the amounts are further broken down to illustrate how much of the total disgorgement relates to each customer. Div. Br. at 73-74. As the registered representative for Williams, Calabro is ordered to disgorge \$282,000 plus prejudgment interest of \$34,975.90. As the registered representative for Carlson, Konner is ordered to disgorge \$55,000 plus prejudgment interest of \$6,613.57. As the registered representative for Bryant, Koutsoubos is ordered to disgorge \$30,000 plus prejudgment interest of \$5,028.18. Prejudgment interest shall be calculated from January 1, 2010, the first day of the month following the last day of the Churn Period, through the last day of the month preceding the month in which payment of disgorgement is made. See 17 C.F.R. § 201.600(a).

D. Civil Penalty

The Division requests imposition of civil penalties against Bresner, Calabro, Konner, and Koutsoubos. Sections 8A(g) of the Securities Act, 21B of the Exchange Act, 203(i) of the Advisers Act, and 9(d) of the Investment Company Act authorize the Commission to impose civil money penalties for willful violations of the Securities, Exchange, Advisers, or Investment Company Acts or rules thereunder.

In considering whether a penalty is in the public interest, the Commission may consider six factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. See Sections 21B(c) of the Exchange Act, 203(i)(3) of the Advisers Act, and 9(d)(3) of the Investment Company Act; New Allied Dev. Corp., 52 S.E.C. 1119, 1130 n.33 (1996); First Sec. Transfer Sys., Inc., 52 S.E.C. 392, 395-96 (1995); see also Jay Houston Meadows, 52 S.E.C. 778, 787-88 (1996), aff'd, 119 F.3d 1219 (5th Cir. 1997); Consol. Inv. Servs., Inc., 52 S.E.C. 582, 590-91 (1996). "Not all factors may be relevant in a given case, and the factors need not all carry equal weight." See Robert G. Weeks, Initial Decision Release No. 199 (Feb. 4, 2002), 76 SEC Docket 2609, 2671.

A three-tier system establishes the maximum civil money penalty that may be imposed for each violation found. 15 U.S.C. § 78u-2(b). Where a respondent's misconduct involved fraud, deceit, or deliberate or reckless disregard of a regulatory requirement and resulted in "substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain," a third-tier penalty of up to \$130,000 may be imposed for each act or omission prior to March 3, 2009, and \$150,000 for each act or omission thereafter. Id.; 17

C.F.R. § 201.1004, .1005 (adjusting the statutory amounts for inflation). The provisions, like most civil penalty statutes, leave the precise unit of violation undefined. See Colin S. Driver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435, 1440-41 (1979). It must be determined how many violations occurred to impose civil penalties under the statute. See Rapoport v. SEC, 682 F.3d 98, 108 (D.C. Cir. 2012).

The Division seeks a one-time maximum third tier civil penalty of \$150,000 against Bresner. Div. Br. at 78. For Calabro, Konner, and Koutsoubos, the Division seeks the maximum third tier penalty for each customer who was a victim of churning by that respondent. Id. at 77. Specifically, the Division requests a total civil penalty of \$450,000 against Calabro (\$150,000 multiplied by three customers), a total civil penalty of \$300,000 against Konner (\$150,000 multiplied by two customers), and a total civil penalty of \$280,000 against Koutsoubos (\$150,000 for the Mills account and \$130,000 for Bryant's account). Id. at 78.

Although the tier determines the maximum penalty, "each case has its own particular facts and circumstances which determine the appropriate penalty to be imposed" within the tier. SEC v. Murray, No. OS-CV-4643 (MKB), 2013 WL 839840, at *3 (E.D.N.Y. Mar. 6, 2013) (quotation omitted); see also SEC v. Kern, 425 F.3d 143, 153 (2d Cir. 2005). In addition to the statutory factors cited above, courts consider the Steadman factors and:

(1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit to their wrongdoing; (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons; (6) defendants' lack of cooperation and honesty with authorities, if any; and (7) whether the penalty that would otherwise be appropriate should be reduced due to defendants' demonstrated current and future financial condition.

SEC v. Lybrand, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), aff'd on other grounds, 425 F.3d 143 (2d Cir. 2005) (Lybrand factors).

