SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 9798 / May 29, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 75076 / May 29, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31657 / May 29, 2015

Admin. Proc. File No. 3-15015

In the Matter of

RALPH CALABRO,
JASON KONNER, and
DIMITRIOS KOUTSOUBOS

CORRECTED OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

**Grounds for Remedial Action**

**Churning of Customer Accounts**

Respondents, who were associated with a registered broker-dealer, each willfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder by churning the account of a customer. *Held*, it is in the public interest to enter an order imposing industry bars against Respondents; to issue cease-and-desist orders; to impose third-tier civil money penalties; and to order disgorgement plus prejudgment interest.

APPEARANCES

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

*Eric S. Hutner* of Hutner Klarish LLP for Jason Konner.

*Paul J. Bazil* and *Michael D. Mattia* of Pickard and Djinis LLP for Dimitrios Koutsoubos.

*Edward G. Sullivan*, *W. Shawn Murnahan*, and *Natalie Brunson* for the Division of Enforcement.

Appeals filed: November 27, 2013
Last brief received: April 18, 2014

**I.**

Respondents Ralph Calabro, Jason Konner, and Dimitrios Koutsoubos, former registered representatives at J.P. Turner & Co. ("J.P. Turner"), appeal from an administrative law judge's initial decision[1] finding that they each churned a customer account in violation of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder.[2] The law judge barred Respondents from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. The law judge also ordered Respondents to cease and desist from further violations; to disgorge certain ill-gotten gains, as well as pay prejudgment interest; and to pay third-tier civil money penalties. Upon our de novo review of the record, we find each Respondent liable for churning and order remedial sanctions. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.[3]

**II.**

A broker violates Exchange Act Section 10(b) and Rule 10b-5, as well as Securities Act Section 17(a), by churning.[4] "'Churning' is a shorthand expression for a type of fraudulent conduct in a broker-customer relationship where the broker 'overtrades' a relying customer's account to generate inflated sales commissions."[5] Churning has been recognized as a

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1 *Michael Bresner*, Initial Decision Release No. 517, 2013 WL 5960690 (Nov. 8, 2013).

2 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

3 The Division did not appeal the law judge's findings that Respondents did not churn the accounts of five additional J.P. Turner customers. In addition, Michael Bresner, a respondent below, did not appeal the law judge's finding that he failed reasonably to supervise Konner and Koutsoubos or the related sanctions the law judge imposed.

4 *Donald A. Roche*, Exchange Act Release No. 38742, 53 SEC 16, 1997 WL 328870, at *5 (June 17, 1997) (finding that respondent "wilfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, by churning [customer] accounts").

5 *Craighead v. E.F. Hutton & Co., Inc.*, 899 F.2d 485, 489 (6th Cir. 1990).

manipulative and deceptive device within the meaning of Section 10(b) and Rule 10b-5.[6] "Churning occurs when a securities broker enters into transactions and manages a client's account for the purpose of generating commissions and in disregard of his client's interests."[7] "Churning is commonly said to have three elements: (1) control of the customer's account by the broker, either explicit or de facto; (2) excessive trading in light of the customer's investment objectives; and (3) scienter — the required state of mind for liability under Section 10(b) and Rule 10b-5."[8]

Under this standard, we conclude, based on a preponderance of the evidence,[9] that each Respondent churned a customer account he controlled.[10] In Section III.A. below we set out the facts relevant to the charges against Calabro, who managed J.P. Turner's Parlin, New Jersey office. Based on those facts, we conclude in Section III.B. that Calabro churned the account of Dudley Wayne Williams, an elderly retired client who paid nearly $300,000 in commissions over the relevant period. In Section IV.A., we address the facts relevant to Konner, who worked in J.P. Turner's Brooklyn office, and we conclude in Section IV.B. that he churned the account of James Carlson, a self-employed Iowa farmer who paid nearly $90,000 in commissions in 2009. In Section V.A., we address the facts relevant to Koutsoubos, who split time between J.P. Turner's Brooklyn and Fort Lauderdale offices, and we conclude in Section V.B. that he churned the account of Teddy Dale Bryant who paid nearly $50,000 in commissions in 2009. As explained in the applicable legal analysis sections, each Respondent's trading surpassed relevant guideposts we have considered indicative of excessive trading, including by as much as nine times the benchmark, and each Respondent acted with scienter.

Section VI sets forth our findings with respect to remedial sanctions necessary to protect the investing public. For the reasons explained in Section VI.A., we impose industry bars on all Respondents prohibiting their association with any broker, dealer, investment adviser, municipal

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6 *Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983); *accord David Wong*, Exchange Act Release No. 45426, 55 SEC 602, 2002 WL 200089, at *4 n.20 (Feb. 8, 2002); *see also Carras v. Burns*, 516 F.2d 251, 258 (4th Cir. 1975) (recognizing that churning "is a deceptive device made actionable by § 10(b) of the Securities Exchange Act and S.E.C. Rule 10b-5").

7 *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *15 (July 2, 2013) (quoting *Roche*, 1997 WL 328870, at *4), *petition denied sub nom., Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014); *see also Al Rizek*, Exchange Act Release No. 41725, 54 SEC 261, 1999 WL 600427, at *5 (Aug. 11, 1999) ("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.'" (quoting *Olson v. E.F. Hutton & Co.*, 957 F.2d 622, 628 (8th Cir. 1992))), *aff'd*, 215 F.3d 157 (1st Cir. 2000).

8 *SEC v. Rizek*, 215 F.3d at 162 (citations omitted).

9 *See Rita J. McConville*, Exchange Act Release No. 51950, 58 SEC 596, 2005 WL 1560276, at *14 (June 30, 2005) ("[I]t is well settled that the applicable standard . . . is preponderance of the evidence." (citing *Steadman v. SEC*, 450 U.S. 91, 102 (1981))), *petition for review denied*, 465 F.3d 780 (7th Cir. 2006).

10 *See infra* Sections III (Calabro), IV (Konner), V (Koutsoubos).

securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. In Section VI.B., we explain our basis for ordering all Respondents to cease and desist from committing or causing any violations or future violations of Securities Act Section 17(a), Exchange Act Section 10(b), and Rule 10b-5. And we require each Respondent to pay disgorgement and pre-judgment interest, and each to pay a single maximum third-tier civil money penalty, for the reasons set forth in Sections VI.C. and VI.D., respectively.

## III.

### A. Facts relating to Ralph Calabro

Ralph Calabro began working in the securities industry in 1995 and holds Series 7, 24, and 63 licenses. In early 2004, Calabro opened J.P. Turner's small Parlin, New Jersey office, joining the firm as a principal and registered representative.[11] While at J.P. Turner, Calabro's compensation consisted largely of commissions, rather than a fixed salary.[12]

#### 1. For over fifteen years, Dudley Wayne Williams, a retired professor, followed a conservative investment strategy relying entirely on his broker.

At the time he opened his J.P. Turner account, Dudley Wayne Williams was 70 years old and had been retired from his job as a university professor for approximately twelve years. Williams holds graduate and undergraduate degrees in business administration and, before retirement, taught statistics and various business-related courses, none of which involved finance. Williams is not computer-savvy, has no mobile phone, and has never had an email address. Williams does not consider himself to be a sophisticated investor.

Williams opened a Smith Barney account in 1991, which he held until 2008. Williams relied entirely on his broker to select transactions for him and never bought or sold options or commodities or traded on margin. Instead, Williams invested in securities that he considered "good stuff that [he] could rely on." He held his securities for an average of ten years.

#### 2. In October 2007, Williams opened a J.P. Turner account with Calabro, which he funded from his Smith Barney account.

In October 2007, Williams opened an account with Calabro, following a telephone introduction from a friend of more than 40 years. By that time, Williams's longtime representative at Smith Barney had retired, and no one else had stepped forward to handle his account. Williams funded his J.P. Turner account through the proceeds of the Smith Barney account, which Williams had told Calabro was worth approximately $1.5 million.

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[11] J.P. Turner is a registered broker-dealer headquartered in Atlanta, Georgia. During 2008 and 2009, J.P. Turner had approximately 500 registered representatives working in 180 to 200 branch offices, most of which were small or one-person offices.

[12] Calabro also received a $9 share of per transaction "ticket charges" and 0.1% of daily margin balance.

Williams signed a six-page account application to open his J.P. Turner account. The second page of the application, which Williams was not required to sign or initial, listed a number of pre-printed investment objectives with small boxes next to them. Calabro typed, or caused to be typed, the numerals 1, 2, and 3, next to, respectively, "Speculation," "Trading Profits," and "Capital Appreciation." Nothing was typed next to "Preservation of Capital," "Income," or "Other." On the same page, across from "Risk Tolerance," Calabro also typed, or caused to be typed, an "X" in the small box next to "Aggressive." The boxes next to the other options ("Conservative," "Moderate," and "Combination") were not marked. Calabro says that he completed these sections before Williams signed the application.

In contrast, Williams testified that the selections regarding risk tolerance and his account objectives were "absolutely wrong" and had not been completed when he signed the document. Had Williams completed the form, he would have specified "Preservation of Capital," "Income," and "Capital Appreciation" as investment objectives (in that order) and would have selected a risk tolerance of conservative or moderate. Put differently, Williams explained that he had the same objective in investing with J.P. Turner as he did with Smith Barney: to earn "a fair return." Williams also testified that Calabro never asked Williams how much he was willing to risk or what his investment objectives were and did not go over the account application with him. Instead, Calabro told Williams that all he needed to do was to sign and return the form to Calabro, which Williams did.

**3. Calabro briefly took long positions in Williams's account but soon transitioned to shorting and options trading.**

Calabro initially took long positions in Williams's account. But in November 2007, Calabro took a negative view on economic prospects and began to sell securities short.[13] Although Williams "basically" understood that "in a slipping economy, you could sell the stock now" through shorting and "buy it back later at a reduced price," he did not "fully understand how you can do that."[14]

By February 2008, Williams believed that Calabro had exaggerated the gains in Williams's account. So Williams prepared and sent Calabro what Williams termed a "quick analysis" of his account's 2007 performance. Williams calculated gain and loss from particular securities transactions but did not purport to evaluate the appropriateness of transactions or

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[13] "A short sale is the sale of a stock that an investor does not own or a sale which is consummated by the delivery of a stock borrowed by, or for the account of, the investor. Short sales are normally settled by the delivery of a security borrowed by or on behalf of the investor. The investor later closes out the position by returning the borrowed security to the stock lender, typically by purchasing securities on the open market." Short Sales, http://www.sec.gov/answers/shortsale.htm (last visited May 28, 2015).

[14] "Investors who sell stock short typically believe the price of the stock will fall and hope to buy the stock at the lower price and make a profit." *Id.* But "[i]f the price of the stock rises, short sellers who buy it at the higher price will incur a loss." *Id.*

critique Calabro's strategy. Williams attached his analysis to a handwritten note to Calabro stating that he hoped the "'short' gods w[ould] turn in our favor in the not too distant future."

In September 2008, Calabro began to trade options in Williams's account. At Calabro's behest, Williams signed two J.P. Turner account documents relating to that trading. As with the account application, Williams testified that the documents contained incorrect statements regarding his investment objectives and experience, which he believed were not present when he signed them.[15] Williams signed the documents based on Calabro's representations that he was expert and experienced in options trading and would use it to reduce risk. But Calabro did not identify any risks of options trading and told Williams only that "it would provide an insurance on a trade and that, if the trade went the right way, that there would be profit involved." Despite his professed experience, Calabro had not used options before in J.P. Turner customer accounts.

In early 2009, after Calabro's supervisors took note of the volume of trades in Williams's account, Calabro requested that Williams sign two additional documents that the firm used with "actively traded" accounts to confirm the customer had authorized the trading. One of these documents, the Active Account Suitability Questionnaire ("AASQ"), purported to state a preference for speculation and identified a trade frequency of "3-6 a month."[16] Williams testified that this and other statements on the form were incorrect and that he believed that they were not present on the form when he signed it. For his part, Calabro concedes that he completed the portions of the AASQ stating Williams's investment preferences—as he did with other account forms—but asserts that he added the information before Williams signed it, not after.

J.P. Turner's policies dictated that if a customer failed to return a signed AASQ, the customer's account would be placed on restriction and no additional purchases would be permitted, even if they were necessary to close open short positions such as those in Williams's account. Calabro testified that he explained this risk when he asked Williams to sign the AASQ.

**4. Calabro dictated and unilaterally implemented the trading strategy for Williams's account and also made unauthorized trades in it.**

Throughout the period that Williams maintained a J.P. Turner account, Calabro dictated and unilaterally implemented the trading strategy for it. Virtually all of the transactions in Williams's account over the relevant period were marked as "solicited" in his account statements. But Calabro's conversations with Williams regarding these recommendations were one-sided. Rather than seek Williams's input, Calabro called Williams periodically to tell him which transactions would take place. Because Williams did not believe himself to be qualified, he accepted Calabro's recommendations and did not independently research them. And when

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[15] Under the heading "Investment Objectives," in the Options Suitability Questionnaire, Calabro circled "Speculation" and "Growth" but not "Income" or "Safety of Principal." Williams testified that if he had completed the form himself, he would have selected Safety of Principal and Income.

[16] The other account document was an Active Account Suitability Supplement ("AASS"), which contained various boilerplate risk disclosures regarding active trading.

Williams occasionally brought concerns to Calabro about stocks going "the wrong way," Calabro reassured Williams that things would turn around. Williams always relied on Calabro's recommendations and never told Calabro to purchase or sell particular stocks.

Separate from this course of dealing, Williams noticed at some point in 2009 that Calabro had executed trades without his knowledge. Although Calabro generally would call Williams before opening short positions, Calabro made many fewer advance calls before closing them. In addition, on one occasion, Calabro told Williams that he had netted $100,000 in profit through an options trade in J.P. Morgan securities that Williams had never authorized. But upon receiving a trade confirmation, Williams discovered that the trade had made no money.

**5. Williams's account declined dramatically between December 2008 and November 2009, during which time he paid J.P. Turner nearly $300,000 in commissions and fees in connection with Calabro's frequent trading.**

Calabro frequently traded in Williams's account between December 2008 and November 2009, executing 271 purchases and sales (a monthly average of over 22.5 trades). The Division's expert witness, Louis Dempsey, calculated a turnover rate of eight and a cost-to-equity ratio of 22.9% over this period, which he opined each exceeded levels of excessive trading. This trading was far more frequent than that in Williams's prior Smith Barney account. And, although Calabro had specified "3-6" trades a month on the AASQ he completed in March 2009, he executed between thirty and sixty-eight trades in each of April, May, and June 2009.

At the same time, Williams's account value fell from approximately $2 million to about $550,000, and the vast majority of the decline was attributable to trading losses, rather than withdrawals. During the relevant period, Williams paid $297,515 in fees and commissions to J.P. Turner, of which Calabro received over $247,945.

**6. Williams closed his J.P. Turner account in 2010, and Calabro left J.P. Turner the following year.**

Williams closed his J.P. Turner account in mid-2010. In all, Williams had deposited over $1.7 million with J.P. Turner. Calabro left J.P. Turner in 2011 and joined another firm. Calabro currently is not registered with FINRA and maintains that he has "left the brokerage industry."

**B. Based on our analysis of the facts, we conclude that Calabro churned Williams's account between December 2008 and November 2009.**

As explained below, we find that, between December 2008 and November 2009, Calabro (1) exercised de facto control over Williams's account, (2) excessively traded it, and (3) acted with scienter in doing so. We accordingly find that Calabro churned Williams's account in violation of Securities Act Section 17(a), Exchange Act Section 10(b), and Rule 10b-5.

### 1. Calabro exercised de facto control over Williams's account.

#### a. Factors applicable to control

In the absence of formal discretionary authority, a broker's de facto control over an account "may be established when the customer relies on the representative such that the representative controls the volume and frequency of transactions."[17] Alternatively, de facto control exists where a customer routinely follows a registered representative's recommendations.[18] In that context, we have considered whether the customer had "sufficient understanding to make an independent evaluation" of the broker's recommendations.[19] Finally, we also have recognized that a broker's unauthorized transactions support a finding of control.[20]

#### b. The facts establish that Calabro controlled Williams's account.

We find that Calabro controlled Williams's account. First, the record establishes that Williams relied on Calabro in determining the frequency and volume of transactions and, as Williams testified, "trusted [Calabro] up until the very end." Calabro dictated the strategy for the

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[17] *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *12 (May 27, 2011) (citing *Clyde J. Bruff*, Exchange Act Release No. 40583, 53 SEC 880, 1998 WL 730586, at *2 (Oct. 21, 1998), *petition denied*, 198 F.3d 253 (9th Cir. 1999) (Table), *Stephen Thorlief Rangen*, Exchange Act Release No. 38486, 52 SEC 1304, 1997 WL 163991, at *4 (Apr. 8, 1997), and *John M. Reynolds*, Exchange Act Release No. 30036, 50 SEC 805, 1991 WL 288500, at *2 (Dec. 4, 1991)), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

[18] *Roche*, 1997 WL 328870, at *7 n.14 ("De facto control of an account may be established where the client habitually follows the advice of the broker."); *see also Mihara v. Dean Witter & Co., Inc.*, 619 F.2d 814, 821 (9th Cir. 1980) ("[T]he requisite degree of control is met when the client routinely follows the recommendations of the broker."); *Cody*, 2011 WL 2098202, at *12 ("A representative also exercises de facto control if the customer 'relied heavily on and followed [the representative's] advice.'" (quoting *Rangen*, 1997 WL 163991, at *5, and citing additional authority)).

[19] *Eugene J. Erdos*, Exchange Act Release No. 20376, 47 SEC 985, 1983 WL 33908, at *4 (Nov. 16, 1983), *aff'd*, 742 F.2d 507 (9th Cir. 1984); *see also Cody*, 2011 WL 2098202, at *12 n.34 (citing *Erdos*).

[20] *See Sandra K. Simpson*, Exchange Act Release No. 45923, 55 SEC 766, 2002 WL 987555, at *15 (May 14, 2002) (finding that, among other things, the "many unauthorized transactions" executed by broker supported a finding of de facto control); *Roche*, 1997 WL 328870, at *5 n.14 (same); *cf. Frederick C. Heller*, Exchange Act Release No. 31696, 51 SEC 275, 1993 WL 8588, at *2 & n.7 (Jan. 7, 1993) (finding "control" when a registered representative "exercised de facto discretionary control" over customers' account, as evidenced by the fact that customers "were not consulted, nor typically even made aware of, the particular trades executed in their account until well after the fact"). Where a broker engages in unauthorized transactions, he operates as though he has been delegated discretionary authority (and thus formal control) by the client, although he has not been.

account, which diverged substantially from Williams's account history over the prior fifteen years, and implemented it unilaterally. Calabro also vastly exceeded the number of monthly trades specified in Williams's AASQ, which Calabro testified represents "the only time" J.P. Turner documents "the amount of trades" that "the client feels comfortable with."[21] Nonetheless, Calabro executed, in at least one month, over ten times the maximum number of trades specified in the AASQ, and, on average, more than three times the maximum. Because Calabro controlled the frequency and volume of transactions, and did so in a way that conflicted with what he documented as his customer's objective, we find that he exercised control over Williams's account.[22]

Second, we also find that Calabro exercised de facto control over Williams's account because Williams routinely followed Calabro's recommendations.[23] Williams deferred to Calabro with respect to establishing (and altering) account strategy, selecting securities, and determining when and in what quantities to trade them. When Calabro informed Williams of transactions that Calabro selected or had already implemented, Williams felt he could not object to them because of his lack of knowledge and expertise.[24] We find this evidence particularly compelling in light of the law judge's determination that, based on his demeanor, Williams was an "especially credible" witness with respect to "his dealings with Calabro."[25]

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[21] This statement belies Calabro's contention in his brief that the AASQ was merely intended to reflect the historical level of trades in the account.

[22] *See Rangen*, 1997 WL 163991, at *4 (finding control where respondent "used his influence over his customers' accounts to pursue an aggressive, short-term trading strategy that was inconsistent with his customers' objectives"); *see also Cody*, 2011 WL 2098202, at *12 (finding control where respondent "controlled the volume and frequency of trading in the Customer accounts").

[23] *See Roche*, 1997 WL 328870, at *7 n.14 (concluding that "[t]he evidence strongly show[ed] Roche exercised de facto control of trading . . . , as the customers routinely followed his recommendations"); *Michael David Sweeney*, Exchange Act Release No. 29884, 50 SEC 761, 1991 WL 716756, at *4 (Oct. 30, 1991) (finding control where customers routinely followed broker's recommendations); *see also Cody*, 2011 WL 2098202, at *12 (finding that respondent "maintained de facto control because the Customers did not independently evaluate his recommendations but rather acquiesced in his trades"); *Joseph J. Barbato*, Exchange Act Release No. 7638, 53 SEC 1259, 1999 WL 58922, at *12 (Feb. 10, 1999) (concluding that respondent exercised de facto control where client "testified that he placed his trust and confidence in [respondent] and allowed him to decide what to buy or sell in the account").

[24] *See Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 767 F.2d 1498, 1502 (11th Cir. 1985) (sustaining jury finding of control where, although the plaintiff, "apparently discussed his account frequently with [broker], the jury could have concluded from [plaintiff's] testimony that he was somewhat intimidated by his broker and reluctant to make suggestions or contradict any suggestions that [broker] made").

[25] *Cf. Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1070 (2d Cir. 1977) (noting that "determination of whether [client] exercised control over the account involved a question of fact,

(*continued . . .*)

Calabro's trading without obtaining Williams's prior permission further supports our finding that Calabro controlled the account.[26] Williams consistently testified that Calabro executed trades without advance permission, and Calabro could not definitively deny trading without authorization. Even though Calabro asserted that his "practice" was to "get prior authorizations" from his clients before he "d[id] anything," Calabro could not "remember 100 percent" whether he ever traded without prior authorization. Indeed, Calabro asserted that, given that "[t]hings [we]re very volatile," there were times he would have to "protect" Williams. Calabro also testified that he considered an opening and closing of a short position to be a single "connected" trade, consistent with a view that he did not need authorization to close a position. Weighing Williams's consistent testimony against Calabro's qualified denials, we reject Calabro's assertion that he did not make unauthorized trades.

Nor are we persuaded by Calabro's limited attempts to minimize the importance of his unauthorized trades. Calabro simply ignores Williams's testimony that Calabro closed short positions without seeking authorization and instead focuses on a specific unauthorized trade in JP Morgan securities that Williams referenced at the hearing. Calabro asserts that Williams's only concern regarding that trade was a discrepancy in the amount of profit from the sale. But Williams was concerned both that Calabro reported a fictional profit where there was none *and* that he learned of the trade only after it was made.[27] In any event, although Williams eventually learned of the bulk of Calabro's unauthorized trades from trade confirmations, such after-the-fact knowledge does not demonstrate that Williams approved those transactions *before* Calabro made them.[28] Accordingly, Williams's subsequent knowledge of Calabro's trading does not negate Calabro's control of the account.[29]

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(. . . *continued*)
which turned largely upon the court's assessment of the witnesses' credibility and its judgment" regarding client's abilities).

[26] *See supra* note 20.

[27] Calabro's unauthorized transactions distinguish this case from *M & B Contracting Corp. v. Dale*, in which the court concluded that there was no "usurpation of control by [the broker], since he always had [the corporate client's] prior approval" of trades and "[a]t no time was a trade made without consultation." 601 F. Supp. 1106, 1111 (E.D. Mich. 1984).

[28] *See Simpson*, 2002 WL 987555, at *13 (rejecting argument that customers who "received monthly statements and other forms notifying them of [unauthorized] transactions but filed no complaints" ratified the trades because, among other things, "after-the-fact 'acceptance' of an unauthorized trade does not transform that transaction into an authorized trade"); *Neil C. Sullivan*, Exchange Act Release No. 33613, 51 SEC 974, 1994 WL 46344, at *2 & n.1 (Feb. 10, 1994) (finding that applicant made unauthorized trades and noting that "[t]he fact that a customer ultimately accepts an unauthorized trade does not transform it into an authorized purchase").

[29] *Cody*, 2011 WL 2098202, at *13 ("Cody argues that the Customers' review of confirmations and statements demonstrates their control, but we have rejected claims that the receipt of such post-trade notice amounts to control over accounts."); *see also* 1 Stuart C. Goldberg, *Fraudulent Broker–Dealer Practices* § 2.8[b][1][G] (1978) ("The arrogance of a

(*continued . . .*)

We also are not persuaded by Calabro's argument that Williams retained control over his own account because he was a sophisticated investor who taught statistics and various business courses as a university professor for many years and held an MBA. Unlike the customers in cases on which Calabro relies, Williams was not an active participant in Calabro's trading and did not suggest or reject any trades.[30] We also find it compelling that before Calabro became his broker, Williams had never invested in options, commodities, or traded on margin,[31] and his account had been invested in long positions (selected by his prior broker) that were held for many years.[32] Moreover, Williams lacked access to, and facility with, computerized sources of data necessary to effectively monitor the complex, shorting strategy that Calabro employed.[33]

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(. . . *continued*)
registered representative making unauthorized purchases or sales for a non-consenting investor, followed by the obtaining of the investor's consent after the fact, is probably the most cogent evidence of control possible.").

[30] *See, e.g., Follansbee v. Davis, Skaggs & Co.*, 681 F.2d 673, 674-78 (9th Cir. 1982) (finding that client took "many positive steps . . . to insure that his account was actively traded," including active trading prior to introduction to defendant broker, participation in weekly financial seminar led by broker, regular review of investment literature, suggestion of investment prospects to broker, and enthusiasm for "active pursuit of the quick profit"); *Newburger*, 563 F.2d at 1070 (noting that client spent "over $100 per month on investment advisory services, in addition to subscribing to various financial journals" and initiated at least 10% of account transactions); *Morris v. CFTC*, 980 F.2d 1289, 1296 (9th Cir. 1992) (finding that client "took the time to independently monitor the gold and silver markets," "ma[d]e time to speak with [broker] about [his] account virtually 'on a daily basis,'" and "actually rejected a number of [broker's] suggestions"); *Xaphes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 632 F. Supp. 471, 483-84 (D. Maine 1986) (determining that client "took an active role in the management of his account" and citing his rejection of broker recommendations).

[31] *See Cody*, 2011 WL 2098202, at *12 (rejecting broker's assertion that customers "were sufficiently sophisticated to control their own accounts," because customers "had little if any experience evaluating individual bonds or short-term bond trading, and relied heavily on Cody's recommendations"); *see also Rizek*, 1999 WL 600427, at *6 (rejecting respondent's assertion that he lacked control because, among other factors, his customers "were self-employed businessmen accustomed to making business and financial decisions," where "customers placed their reliance on Rizek's supposed expertise, and almost invariably followed his recommendations").

[32] We reject Calabro's assertion that Williams's alleged sophistication is evident because he "repeatedly boasted to having more than 30 years of investment experience" in signed account documents. Williams consistently testified that these statements regarding his purported investment experience were incorrect. In any event, as stated above, during the over fifteen years Williams maintained his Smith Barney account, he relied entirely on his broker to select transactions for him in a buy-and-hold strategy. He was not a sophisticated investor.

[33] *See Carras*, 516 F.2d at 259 (considering "whether or not the customer, based on the *information available to him* and his ability to interpret it, can independently evaluate his broker's suggestions" (emphasis added)); *Rizek*, 1999 WL 600427, at *6 (finding control where

(*continued . . .*)

We also reject Calabro's argument that Williams was a sophisticated investor because he prepared an analysis of 2007 trading profits in his account. This analysis shows (at most) that Williams could arrive at the gain and loss from transactions through simple arithmetic.[34] It does not establish that Williams understood the risks associated with the trading strategy that Calabro devised or the factors that dictated Calabro's choices, or that Williams was capable of selecting or weighing in on the merits of the trades at issue.[35] Indeed, Williams's reference to "short gods" in the cover note to his analysis is further evidence that he lacked a detailed understanding of Calabro's trading.[36] And, although Williams knew that a short sale was a way to profit from a decline in a stock's price, that basic understanding does not demonstrate that Williams had sufficient knowledge and investment experience to evaluate Calabro's recommendations[37] and to reject trades he thought unsuitable.[38] Accordingly, for the reasons explained above, we find that Williams could not "independently evaluate his broker's suggestions" "based on the information available to him and his ability to interpret it,"[39] and was not a sophisticated investor who exercised control over his account.[40]

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(. . . *continued*)
"[t]he information that [broker] supplied did not cure or alleviate his customers' lack of understanding"); *cf.* Securities and Exchange Commission, 96th Cong., 1st Sess., Report of the Special Study of the Options Markets, 440 (Comm. Print 1978) (finding that due to "option's short life and the complexity of options trading," "many customers rely heavily on their registered representatives for options trading decisions," that "[t]his reliance, in many cases, is so great that registered representatives can effectively control all trading in these customers' options accounts," and that "problems can arise" as a result of this control).

[34] Nonetheless, Calabro identified errors in Williams's computations.

[35] For example, with respect to options trading, Williams testified "I would not be able to do it because, let me see, if you do this, then what happens here? . . . I may be stupid but when I think about these things and how you would use them, my brain doesn't absorb that."

[36] Williams also prepared a handwritten analysis of a J.P. Turner account for the friend who referred him to Calabro. Like the analysis of Williams's own account, this document did not purport to critique Calabro's trading or suggest alternative strategies or trades.

[37] Rather, this basic knowledge is analogous to an investor's understanding that, in a long strategy, a customer hopes to profit from an increase in a stock's price.

[38] Williams's testimony that if he "had a reason to say [no]" with respect to a particular trade, he "would have said it" supports his lack of understanding and experience. It does not establish that Williams was a sophisticated investor able to stand up to Calabro when necessary, as Calabro contends.

[39] *Carras*, 516 F.2d at 259.

[40] Relying on *Follansbee v. Davis, Skaggs & Co.*, Calabro asserts that the "touchstone" for determining if a representative controls a client account 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." 681 F.2d at 677. Calabro asserts that, under this test, Williams was sufficiently sophisticated to preclude a finding that Calabro controlled Williams's

(*continued* . . .)

**2. Calabro excessively traded Williams's account.**

**a. Factors applicable to determination of excessive trading**

In determining whether a broker has engaged in excessive trading, we have considered, among other factors, the turnover rate and cost-to-equity ratio during the relevant period. "The turnover rate represents the number of times in one year that a portfolio of securities is exchanged for another portfolio of securities" and is calculated "by dividing the total [account] purchase[s] by the average account equity and annualizing the number."[41] The cost-to-equity ratio "measures the amount an account has to appreciate annually just to cover commissions and other expenses" and is obtained "by dividing total expenses by average monthly equity."[42] "While there is no definitive turnover rate or cost-to-equity ratio that establishes excessive trading," we have held that "a turnover rate of 6 or a cost-to-equity ratio in excess[] of 20% generally indicates that excessive trading has occurred."[43] But we also have found "excessive trading where the annual turnover ratio was 4 or less,"[44] and in accounts with cost-to-equity ratios less than 20%.[45]

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(. . . *continued*)
account. We disagree. As explained above, the evidence does not demonstrate that Williams was sufficiently sophisticated regarding the investments at issue here to retain control of his account.

[41] *Roche*, 1997 WL 328870, at *7 n.6. The turnover rate is sometimes referred to as the "turnover ratio." *See, e.g.*, *Cody*, 2011 WL 2098202, at *6.

[42] *Peter C. Bucchieri*, Exchange Act Release No. 37218, 52 SEC 800, 1996 WL 254677, at *1 & n.4 (May 14, 1996). The cost-to-equity ratio is at times referred to as the "break-even cost factor," "cost-to-equity factor," "cost-equity maintenance factor," or other variants. *See, e.g.*, *Roche*, 1997 WL 328870, at *4 n.7.

[43] *Daniel Richard Howard*, Exchange Act Release No. 46269, 55 SEC 1096, 2002 WL 1729157, at *3 (July 26, 2002), *aff'd*, 77 F. App'x 2 (1st Cir. 2003); *see also Harry Gliksman*, Exchange Act Release No. 42255, 54 SEC 471, 1999 WL 1211765, at *4 (Dec. 20, 1999) (holding that a turnover "rate in excess of 6 is generally presumed to reflect excessive trading"), *aff'd*, 24 F. App'x 702 (9th Cir. 2001).

[44] *Barbato*, 1999 WL 58922, at *12; *Laurie Jones Canady*, Exchange Act Release No. 41250, 54 SEC 65, 1999 WL 183600, at *6 (Apr. 5, 1999) (turnover rates ranging from 3.83 to 7.28), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000); *Roche*, 1997 WL 328870, at *4 (turnover rate of 3.3); *Gerald E. Donnelly*, Exchange Act Release No. 36690, 52 SEC 600, 1996 WL 20834, at *2 n.11 (Jan. 5, 1996) (turnover rates between 3.1 and 3.8).

[45] *Simpson*, 2002 WL 987555, at *7, *8, *9, *14 (finding that trading in accounts with break-even rates of return of 11.98%, 12.01%, 13.88%, and 17.88%, among others, was excessive); *see also Gliksman*, 1999 WL 1211765, at *3-4 (finding excessive trading in the account of a conservative corporate investor with an annualized cost-to-equity ratio of 18%).

Other relevant factors in determining the existence of excessive trading include the "number and frequency of trades";[46] the client's "investment objectives and financial condition,"[47] age,[48] and retirement status;[49] and the existence of unauthorized trades.[50]

**b. The turnover rate and cost-to-equity ratio, as well as other relevant factors, establish that Calabro excessively traded Williams's account.**

Applying the factors outlined above, we conclude that Calabro excessively traded Williams's account over the relevant period.[51] We agree with the law judge that Williams's "investment objectives were capital preservation and capital appreciation" and "his risk tolerance was no greater than moderate." But Calabro's frequent trading, in short positions, exceeded the guideposts we have recognized as indicative of excessive trading because it produced a turnover rate of eight and a cost-to-equity ratio of 22.9%.[52] The sheer volume of Calabro's transactions was also excessive and far exceeded the three-to-six trades a month specified in the AASQ he completed for Williams, as well as the frequency of trading in Williams's Smith Barney account. Moreover, Calabro traded without authorization. Although no one of these factors is dispositive, we find that, under the circumstances, including consideration of Williams's age, trading history, and retirement status, Calabro's trading was excessive.

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46 *See Jack H. Stein*, Exchange Act Release No. 47335, 56 SEC 108, 2003 WL 431870, at *4 (Feb. 11, 2003) (noting that "the number and frequency of trades in an account provide an objective and reasonable basis for a finding of excessive trading").

47 *Cody*, 2011 WL 2098202, at *13 ("Customer investment objectives and financial situation are the benchmarks for evaluating whether the level of trading in any account is appropriate."); *Howard*, 2002 WL 1729157, at *2 (observing that account activity "must be consistent with the customer's investment objectives and needs").

48 *Bruff*, 1998 WL 730586, at *3 (considering, among other factors, client's age).

49 *Cody*, 2011 WL 2098202, at *13 (noting that accounts at issues "were to be used to fund retirement, demonstrating a need to protect principal and limit risk-taking"); *Barbato*, 1999 WL 58922, at *12 (finding that "[f]or an individual who is dependent on the account for retirement," rate of trading was "clearly excessive").

50 *Simpson*, 2002 WL 987555, at *14 (explaining that finding of excessive trading was "bolstered by the unauthorized nature of many of the trades").

51 We separately reject Calabro's assertions that his trading was not excessive because Williams had a high risk tolerance and intended that Calabro speculate in his account, *infra* Section III.B.2.c., and Calabro's attempts to discredit the testimony of Louis Dempsey, the Division's expert on excessive trading. *See infra* Section III.B.2.d.

52 *See supra* note 43.

**c. We reject Calabro's argument that his trading in Williams's account was not excessive because Williams was a speculative investor.**

Calabro argues that Williams was a speculative investor who wanted to short his account and documented that intention in various account forms and a note to Calabro. For this reason, Calabro contends, the account's high turnover rate and cost-to-equity ratio are consistent with Williams's intentions, rather than indicative of excessive trading. We do not agree.

The weight of the evidence establishes that the preferences stated in Williams's account documents were incorrect, as Williams consistently testified. We first reject Calabro's assertion that Williams's account documents conclusively establish his preference for speculation as a matter of law.[53] Rather, we have found that an account can be churned notwithstanding the customer's signature on an application purporting to state a preference for speculation.[54] We find it significant that Calabro, and not Williams, completed the portions of the account documents upon which Calabro now relies. Calabro concedes this, although he asserts that he completed the documents before Williams signed them, not after. But Williams uniformly testified that, although some portions of his account documents (such as his address) were prefilled, the account preference information in question was not added to the documents until after he signed them.[55] In contrast, Calabro's testimony as to his practices was inconsistent. Calabro initially

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[53] Calabro relies on inapposite case law to support his argument that Williams "cannot avoid" written "obligations or representations" by "asserting that the documents were not reviewed prior to signing." First, *Coleman v. Prudential Bache Securities, Inc.* holds that a party cannot avoid an arbitration agreement simply by asserting that she did not read it. 802 F.2d 1350, 1352 (11th Cir. 1986). But the issue here turns on Williams's true preferences, not contract enforcement. Second, *First Union Discount Brokerage Services v. Milos* held that the plaintiffs could not justifiably rely on an alleged misrepresentation that was contradicted by subsequent contracts that they signed without reading. 997 F.2d 835, 846 & n.21 (11th Cir. 1993). But justifiable reliance is not at issue here because reliance is not required in a Commission enforcement action. *See SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012).

[54] *Michael T. Studer*, Exchange Act Release No. 50543A, 57 SEC 1011, 2004 WL 2735433, at *4 & n.10 (Nov. 30, 2004) (finding that account was churned where "check-mark indications on [client's] account application that [she] was interested in speculation [we]re contradicted by," among other things, her age and investment history); *see also Arceneaux*, 767 F.2d at 1500 (sustaining jury finding of churning although plaintiff "signed an options information sheet, stating his investment objective was trading profits" and "an options agreement which, by plaintiffs' own admission, clearly warned of the risks inherent in trading options").

[55] We are not convinced by Calabro's argument that Williams's testimony should be rejected as inconsistent with a handwritten note he sent a Commission staff member in 2010. With the note, Williams forwarded a letter from J.P. Turner compliance that, in turn, attached a final, signed copy of Williams's Options Suitability Questionnaire. Calabro seizes on Williams's statement in the note that the Questionnaire was prefilled and mailed for his signature, as evidence that the Questionnaire was fully completed at the time Williams signed it, rather than

(*continued . . .*)

testified that he "never sent a blank account form to any customer," but later explained that he "[s]ometimes" did so and that customers, at times, would complete those forms incorrectly, which required the forms to be revised. In any event, it is undisputed that the stated account preferences are inconsistent with the conservative trading that Williams favored in the Smith Barney account he held for over fifteen years before retaining Calabro, as well as Williams's retired status and age.

There are additional reasons to believe that the account documents at issue did not represent Williams's true preferences, even assuming they were fully completed when Williams signed them. First, Williams's account application is not convincing evidence that Williams intended to speculate because Calabro initially invested Williams's account in long positions, as Williams's Smith Barney representative had done for over a decade and a half.[56] Calabro did not begin shorting until after Williams had signed the application. Second, we also are not convinced that Williams's execution of J.P. Turner's options documents establishes that Williams had a high risk tolerance. To the contrary, Williams signed the options documents because Calabro represented that he would use options trading as a hedge to *reduce* risk. Third, it also appears that Williams signed the active account documents, not to indicate his assent to aggressive trading, as Calabro asserts, but because Calabro told Williams that if he did not sign the documents J.P. Turner would prohibit Calabro from closing any of the short positions in Williams's account, thereby leaving Williams exposed to additional risk.[57]

Our conclusions are bolstered by the law judge's credibility findings, which supported his conclusion that Williams's "investment objectives did not include speculation and he did not

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(. . . *continued*)
only partially completed as Williams testified. We find Calabro's argument unpersuasive for three reasons. First, Williams's reference to the Questionnaire as prefilled is ambiguous. Williams does not explain if the document was completed in its entirety before he signed it (as Calabro claims) or only in part (as Williams testified at the hearing). Second, it appears that Williams may have misinterpreted the documents he sent the Commission staff member. In his cover note, Williams stated that "*[a]s you can see*," the Questionnaire "was 'pre' filled out and then mailed for my signature." (emphasis added). But these facts are not established by the documents Williams attached because the Questionnaire that he provided was not an unsigned, prefilled form sent for his signature, but rather a fully completed signed copy that J.P. Turner sent Williams. A reader thus cannot "see" if the Questionnaire was complete when Williams signed it. Third, the note addresses only one of the multiple account documents that Williams uniformly testified were not fully completed when he signed them.

[56] And, because the relevant portions of the account application are separated from the signature page by several pages, these portions might easily have been overlooked.

[57] We do not find persuasive Calabro's reliance on a checked box corresponding to speculation in an April 2009 application for an account Williams maintained at Newbridge Securities. Williams testified that the statement regarding speculation was wrong, and he requested Newbridge to correct it on multiple occasions. In any event, the trading in Williams's J.P. Turner account was more frequent than in the Newbridge account.

have an aggressive risk tolerance." "We give considerable weight to the credibility determination of a law judge since it is based on hearing the witnesses' testimony and observing their demeanor."[58] The law judge found that Williams was a "generally credible witness," and that his "demeanor, particularly his tone of voice, bolstered his credibility." The law judge also found that Williams's "testimony regarding his investment experience, his investment objectives, and his dealings with Calabro," were "especially credible." In particular, "Williams consistently and emphatically testified" that his account forms "contained inaccurate information, including his investment objectives and risk tolerance."[59] We see no reason to reject these findings based on the evidence discussed above, as Calabro urges.[60]

We also reject Calabro's argument that Williams necessarily intended to engage in a high volume of trades because he was aware of, and analyzed the performance of, Calabro's shorting in early 2008. That analysis covered only 2007 (approximately a year before the relevant period here), and Calabro had begun shorting only in November 2007. Moreover, when called upon to document his client's objectives in March 2008, Calabro identified a preference for three-to-six trades a month, substantially less than the frequent trading Calabro now seeks to justify.[61]

**d. Calabro's challenges to the testimony of the Division's expert regarding excessive trading are meritless.**

We find meritless Calabro's argument that the testimony of Louis Dempsey, the Division's expert regarding the excessive nature of Calabro's trading in Williams's account, should be excluded or disregarded. Calabro asserts that Dempsey (i) was not qualified to serve

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[58] *Robert M. Fuller*, Exchange Act Release No. 48406, 56 SEC 976, 2003 WL 22016309, at *7 (Aug. 25, 2003) (internal quotation marks and citation omitted), *petition denied*, 95 F. App'x 361 (D.C. Cir. 2004); *see also Martin R. Kaiden*, Exchange Act Release No. 41629, 54 SEC 194, 1999 WL 507860, at *6 (July 20, 1999) (same).

[59] "[A]s between Williams and Calabro," the law judge "generally f[ou]nd Williams to be the more credible witness" and concluded that "Calabro was, quite simply, not a believable witness on most crucial points."

[60] This case is a far cry from *Kenneth R. Ward*, cited by Calabro, in which we rejected a law judge's credibility findings as "untenable" where testimony credited in the initial decision was "vague and self-serving" and "contradicted by overwhelming testimonial and documentary evidence in the record." *See id.*, Exchange Act Release No. 47535, 56 SEC 236, 2003 WL 1447865, at *10 (Mar. 19, 2003) (noting that overwhelming evidence included "consistent testimony of city officials from the two distinct municipalities involved, misleading facsimile transmissions [respondent] sent to city officials, and contemporaneous notes taken by one of those officials that supported the officials' testimony," as well as "transcripts of taped conversations between [respondent] and one of these officials" and additional testimony of officials from respondent's employer), *aff'd*, 75 F. App'x 320 (5th Cir. 2003).