As noted above, the Steadman factors weigh in favor of a heavy sanction against Calabro, Konner, and Koutsoubos. Additionally, their conduct was egregious, they acted with scienter, they failed to admit their wrongdoing, and their misconduct caused substantial losses to their customers. They defrauded and harmed their customers and received substantial unjust enrichment, and there is a need to deter others from churning. On the other hand, they all generally cooperated with authorities, and except for Calabro, their previous violations were either not serious or nonexistent. Although Calabro has been sanctioned before, he acted with the lowest degree of scienter of these three respondents; conversely, although Koutsoubos has essentially no disciplinary history, he acted with the highest degree of scienter. The mitigating factors do not impress me, and I will impose the maximum third tier penalties against each. The requested unit of violation is one, the smallest possible, and the penalties are limited to accounts where violations occurred. Thus, Calabro will be order to pay \$150,000, Konner \$150,000, and Koutsoubos \$130,000.

I have considered Konner's Financial Disclosure Forms and supporting documentation, and I am satisfied that he has the ability to pay a civil penalty of \$150,000 plus disgorgement and prejudgment interest of \$61,613.57.

As to Bresner, the Steadman factors weigh in favor of at least a moderate penalty, his misconduct was recurrent and egregious, he has failed to admit wrongdoing, JPT's customers were substantially harmed by his failures, he has a significant previous violation, and there is a strong need for deterrence. On the other hand, he did not act with scienter, he did not defraud anyone, he was not unjustly enriched, and he generally cooperated with authorities. I place particular weight on the lack of scienter. The Division asserts that Bresner acted recklessly, but there is no persuasive proof of this, and in particular, Pinto did not opine that Bresner acted recklessly. Div. Br. at 78. Thus, Bresner did not act with fraud, deceit, or deliberate or reckless disregard of a regulatory requirement. I have also considered Bresner's successful interruption of Koutsoubos' churning in October 2008.

Accordingly, the requested unit of violation is one, the smallest possible, and only a first tier penalty is appropriate. 15 U.S.C. § 78u-2(b)(1). Under the totality of the circumstances, I find that a civil penalty of \$5,000 is warranted. I have considered Bresner's Financial Disclosure Forms, and I am satisfied that he has the ability to pay a civil penalty of \$5,000.

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the Record Index issued by the Secretary of the Commission on October 22, 2013.

VI. ORDER

IT IS ORDERED that, pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, and Section 203(k) of the Investment Advisers Act of 1940, Ralph Calabro, Jason Konner, and Dimitrios Koutsoubos shall CEASE AND DESIST from committing or causing violations or future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Ralph Calabro, Jason Konner, and Dimitrios Koutsoubos are BARRED from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

IT IS FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Michael Bresner is BARRED from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, in a supervisory capacity.

IT IS FURTHER ORDERED that, pursuant to Section 8A(e) of the Securities Act of 1933, Sections 21B(e) and 21C of the Securities Exchange Act of 1934, Section 203(j) of the Investment Advisers Act of 1940, and Section 9(e) of the Investment Company Act of 1940,

Ralph Calabro shall DISGORGE \$282,000 plus prejudgment interest of \$34,975.90, plus additional prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600(b). Pursuant to 17 C.F.R. § 201.600(a), additional prejudgment interest is due from June 1, 2013, through the last day of the month preceding which payment is made.

Jason Konner shall DISGORGE \$55,000 plus prejudgment interest of \$6,613.57, plus additional prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600(b). Pursuant to 17 C.F.R. § 201.600(a), additional prejudgment interest is due from June 1, 2013, through the last day of the month preceding which payment is made.

Dimitrios Koutsoubos shall DISGORGE \$30,000 plus prejudgment interest of \$5,028.18, plus additional prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600(b). Pursuant to 17 C.F.R. § 201.600(a), additional prejudgment interest is due from June 1, 2013, through the last day of the month preceding which payment is made.

IT IS FURTHER ORDERED that, pursuant to Section 21B of the Securities Exchange Act of 1934 and Section 9(d) of the Investment Company Act,

Michael Bresner shall PAY A CIVIL MONEY PENALTY in the amount of \$5,000.

Ralph Calabro shall PAY A CIVIL MONEY PENALTY in the amount of \$150,000.

Jason Konner shall PAY A CIVIL MONEY PENALTY in the amount of \$150,000.

Dimitrios Koutsoubos shall PAY A CIVIL MONEY PENALTY in the amount of \$130,000.

Payment of penalties and disgorgement plus prejudgment interest shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying the Respondent(s) and Administrative Proceeding No. 3-15124, shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

In the event that the Commission reviews this Initial Decision, Respondents are reminded of the need to update their sworn financial disclosure statements. See 17 C.F.R. § 201.410(c) ("Any person who files a petition for review of an initial decision that asserts the person's inability to pay either disgorgement, interest or a penalty shall file with the opening brief a sworn financial disclosure statement containing the information specified in Rule 630(b).").

Cameron Elliot
Administrative Law Judge