[61] We also reject Calabro's argument that Williams should be deemed a speculative investor because, among other things, he separately invested in oil wells. We find that those non-brokerage investments are beside the point with respect to his J.P. Turner account profile.

as an expert witness and failed to independently analyze Calabro's trading by adopting the Division's trading analysis as his own and (ii) should have adjusted his calculation of the turnover rate and cost-to-equity ratio to account for the sharp decline in Williams's account during the relevant period and Calabro's shorting.

**i. Dempsey was well qualified to serve as an expert and independently analyzed Calabro's trading.**

Contrary to Calabro's argument, we find that Dempsey was well qualified to serve as an expert. Among other things, Dempsey previously had provided training on churning and conducted many forms of trading analysis, and his expert report and testimony reflected a familiarity and facility with churning literature and concepts. Using established methodology, Dempsey independently verified and corrected the Division's trading analysis in several instances.[62] And, although Dempsey had not testified previously as an expert on churning, this does not bar his testimony (as Calabro suggests) because every expert must testify for the first time at some point.[63] We thus conclude that the law judge properly admitted Dempsey's testimony under our Rule of Practice 320.[64]

**ii. Dempsey properly applied the established methodologies in calculating the turnover rate and cost-to-equity ratio.**

We also find unpersuasive Calabro's argument that Dempsey's opinion should be excluded or given diminished weight because he did not revise his methodology for calculating the turnover rate and cost-to-equity ratio in light of the steep decline in Williams's account and Calabro's use of shorting. Calabro asserts that Dempsey's opinion thus failed to satisfy the standard for admission of expert evidence established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[65] But although *Daubert* does not apply because the Federal

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62 *Cf. Donnelly*, 1996 WL 20834, at *2 n.11 (rejecting claim that NASD failed to "perform its own independent analysis," where "NASD calculated the turnover rates, and derived results consistent with," calculations performed by registered representative's employer).

63 *Cf. Paine v. Johnson*, No. 06-cv-3173, 2010 WL 785398, at *3 (N.D. Ill. Feb. 26, 2010) (rejecting argument that expert witness was unqualified to testify under the Federal Rules of Evidence "because he [wa]s not one of the usual suspects, as 'there is a first time in court for every expert' and experts need not be 'professional witnesses' to be qualified in their areas of expertise" (citing *United States v. Parra*, 402 F.3d 752, 758-59 (7th Cir. 2005)).

64 17 C.F.R. § 201.320 (permitting the admission of relevant evidence and excluding "all evidence that is irrelevant, immaterial or unduly repetitious"); *accord* Administrative Procedure Act Section 556(d), 5 U.S.C. § 556(d). Calabro does not challenge the admission of Dempsey's opinion under this standard.

65 509 U.S. 579 (1993) (applying Federal Rule of Evidence 702); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (extending *Daubert* approach to non-scientific evidence).

Rules of Evidence are inapplicable in our administrative proceedings,[66] we see nothing in Dempsey's report or testimony that violates its "spirit."[67]

Dempsey calculated the turnover rate and cost-to-equity ratio using established formulas routinely used in cases alleging excessive trading.[68] Indeed, Calabro concedes that "the Commission and the courts have considered two metrics as indicators of excessive trading—the turnover and cost/equity ratios." Although Calabro attacks Dempsey's use of these measures, Calabro offered no expert testimony supporting his critiques of Dempsey's calculations and cites no case, scholarly article, or other apposite authority supporting those critiques. Consistent with this lack of authority, we specifically reject each of Calabro's three articulated attacks on Dempsey's calculations. We also find that calculating the turnover rate and cost-to-equity ratio as Calabro urges would not alter our conclusion that Calabro excessively traded Williams's account.

*Use of average account value in turnover rate*: Calabro argues that because Williams's account declined rapidly during the relevant period, Dempsey should have calculated the turnover rate by dividing total account purchases by the account's initial value (reduced by the value of commissions), rather than its (lower) average value. Calabro's proposed revision would decrease the turnover rate because, given the decline in Williams's account, its initial value (less

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66 *Del Mar Fin. Servs., Inc.*, Exchange Act Release No. 48691, 56 SEC 1350, 2003 WL 22425516, at *8 (Oct. 24, 2003) ("We have stated on numerous occasions that the Federal Rules of Evidence . . . are not applicable to our administrative proceedings which favor liberality in the admission of evidence.").

Although *Daubert* recognized a "gatekeeping role for the judge" before expert evidence is presented to the trier of fact, *Daubert*, 509 U.S. at 597, "[t]he 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial." *Deal v. Hamilton County Bd. of Ed.*, 392 F.3d 840, 852 (6th Cir. 2004). We see no reason why a law judge, if he deems it appropriate, cannot hear expert testimony (and cross-examination) and then determine what weight to give that testimony. *See City of Anaheim*, Exchange Act Release No. 42140, 54 SEC 452, 1999 WL 1034489, at *2 (Nov. 16, 1999) ("Administrative agencies such as the Commission are more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries.").

67 *Cf. Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004) (holding that "'[j]unk science' has no more place in administrative proceedings than in judicial ones").

68 *See Stein*, 2003 WL 431870, at *4 n.26 (collecting authority for the proposition that "modified Looper formula" is a "method of calculating the turnover rate [that] has been repeatedly used by the Commission"); *Rafael Pinchas*, Exchange Act Release No. 41816, 54 SEC 331, 1999 WL 680044, at *5 & n.20 (Sept. 1, 1999) (stating that "[a]nother indicator of excessive trading is the cost-to-equity ratio" and citing examples of its use); *see also Kenneth C. Krull*, Exchange Act Release No. 40768, 53 SEC 1101, 1998 WL 849545, at *4 (Dec. 10, 1998) (observing that analysis of "turnover ratios and cost-equity maintenance factors" is "the type of analysis applied when determining whether an account has been churned or excessively traded"), *aff'd*, 248 F.3d 907 (9th Cir. 2001).

commissions) exceeds its average monthly value.[69] But we find that the decline in Williams's account value is not an unusual occurrence requiring a modification to the established turnover rate formula because churning and losses frequently coincide.[70] In addition, average account value yields a more accurate indication of turnover than a modified initial value because average value better reflects the variations in an account over time.[71] This is particularly appropriate because the turnover rate is calculated based on the purchases in the account over the entire relevant period, not just those purchases in its first month.

Calabro attempts to support his argument using a citation to the 1978 Special Study on options trading, but his reliance is misplaced. Calabro cites the Study for the out-of-context proposition that "if the values of portfolio securities change significantly, the [turnover rate] formula will not accurately reflect the ratio of the amount of purchases to the amount of total capital available for investment." But Dempsey did not apply the turnover formula that the passage criticizes. Instead, he applied a revised formula (the modified Looper formula) that addressed the concern identified in the passage.[72]

In any event, calculating the turnover rate in the manner Calabro suggests would make little difference because it still would yield a 5.4 turnover rate. That calculation approaches the rate of six that we have found is generally indicative of excessive trading and exceeds levels at which the Commission previously has found excessive trading in other cases.[73]

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69 Dempsey calculated the turnover rate using the modified Looper formula, which necessitates "dividing total cost of purchases by average monthly equity." *Bucchieri*, 1996 WL 254677, at *6 n.3 (citing *Allen George Dartt*, Exchange Act Release No. 24198, 48 SEC 693, 1987 WL 757985, at *2 n.6 (Mar. 10, 1987)). Dividing by a greater number (initial account value minus commissions) than provided in the formula (average account value) would decrease the turnover rate.

70 We have used the turnover rate to assess the excessiveness of trading in cases in which a client's account value drastically declined. *See, e.g.*, *Roche*, 1997 WL 328870, at *4 (citing ratios relevant to churned accounts where clients lost between 75% and 95% of amounts invested during relevant period).

71 Calabro argues that, if an account's value falls without trading, the turnover rate will be lower than if the value of the account held constant. This criticism is inapposite here because Calabro frequently traded Williams's account. It did not decline under a buy-and-hold strategy.

72 As originally conceived in *Looper & Co.*, Exchange Act Release No. 5676, 38 SEC 294, 1958 WL 55531 (Apr. 15, 1958), the turnover rate formula did not consider the value of securities held in an account. The Special Study thus explained "[i]f substantial securities positions are held in the account . . . , the [original] formula substantially overstates the degree of activity since the value of these positions is excluded from the amount of average monthly investment." As suggested in the Special Study, Dempsey applied a formula (the modified Looper formula) that takes into account the value of held securities.

73 *See supra* note 44.

*Effect of shorting on turnover rate*: We also are not persuaded by Calabro's argument that, to adjust for Calabro's shorting, Dempsey should have calculated the turnover rate not by using the value of purchases (as is standard), but rather by using the value of sales (for which Calabro cites no precedent).[74] This modification is appropriate, Calabro argues, because when an investor shorts a stock, he first sells borrowed stock and only later repurchases the stock to close the position. This reverses the normal order of transactions from that in a long position, where a purchase precedes a sale. Because the total value of sales in Williams's account over the relevant period is less than the total value of purchases (given Calabro's trading losses), calculating turnover using sales ("opening" transactions) instead of purchases ("closing" transactions), as Calabro proposes, would reduce the turnover rate.

But the reason that Calabro's revision would bring down the turnover rate has nothing to do with the reversal of the usual order of transactions in Williams's account dictated by Calabro's shorting strategy. Rather, it is that, on the whole, Calabro lost money trading Williams's account, making the total value of sales less than the total value of purchases. But selling securities for less than the investor paid for them is not unique to, or necessarily the result of, shorting. If a broker takes long positions and, on the whole, sells those positions for less than their total purchase price (causing a loss in the account), the total value of purchases will exceed the total value of sales. In that instance, calculating turnover using the value of sales, as Calabro urges, would reduce the turnover rate, even though the broker used long positions. On the other hand, if a broker made money using either short or long positions, applying Calabro's revised formula would increase the turnover rate because the total value of sales would exceed the value of purchases. Because Calabro raises nothing unfair or unique to shorting in his argument, we decline to depart from the standard turnover rate formula.[75] We will not apply a different formula simply because Calabro lost money shorting.

In any event, calculating turnover as Calabro advocates still yields a 6.6 turnover rate, which exceeds the rate we have found generally indicative of excessive trading.[76]

*Use of average account value in cost-to-equity ratio*: Third, we also reject Calabro's argument that Dempsey should have calculated the cost-to-equity ratio based on the initial value of Williams's account (subtracting commissions), rather than the account's average value (as the established formula does). Calabro asserts that this modification to the formula is appropriate because Williams's account declined rapidly during the relevant period. We disagree. Calculating the cost-to-equity ratio based on Williams's account's initial value would assume that

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[74] Dempsey testified that it would be unusual and inappropriate to calculate the turnover rate by reference to sales instead of purchases. Calabro also used the value of sales in his calculation of the 5.4 turnover rate discussed in the preceding section.

[75] We also reject Calabro's argument that where an account loses money shorting, there is an unfair "double effect" that increases the turnover rate by affecting both the numerator and denominator in the turnover formula. To the extent that such an effect exists, it is a function of the factors addressed above in Calabro's first two arguments and does not present a basis to modify the turnover rate formula.

[76] *Howard*, 2002 WL 1729157, at *3.

the account lost no money other than transaction costs. But the cost-to-equity ratio measures the amount that an account must appreciate just to pay the fees charged by the broker over the relevant period.[77] Assuming a constant account value (even adjusted to take out commissions) would ignore the results of Calabro's trading and thus understate the account appreciation necessary to cover the fees he charged Williams. In any event, Calabro's adjustment decreases the cost-to-equity ratio only to 18.7%, which approaches the 20% level that the Commission generally considers excessive,[78] and exceeds levels at which excessive trading has been found or considered to occur.[79]

**3. Calabro acted with scienter because his trading in Williams's account was at least reckless.**

**a. Standard applicable to scienter**

Scienter is "a mental state embracing [an] intent to deceive, manipulate, or defraud,"[80] and "is established either by evidence of intent to defraud or by evidence of willful and reckless disregard of the customer's interests."[81] We have stated that scienter "may be inferred from the amount of commissions charged by the registered representative."[82]

**b. Calabro exhibited reckless disregard for his customer's interests.**

The record establishes that Calabro knew that his client was 70 years old and retired, but he nonetheless coordinated an excessive trading strategy predicated on frequent shorting and options trades, which was contrary to Williams's true account objectives and trading history. Calabro also engaged in unauthorized trading and, at times, exaggerated the results of his trading.[83] And although Williams's account declined from approximately $1.9 million to

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77 *Bucchieri*, 1996 WL 254677, at *1 & n.4.

78 *Howard*, 2002 WL 1729157, at *3.

79 *See supra* note 45.

80 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

81 *Rizek*, 1999 WL 600427, at *5; *Studer*, 2004 WL 2735433, at *4-5; *Roche*, 1997 WL 328870, at *4.

82 *David Wong*, Exchange Act Release No. 45426, 55 SEC 602, 2002 WL 200089, at *4 (Feb. 8, 2002) (citing *Rivera v. Clark Melvin Securities Corp.*, 59 F. Supp. 2d 280, 289 (D.P.R. 1999) and *Sheldon Company Profit Sharing Plan & Trust*, 828 F. Supp. 1262, 1273 (W.D. Mich. 1993)); *cf. Armstrong*, 699 F.2d at 91 (finding that "the scienter required" for a finding of churning is "implicit in the nature of the conduct"); *Dzenits v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 494 F.2d 168, 171 n.2 (10th Cir. 1974) (holding that "proof of churning does not require proof of a specific or invidious intent to defraud").

83 The law judge specifically found Williams's testimony that "Calabro would sometimes exaggerate the results of his trading" to be credible. This exaggeration, Calabro's unauthorized trading, and the much more frequent trading than specified in the AASQ distinguish *Hotmar v.*

(*continued . . .*)

approximately $550,000 over the relevant period (principally attributable to Calabro's trading rather than withdrawals), Calabro received nearly $250,000 in commissions from that trading.[84] In short, the risk that Calabro's excessive trading was in derogation of Williams's investment objectives and contrary to Williams's interests was so obvious that Calabro must have been aware of it. We accordingly find that Calabro willfully and recklessly disregarded Williams's interests and thus acted with scienter.

Calabro denies that he acted with scienter for two principal reasons, each of which we reject. First, Calabro asserts that he "followed a strategy which he explained to each of his customers and which was reviewed and approved by his superiors." The record does not support this contention. Despite his claims of transparency, Calabro executed unauthorized trades and traded much more frequently than the three-to-six trades a month that he himself indicated in the AASQ.[85] We also are not convinced that Calabro's supervisors made a thorough review of his trading in Williams's account after it raised red flags internally. Among other things, there is no indication that Calabro's supervisors were aware of Williams's history of conservative investing or his true account objectives or that they ever spoke with him.[86]

Second, we also reject Calabro's argument that he did not act with scienter because he consistently had Williams's best interests in mind and worked tirelessly on his behalf. Calabro asserts that he extensively researched his trading strategy, was initially very successful using it, and experienced the substantial losses in Williams's account solely as a result of his honest miscalculations about the effect and extent of government intervention in the economy. Calabro's assertion that he initially made money in Williams's account (in part before the

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(. . . *continued*)
*Lowell H. Listrom & Co., Inc.*, 808 F.2d 1384, 1386 (10th Cir. 1987), in which the Court "fail[ed] to perceive any real evidence of deception" by the alleged churner.

[84] *Roche*, 1997 WL 328870, at *5 (finding that, where respondent's "clients were sustaining large losses while he was generating substantial commission income for himself," "[a]t the least, Roche acted in reckless disregard of his customers' interests and account objectives, and in favor of his own interests"). Calabro blames market upswings for the poor performance of his shorting strategy. But nothing compelled Calabro to follow a frequent trading strategy that benefitted him at his client's expense.

[85] *Cf. Rizek*, 1999 WL 600427, at *6 (finding scienter where "[e]ven assuming that Rizek believed in the efficacy of his strategy, he had no justification for recommending it to unsophisticated customers who were incapable of making an independent judgment, when he knew that the extremely high risk was directly contrary to the customers' conservative investment objectives").

[86] Calabro relies solely on alleged review by J.P. Turner's Executive Vice President, Michael Bresner, who the law judge found had failed to reasonably supervise Konner and Koutsoubos, and James McGrath, who did not testify. Although Bresner testified that McGrath told him that he had talked to Calabro's customers (at a time when their accounts purportedly had increased in value), Bresner conceded that he did not know the names of the clients McGrath called. Indeed, there is no evidence that McGrath or Bresner spoke with Williams.

relevant period) does not excuse his excessive trading. That an account makes money does not mean it is free from churning, which will decrease the gains a customer would receive but for the churning.[87]

Calabro also argues that, had he wanted to churn Williams's account, he could have done so much more easily by frequently trading in and out of recommended stocks. We do not find this assertion compelling. That Calabro did not pursue a more transparent form of misconduct does not establish that he did not churn Williams's account. Indeed, after Williams's account suffered losses from shorting attributable to the market recovery in March 2009, Calabro accelerated his trading in Williams's account over the next three months. Although the increased frequency of trading no doubt required more effort from Calabro, we conclude that it was no coincidence that that it benefitted him. Accordingly, we find that Calabro enriched himself by receiving substantial commissions at Williams's expense and acted, at a minimum, recklessly in excessively trading Williams's account.

* * *

For the reasons set forth above, we find that Calabro's excessive trading of Williams's account was fraudulent. We thus conclude that Calabro violated Securities Act 17(a), Exchange Act Section 10(b), and Rule 10b-5.

## IV.

### A. Facts relating to Jason Konner

Jason Konner began working in the securities industry in 1994. He holds Series 7 and 63 securities licenses and worked as a registered representative at several other brokerage firms before joining J.P. Turner's Brooklyn branch in September 2006. Konner spent much of his time at J.P. Turner "prospecting" new clients—i.e., trying to get additional clients through cold calls—often making more than 200 calls a day. Konner testified that when he searched for new clients he looked for experienced investors and those who could afford to speculate. When he started at J.P. Turner, Konner had approximately 20 clients. By 2010, he had approximately 200. At J.P. Turner, Konner was compensated solely based on commissions and received 65% of the commissions charged to his clients.

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[87] *Studer*, 2004 WL 2735433, at *5 ("The existence of churning does not turn on whether the customer lost money. . . . An account may be churned even if the customer shows a profit on the excessive trading."); *accord Davis v. Merrill Lynch, Pierce, Fenner & Smith*, 906 F.2d 1206, 1218 (8th Cir. 1990) (refusing to recognize profit as a defense to churning claim because "securities brokers would be free to churn their customers' accounts with impunity so long as the net value of the account did not fall below the amount originally invested"); *Nesbit v. McNeil*, 896 F.2d 380, 385-86 (9th Cir. 1990) (finding that plaintiff was entitled to recover for churning despite an increase in the value of the portfolio and that portfolio gains will not offset losses due to commissions from churning), *overruled on other grounds by Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

**1. James Carlson, a self-employed Iowa farmer, opened a J.P. Turner account in July 2007.**

After a cold call from Konner and a few follow-up telephone conversations, James Carlson opened an account with J.P. Turner in July 2007. Carlson is a self-employed farmer residing in Winfield, Iowa. He graduated from Iowa State University with a degree in agriculture and has farmed corn and soybeans for over 30 years. At the time he opened his J.P. Turner account, Carlson had a few individual retirement accounts and one non-retirement account. All of these accounts were managed "fairly conservative[ly]," with a buy-and-hold approach and relatively few trades. Carlson does not consider himself a sophisticated investor and does not believe that he has the expertise to trade stocks on his own. He does not regularly read investment-related periodicals and only occasionally watches investment-related television shows "for entertainment."

Carlson testified that Konner was "a good salesman" and that he decided to open a J.P. Turner account because he "assumed [Konner] knew what he was doing" and he "thought [Konner] had ideas." At the time Carlson opened the account, he told Konner that his goal was "to make money," but they never discussed a trading strategy. Carlson initially deposited about $6,500 into his J.P. Turner account.

With this relatively small amount of money, Carlson said he was willing to "take a few chances." This was reflected in the account application that J.P. Turner sent to Carlson with relevant information about the account's objectives and his finances already filled in: the primary investment objectives for the account were marked "Trading Profits" and "Speculation" and Carlson's risk tolerance was marked "Aggressive." Although Carlson agreed that the account application reflected his investment objectives and risk tolerance "[w]ith a small amount of money," he testified that "[w]ith a large amount of money" it did not. He also agreed that the information in the account application about his personal finances—income, net-worth, and investable assets—was accurate at the time. Carlson testified that he "glanced over" the account application briefly before signing it, but because "everything came filled out," he did not read it closely.

**2. Konner made the investment decisions in the account and engaged in active trading including unauthorized transactions.**

By April 2008, Carlson had deposited significantly more money into his J.P. Turner account—over $200,000—derived from proceeds he had received from a successful farming season. With the additional funds, Konner began to execute more and more trades. According to Carlson, "Konner made the decisions" for the transactions in the account. Konner initiated essentially all of the trades in the account in 2008 and 2009—a fact reflected in the account statements, which show virtually all of the transactions were marked "solicited." Although Carlson remembered mentioning a few stocks picks to Konner, he could specifically recall Konner purchasing only one of his suggestions. Carlson testified that he "went along with" Konner's recommendations "probably 100 percent" of the time. For his part, Konner insisted that he and Carlson were "managing [the account] together" and that Carlson declined trades, but

Konner conceded that "the vast majority of the trades were done at [his] recommendation" and that Carlson went along with "the majority of the recommendations."[88]

When they spoke on the telephone, Konner usually called Carlson and did most of the talking. Carlson did not typically ask Konner many questions. Carlson did not conduct any independent research on stocks, and Konner rarely sent him investment research. Instead, when deciding whether to accept a recommendation, Carlson typically had only the information Konner gave him over the telephone at the time Konner called with the recommendation. Konner himself acknowledged that Carlson was relying on Konner's knowledge of the market, and Carlson testified that he was willing to go along with Konner's recommendations because he trusted Konner.

Carlson's trust in Konner was further demonstrated by his not objecting to unauthorized trading. Carlson testified repeatedly and emphatically that Konner executed transactions in the account without first obtaining Carlson's permission. When asked specifically whether Konner called every time a trade was made, Carlson responded, "No. Oh, no. I would have been on the phone all day." When asked why he never confronted Konner about the unauthorized trading, Carlson explained that he "thought it was okay for [Konner] to do that, as my broker" and that he trusted Konner. Konner denied unauthorized trading in Carlson's account, but the law judge credited Carlson's testimony on this point.

As the trading in the account increased in volume and frequency through 2008 and 2009, Carlson found it difficult to keep up with the activity because "there were so many trades and so many companies involved that [he] didn't know anything about." Carlson acknowledged that he received trade confirmations and account statements, but testified that "for the most part" he did not review account statements when he received them. When he was busy farming, Carlson might not have even opened the account statements, and he often just threw them in a box because he "didn't have time to go through all the mail."

In the second quarter of 2008, because of the high level of activity, J.P. Turner placed a commission restriction on the account of $100 per trade.[89] Konner was "upset" about the restriction. According to Konner's testimony, he notified Carlson of the change in commissions

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[88] Konner insisted that Carlson declined his recommendations for some mutual funds and a real estate investment trust, but in his testimony Konner appears to confuse Carlson with another customer, Gordon Miller. For example, Konner testified that both Carlson and Miller had acknowledged during the hearing "that they declined to buy the mutual funds and the REIT that I recommended." In fact, Carlson never testified to this effect.

[89] The trigger for the restriction was a high ROI ("return on investment") number in J.P. Turner's Account Activity Review System. What J.P. Turner called ROI in this context is essentially the same as the cost-to-equity ratio. *Compare Bresner*, 2013 WL 5960690, at *4 ("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.") *with supra* note 42 and accompanying text (explaining that the cost-to-equity ratio is obtained by dividing total expenses by average monthly equity).

but did not tell him it was imposed because of active trading in the account.[90] In any event, Carlson did not "keep up with the commissions" he was being charged in the account.

**3. Carlson raised concerns to Konner, but Konner continued to actively trade the account through at least the end of 2009.**

At some point in 2008, Carlson became concerned about the "level of activity" in the account and "the fact that [the] account was dropping" in value. Carlson told Konner "several times" that the account needed to perform better and that he "c[ould]n't afford to lose" the money in the account.[91] But the active trading in Carlson's J.P. Turner account continued in 2009. In fact, J.P. Turner's Account Activity Review System put Carlson's account at the highest level for trading (Level 4) each quarter from the second quarter of 2008 to the third quarter of 2009. In 2009, Konner executed 118 sales totaling $4,163,638.86 and 134 purchases totaling $4,419,365.84. This trading generated commissions to J.P. Turner of $87,686, with over $55,000 of that amount going to Konner. According to the analysis of the Division's expert, Dempsey, the turnover rate in 2009 was 17 and the cost-to-equity rate was 34.6%. In April, June, and September 2009, the account experienced particularly active trading, with 30 or more trades in each of those months.

**4. The account forms signed by Carlson generally did not reflect his financial goals and situation.**

After opening the account, Carlson signed several account documents referencing his investment objectives, risk tolerance, and personal financial condition. In every document but one, someone at J.P. Turner filled in the relevant information in these areas and sent the document to Carlson for his signature. The information on these documents, which span from April 2008 to August 2011, was quite consistent. The prefilled forms indicated that Carlson had an annual income of $200,000, a liquid net worth of $750,000, and a net worth of either $2.5 or $2 million.[92] The prefilled forms also indicated (when they included a section for such information) that speculation and short-term trading were the account's primary investment objectives and that Carlson's risk tolerance was aggressive. Carlson testified that he did not read

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90 Konner testified that he negotiated his commission "on a trade by trade basis" with his customers, but later admitted that he did not discuss the commission on each trade with Carlson after the $100 restriction was in place. Carlson recalled a discussion with Konner about commissions only on the "early trades back in 2007" but testified that Konner never "negotiate[d]" the commission with him.

91 Konner gave inconsistent testimony on this topic at the hearing, first testifying that "I don't recall Mr. Carlson ever being upset with commission *or performance* in his account," but later stating that when the account was losing money Carlson did "complain." He denied that Carlson told him that he could not afford to lose his money.

92 Unlike the other forms, the August 2011 form had printed ranges for these categories. The following ranges were preselected by someone at J.P. Turner before the form was sent to Carlson: Annual Income – "> $100,000 < $250,000"; Liquid Net Worth – "> $100,000 < $500,000"; Net Worth – "> $1,000,000 < $2,500,000."

these documents closely when he received them and that he simply signed and returned them to Konner because he thought they were forms that "just had to be on file in [Konner's] office." Carlson explained his approach to the prefilled forms in this way: "I just got stuff from my broker and they had it marked where I was supposed to sign and that's usually what I did, because I trusted my broker."

During the hearing, Carlson stated, in testimony credited by the law judge, that the information in the prefilled forms was incorrect. Had he filled out the forms himself he would not have marked "speculation" as his primary investment objective or "aggressive" as his risk tolerance.[93] Carlson further insisted that he "wasn't worth near" $2 or $2.5 million and that he told Konner this "several times." At least once when Carlson told Konner the net-worth figure was incorrect, Konner told Carlson to "just initial" the form because "it really doesn't mean anything." Based on this representation and because he trusted Konner, Carlson signed the forms, even though he knew they contained inaccurate information. Konner denied that Carlson told him the net-worth numbers were incorrect and that he told Carlson they did not matter, but the law judge rejected Konner's testimony on this point.[94]

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[93] Upon cross-examination, Carlson agreed that he did not have "conservative" investment objectives or risk tolerance for the account, but as the law judge found, the record shows "that Konner failed to explain, and Carlson failed to understand, the various types of investment objectives as they apply in the securities industry." For example, when asked directly what the investment objective was for his non-retirement account held with another broker, Carlson responded, "It's local so it's just a place to put some spare money and money I don't think I'm going to need for a while and then he gives me a recommendation on maybe buying a stock or something. So that's why it's there, I guess." Carlson was then asked, "Do you understand what the term investment objectives means?," to which he responded, "Well, I guess I do. I don't know." And when asked about the investment objectives selected on the prefilled April 2008 account update form, Carlson testified, "I still don't understand the difference between trading profits and speculation but, I mean, to me, trading profits makes it sound like any stock you buy, you'll obviously make money on it. Well, that would obviously become the number one rank if you're going to make money on every stock."

[94] Even without the benefit of observing Konner's demeanor, we agree with the law judge that Konner's denials on this issue lack credibility. For example, in answering the Division's questions on this topic, Konner was inconsistent and evasive, often failing to give a direct answer:

> Q: Isn't it true that he told you his net worth was nowhere near two to two-and-a-half million dollars?
>
> A: All I know is what he told me and what he signed with the document. What he told me and what he signed to shows that.
>
> Q: Do you have a recollection of what he told you about his net worth?
>
> A: It's what was put down on the form he signed.
>
> Q: You remember him telling you he was worth two-and-a-half million dollars?

(*continued . . .*)

Tellingly, the only J.P. Turner form with all the information filled in by Carlson himself—a February 2010 AASQ—looks markedly different from the prefilled forms. Neither "speculation" nor "short-term trading" is marked as an investment objective,[95] and Carlson's annual income is shown as $120,000, his liquid net worth as $400,000, and his net worth as $800,000. As the law judge found, "Konner failed to provide a credible explanation for the change in the financial information on the forms or the inaccuracies contained thereon."

**5. Even after substantial losses, Carlson hoped that Konner could turn the account around.**

The value of Carlson's account declined significantly in 2010, but he kept the account open, thinking "that at some point in time, [Konner] would get things headed in the right direction." Konner remained Carlson's registered representative until Konner left J.P. Turner at the end of 2011, by which point Carlson had lost hundreds of thousands of dollars in his account, a substantial portion of which was attributable to commission charges. As Carlson testified at the hearing, "I kept giving [Konner] too many chances to try and turn it around."

## B. Based on our analysis of the facts, we conclude that Konner churned Carlson's account between January and December 2009.

As the analysis below demonstrates, in 2009, Konner (1) had de facto control over Carlson's account, (2) excessively traded the securities in the account, and (3) acted with scienter. We thus find that Konner churned Carlson's account in violation of Securities Act Section 17(a), Exchange Act Section 10(b), and Rule 10b-5.

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(. . . *continued*)

A: If that is what is put down there, yes.

…

Q: Isn't it true when discussing this form with Mr. Carlson, you told him the numbers didn't matter and they were merely a formality?

A: If the numbers didn't matter, we wouldn't be sending this out to him.

…

Q: Isn't it true that Mr. Carlson told you he wasn't worth two-and-a-half million dollars?

A: I only know what the client told me and what he signed to on the document.

…

Q: Mr. Konner, Mr. Carlson was emphatic, said several times he told you that he wasn't worth anywhere near $2.5 million. Do you have a recollection of him saying that to you?

A: He also initialed next to it acknowledging that that is exactly what he told me at that point in time.

[95] Carlson selected "Trading Profits" as his investment objective on the February 2010 AASQ, but as noted previously, *see supra* note 93, he did not understand what this term meant.

**1. Konner exercised de facto control over Carlson's account.**

Upon our de novo review of the record, we find that Konner exercised de facto control over Carlson's account. The record shows that Konner was in control of the volume and frequency of the trading in the account. As Carlson testified at the hearing, "Konner made the decisions" for the trading in the account. Konner initiated essentially all of the transactions during the churn period. In addition, the record indicates that Carlson lacked the knowledge and experience to independently evaluate Konner's recommendations. Carlson did not do any independent investment research. Instead, Carlson habitually relied on Konner and, because he trusted him, "went along with" Konner's recommendations "probably 100 percent" of the time.

Konner's unauthorized trading is further evidence that he had control of the account.[96] In testimony credited by the law judge, Carlson repeatedly stated that Konner did not get his approval before executing transactions in the account. Carlson testified that Konner's unauthorized trading occurred "a lot," and there were many trades for which Konner never sought his approval, even after the fact. Carlson never confronted Konner about the unauthorized trading because he mistakenly believed that Konner, as his broker, could trade without his prior approval.

Konner concedes that Carlson was not a sophisticated investor, that "the lion's share of the activity was initiated by Konner," and that "Carlson accepted most of Konner's recommendations," but he insists that other evidence in the record shows that Carlson maintained control of his account. We disagree. Konner points to the fact that Carlson was a successful farmer who prepared his own tax returns and had other investment accounts, but this is not persuasive evidence that Carlson maintained control of his J.P. Turner account.[97] The record shows that Carlson's other accounts were mostly retirement accounts and that all of his other accounts were managed conservatively with few trades in them. Konner does not dispute this but argues that the existence of the other accounts means that Carlson had "other brokers to go to if he wanted to pursue a different investment approach or philosophy with any or all of his money, or if he needed information or guidance about how to deal with a broker engaged in conduct he didn't understand or thought was misguided." But whether Carlson knew other brokers that he could turn to for advice is beside the point. The relevant question for purposes of control is whether Carlson himself had the wherewithal to independently evaluate Konner's recommendations.[98] The preponderance of the evidence in the record, including evidence of Carlson's prior investment experience, shows that he did not.

In support of his argument that Carlson maintained control of the account, Konner points to the fact that Carlson deposited money into his J.P. Turner account rather than other more

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96 *Supra* note 20 and accompanying text.

97 *Rizek*, 1999 WL 600427, at *6 (rejecting the argument that because the customers were "successful businessmen" they controlled their accounts and noting that the customers lacked "the degree of investor sophistication necessary … to make any sort of independent evaluation" of the broker's recommendations).

98 *See supra* notes 19 and 39 and accompanying text.

conservative accounts and told Konner he wanted to "make money" with the account. As the Division points out, a desire to make money "is every investor's intent," and Carlson telling this to Konner is not evidence of control. Moreover, even if Carlson was willing to accept more risk in his J.P. Turner account than in his other accounts, his decision to send Konner money does not mean that Carlson had control of the account. In fact, the evidence in record shows just the opposite. Carlson told Konner he wanted to make money, but they never discussed a trading or investment strategy.[99] Instead, convinced that Konner had "new ideas" because he was a "good salesman," Carlson was "willing to send him some money" and let Konner manage the account with very little input from him. The record shows that, because he trusted Konner and because he lacked the knowledge and experience necessary to gainsay Konner's recommendations, Carlson simply "acquiesced in [Konner's] trades."[100]

Konner also insists that Carlson "rejected a number of conservative investment opportunities," but there is scant evidence in the record to support this claim. Konner faults the law judge for crediting Carlson's testimony that he could not recall having rejected a trade recommendation by Konner over Konner's testimony that Carlson rejected specific recommendations. Konner also argues that his version of events is supported by the testimony of Gordon Miller, another of his clients, who admitted rejecting recommendations by Konner. But the fact that Miller rejected Konner's recommendations is hardly convincing evidence that Carlson did. And Konner's testimony on the matter is problematic because he erroneously testified that Carlson admitted during the hearing to rejecting Konner's recommendations when, in fact, only Miller did.[101] Considering the relevant evidence, we decline to overturn the law judge's credibility determination.[102] In any event, whether Carlson rejected none or only a very

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99 As the Division notes, in the same passage in which Carlson testifies to telling Konner he "wanted to make money," he added that he "realized that certain things were a little more risky . . . . But I also know there is also some good stuff out there that will make you money, you know, if you buy and hold it, too." We agree with the Division that this testimony, which suggests that Carlson thought that Konner's approach to trading was consistent with a buy-and-hold approach, underscores Carlson's "lack of investor sophistication" as well as Konner's failure to communicate clearly with Carlson about his investment approach.

100 *Cody*, 2011 WL 2098202, at *12.

101 *See supra* note 88.

102 Konner argues that the law judge's credibility determination on this issue "makes no sense" because Carlson testified only that he had no recollection of rejecting a recommendation whereas Konner's testimony that Carlson rejected specific recommendations was bolstered by Miller's testimony. But given the low probative value of Miller's testimony on this question and Konner's mistaken testimony about what Carlson said during the hearing—which casts doubt on the veracity of Konner's other testimony on this topic—we will not disturb the law judge's credibility determination.

few of Konner's hundreds of recommendations, our conclusion that Konner had de facto control of the account remains the same.[103]

Likewise, we reject Konner's contention that "the fact that Carlson admitted he initiated at least one investment possibility" is convincing evidence of Carlson's control of the account. The record shows that nearly all of the activity in the account was initiated by Konner, with even Konner conceding that "the vast majority of the trades were done at [his] recommendation." This supports a finding of broker control, even if Carlson put forward a suggestion for at least one trade.[104]

Pointing to trade confirmations, account statements, and tax documents Carlson received, Konner argues that Carlson "was continuously informed about the activity in the account."[105] But, as we have held, merely receiving account documents showing the activity in the account does not mean that the customer controlled the account.[106] Although a customer's knowledge and understanding of the trading in the account may be relevant to the issue of control,[107] the record shows that Carlson typically did not review account statements and, when he was busy farming, might not even open them. In addition, because of the high level of activity, Carlson testified that it was "very difficult" to keep up with the trading in the account. And Konner was executing "a lot" of trades without Carlson's authorization. Thus, the facts here show that Carlson lacked control of the account.[108]

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[103] *See Sweeney*, 1991 WL 716756, at *4 (finding control when customer rejected one transaction but otherwise routinely followed the broker's recommendations).

[104] *See id.* (finding control when "[w]ith few exceptions, the customers did not initiate the transactions in their accounts").

[105] Without any citation to the record, Konner contends that Carlson "admitted being aware of all trades and that he never complained about anything." But although Carlson acknowledged receiving documentation on account activity, the record shows that he was not "aware of all the trades" because he typically did not review and might not even read the statements he received. And Konner engaged in frequent unauthorized trading for which he never sought Carlson's authorization, even after the fact. In addition, Carlson repeatedly testified that he did complain to Konner about his account's performance, telling Konner "I can't keep losing money like this."

[106] *See supra* note 29; *Sweeney*, 1991 WL 716756, at *4 (holding that the "fact the customers received confirmations and monthly statements" does not mean they controlled their accounts).

[107] *See, e.g.*, *Sweeney*, 1991 WL 716756, at *4.

[108] Contrary to Konner's suggestions, the fact that Carlson signed certain account documents is not evidence of control because, as the record shows, he did so without closely reviewing or reading them. Moreover, the record does not support Konner's contention that Carlson "affirmed" to J.P. Turner compliance personnel that his account activity was "consistent with his investment objectives." *See infra* Section IV.B.2.b. (discussion of John Williams's testimony).

Konner also argues, citing *Follansbee v. Davis, Skaggs & Co., Inc.*,[109] that "to the extent the Law Judge found that Konner exercised control because Carlson routinely accepted his broker's stock recommendations, following the advice of a broker is hardly tantamount to broker control." But the finding that Konner exercised de facto control over the account is not grounded only on Carlson accepting all or nearly all of Konner's recommendations, even though this is an important factor in the analysis.[110] Here, as we have already discussed, there are multiple factors supporting a finding of broker control, including Carlson's lack of investing sophistication, Carlson's inability to independently evaluate Konner's recommendations, Carlson's failure to keep up with the activity in the account, the trust Carlson placed in Konner, and Konner's unauthorized trading. Unlike in *Follansbee*, which involved a sophisticated investor who actively participated in the management of his account, the evidence in the record here shows that Carlson's involvement can accurately be characterized as "the passive acquiescences of an uninformed dependent."[111] Considering all of the evidence in the record relevant to the issue of control, we find that Konner exercised de facto control of Carlson's account.

**2. Konner excessively traded Carlson's account during 2009.**

**a. Konner's trading in Carlson's account was excessive as demonstrated by the turnover rate and cost-to-equity ratio, as well as other relevant factors.**

Konner engaged in excessive trading in Carlson's account between January and December 2009. The account's annual turnover rate of 17 and cost-to-equity ratio of 34.6% during the churn period far exceed the standard benchmarks for trading that is excessive. In 2009, Konner executed over 250 transactions in the account totaling over $8.5 million, which generated commissions to J.P. Turner of $87,686. Konner's trading also included repeated unauthorized trading. These facts are strong evidence that Konner excessively traded Carlson's account.

Konner argues that because "the Carlson account was designed to be an aggressive, short-term trading account, any reliance upon turnover ratios and other indicia of excessive trading

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109 681 F.2d 673 (9th Cir. 1982).

110 In prior cases, we have found that a customer routinely following a broker's recommendations may be dispositive of control. *See, e.g.*, *Sweeney*, 1991 WL 716756, at *4; *see also supra* note 18.

111 *Follansbee*, 681 F.2d at 677-78 (finding that Follansbee was "far from an untutored novice" and that he actively pushed for investments against his broker's recommendation); *see also supra* note 30 (discussing *Follansbee*). For the same reason, Konner's reliance on *IFG Network Securities, Inc.*, Initial Decision Release No. 273 (Feb. 10, 2005), is also misplaced. Further, *IFG Network Securities* did not concern churning and, in any event, is not binding on us. *See Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at *8 n.48 (Apr. 4, 2014) (noting that the Commission is "not bound by a law judge's initial decision"); *Rapoport v. SEC*, 682 F.3d 98, 105 (D.C. Cir. 2012) (noting that ALJ order was "not a binding Commission decision").

used to evaluate a conservative investment account must be discarded."[112] We reject this argument on two grounds. First, although Konner is correct that the excessiveness of a broker's trading is "considered in light of the nature and objectives of the account,"[113] we find, as explained more fully below, that Carlson was not a speculative or aggressive investor.

Second, Konner is wrong that turnover rates and cost-to-equity ratios have "no relevance" and "must be discarded" except in the case of conservative investors. Although "there is no definitive turnover rate or cost-to-equity ratio that establishes excessive trading"[114] and "our assessment of whether trading is excessive does not rest on any magical per annum percentage,"[115] the standard guideposts or benchmarks that we, the courts, and other regulators have applied for many years to gauge the excessiveness of trading in an account provide a useful starting point in evaluating all customer accounts, not just conservative ones.[116] A respondent may demonstrate a lack of excessive trading by showing that the client was intentionally pursuing an aggressive, short-term trading strategy, but the standard benchmarks remain relevant for the accounts of more than just the most conservative investors.[117] Notably, we have repeatedly found excessive trading occurred in conservative investors' accounts when the turnover rate and cost-to-equity ratio were *below* the standard benchmarks.[118] In this case, the turnover rate and cost-to-equity ratio significantly exceed the standard benchmarks. Given this fact and our findings concerning the character of Carlson's account, we conclude that Konner's trading in the account was excessive.[119]

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112 In his brief, Konner in part frames this argument as an attack on the testimony of the Division's expert, Dempsey. But, in doing so, Konner actually challenges the use of the turnover rate and cost-to-equity ratio at all in this case, rather than Dempsey's calculation of them or some other facet of his testimony.

113 *Costello v. Oppenheimer & Co., Inc.*, 711 F.2d 1361, 1368 (7th Cir. 1983) ("The starting point for such an inquiry is, of course, delineation of the customer's investment goals, for those objectives significantly illuminate the context in which the trading took place and, indeed, form standards against which the allegations of excessiveness may be measured."); *see also supra* note 47.

114 *Howard*, 2002 WL 1729157, at *3.

115 *Cody*, 2011 WL 2098202, at *14 (quoting *Donnelly*, 1996 WL 20843, at *2) (internal quotation marks omitted); *see also Stein*, 2003 WL 431870, at *4 (noting that "there is no single test for making an excessive trading determination").

116 *See supra* notes 43-45.

117 *See, e.g.*, *Murphy*, 2013 WL 3327752, at *13-15 (finding excessive trading by applying the standard turnover and cost-to-equity benchmarks in accounts where clients did not have conservative risk tolerances).

118 *See supra* notes 44 and 45.

119 We also reject Konner's vague and undeveloped argument that "extreme and unusual market conditions" somehow excuse his excessive trading in Carlson's account. Even accepting

(*continued . . .*)

**b. Carlson was not a speculative, aggressive investor.**

Konner contends that his trading was not excessive because the substantial weight of the evidence shows that Carlson's investment objectives for his J.P. Turner account were speculation and short-term trading. We disagree. Contrary to Konner's insistence, the account forms signed and initialed by Carlson are not convincing evidence that he was a speculative investor. According to Carlson's testimony, when he opened his account with J.P. Turner, he was willing to "take a few chances" with the relatively small amount of money that he invested. For this reason, Carlson admitted that the primary investment objectives ("Trading Profits" and "Speculation") and risk tolerance ("Aggressive") marked on his 2007 account application were "probably" accurate for his initial $6,500 investment, even though he could not recall selecting them. But Carlson testified that "with a large amount of money" his investment objectives and risk tolerance were more conservative than those represented on the 2007 account application and on subsequent account forms that he signed. Specifically, Carlson testified that his risk tolerance during the relevant period was "moderate." Although Carlson admitted that he would not characterize his investment objectives and risk tolerance as "conservative" for his J.P. Turner account, considering all the evidence in the record, we agree with the law judge that "Carlson's investment objectives and risk tolerance [were] not accurately reflected" in the account documents. We base this finding on a variety of considerations.

It is undisputed that, with the exception of one form, Carlson did not fill in the information on investment objectives and risk tolerance on the account forms that he signed but they were sent to him with that information filled in by someone at J.P. Turner. With regard to the prefilled forms most relevant to the churn period—the April 2008 account update and March 2009 AASQ—Carlson testified that he did not recall telling anyone at J.P. Turner before receiving the forms that his investment objectives were speculation and short-term trading, even though those were the primary objectives indicated on the forms.[120] Carlson further testified that, because the account documents were sent to him already filled in, he glanced over them but did not pay close attention to them, particularly to the investment objectives and risk tolerance sections of the forms.[121] Carlson did pay closer attention to the sections concerning his personal financial situation, but when he told Konner "several times" that the forms overstated his net worth, Konner responded that it "didn't mean anything" and that Carlson should "just initial" the

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(. . . *continued*)
that there was a significant amount of market volatility in 2009, we still conclude that Konner's trading in Carlson's account was excessive.

[120] Konner testified that he did not know where the information on the April 2008 form came from, which further supports the finding that the information did not come from any conversation he had with Carlson.

[121] Carlson testified that he did not read some of the forms at all. For example, Carlson testified that he did not read the Active Account Suitability Supplement forms that accompanied the March 2009 and February 2009 AASQs before signing them. The AASS forms contained boilerplate disclosures about the risks of active trading and stating that the signatory had read and understood the document. *See supra* note 16.

forms. Based on Konner's representations and Carlson's belief that forms were just something that needed to be on file in Konner's office, Carlson signed and initialed the forms as requested because he trusted Konner. These facts give us little reason to rely on the account forms as accurate reflections of Carlson's investment objectives and risk tolerance during the churn period.[122]

In addition, the one form that Carlson did fill out himself just after the churn period—the February 2010 AASQ—did not indicate speculation or short-term trading as his investment objectives. Carlson's explanation for why he selected "Trading Profits" instead is revealing:

> Q: By marking trading profits, what did you intend to happen in your account?
>
> A: I guess I decided that the word profit was involved and I hadn't seen much of that so I wanted to get back into that, trading profits.
>
> Q: Did you have a firm understanding of what these investment objectives meant?
>
> A: I have never understood with trading profits, how it's different. I thought that was the goal of any trade. So I didn't understand the trading profits. *I assumed it was lower risk than the other two.* (Emphasis added.)

Although he did not really understand what trading profits meant as an investment objective and it was undefined on the form,[123] Carlson selected it because he believed it was more conservative than speculation and short-term trading. Based on this testimony and other testimony by Carlson concerning investment objectives,[124] we agree with the law judge's finding that "Konner failed to

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[122] Although it was otherwise prefilled, Carlson testified that he wrote "4 a week" next to "Frequency of Trades" in the March 2009 AASQ. When asked how he selected that number, Carlson testified that he did not recall and that he did not remember if he discussed it with Konner. Given this testimony and Carlson's general lack of investing sophistication and experience, unlike the law judge, we are not inclined to place particular significance on what Carlson wrote here. Nevertheless, as the law judge indicated, on average Konner traded "significantly more" than four trades per week during the churn period. Carlson also testified that he was "not sure" why he wrote two trades per week on the February 2010 AASQ, but that he had decided "we needed to cut down on the trades and try to make some money back."

[123] One industry source defines "Trading Profits" in this way: "An investment objective of Trading Profits indicates you seek to take advantage of short-term trading opportunities, which may involve establishing and liquidating positions quickly. Some examples of typical investments might include short-term purchases and sales of volatile or low priced common stocks, put or call options, spreads, straddles and/or combinations on equities or indexes. This is a high-risk strategy." Commerce Brokerage Services, Inc., *Glossary of Investment Terms, available at* http://www.commercebank.com/wealth-management/investments-and-insurance/glossary.asp#T (last visited May 28, 2015).

[124] *See, e.g. supra* Section IV.A.4.

explain, and Carlson failed to understand, the various types of investment objectives as they apply in the securities industry." This finding further undermines Konner's argument that the account forms are convincing evidence that Carlson was a speculative investor. If Carlson did not understand what the investment objectives meant, whatever was marked on the form has little relevance to Carlson's actual objectives.[125]

Although Carlson did not have a firm grasp of the investment objectives on the forms, he told Konner "several times" that he could not afford to lose the money in his account. Carlson thus alerted Konner that he was, in fact, not willing or able to bear the risks associated with Konner's style of trading. Konner points to his "business model" of seeking "high net worth individuals interested in deploying a small portion of their liquid assets in short-term, speculative trading," and he testified that he was looking for clients who were "willing, able, and financially stable enough" to speculate with "a very small portion of the liquid assets they had." But the problem with Konner's argument is that during the churn period Carlson did not fit the profile of the investors Konner sought. As Carlson testified, the money Carlson put into his J.P. Turner account was not "pure profit" but money that he would need to put back into his business the next season, and it represented a "very high percentage" of his liquid net worth. Thus, Konner should not have pursued the aggressive trading that he did in Carlson's account because, as he acknowledged at the hearing, a "customer who didn't have the financial resources to engage in active trading shouldn't do it."[126]

But Konner did more than engage in trading that was inconsistent with Carlson's financial condition. He also inflated the net worth numbers on Carlson's account forms so his trading would seem more consistent with the account's profile, which, as the law judge found, allowed Konner to "engage in active trading in Carlson's JPT account without drawing the attention of the compliance department." As noted, in testimony credited by the law judge, Carlson told Konner multiple times that he was not worth "near" $2 or $2.5 million, but Konner told him that the figure "didn't mean anything." Konner insists that the sharp increase in Carlson's net worth as reflected on the account forms following his initial account application is attributable to a "truism known to brokers" that "clients often do not reveal the full extent of their net worth at the beginning, when they are just getting to know their broker." Even if such a phenomenon exists—and Konner offers no evidence that it does other than his own assertion[127]—we reject

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[125] Konner argues that a "broader review" of the record evidence shows that Carlson was "a client willing to invest aggressively in order to generate significant investment profits" and that "Carlson knew what was going on and accepted it." We disagree with Konner's characterization of the evidence. Although Carlson hoped to "make money" in his J.P. Turner account, the record demonstrates that he was uninformed about active trading and the associated risks. The record shows that Carlson placed significant trust in Konner's ability to properly manage his J.P. Turner account, and although generally aware that Konner was trading a lot, he did not actively monitor his account and did not "keep up with the commissions" he was being charged.

[126] Konner acknowledged that Carlson's significant investment in his J.P. Turner account in 2008 "just didn't match up" to his financial profile in his account application.

[127] As the law judge notes, Konner's hearing testimony on this topic was inconsistent. Konner first testified that he did not recall having a conversation with Carlson about his net

(*continued . . .*)

this explanation both because it is directly contrary to Carlson's credited testimony and because it is inconsistent with the information on the February 2010 AASQ. That form, which Carlson filled out himself, indicated his net worth was $800,000, which differs significantly from *earlier* prefilled forms indicating $2 or $2.5 million.

In support of his argument that Carlson was interested in aggressive, speculative trading, Konner attacks Carlson's credibility and argues that his testimony is biased and inconsistent. The law judge found Carlson to be "generally credible" with a "demeanor and matter-of-fact tone [that] bolstered his credibility." The law judge also specifically credited Carlson's testimony over Konner's on several key points, including the accuracy of the account forms. Konner acknowledges in his brief that the findings against him "turn largely on credibility assessments," but he insists that the law judge's credibility determinations are erroneous. As noted, we give considerable weight to the credibility determinations of the law judge.[128] Based upon our review of the entire record, we decline Konner's invitation to reject the law judge's credibility determinations concerning Carlson's testimony.[129]

Konner argues that Carlson testified to further his own financial interests because he believes a win for the Division "might translate into a financial win for him." But Carlson's testimony that Konner being found liable "can't hurt" any potential effort to recover the financial losses in his J.P. Turner account is hardly a basis to reject the law judge's credibility determination. This is particularly true given Konner's own strong incentive to testify to avoid liability. With the evidence of potential bias before him, the law judge ultimately determined to credit Carlson's testimony over Konner's, and we find no reason to disturb this finding.

Konner further argues that Carlson is not credible because he testified generally that when he signs a document he intends to represent that what he signed was "a truthful and accurate statement" but also testified that he signed and initialed forms that he knew were inaccurate. Along the same lines, Konner attacks Carlson's testimony that he never read certain

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(. . . *continued*)
worth, then he said that Carlson told him "what was put down on the form" and that Carlson had "a two million dollar net worth as he stated to me." Only later did Konner put forward his theory that Carlson was initially reluctant to reveal his full net worth. At this point in his testimony, Konner suggested that he recalled specific details of a conversation about Carlson's net worth in which he told Carlson "to come clean" and provide accurate financial information. But this is inconsistent with Konner's testimony that he never had "any reason to doubt any information that" his customers provided him on their account forms.

[128] *Supra* note 58 and accompanying text.

[129] In arguing that the law judge's credibility determination should be rejected, Konner cites *Herbert Moskowitz*, Exchange Act Release No. 45609, 2002 WL 434524 (Mar. 21, 2002) and *Ward*, 2003 WL 1447865. In those cases, we found the testimony credited by the law judge "fl[ew] in the face of the substantial, contradictory documentary evidence," *Moskowitz*, 2002 WL 434524, at *6, and "was contradicted by overwhelming testimonial and documentary evidence in the record," *Ward*, 2003 WL 1447865, at *10; *see also supra* note 60 (detailing overwhelming evidence in *Ward*). That is not the case here.

account forms that he signed, which included language that he had read and understood the documents.[130] These arguments miss the mark. Carlson's hearing testimony explains why Carlson signed and initialed account forms even when he had not read or did not fully understand them and sometimes even when he knew they contained inaccuracies. He did so because he trusted Konner and, on at least one occasion, because Konner told him to "just initial" the form and that the inaccuracies "didn't matter." In this context, we do not find that inconsistencies between the account forms and Carlson's hearing testimony undermine his credibility as a witness. On the contrary, other evidence in the record, such as the February 2010 AASQ, bolsters Carlson's testimony that the prefilled account forms were inaccurate and Carlson signed them because Konner asked him to.

Konner places particular importance on the testimony of John Williams, J.P. Turner's Brooklyn branch compliance officer, regarding his general practice of reviewing account forms and contacting customers when there was a change or inconsistency on the forms. Konner argues that this testimony establishes that, in early 2009, "Carlson had reaffirmed that he had the financial wherewithal, the investment objectives, and the risk tolerance, to invest in an actively traded, speculative brokerage account." But Konner's reliance on Williams's testimony is misplaced. First, the law judge found that Williams was not a credible witness generally, and particularly with regard to testimony concerning Carlson's March 2009 AASQ, the law judge found that Williams's credibility was "very low." Upon our review of the record, we find no compelling basis to disturb those findings.[131]

More importantly, Williams's testimony, even if believed, does not have the meaning or importance that Konner ascribes to it. With regard to the March 2009 AASQ, Williams did not actually recall a conversation with Carlson about the form. Instead, Williams speculated, based on his "general practice," about what the conversation might have included if it had taken place. Such testimony is not convincing evidence of what Carlson "reaffirmed" during a telephone conversation that no one actually recalls happening. Similarly, the fact that Williams reviewed Carlson's account documents is not evidence that the forms accurately portrayed Carlson's investment objectives, risk tolerance, and financial condition—particularly given the credited testimony that Konner told Carlson to initial inaccurate information on the forms. And

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130 *See supra* note 121.

131 Konner insists that the law judge unfairly discounted Williams's testimony because he was soft spoken, exhausted from a long day, and had difficulty responding to an "inartful question" by the law judge. But because the law judge is best positioned to judge the demeanor of a witness in assessing credibility, we are particularly wary about second-guessing the law judge's demeanor-based assessments.

We also disagree with Konner's characterization of Williams as a "completely independent" witness. Williams was a former long-time employee of J.P. Turner who had reason to defend his own practices as a compliance officer and who had a "friendly" relationship with Konner. In any event, as we explain, Williams's testimony is not particularly relevant or probative.

Williams's testimony about Konner's practices as a broker, while having some relevance, is not particularly probative because, as Williams acknowledged, "I am not next to the guy 24/7."

For all of the above reasons, we find, upon our de novo review of the record, that during the churn period Carlson's investment objectives did not include a desire for speculative and aggressive trading.

**c. Konner's challenges to the Division's expert are meritless.**

We also reject Konner's challenges to the testimony of Dempsey, the Division's expert on excessive trading. Konner argues that the churning analysis for Carlson's account is flawed because Dempsey treated the deposit of Quantum Fuel Systems Technologies Worldwide, Inc. stock into the account in September 2009 as a customer deposit, when it should have been treated as investment profit.[132] At Konner's recommendation, Carlson purchased Quantum Fuel Systems "common stock units" in private investment in public equity ("PIPE") transactions directly from the issuer in June and August 2009 for $150,000.[133] Shares of Quantum Fuel Systems stock appeared in Carlson's J.P. Turner account in September 2009, and at the end of that month they were worth approximately $325,000. Konner argues that, if these shares were treated properly, the churning analysis would reflect a net profit rather than a net loss in Carlson's account during the churn period. Konner does not contend, however, that this adjustment would meaningfully impact the turnover rate or cost-to-equity ratio during the churn period.

We reject Konner's contention that Dempsey's treatment of the Quantum Fuel Systems shares is a fundamental flaw in the churning analysis. During the hearing, Dempsey defended his treatment of the shares, testifying that "[i]nvestments outside the account are not included in the analysis for churning purposes." This is entirely consistent with our precedent, which holds that, when determining excessive trading, "the assets by which the rate of activity is to be measured are those *in the account*."[134] As Carlson's account statements show, the Quantum Fuel Systems shares in question were not deposited "in the account" until September 2009. And the September 2009 account statement characterizes the transaction as a deposit "received from"

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132 Konner questions Dempsey's testimony because "he has never qualified to testify as an expert witness in a litigated proceeding about the qualitative aspects of churning." As we have already explained, this fact does not render Dempsey unqualified as an expert in this proceeding. *See supra* note 63 and accompanying text.

133 PIPEs, as we recently explained, "'are unregistered securities issued by companies whose stock is already publicly traded. Because PIPEs are unregistered, they cannot be offered to the market generally, and once issued, they cannot be resold or traded for a set period of time . . . . Issuers . . . offer[] PIPEs at a significant discount from the common stock's market price as compensation for the temporary illiquidity.'" *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *2 n.12 (Dec. 12, 2013) (quoting *SEC v. Lyon*, 605 F. Supp. 2d 531, 536 (S.D.N.Y. 2009)), *petition denied*, 773 F.3d 89 (D.C. Cir. 2014).

134 *Bucchieri*, 1996 WL 254677, at *5 (emphasis added).

Carlson. Under the circumstances, we find no fundamental flaw in Dempsey's treatment of the shares.

Moreover, even if we accepted Konner's argument that the Quantum Fuel Systems PIPE transactions should be treated as a $150,000 investment at the time Carlson executed the PIPE subscription agreements, it would not alter our conclusion that Konner churned Carlson's account. Konner argues that his suggested treatment of the Quantum Fuel Systems shares would mean that the account actually showed a substantial profit during the churn period and that this undermines a finding of churning. We find this argument unconvincing because, as we have held, "the existence of churning does not turn on whether the customer lost money."[135] In addition, although Konner's treatment of the PIPE transactions would show an unrealized profit at the end of December 2009, as the Division points out, Carlson experienced significant realized losses for tax purposes in his J.P. Turner account in 2009.[136] And as Carlson's J.P. Turner account statements show, any profit on paper at the end of 2009 was completely wiped out within the first few months of 2010.[137]

Furthermore, Konner's suggested treatment of the shares would still result in a turnover rate and a cost-to-equity ratio far in excess of the standard benchmarks that show excessive trading has occurred. For example, assuming a hypothetical scenario favorable to Konner—that the initial PIPE investments of $50,000 in June 2009 and $100,000 in August 2009 were treated as stock purchases and that, by the end of the month in which the shares were purchased, they had appreciated to the shares' value at the end of September 2009[138]—the turnover rate would still be 14.78 and the cost-to-equity ratio would be 29.5%. Thus, even under the treatment urged by Konner, the quantitative analysis supports a churning finding.

**3. Konner acted with scienter in trading Carlson's account.**

We find that Konner acted with scienter when he excessively traded Carlson's account. Although Carlson told Konner "several times" that he could not afford to lose the money in his

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135 *Studer*, 2004 WL 2735433, at *5; *see also supra* note 87.

136 Carlson's 2009 J.P. Turner Form 1099 shows a short-term realized loss of approximately $130,000, which did not include a short-term realized disallowed loss of $90,000.

137 Carlson's account value went from $528,595.42 at the end of December 2009 to $264,359.80 at the end of March 2010. The March 2010 value reflects a $60,000 withdrawal by Carlson, but the account still lost over $200,000 in three months as Konner continued to actively trade the account.

138 There is no evidence in the record concerning the value of the Quantum Fuel Systems investment before the end of September, so we assign a hypothetical value in order to perform this analysis. According to Carlson's J.P. Turner statement, the value of the shares purchased through the June 2009 PIPE transaction was $108,645.04 at the end of September, an increase of over 100% of the $50,000 investment. The value of the shares purchased through the August 2009 PIPE transaction was $217,288.75 at the end of September, an increase of over 100% of the $100,000 investment.

account and that the account forms contained inaccurate information about his net worth, Konner engaged in aggressive and speculative trading that lost Carlson hundreds of thousands of dollars during Konner's management of the account. During the churn period alone, Konner's trading cost Carlson approximately $87,686 in commissions, with over $55,000 going to Konner. The evidence shows that Konner took advantage of Carlson's lack of sophistication and trust to excessively trade his account in a manner that was inconsistent with Carlson's investment objectives. Konner's unauthorized trading also supports a finding of scienter.

We agree with the law judge that Konner's conduct relating to the net worth figures on Carlson's account forms is compelling evidence of scienter. Konner falsely told Carlson that the net worth amount on the forms "didn't matter" and that Carlson should "just initial" the prefilled forms that substantially overstated his net worth. Konner did so because he recognized that Carlson's actual net worth was inconsistent with the type of speculative and aggressive trading that he was engaged in with a "very high percentage" of Carlson's liquid net worth. Instead of managing Carlson's account in a manner consistent with his financial profile and true risk tolerance, Konner pursued excessive trading that primarily benefitted himself. Konner knew that his trading did not make sense for Carlson and he lied to Carlson about the importance of the account forms to evade compliance concerns to generate commissions through excessive trading. In addition, Konner's inconsistent, and ultimately false, testimony on the topic at the hearing is further evidence of his fraudulent intent.[139]

Konner points to a statement by the law judge in dismissing the churning charge with respect to Konner's client, Gordon Miller: "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." As the law judge noted, however, Miller's case is "[i]n sharp contrast to Carlson's" where there was "evidence of false statements both in the account documentation and on the witness stand." Upon our review of all the relevant evidence—including evidence of deception—we find that Konner possessed the intent to defraud Carlson and thus acted with scienter.[140]

* * *

Accordingly, for the reasons set forth above, we find that Konner's excessive trading of Carlson's account was fraudulent. We thus conclude that Konner violated Securities Act 17(a), Exchange Act Section 10(b), and Rule 10b-5.

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[139] Relying on *Hotmar v. Lowell H. Listrom & Co.*, Konner argues that scienter is lacking because Carlson received trade confirmations and account statements, Konner did not withhold information, and "there is no evidence to suggest any actual deception." But, similar to our conclusion with regard to Calabro, *see supra* note 83, *Hotmar* is distinguishable because there is considerable evidence of deception in the record, such as Konner's unauthorized trading, his failure to explain the investment objectives and other information on the forms to Carlson, his telling Carlson that the net worth amount did not matter and that he should just sign the prefilled forms, as well as his lack of candor during the hearing.

[140] *See supra* note 81.

## V.

### A. Facts relating to Dimitrios Koutsoubos

Dimitrios Koutsoubos entered the securities industry in 1999 and holds Series 7 and 63 licenses. From November 1999 to August 2009, Koutsoubos worked as a registered representative at J.P. Turner and split his time between the firm's Brooklyn and Fort Lauderdale branch offices.

#### 1. Teddy Dale Bryant, a small business owner, opened a J.P. Turner account in February 2005, and a few months later Koutsoubos was assigned to the account.

Following a cold call from a J.P. Turner representative, Teddy Dale Bryant opened a J.P. Turner brokerage account in February 2005. Bryant is a resident of Holly Springs, Mississippi, where for over twenty years he has owned and operated Teddy's Discount Building Supply. He also owns and operates Grisham Lumber & Supply in Blue Mountain, Mississippi. Bryant attended one semester of college at the University of Tennessee, but he did not earn a degree. At the time he opened his J.P. Turner account, Bryant had limited investment experience. He had two other brokerage accounts but remembered making only one suggestion to buy a particular stock in those accounts. These other accounts did not have many transactions because Bryant took a buy-and-hold approach in them. Bryant does not consider himself a sophisticated investor, and he does not watch any investment-related television shows or subscribe to any investment-related periodicals.

When he opened his J.P. Turner account, Bryant deposited about $4,200. The account application indicates an investment objective of growth and a risk tolerance of medium.[141] Bryant's J.P. Turner account was initially managed by another registered representative, but around May 2005, Koutsoubos was assigned to the account. When he took over the account, Koutsoubos told Bryant that he "was going to make [him] a lot of money." Bryant testified that Koutsoubos never asked him if he was an experienced investor, what his investment objectives were, or anything about his risk tolerance.[142] Bryant told Koutsoubos "[o]n a number of

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[141] At the time he opened his J.P. Turner account, Bryant also signed a margin account agreement and suitability supplement, which contained standard disclosures about the risks involved in margin trading. Bryant testified that he likely did not read these documents but signed them because a J.P. Turner representative asked him to do so. Koutsoubos sent Bryant a supplemental application for margin account privileges in July 2006, but again Bryant testified that he just signed the document where Koutsoubos had put an "X" and likely did not read it. Bryant said he signed the document because Koutsoubos said he had to have it "to continue making [Bryant] money." Bryant testified that neither Koutsoubos nor anyone else at J.P. Turner talked to him about the risks of margin trading and that he does not understand margin accounts.

[142] In his hearing testimony, Koutsoubos was uncertain about whether he typically discussed with new customers what their investment objectives and risk tolerance were: "Q: Did you typically ask them what their investment objectives were? A: I guess I did. Q: Did you

(*continued . . .*)

occasions," however, that he wanted the account to be managed conservatively. Bryant testified that "I just told [Koutsoubos] I didn't want to lose money. I wanted to earn money and be conservative."

**2. Bryant signed an account update form in March 2007 as requested but did not pay attention to its contents.**

In March 2007, about two years after he opened his account, Bryant received an account update form from J.P. Turner. Bryant remembered Koutsoubos telling him: "I've got to have this [form;] get it back[;] just sign where I put the stars, and I'll take care of the rest."[143] Bryant signed the form, but he did not recall if the information on the form was filled in before he signed it. In handwriting that is not Bryant's, the form contains information on Bryant's financial condition, risk tolerance, investment objectives, and investment knowledge. Specifically, the form indicates that Bryant's risk tolerance was "Aggressive," that his investment objectives were "Capital Appreciation," "Trading Profits," and "Speculation," and that his investment knowledge was "Good." But Bryant testified that the information on the form was incorrect and that he had never told Koutsoubos that his risk tolerance was aggressive, that his investment objective was speculation, or that his investment knowledge was good.[144] The law judge explicitly credited Bryant's testimony on this point.[145]

**3. Koutsoubos recommended nearly all the trades in the account, and Bryant relied on Koutsoubos's purported expertise.**

Throughout the time he managed Bryant's account, Koutsoubos was responsible for recommending almost all of the trading activity. Bryant's account statements show that virtually all of the transactions in his account during the relevant period were marked "solicited." Bryant recalled suggesting to Koutsoubos the purchase of Apple stock and possibly "a couple" of others for his account, but he testified that "98, 99 percent" of the trades in the account were made on

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(. . . *continued*)
typically ask them what their risk tolerance was? A: I would guess I would go over their risk tolerance."

143 For his part, Koutsoubos, who was Bryant's registered representative at the time, does not recall sending the form to Bryant or why he received the form: "I don't know where this—who sent it or where it came from. I don't know. I didn't even sign this. That's not my signature, as a registered rep. So I don't know—I've seen this form, but I don't know where this form—who was sent it or what you're—you know, anything."

144 Even Koutsoubos testified that he never had a conversation with Bryant about this form. Bryant has some recollection of speaking with Koutsoubos at some point about "trading profits," which he understood to mean "we would take profits from some trades and trade again."

145 *Bresner*, 2013 WL 5960690, at *103 ("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.").

Koutsoubos's recommendation. At the hearing, Koutsoubos conceded that "the vast majority of the trading activity in Mr. Bryant's account was the result of [Koutsoubos's] recommendations," and when asked, Koutsoubos could not recall any particular trade that Bryant had directed.

Bryant testified that he trusted Koutsoubos and "thought he would deliver on what he said he could do." And Koutsoubos consistently encouraged Bryant to rely on his expertise, telling Bryant on more than one occasion, "you sell lumber, and I'll take care of the stocks." Typically, Bryant and Koutsoubos's conversations about potential investments were one-sided and did not involve a discussion of the investments' pros and cons. According to Bryant, Koutsoubos would call him with a recommendation for a stock "and make some explanation on it." Bryant would not have much to say in response because, as he testified, "I didn't keep up with the stock market. I didn't follow Wall Street. I didn't know if it was a good stock or a bad stock." When asked if he posed questions to Koutsoubos about his stock recommendations, Bryant responded, "I didn't know enough to ask many questions." Koutsoubos testified that he typically asked his clients to make a decision about the trades he was recommending before they hung up the phone with him. Bryant described his conversations with Koutsoubos in this way: "He would call frequently and say, hey, I need to do this, I need to do this, need to do that and boom, he was gone."

Bryant received correspondence from J.P. Turner, including trade confirmations, at his office at the lumberyard. Bryant testified that he "may [have] glance[d] at" trade confirmations after receiving them, but then he immediately put them in a three-ring binder for storage. Because he was busy working, Bryant typically did not focus on account documents when he received them and "may not even [have] read them." When asked why, Bryant responded, "I trusted [Koutsoubos]."

**4. Koutsoubos traded frequently in Bryant's account, incurring significant losses, and also engaged in unauthorized trading.**

Bryant testified that altogether he invested approximately $250,000 in his J.P. Turner account. Using this considerable investment, Koutsoubos engaged in frequent trading in the account. J.P. Turner's Account Activity Review System put Bryant's account at the highest level for trading (Level 4) each quarter between the third quarter of 2007 and fourth quarter of 2008. During 2008, Koutsoubos executed 99 sales totaling $4,202,728.03 and 92 purchases totaling $4,032,172.11. Koutsoubos's trading in 2008 resulted in losses in the account of approximately $190,000 and generated approximately $47,000 in commissions. In the months of May, August, and October 2008, trading in Bryant's account was particularly active, and Koutsoubos effected 25, 39, and 49 transactions respectively in those months. In 2008, according to the analysis of the Division's expert witness, the turnover rate in Bryant's account was 56 and the cost-to-equity ratio was 73.3%.

In the second half of 2008, as the losses in his account continued to mount, Bryant suggested to Koutsoubos that he convert his account to cash and "sit on the sideline until it settled down some." Koutsoubos was opposed to this idea and convinced Bryant not only to continue trading but to day trade in his account. Bryant was not really comfortable with day trading but agreed because Koutsoubos said he "needed" to do it and Bryant "just was so disgusted" with the account's losses.

Bryant also testified that during this time Koutsoubos made trades without getting Bryant's prior approval before each trade. When asked why he did not complain to Koutsoubos's supervisors about the unauthorized trading, Bryant responded that Koutsoubos convinced him that he could recover the account's losses, noting that Koutsoubos "was a great cheerleader." The law judge explicitly credited Bryant's testimony concerning Koutsoubos's unauthorized trading, noting that "[i]nasmuch as Bryant and Koutsoubos differ as to whether Bryant gave such approval, I find Bryant to be more credible on this point."

Bryant understood that he was incurring a commission charge for each transaction in the account, but he testified that Koutsoubos did not discuss with him what the commission would be for each purchase or sale. Although the commission charge was included on the trade confirmations, J.P. Turner's account statements did not provide commission information, and Bryant never added up the amounts from the trade confirmations to see how much he was paying in commissions. Bryant testified that, if he had, he would have told Koutsoubos to stop trading. Bryant further testified that around the time Koutsoubos began day trading he told Bryant he would waive his commissions.[146] In fact, Koutsoubos did not waive commissions at any point, something that Bryant realized only when he filed his taxes the following year.

**5. Bryant signed documentation for active accounts in May 2009, and Koutsoubos left J.P. Turner soon thereafter.**

In May 2009, J.P. Turner sent Bryant an Active Account Suitability Supplement and an Active Account Suitability Questionnaire.[147] Koutsoubos testified that he filled out the AASQ before sending it to Bryant. The investment objectives circled on the form are "Trading Profits," "Speculation," and "Short-Term Trading." Next to "Frequency of Trades," Koutsoubos wrote "6 / monthly." Before returning them by fax to J.P. Turner, Bryant signed both documents and initialed the AASQ in two places. He testified, however, that he likely did not read the documents and could not say whether the AASQ was filled in when he signed it.

Koutsoubos left J.P. Turner in August 2009. At the time of Koutsoubos's departure, Bryant's account was worth only a few thousand dollars. Bryant decided to leave the account open, but there were not many trades in the account after Koutsoubos left. After leaving J.P. Turner, Koutsoubos worked for a couple of years at two Internet startups and then began working again as a registered representative at a securities firm in June 2011.

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146 Koutsoubos denied that he agreed to waive the commissions in Bryant's account, but the law judge credited Bryant's testimony on this point.

147 It is unclear from the record why these forms were first sent to Bryant in mid-2009 when his account had been identified by J.P. Turner as actively traded for at least six consecutive quarters before the forms were sent.

**B. Based on our analysis of the facts, we conclude that Koutsoubos churned Bryant's account between January 2008 and December 2008.**

As detailed below, we find that, in 2008, Koutsoubos (1) exercised de facto control over Bryant's account, (2) excessively traded the account, and (3) acted with scienter. Accordingly, we find that Koutsoubos churned Bryant's account in violation of Securities Act Section 17(a), Exchange Act Section 10(b), and Rule 10b-5.

**1. Koutsoubos exercised de facto control over Bryant's account.**

A preponderance of the evidence shows that Koutsoubos had de facto control over Bryant's account. Koutsoubos conceded that he was the source of virtually all of the trading recommendations in the account, and the record shows that Koutsoubos, not Bryant, was responsible for the volume and frequency of the trading. Because of his lack of investment knowledge and expertise, Bryant neither questioned nor independently evaluated Koutsoubos's recommendations.[148] And as in other cases in which we have found de facto control, Bryant "placed [his] reliance on [Koutsoubos's] supposed expertise, and almost always invariably followed his recommendations."[149]

In addition, Koutsoubos's trading without prior approval from Bryant is strong evidence of control. In testimony explicitly credited by the law judge, Bryant said that Koutsoubos sometimes traded without first "get[ting] a hold" of him and that Koutsoubos traded "on his own" without Bryant's prior approval.

Koutsoubos makes several arguments for why he did not control Bryant's account. We find none of them convincing. Koutsoubos argues that Bryant maintained control of his account because he was a relatively young, successful businessman with prior investment experience who closely monitored his account and did not place undue trust and confidence in Koutsoubos. It is true that, at the time of the alleged violations, Bryant was in his late forties, the owner of two lumberyards, and had a net worth of around $3 million, but these facts are not determinative of control. We have rejected similar arguments, noting that although the "customers may have been successful businessmen" they lacked "the degree of investor sophistication necessary … to make any sort of independent evaluation" of the broker's recommendations.[150] Such is the case here. Bryant described himself as "absolutely not" a sophisticated investor. He "didn't keep up with the stock market" and had no basis to determine if a recommendation "was a good stock or a bad stock." Because of his lack of investing knowledge, Bryant simply deferred to Koutsoubos without questioning his recommendations. And Koutsoubos encouraged Bryant to rely upon him, telling him, "you sell lumber, and I'll take care of the stocks."[151]

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148 *See Cody*, 2011 WL 2098202, at *12 (finding de facto control where the customers "did not independently evaluate [the broker's] recommendations but rather acquiesced in his trades").

149 *Rizek*, 1999 WL 600427, at *6.

150 *Id*.

151 Despite the evidence in the record that Bryant was not a sophisticated investor, Koutsoubos insists that Bryant held himself out as one by signing account documents that

(*continued . . .*)

Moreover, even if Bryant were capable of independently evaluating Koutsoubos's recommendations, the manner in which Koutsoubos consulted with Bryant prevented him from having any meaningful opportunity to do so. Koutsoubos testified that he typically insisted that his customers make a decision about a recommendation immediately while on the telephone with him. Without the knowledge necessary to question Koutsoubos's recommendations and without any real opportunity to investigate them further, Bryant simply acquiesced to Koutsoubos's recommendations, with the telephone consultations being "merely a formality."[152]

Koutsoubos points to account documents indicating that Bryant was an experienced investor. For example, the account update form completed in March 2007 indicates that Bryant had "Good" general investment knowledge and "Extensive" knowledge of stocks. But in testimony explicitly credited by the law judge, Bryant said that the information on the forms was incorrect and that, in fact, his investment knowledge was limited.[153] We find based on all the evidence in the record, including Bryant's credible testimony, that the forms did not accurately reflect Bryant's investment knowledge and experience.

The fact that Bryant had other brokerage accounts and some prior investment experience does not alter our conclusion. Bryant testified that he could remember making only one suggestion for trading in his other accounts and that he took a buy-and-hold approach to the stocks in them.

Likewise, Koutsoubos's claim that Bryant "closely monitored the activity in his account" is not supported by the record.[154] Bryant testified that he "may [have] glance[d]" at trade

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(. . . *continued*)
"repeatedly represented in writing that he understood the risks associated with the securities traded in his J.P. Turner account" and that Koutsoubos was entitled to rely upon these representations. For the purpose of determining whether Koutsoubos had de facto control of the account, the question of Koutsoubos's alleged reliance on the account documents is irrelevant. For this reason and for those we have already articulated above, *see supra* note 53, Koutsoubos's reliance on cases such as *First Union Discount Brokerage Services v. Milos* and *Coleman v. Prudential Bache Securities* is misplaced. The question regarding Bryant's sophistication as it relates to the issue of control is whether, in fact, "the customer, based on the information available to him and his ability to interpret it, can independently evaluate his broker's suggestions." *Carras*, 516 F.2d at 259. The evidence in the record supports the finding that Bryant lacked the ability independently to evaluate Koutsoubos's suggestions.

[152] *Sweeney*, 1991 WL 716756, at *4.

[153] Bryant suggested that the form's indication that he had "Good" knowledge of bonds was clearly incorrect because he had, in fact, never invested in bonds.

[154] Because the record shows that Bryant was not closely monitoring his account, the cases relied upon by Koutsoubos in which courts have found the element of control lacking are easily distinguished. In *Xaphes v. Merrill Lynch, Pierce, Fenner & Smith*, the plaintiff was a "well-educated, sophisticated investor" who "monitored his account constantly and in great detail" and "took an active role in the management of his account." 632 F. Supp. at 483. In *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 956 (E.D. Mich. 1978), the plaintiff was
(*continued . . .*)

confirmations before he put them in a three ring binder, but that given his busy work schedule, he typically did not focus on, or even read, account documents sent to him from J.P. Turner. As we have held, merely receiving trade confirmations and account statements does not amount to customer control over the account.[155] Bryant acknowledged receiving some investment research from Koutsoubos, but testified that he does not remember using it. Koutsoubos points to a single instance when Bryant tried to reach Koutsoubos when he was out of the office as evidence that Bryant was closely monitoring his account, but Bryant testified that he "very seldom" called Koutsoubos. Instead, the trading in the account was almost always initiated by a call from Koutsoubos telling Bryant what he "needed" to do.[156] And when Koutsoubos began day trading in the account without receiving Bryant's prior approval for each trade, Bryant testified, "I didn't know what was going on."

Furthermore, the record shows that Bryant placed considerable trust in Koutsoubos. Bryant repeatedly testified that he trusted Koutsoubos and that he followed Koutsoubos's recommendations because of that trust. Bryant's trust in Koutsoubos is shown by his willingness, despite reservations, to allow Koutsoubos to day trade in his account. Koutsoubos argues that Bryant acted independently without undue trust in Koutsoubos because he declined Koutsoubos's investment recommendations and "sometimes came up with his own investment ideas." But the record suggests that such occurrences were rare and thus not indicative of control by Bryant.[157] For example, Bryant testified he can remember suggesting only a couple of trades, and Koutsoubos could not remember any particular trade that Bryant had directed. Similarly,

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(. . . *continued*)
"a man with professional experience in managing the financial affairs of others," who "understood the dynamics of the stock market" and kept "tabs on the account on a daily basis—often on an hourly basis." And in *Norniella v. Kidder Peabody & Co., Inc.*, 752 F. Supp. 624, 629 (S.D.N.Y. 1990), the court dismissed plaintiffs' churning claim for a failure to plead fraud with particularity based in part on the complaint's admission that the plaintiffs "monitored their accounts and raised questions about the accounts with" their broker. The active monitoring in these cases is in stark contrast to the current case, in which Bryant glanced occasionally at trade confirmations but typically did not even read account documents sent to him by J.P. Turner and rarely, if ever, questioned Koutsoubos's recommendations.

[155] *See supra* notes 28 and 29. Koutsoubos also argues that he "[p]rovided [o]nly [a]ccurate [i]nformation to Bryant," but given the evidence that Bryant typically did not scrutinize or even read the account information he received, the accuracy of the information is largely irrelevant to the issue of control.

[156] We are not convinced that Bryant writing the number of shares and the stock ticker symbol in the memo line of some checks he sent to J.P. Turner is persuasive evidence that he was actively monitoring his account. As Bryant testified during the hearing, he wrote the number of shares and the stock symbol simply "so [he] would know what [the check] was for."

[157] *See supra* notes 103 and 104.

there is no evidence in the record of Bryant declining any particular recommendation by Koutsoubos.[158]

Koutsoubos argues that the law judge erred by finding he had de facto control over Bryant's account "solely on the grounds that Koutsoubos made most of the recommendations and that Bryant typically followed his securities recommendations." But this argument erects a straw man; our finding of control is not based *solely* on our finding that Koutsoubos made nearly all of the recommendations in the account and Bryant invariably followed them.[159] As the above analysis shows, consideration of several other factors—Bryant's lack of investing sophistication, Bryant's inability to independently evaluate Koutsoubos's recommendations, Bryant's lack of active account monitoring, the interactions between Koutsoubos and Bryant, and Koutsoubos's trading without prior approval—all strongly support the conclusion that Koutsoubos controlled the account.[160] Upon our de novo review of the record, we find that Koutsoubos exercised de facto control over Bryant's account based on this multitude of factors.

**2. Koutsoubos excessively traded Bryant's account in 2008.**

**a. The activity in Bryant's account, as reflected in the high turnover rate and cost-to-equity ratio, evidences excessive trading.**

Koutsoubos engaged in excessive trading in Bryant's account between January and December 2008. Koutsoubos's trading in 2008 far exceeded the established benchmarks for excessive trading. The turnover rate was a staggering 56 and the cost-to-equity ratio was 73.3%. This means that on average all of the securities in Bryant's account were being bought and sold every week and that Bryant's account would have had to appreciate by over 73% during the period just to cover the commissions and other expenses. Koutsoubos's trading also included

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158 Although Koutsoubos testified that he remembered Bryant declining recommendations, he could not say whether it happened frequently or infrequently, and the law judge appears to have discredited his testimony on this point. *See Bresner*, 2013 WL 5960690, at *102 ("Koutsoubos asserts that … Bryant rejected recommendations as well as made his own investment recommendations. I reject Koutsoubos' arguments as unpersuasive." (internal citations omitted)).

159 *See supra* notes 18 and 110. Indeed, even the authority relied upon by Koutsoubos recognizes that "[e]vidence that an investor routinely followed his broker's recommendation is certainly an important consideration in deciding who controlled an investment account." *Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 3 (1st Cir. 1983).

160 Koutsoubos is correct that the Division's expert, Dempsey, did not offer a legal opinion about whether Koutsoubos controlled Bryant's account for the purpose of a churning violation, but neither the Division nor the law judge has suggested otherwise. Based on his analysis of the account documents, Dempsey testified that Koutsoubos recommended "virtually all" of the trades made in Bryant's account, and in that sense, he controlled "the selection of transactions and the frequency of the transactions in the account." Like the law judge, we have considered this evidence—corroborated by other evidence in the record—together with other relevant evidence of control to conclude that Koutsoubos had de facto control of Bryant's account.

transactions for which he did not receive prior authorization. This fact and the high volume and frequency of transactions in 2008—almost 200 transactions totaling over $8 million—further demonstrate that there was excessive trading in the account.

Koutsoubos argues that reliance upon the standard benchmarks for excessive trading is "entirely misplaced" in this case because Bryant had a high risk tolerance and intended to use his J.P. Turner account for speculative and aggressive trading. Although trading in an account must be considered in light of the account's nature and objectives to determine whether the trading has been excessive,[161] as we explain below, we find that Bryant did not have a high risk tolerance and was not interested in speculative and aggressive trading. Moreover, even if (contrary to our finding) Bryant had a desire to speculate, this does not permit Koutsoubos to "deplete [his] account through commissions."[162]

In addition, as explained previously, Koutsoubos is wrong that the standard benchmarks are relevant only when evaluating the trading in accounts of conservative investors.[163] In any event, the turnover rate and cost-to-equity ratio are so high here—respectively more than nine and three-and-a-half times the standard benchmarks—we conclude that Koutsoubos's trading in Bryant's account was excessive.

**b. Bryant was not a speculative, aggressive investor.**

We reject Koutsoubos's insistence that Bryant had a "high risk tolerance and desire to aggressively trade his account." Koutsoubos points to a handful of account documents as "clear and unequivocal" proof of Bryant's risk tolerance and investment objectives. But Koutsoubos's reliance on these documents is misplaced for several reasons. Based on our review of the entire record—including Bryant's testimony that the law judge credited—we find that the account documents relied upon by Koutsoubos do not reflect Bryant's true risk tolerance and investment objectives. A preponderance of the evidence shows that Bryant's risk tolerance was at most medium and that his investment objectives did not include speculation.

Koutsoubos first points to two sets of margin-related documents,[164] but none of these documents demonstrates that Bryant had a high risk tolerance or desired speculative or active trading. Although the documents contain boilerplate disclosures about the risks of trading on

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161 *See supra* note 113.

162 *Shearson Lehman Hutton, Inc.*, Exchange Act Release No. 26766, 49 SEC 1119, 1989 WL 257097, at *2 (Apr. 28, 1989) (noting that "[t]here is a difference between aggressive investing and excessive trading" and that a 50% cost-to-equity ratio shows a "depletion of principal clearly indicat[ing] excessive trading").

163 *See supra* note 117 and accompanying text.

164 Specifically, Koutsoubos relies on (1) a Customer's Margin Agreement and accompanying Suitability Supplement Margin Account Agreement that Bryant signed at the time he opened his account in February 2005 and (2) a Supplemental Application for Margin Account Privileges he signed about a year later when J.P. Turner changed clearing firms.

margin, there is no evidence in the record that Bryant desired to trade on margin or even understood margin trading. Bryant testified that he signed the documents—likely without reading them—because Koutsoubos told him that they were just paperwork that he needed to sign for trading to occur in the account. He further testified that no one at J.P. Turner explained anything about the risks of margin trading to him. In addition, Bryant's account application, signed at the same time as the first set of margin-related documents, indicated that his risk tolerance was "Medium" and investment objective was "Growth." There is nothing in any of the margin-related documents—which contain no specific customer information about risk tolerance or investment objectives—that would show the information in the account application was incorrect.

The next document identified by Koutsoubos presents a closer call, but ultimately we conclude that it did not accurately reflect Bryant's risk tolerance and investment objectives. In March 2007, Bryant signed and initialed an Account Update Form, which indicated a risk tolerance of "Aggressive" and investment objectives of "Capital Appreciation," "Trading Profits," and "Speculation." Bryant testified that even though he signed and initialed the Account Update Form, he did not fill in any of the information other than his name and address. He testified that he was unsure whether the information about risk tolerance and investment objectives was filled in at the time he signed the form. In any event, he testified that the information about his risk tolerance and investment objectives was incorrect—in reality he had a more conservative risk tolerance and was not interested in speculation. When asked why he would sign and initial a form that was blank or did not contain accurate information, Bryant testified that Koutsoubos told him that he needed the form back and that Bryant should "just sign where [Koutsoubos] put the stars, and [he would] take care of the rest." Bryant simply signed and initialed the form as requested without paying attention to its contents. The law judge expressly credited Bryant's testimony in this regard and found "that the updated account form contains incorrect information, including incorrect investment objectives and risk tolerance." We find no basis to disturb the law judge's finding.[165]

The final set of documents relied upon by Koutsoubos are the Active Account Suitability Supplement and the Active Account Suitability Questionnaire, which Bryant signed and initialed in May 2009.[166] The AASQ indicates that Bryant's investment objectives were "Trading Profits," "Speculation," and "Short-Term Trading." Like the 2007 Account Update Form, Bryant

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[165] As the law judge noted, the record is devoid of any evidence explaining why Bryant would have changed his risk tolerance and investment objectives at this time. Koutsoubos's testimony does not help his case. Koutsoubos, who was Bryant's registered representative at the time, testified that he did not send the form to Bryant or have any conversations with him about the form. If true, this testimony means that Koutsoubos did not discuss with Bryant his risk tolerance and investment objectives in order to accurately reflect them on the form, and there is no evidence in the record that anyone else at J.P. Turner did so either, which casts further doubt on the form's accuracy.

[166] The AASS reads directly above Bryant's signature, "I have read and understand the Active Account Suitability Agreement as required. I am aware of the liabilities which may be incurred through active trading."

testified that he did not fill in any of the substantive information on the AASQ and that it was "highly unlikely" that he read the documents before signing and initialing them. We find that, like the 2007 Account Update Form, the AASS and AASQ are not convincing evidence that Bryant was an aggressive, speculative investor. Bryant simply signed the forms at Koutsoubos's request without paying attention to them. The forms are therefore of little value in determining Bryant's relevant risk tolerance and investment objectives.[167]

Moreover, the AASS and AASQ postdate the churning period by almost a half year, and therefore, even if the AASQ were accurate at the time Bryant signed it, it would not prove what Bryant's investment objectives were in 2008. Koutsoubos insists that the AASQ is probative of Bryant's investment objectives during the churn period because it is consistent with the 2007 Account Update Form. But given Bryant's testimony—which the law judge credited—that he did not pay attention to the information on either form, we conclude that the consistency of the two forms carries little probative value as to Bryant's actual investment objectives.

Koutsoubos appears to argue that he was entitled to rely on the account forms indicating a high risk tolerance and speculative investment objective when he actively traded Bryant's account. This argument misses the mark. Any reliance on the forms was misplaced because the record evidence—including Koutsoubos's own testimony—shows that Koutsoubos did not conduct a meaningful inquiry into Bryant's risk tolerance and investment objectives. Moreover, to the extent they discussed the issue, Bryant testified that he repeatedly told Koutsoubos that he wanted his account managed conservatively, which would not permit Koutsoubos to rely on the contrary representations in the documents.

In conjunction with his arguments based on the account documents, Koutsoubos attacks the credibility of Bryant's hearing testimony, arguing that it is contradictory, unsupported by other evidence in the record, and biased. We disagree. The law judge found that "Bryant had a

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[167] In fact, neither the AASS nor the AASQ has specific information about the customer's risk tolerance. Koutsoubos also points to Bryant's testimony that he was "on board" with Koutsoubos trading actively in his account in order to try to regain the account's considerable losses, but it is unclear from the record the point in time at which Bryant agreed to more active trading. It appears likely that it was toward the end of the churn period because it was the account losses in the second half of 2008 that caused Bryant to agree to Koutsoubos's day trading. Moreover, Bryant explained that, because the account had lost so much money, he felt that he had few options but to let Koutsoubos try to regain some of the losses. That Bryant reluctantly agreed to Koutsoubos's day trading to try to recoup significant losses in the account does not suggest that he had a high risk tolerance and was interested in speculation—particularly for the time before he gave his assent.

Bryant testified that he remembered having a conversation about active trading with someone from J.P. Turner in addition to Koutsoubos. But Bryant testified that this conversation did not include a discussion of his risk tolerance or investment objectives. In addition, it is unclear when this conversation took place. If it took place in conjunction with J.P. Turner sending the AASS and AASQ to Bryant, as John Williams's testimony would suggest, it happened several months after the churn period.

straightforward and matter-of-fact demeanor while testifying, and his credibility was bolstered by evidence that corroborated his hearing testimony." And the law judge specifically credited Bryant's testimony that the account documents did not reflect his true risk tolerance and investment objectives. As we have indicated, we give considerable weight to the credibility determinations of the law judge.[168] Koutsoubos's challenges to Bryant's testimony do not provide a sufficient basis for us to reject the law judge's credibility determination. In fact, we agree with the law judge that the credibility of Bryant's testimony is bolstered by other evidence in the record.

In addition to testifying at the hearing about what his risk tolerance and investment objectives were, Bryant gave an explanation for why the account forms did not accurately reflect those facts—namely, that he did not pay attention to the account forms and simply signed and initialed them because Koutsoubos asked him to. This explanation is corroborated by other evidence in the record, which shows that Bryant lacked investing sophistication, that Bryant placed significant trust in Koutsoubos, that Bryant was not actively monitoring his account, that Bryant did not fill in the relevant information on the forms, and that (consistent with Koutsoubos's own testimony) Koutsoubos did not ask Bryant about his risk tolerance and investment objectives. In addition, Koutsoubos points to nothing in the record that would explain the change in risk tolerance and investment objectives between those reflected in the 2005 Account Application and the 2007 Account Update Form. Far from undermining Bryant's credibility, we find that the weight of the record evidence supports the law judge's credibility determination.

Bryant's testimony is not undermined by the testimony of John Williams regarding his work as the compliance officer in J.P. Turner's Brooklyn office. Williams was found by the law judge to be "generally not credible except on technical issues." Moreover, even if believed, his testimony does not impeach Bryant's testimony. Although he testified about his general practices as the compliance officer, Williams disclaimed any independent recollection of speaking to Bryant or reviewing his account forms.[169] If credited, Williams's testimony about the procedures at J.P. Turner's Brooklyn branch office would, at most, serve as evidence that Bryant's account forms were not blank when he signed them—assuming that Williams consistently followed the procedures he described.[170] But contrary to Koutsoubos's suggestion,

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168 *See supra* note 58 and accompanying text.

169 When asked if he recalled ever speaking to Bryant, Williams testified, "I don't recall a specific conversation with him," and he later confirmed that "I don't recall if I ever spoke to [Bryant] or not." Williams also confirmed that apart from a document from another client's account he did not "have any independent recollection regarding any of the other documents that [he had] been shown in this case."

170 Williams testified that his signature and initials on the 2007 Account Update Form and the 2009 AASS and AASQ indicated that he reviewed the forms either before or after they were sent to Bryant. Upon receiving account forms from clients, Williams testified that he generally would review the information on the forms to ensure they were completely filled out and consistent with other account documentation in the client's file, and that if there was a discrepancy he typically would call the client to resolve the issue. Similarly, he testified that any

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Bryant's testimony does not actually contradict Williams's testimony on this topic. Bryant repeatedly testified only that he could not say for sure whether the forms were blank or filled in at the time he signed them.[171] Similarly, Williams's testimony that he never heard Koutsoubos tell his clients to "just sign" forms is not persuasive evidence that it did not happen. Koutsoubos split his time with another J.P. Turner branch office, and there was no testimony that when Koutsoubos was in the Brooklyn office, Williams listened to every conversation that Koutsoubos had with clients. Furthermore, Koutsoubos's characterization of Williams as an "independent" and "unbiased" witness is questionable given that Williams was a long-time employee of J.P. Turner who had reason to defend his own practices and who admitted he was friendly with Koutsoubos outside of work.

In addition, we reject Koutsoubos's argument that Bryant's testimony must be disregarded because he is biased. Bryant acknowledged that he hopes to recover some of the hundreds of thousands of dollars that were lost in his J.P. Turner account, but this does not establish that his testimony was not credible. Koutsoubos himself had a strong incentive to testify in a way that would help him avoid liability. And ultimately, the law judge credited Bryant's testimony over Koutsoubos's, even with the evidence of Bryant's alleged bias squarely before him.

Contrary to Koutsoubos's contentions, we find, based upon our de novo review of the record, that during the churn period Bryant had at most a medium risk tolerance and that his investment objectives did not include aggressive and speculative trading.

**c. Koutsoubos's challenges to the Division's expert are meritless.**

We find no merit to Koutsoubos's challenges to the evidence put forward by the Division's expert Dempsey. Koutsoubos argues that (1) Dempsey was not qualified as an expert, (2) his calculations failed to take into account a unique period of market decline, (3) his calculations overstated the number of transactions in Bryant's account, (4) he made mistakes in his analysis of other customers' accounts, and (5) he was biased. We reject each of these challenges in turn.

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(. . . *continued*)
fax or mail correspondence to or from customers would be seen by the branch supervisors. This testimony suggests that if Bryant signed and returned forms to the Brooklyn branch office with information about his risk tolerance and investment objectives not filled in, Williams would have noticed it and followed up with Bryant over the telephone.

[171] For example, with regard to the 2007 Account Update Form, Bryant testified, "I don't know if it was filled out when I received it because [Koutsoubos] just said, sign where I put the stars and send back, [and] I'll take care of the rest." And upon cross-examination, Bryant made clear that he was "not testifying that it was filled out or not filled out when I signed it." When asked to speculate about whether the 2007 Account Update Form was blank when he signed it, Bryant said "it's a real good possibility," but he never testified to have actual knowledge that it was blank. This makes sense given Bryant's testimony that he did not read the form before signing it.

First, as we have previously explained, the fact that Dempsey had never testified previously as a churning expert does not disqualify him.[172] For the reasons we have already stated, we find that Dempsey was well qualified as an expert on churning.[173]

Second, Koutsoubos contends that Dempsey's calculations were "skewed" because he failed to take into account "the 'anomaly' of the downward market forces during 2008, which dramatically inflated turnover and cost/equity since account values declined rapidly." We find no flaw in Dempsey's calculation of the turnover rate and cost-to-equity ratios in the account. It is true that (holding other factors constant) a decrease in the account's value increases the turnover rate and the cost-to-equity ratio and that Bryant, like many other investors, saw the value of his account decrease in 2008. But this is not a legitimate reason to reject Dempsey's use of the recognized methods for calculating the turnover rate and cost-to-equity ratio.[174] Koutsoubos introduced no expert testimony in support of his contention that the standard methods should be altered and he offers no alternative methods. Although we may consider other factors—such as market conditions—in evaluating whether excessive trading has occurred, this does not provide a basis for changing the standard methods for calculating a turnover rate and cost-to-equity ratio.[175] In this case, we find that the incredibly high turnover rate and cost-to-equity ratios are strong evidence of excessive trading, even considering the general downturn in the U.S. equities market in 2008.[176]

Third, Koutsoubos challenges Dempsey's treatment of stop-loss orders, arguing that an initial purchase and a subsequent sale based on a stop-loss order should be treated as a single transaction. We find no fault in Dempsey's treatment of stop-loss orders because the initial purchase and the subsequent sale based on a stop-loss order are separate transactions and are treated as such in Bryant's account documents. Moreover, Koutsoubos argues only that Dempsey's treatment of stop-loss orders "affects the calculation of the *number* of transactions effected in the Bryant account." Even if we accepted this argument, it would not reduce the turnover rate or cost-to-equity ratio Dempsey calculated because these calculations do not depend on the number of trades at issue.[177] In any event, we have considered the fact that, in

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172 *See supra* note 63 and accompanying text.

173 *Supra* Section III.B.2.d.i.

174 *See supra* note 68 and accompanying text.

175 *Cf. Fronta v. Prudential-Bache Sec., Inc.*, 639 F. Supp. 1186, 1191 (S.D.N.Y. 1986) (noting that the calculation of the turnover rate is separate from a consideration of "market conditions, size of commissions, and sophistication of the customer").

176 As the Division points out, Bryant expressed a desire to pull out of the market altogether during the market decline in the latter half of 2008, but Koutsoubos insisted that he stay in.

177 We also reject Koutsoubos's argument that Dempsey improperly counted some transactions in Bryant's account involving multiple executions for the same stock on the same day. Dempsey properly calculated the number of transactions based on what was reported in

(*continued . . .*)

some instances, sales in Bryant's account were the result of stop-loss orders but nonetheless find that the activity in Bryant's account was excessive.

Fourth, Koutsoubos points to alleged flaws in Dempsey's analysis of other accounts besides Bryant's to show that his testimony is unreliable, but we find this argument unpersuasive. Not only do the alleged miscalculations have nothing to do with Bryant's account, but, as we explained above in the context of Dempsey's treatment of the PIPE transactions in Carlson's account, Dempsey's calculations were entirely proper under the circumstances.[178]

Finally, Koutsoubos argues that Dempsey's testimony should be rejected because his wife works for the Division. Whenever an expert is hired by a party in litigation there is a potential for bias because the expert is being remunerated by the party for whom he or she is testifying. This fact may be considered in assessing the expert's testimony.[179] So too with regard to the employment of Dempsey's wife.[180] Dempsey disclosed that his wife worked for the Commission in a capacity unrelated to this case, Koutsoubos's counsel examined Dempsey on the topic, and we have this evidence before us in assessing Dempsey's testimony. Koutsoubos points to no specific evidence in the record that Dempsey's spouse's employment had any influence on his testimony, and we find none. For all of these reasons, we decline Koutsoubos's invitation to reject Dempsey's testimony on this basis.

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(. . . *continued*)
Bryant's account statements. And this contention, even if accepted, would have no effect on the turnover rate or cost-to-equity ratio.

[178] *See supra* Section IV.B.2.c. We also see no error on Dempsey's part in treating a dividend distribution in the Mills account as a customer contribution. Koutsoubos offers no expert opinion of his own supporting his view that Dempsey's treatment was improper, and Dempsey admitted only that another treatment of the dividend distribution was possible, not that his treatment was incorrect. And even if we agreed with Koutsoubos that the treatment of the dividend distribution was incorrect, this would not show that Dempsey's calculations for *Bryant's* account were flawed.

[179] *See Cruz-Vazquez v. Mennonite Gen. Hospital*, 613 F.3d 54, 59 (1st Cir. 2010) (holding that "[a]ssessing the potential bias of an expert witness" is a matter for the trier of fact and "considerations such as an expert witness's pecuniary interest in the outcome of a case . . . go to the probative weight of testimony, not admissibility"); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1321 (7th Cir. 2014) (noting that opposing counsel may probe potential bias through cross-examination of the expert and the trier of fact may then take that into account in assessing the expert's testimony).

[180] *Cf. Braun v. Lorillard Inc.*, 84 F.3d 230, 237-38 (7th Cir. 1996) ("A litigant, or a litigant's CEO, or sole stockholder, or mother, or daughter is not, by reason of his or her or its relation to the litigant, disqualified as an expert witness."); *Cole v. Reader's Digest Sales and Servs., Inc.*, 139 F. App'x. 707, 708 (6th Cir. 2005) (holding that the district court erred in striking the expert affidavit of the plaintiff's husband because"[n]othing . . . in Fed. R. Evid. 702 disqualifies an individual from serving as an expert by virtue of his or her relationship to the plaintiff").

### 3. Koutsoubos acted with scienter in trading Bryant's account.

We find that Koutsoubos acted with scienter with respect to his trading in Bryant's account. The record shows that, at a minimum, Koutsoubos acted with recklessness in his handling of Bryant's account.[181] Bryant told Koutsoubos on a "number of occasions" that he wanted his account managed conservatively, but Koutsoubos engaged in aggressive and speculative trading that resulted in Bryant losing approximately $190,000 during the churn period. At the same time, Koutsoubos's trading cost Bryant approximately $47,000 in commissions, of which Koutsoubos kept a significant amount.[182] As discussed above, Koutsoubos took advantage of Bryant's lack of sophistication and the considerable trust he placed in Koutsoubos to excessively trade his account in a manner that was inconsistent with his true risk tolerance and investment objectives. Koutsoubos sent account forms to Bryant without discussing them with him and told Bryant to "just sign" where indicated and that Koutsoubos would take care of the rest.[183] When Bryant wanted to minimize his losses and pull out of the market, Koutsoubos insisted that he be allowed to continue trading. But what Koutsoubos failed to tell Bryant was that, given the costs associated with his trading, it was "extremely unlikely that [Bryant] would be able to break even, much less earn any profit."[184] Koutsoubos also engaged in unauthorized trading and, around the same time, falsely told Bryant that he would waive his commissions. These facts establish that Koutsoubos must have known that his actions were inconsistent with Bryant's interests. By, at a minimum, recklessly disregarding those interests, Koutsoubos acted with scienter.

Koutsoubos argues that he did not act with scienter because he had no economic incentive to excessively trade Bryant's account. Koutsoubos contends that, because Bryant's was an inherited account, he received only 35% of the commissions charged to the account, not the typical 60% or 65%. Because his payout for each trade in Bryant's account was less than a typical client and he had other expenses that he had to cover, Koutsoubos argues that "[t]here was simply no pecuniary reason for Koutsoubos to defraud Bryant or even to recklessly disregard his interests."

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181 *See supra* note 81.

182 *See Roche*, 1997 WL 328870, at *4 (finding that, where respondent's "clients were sustaining large losses while he was generating substantial commission income for himself," "[a]t the least, Roche acted in reckless disregard of his customers' interests and account objectives, and in favor of his own interests").

183 We agree with the law judge that the fact that there is no AASS or AASQ for Bryant's account prior to March 2009 suggests that "Koutsoubos did not even bother to ensure that Bryant had adequate documentation on file."

184 *Roche*, 1997 WL 328870, at *5. As previously noted, during the churn period, Bryant's account would have had to increase in value more than 73% just to cover the commissions and other expenses.

We agree with Koutsoubos that a preponderance of the evidence establishes that his payout percentage for Bryant's account was 35%.[185] We disagree with Koutsoubos, however, that this fact negates a finding of scienter because we find that the record does not support Koutsoubos's contention that he would have no reason to engage in excessive trading at a 35% commission level.

Koutsoubos points to the testimony of J.P. Turner's Executive Vice President, Michael Bresner, who opined that, because registered representatives must pay insurance, secretarial, telephone, delivery service, and other fees out of their own pocket, if the broker's gross commission is 50% to 60% of the commission paid by the client, on trades with a $100 maximum commission the broker was "at best breakeven," and on trades with a $60 maximum commission the broker was "getting crushed." Other than Bresner's unsupported assertion, there is no evidence in the record to support his conclusion about the commission level at which a registered representative would have an economic disincentive to trade. And because Bresner's testimony was an attempt to justify J.P. Turner's commission restriction policies for actively traded accounts, we are wary of relying on his unsupported economic analysis. We note, for example, that many of the additional costs to registered representatives that Bresner identified are fixed and therefore would not lower a registered representative's payout for each trade.[186] Indeed, as Bresner acknowledged during the hearing, there may be an incentive to trade a restricted account *more* actively in order to make up for the lost revenue imposed by the commission restriction.[187] As long as a registered representative is not actually losing money on a trade, there is some economic incentive to make the trade.[188] Indeed, because Koutsoubos engaged in frequent trading, his claims that he had no economic interest in doing so are simply not compelling. We conclude that the evidence in the record supports a finding of scienter even when considering that Koutsoubos received a 35% payout of gross commissions for Bryant's account.

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185 This finding is supported by Bryant's account documentation. Dempsey testified that he based his calculation of the payout Koutsoubos personally received only on Koutsoubos's prior investigative testimony about the percentage he typically received.

186 Relatedly, Konner acknowledged that the money he "would pay for [his] sales assistant and for all this overhead cost would be spread out among all of [his] clients and customers." The same is true for Koutsoubos.

187 This may be particularly true when a client readily acquiesces to trading recommendations or where unauthorized trading is involved because more trading does not involve a significant additional expenditure of the broker's time convincing the client of the appropriateness of the trades.

188 The law judge found that the "only plausible explanation for the sharp drop in trading activity" in Bryant's account after October 2008 was the change in the commission restriction from $100 to $60 per trade. Although we do not find that this is the *only* plausible explanation, the dramatic decrease in trading activity supports the conclusion that the commission restriction at this point created an economic disincentive for Koutsoubos's trading that resulted in less churning.

Koutsoubos also argues that the record does not support a finding of scienter because of his "hard work and good faith in recommending transactions consistent with Bryant's stated investment objectives." But as we have explained, Koutsoubos's trading was not consistent with Bryant's true investment objectives. Moreover, as the Division points out, Koutsoubos never articulated an actual investment strategy and offers no plausible explanation for the high level of trading in Bryant's account. At the hearing, for example, Koutsoubos was at a loss to explain his in-and-out trading in Informatica stock in the account. For all of the above reasons, we conclude that the evidence in the record demonstrates, at the very least, a reckless disregard by Koutsoubos of Bryant's interests in favor of his own.

* * *

Accordingly, we find that Koutsoubos's excessive trading of Bryant's account was fraudulent. We thus conclude that Koutsoubos violated Securities Act 17(a), Exchange Act Section 10(b), and Rule 10b-5.

## VI.

The law judge barred Respondents from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and he ordered them to cease and desist from committing or causing violations or future violations of Securities Act Section 17(a), Exchange Act Section 10(b), and Rule 10b-5 thereunder, to disgorge certain amounts attributable to commissions received from the customers whose accounts they churned and to pay prejudgment interest, and to pay certain civil money penalties. Based on our consideration of the relevant factors, we impose these same sanctions with some modifications to the disgorgement amounts as discussed below.

### A. Bar Orders

Exchange Act Section 15(b)(6)(A) authorizes us to bar any person who, at the time of the misconduct, was associated with a broker or dealer, from "being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization"—a bar referred to as an industry bar—if we find "on the record after notice and opportunity for a hearing" that the person willfully violated the securities laws and the sanction is in the public interest.[189] We find that an industry bar is appropriate for all Respondents under this standard.[190]

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[189] 15 U.S.C. § 78o(b)(6)(A) (referencing, among other provisions, Exchange Act Section 15(b)(4)(D), 15 U.S.C. § 78o(b)(4)(D) (referencing willful violations of the securities laws, among other things)).

[190] Although the conduct at issue here occurred before Exchange Act Section 15(b) authorized complete industry bars, none of the respondents challenges the extent of their bars on that basis, and any such argument is accordingly waived. In any event, we have found that the Dodd-Frank Act's expansion of Section 15(b)'s bar provisions is not impermissibly retroactive.

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**1. Respondents willfully violated the securities laws.**

We find that Respondents each willfully violated Securities Act Section 17(a), Exchange Act Section 10(b), and Rule 10b-5. To support a finding of willfulness, it is sufficient that the respondent "intentionally commit[ed] the act which constitutes the violation."[191] The respondent need not "also be aware" that he "violat[ed] one of the Rules or Acts."[192] We find that the willfulness standard is satisfied by ample record evidence showing that Respondents intentionally engaged in the excessive trading in their clients' accounts that constituted churning.

**2. The public interest favors an industry bar as to each Respondent.**

Our analysis of the relevant public interest factors also supports the imposition of industry bars against Respondents. In analyzing whether an industry bar would serve the public interest we consider, among other things, "the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations."[193] Our inquiry into the public interest "is a flexible one, and no one factor is dispositive."[194] We address each Respondent in turn.

**a. Barring Calabro is in the public interest.**

We find that barring Calabro is in the public interest. Calabro's actions were egregious. By churning Williams's account, Calabro put his own financial interests above those of his elderly retired client and caused Williams devastating financial harm through excessive commissions and drastic account depreciation. Calabro also made unauthorized trades and exaggerated his trading results to Williams. These actions were not isolated but rather part of a pattern and practice that continued over a year, albeit with respect to one client. Calabro churned Williams's account, acting with, at a minimum, recklessness. Calabro offers no assurance against future violations other than to assert that he has left the industry voluntarily, which

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*See Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *13 (July 12, 2013) (considering respondent's pre-Dodd-Frank Act conduct in assessing his future risk to the investing public and stating that "prospective remedies whose purpose is to protect the investing public from future harm" do not implicate retroactivity concerns).

191 *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal citation omitted).

192 *Id.* (internal citation omitted).

193 *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

194 *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *15 (Dec. 21, 2007) (internal citation omitted), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009).

provides no guarantee that he will not seek to return at some point in the future.[195] Absent a bar, nothing would prevent Calabro from reentering the industry.[196] Moreover, he does not recognize the wrongful nature of his conduct. Given his personal profit at a customer's expense, unauthorized and excessive trading, and exaggeration of trading results, among other things, Calabro's continued participation in the industry would present a risk of future violations.

We also find that Calabro's serious misconduct justifies an industry bar. "The securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[197] The risks to customers from self-dealing of the sort in which Calabro engaged exist not only in the broker-dealer context but also throughout the industry, which presents multiple opportunities for personal enrichment at a client's expense. An industry bar will protect investors from future violations by Calabro.

**b. Barring Konner is in the public interest.**

We also find that barring Konner is in the public interest. Konner acted egregiously and with scienter in churning Carlson's account. Taking advantage of Carlson's lack of investing sophistication, Konner engaged in risky and excessive trading that he knew was inappropriate for an investor in Carlson's financial situation. Carlson told Konner repeatedly that he could not afford to lose the money in his account, but Konner treated the account as if Carlson could afford to lose all of his investment. When Carlson told Konner that his net worth on account documents was significantly inflated, Konner lied to Carlson, telling him that the figures on the forms did not matter, and urged Carlson to "just initial" forms that he knew to be inaccurate.

Konner placed his own interest in commissions over the interests of Carlson. Konner's trading during the churn period resulted in commissions to Konner of over $55,000.[198] Konner

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[195] The Division reads Calabro's brief as asserting that he should not be barred because he "relinquished" his career as a registered representative.

[196] *Cf. James E. Franklin*, Exchange Act Release No. 56649, 2007 WL 2974200, at *8 (Oct. 12, 2007) (rejecting respondent's argument that penny stock bar was unnecessary given his claim that he could no longer work in the industry because "absent a bar, there would be no obstacle to [his] participation in a penny stock offering in the future"); *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *8 & n.48 (Sept. 26, 2007) ("A bar is necessary to protect the public interest because, absent a bar, there would be nothing to prevent Seghers from becoming an investment adviser to the Funds' investors or others in the future."), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

[197] *Seghers*, 2007 WL 2790633, at *7; *see also Charles Phillip Elliot*, Exchange Act Release No. 31202, 50 SEC 1273, 1992 WL 258850, at *3 (Sept. 17, 1992) (noting that the industry "presents many opportunities for abuse and overreaching"), *aff'd*, 36 F.3d 86 (11th Cir. 1994).

[198] Even if we accept Konner's contention that his conduct resulted in the value of Carlson's account being net positive during the churn period, we do not find this sufficiently mitigating to avoid a bar. The record shows that Konner's trading overall resulted in significant losses to Carlson. And even during the churn period, any net gains were unrealized and fleeting, as

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also engaged in unauthorized trading. Although we find Konner liable for violations with regard to a single client, his conduct continued over the course of at least one year. In addition, Konner has offered no assurances against future violations and has not recognized the wrongful nature of his conduct. Konner represents in his reply brief that he "is no longer working in the securities industry," but absent a bar nothing will prevent him from seeking employment in the "only field in which he has worked during his adult life."[199] Accordingly, based on our consideration of the relevant factors, we conclude that barring Konner is in the public interest. Given the nature of Konner's misconduct, which involved fraudulent self-dealing at the expense of his client, an industry bar is appropriate.[200]

Konner points to other disciplinary cases in which brokers received sanctions less than a bar to argue that a bar is unnecessary here. But as we consistently have held, the appropriateness of a sanction "depends on the facts and circumstances of each particular case" and "cannot be precisely determined by comparison with action taken in other proceedings."[201] And in any event, the cases cited by Konner are readily distinguishable. In *Shearson Lehman Hutton, Inc.* and *Michael David Sweeney*, there was no finding of scienter or fraud.[202] Moreover, we reviewed NASD's imposition of sanctions in those cases only for whether they were excessive or oppressive; we could not have increased the penalties in those cases even if we had concluded that they should have been more severe in light of the facts and circumstances.[203] In addition, in

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contrasted with the significant *realized* losses that Carlson suffered during the churn period. *See supra* note 136.

199 *See supra* note 196 and accompanying text.

200 *See supra* note 197 and accompanying text.

201 *Leslie A. Arouh*, Exchange Act Release No. 50889, 57 SEC 1099, 2004 WL 2964652, at *11 (Dec. 20, 2004); *see also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) ("'The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."); *Hiller v. SEC*, 429 F.2d 856, 858 (2d Cir. 1970) ("[W]e cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding."); *Wong*, 2002 WL 200089, at *5 ("We consistently have held that the appropriate sanctions in a case depend on its particular facts and circumstances and cannot be determined by comparison with action taken in other cases.").

202 In responding to the argument that the sanctions were unwarranted in *Shearson Lehman Hutton*, we noted that, if anything, the sanctions imposed by the NASD, which included censure and a $3,000 fine, were "mild." 1989 WL 257097, at *5. And in *Sweeney*, we rejected the type of argument made by Konner here by noting that "'[a] sanction is not invalid simply because it is more severe than a sanction imposed in a similar case.'" 1991 WL 716756, at *5 (quoting *Carter v. SEC*, 726 F.2d 427, 474 (9th Cir. 1983)).

203 Pursuant to Exchange Act Section 19(e)(2), we will sustain a self-regulatory organization's sanction unless we find, having due regard for the public interest and protection of investors, that the sanction is "excessive or oppressive" or imposes an unnecessary or

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*Brian J. Kelly*, FINRA, in imposing a two year suspension, relied on mitigating factors not present in Konner's case, namely, that Kelly "accepted responsibility for his misconduct and consistently expressed remorse" including expressing "deep regret" for trading that he conceded was inappropriate.[204] By contrast, Konner continues to insist that his trading was fully appropriate for Carlson.[205] Although we agree with Konner that the Division has not proved actual misconduct in his disciplinary history,[206] we find that the other factors supporting a bar outweigh the lack of prior misconduct in this case. Upon consideration of all the relevant factors, we conclude that an industry bar is fully appropriate under the circumstances.

**c. Barring Koutsoubos is in the public interest.**

Consideration of the public interest factors also supports barring Koutsoubos. As detailed above, Koutsoubos's conduct was egregious and involved scienter. Directly contrary to Bryant's wishes to have his account managed conservatively and inconsistent with Bryant's true risk tolerance and investment objectives, Koutsoubos engaged in aggressive and speculative trading that resulted in investment losses in Bryant's account of approximately $190,000 during the churn period. The level of trading in the account during the period was staggering, with a turnover rate of 56 and a cost-to-equity ratio of 73.3%. Koutsoubos abused the trust Bryant placed in him by, among other things, insisting that Bryant continue excessive trading when Bryant wanted to get out of the market and by executing unauthorized transactions. Koutsoubos

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inappropriate burden on competition. 15 U.S.C. § 78s(e)(2). The same section permits us to "cancel, reduce, or require the remission of" an SRO sanction but does not authorize us to increase the sanction. *Id.*; *see also Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *17 n.128 (Nov. 15, 2013) (noting that the Exchange Act does not authorize the Commission to increase an SRO disciplinary sanction).

204 Complaint No. E9A2004048801, 2008 WL 5273298, at *9 (NAC Dec. 16, 2008).

205 We also are unpersuaded by Konner's citation to a NASD hearing panel case, *Frank Rocky Mazzei*, Discip. Proc. No. C10970120, 1998 WL 1768418 (OHO June 24, 1998). Not only is the case in no way binding on us, it was decided under an earlier version of the NASD sanctions guidelines, in which a bar was not recommended for churning violations. *Id.* (noting that for churning "[t]he *Guidelines* recommend suspension for ten to thirty days, and for up to two years in egregious cases."). The current version of FINRA's Sanction Guidelines provides that a bar may be appropriate in egregious cases of churning or excessive trading. *FINRA Sanction Guidelines* (July 2013 version) at 77, *available at* http://www.finra.org/sites/default/files/Industry/p011038.pdf.

206 The Division insists that "Konner's career in the securities industry has not been without blemish," and it points to a 2006 settled case involving unauthorized trading and a 2012 FINRA arbitration alleging churning among other violations. But Konner's unrebutted testimony during the hearing was that these cases in which he was named did not, in fact, involve any misconduct on his part but that of other brokers.

also misled Bryant by falsely stating he would waive his commissions.[207] Koutsoubos's actions were not isolated but involved misconduct spanning at least one year. In addition, Koutsoubos has failed to recognize the wrongful nature of his misconduct and has offered no assurances against future violations. Indeed, he continues to insist that his actions were wholly appropriate. For these reasons and given the fraudulent nature of the misconduct, we conclude that an industry bar is in the public interest.[208]

Koutsoubos argues that certain mitigating factors counsel against an industry bar, such as his "pristine disciplinary record," that his conduct involved a single customer account, and that the trading occurred "during a unique period of market decline." We have considered these factors, and have determined that they are not mitigating or are outweighed by the relevant public interest factors supporting a bar.[209] As indicated, Koutsoubos's scienter-based fraud raises significant doubts about his fitness to remain in the securities industry in any capacity. Accordingly, we will impose an industry bar.

## B. Cease-and-desist Orders

Exchange Act Section 21C(a) authorizes the Commission to issue an order against "any person [who] is violating, has violated, or is about to violate any provision" of the Exchange Act or "any rule or regulation thereunder" that requires the person "to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation."[210] Securities Act Section 8A(a) contains similar provisions with respect to violations of the Securities Act and related regulations.[211]

In determining whether a cease-and-desist order is appropriate under either of these provisions, we consider the same factors used in determining whether a bar is in the public interest. We also take into account "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same

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207 In challenging the imposition of a bar, Koutsoubos contends that the finding that he misled Bryant about waiving commissions is "unsupported by the totality of evidence in the record." As discussed above (*supra* note 146), we find no reason to reject the law judge's findings on this point, which were based on credibility determinations.

208 *See supra* note 197 and accompanying text.

209 As noted in our discussion of Konner, Koutsoubos's reliance on *Kelly* for this argument is misplaced because, among other reasons, Koutsoubos has failed to recognize the wrongful nature of his misconduct. *See supra* notes 204 and 205 and accompanying text.

210 15 U.S.C. § 78u-3(a).

211 15 U.S.C. § 77h-1(a).

proceedings."[212] In addition, we consider the risk of future violations.[213] Although "'some' risk is necessary, it need not be very great to warrant issuing a cease-and-desist order."[214] "Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation."[215]

We find it is appropriate to order Respondents to cease and desist from committing or causing violations or future violations of Securities Act Section 17(a), Exchange Act Section 10(b), and Rule 10b-5.[216] As explained above, our findings with respect to the imposition of industry bars strongly support the need for serious sanctions against Respondents. Respondents' violative conduct occurred within the last six years, caused their clients significant financial harm, and demonstrates a sufficient risk of future violations to enter cease-and-desist orders. In addition to the risk raised by their fraudulent conduct, Respondents' continued insistence that their trading was appropriate reflects their refusal to recognize any wrongdoing, which in turn supports a finding that these Respondents pose a significant risk of committing future violations. The cease-and-desist orders are a crucial complement to the industry bars: because "the antifraud provisions apply to securities transactions by any person," cease-and-desist orders are "therefore necessary to protect the public against future violations that [Respondents] could commit without being . . . associated person[s] of a broker-dealer,"[217] or other entity covered by an industry bar.

## C. Disgorgement

In any cease-and-desist proceeding under Exchange Act Section 21C(a) or Securities Act Section 8A(a), or proceeding seeking a penalty under Investment Company Act Section 9(d), such as this one, we "may enter an order requiring accounting and disgorgement, including reasonable interest."[218] Disgorgement "is intended primarily to prevent unjust enrichment."[219]

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212 *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 WL 47245, at *26 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002); *see also Moskowitz*, 2002 WL 434524, at *8.

213 *KPMG Peat Marwick*, 2001 WL 47245, at *26.

214 *Id.* at *24.

215 *Id*.

216 Although they challenge the law judge's findings of liability, Respondents do not directly contest the imposition of a cease-and-desist order.

217 *See Thomas C. Bridge*, Exchange Act Release No. 60736, 2009 WL 3100582, at *21 (Sept. 29, 2009) (imposing cease-and-desist order and broker-dealer bar) (internal citation omitted).

218 Exchange Act Section 21C(e), 15 U.S.C. § 78u-3(e); Securities Act Section 8A(e), 15 U.S.C. § 77h-1(e); Investment Company Act Section 9(e), 15 U.S.C. § 80a-9(e).

219 *Zacharias v. SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) (*quoting SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)); *see also Sweeney*, 1991 WL 716756, at *5 ("[D]isgorgement is intended to force wrongdoers to give up the amount by which they were unjustly enriched.").

Although "the amount of disgorgement should include all gains flowing from the illegal activities," calculating that amount "requires only a reasonable approximation of profits causally connected to the violation."[220] "Once the Division shows that its disgorgement figure" reasonably approximates the ill-gotten gains, "the burden shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation."[221] Thus, "[e]xactitude is not a requirement; '[s]o long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.'"[222]

**1. We order Calabro to disgorge his ill-gotten gains.**

During the churning period, Calabro received approximately $247,945 from commissions and fees charged to Williams. Calabro does not dispute that this number is a reasonable approximation of his ill-gotten gains.[223] We therefore find it appropriate to order Calabro to disgorge $247,945 plus prejudgment interest.[224]

We reject Calabro's contrary arguments that disgorgement is "unnecessary" because (1) "a $2,500,000 settlement [was] entered with Williams and another customer in settlement of a related arbitration," and (2) Calabro has now left the securities industry. Because the recent BrokerCheck report that Calabro submitted to us states that he made no monetary contribution to

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220 *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006) (quotation omitted); *Canady*, 1999 WL 183600, at *14 n.35 (noting that "courts have held that '[t]he amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation [and that] any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty'" (*quoting SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996))) (alterations in original and internal quotation marks omitted); *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) (noting that, when calculating disgorgement, "separating legal from illegal profits exactly may at times be a near-impossible task").

221 *Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *15 (Feb. 27, 2012) (citing *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 2006)), *petition denied sub nom., Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013).

222 *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004) (*quoting SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998)); *see also Zacharias*, 569 F.3d at 473 (noting that, where disgorgement cannot be exact, the "well-established principle is that the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create that uncertainty").

223 Although the law judge reached a slightly higher number taken from Dempsey's pre-hearing expert report, Calabro verified during the hearing at the Division's request that the disgorgement number we order represented his share of commissions from Williams's account.

224 *See Terence Michael Coxon*, Exchange Act Release No. 48385, 56 SEC 934, 2003 WL 21991359, at *14 (Aug. 21, 2003) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005).

the settlements he identifies,[225] it provides no basis to "vacate any monetary obligation," as Calabro urges.[226] Calabro also fails to establish that any particular component of the settlement payment (to two customers) is attributable to disgorgement of his ill-gotten gains with respect to Williams.[227] Nor is disgorgement "unnecessarily punitive" because Calabro purportedly has left the industry. Rather, an order for disgorgement "is not a punitive measure; it is intended primarily to prevent unjust enrichment."[228] That Calabro may have left the securities industry does not diminish the amount of his ill-gotten gains.[229] And because disgorgement will "deter others from similar misconduct,"[230] we reject Calabro's assertion that "there is no further need for deterrence" because he "is no longer a broker."[231]

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[225] We take official notice of the report. *See* Rule of Practice 323, 17 C.F.R. § 201.323; *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *1 n.1 (Nov. 9, 2012) (taking notice of BrokerCheck report), *appeal dismissed*, No. 13-31 (2d Cir. Sept. 24, 2013).

[226] *See Murphy*, 2013 WL 3327752, at *25 (finding, in a FINRA review proceeding, that applicant failed to "provide a basis to decrease the disgorgement amount" where he introduced no evidence "show[ing] his contribution to the settlements"); *cf. Disraeli*, 2007 WL 4481515, at *17 n.106 ("Repayments that Disraeli *proves he made* could offset his disgorgement.") (emphasis added).

[227] *See Montford & Co.*, Investment Advisers Act Release No. 3829, 2014 WL 1744130, at *23 (May 2, 2014) (finding insufficient evidence in the record to support respondent's request for offset based on alleged payment to victim, where, although the respondent identified the amount of the settlement, the record contained no evidence on the basis of the settlement amount), *petition for review docketed*, No. 14-1126 (D.C. Cir. June 27, 2014).

[228] *Zacharias*, 569 F.3d at 471 (internal quotation omitted).

[229] Indeed, we repeatedly have ordered that barred respondents disgorge their ill-gotten gains. *See, e.g.*, *Brown*, 2012 WL 625874, at *1 (barring three respondents and imposing, among other things, disgorgement and civil money penalties); *Gregory O. Trautman*, Exchange Act Release No. 61167A, 2009 WL 6761741, at *1 (Dec. 15, 2009) (barring respondent and ordering, among other things, respondent to pay in excess of $600,000 in disgorgement, as well as a third-tier civil money penalty); *see also John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *7 (Dec. 13, 2012) (explaining that "[t]he Commission is authorized to impose a bar not to punish the respondent for past misconduct or to remedy past harms suffered by victims of that misconduct, for example, in the form of disgorgement or damages," but rather "to protect the investing public from the respondent's possible future actions").

[230] *Joseph John VanCook*, Exchange Act Release No. 61039, 2009 WL 4005083, at *16 (Nov. 20, 2009) (citing *First City*, 890 F.2d at 1230), *petition denied*, 653 F.3d 130 (2d Cir. 2011).

[231] We reject Calabro's argument that he is "financially unable to pay any level of disgorgement or penalty" because he failed to offer the record evidence required to support such a modification of sanctions. *See* Rule of Practice 410(c), 17 C.F.R. § 201.410(c) ("Any person who files a petition for review of an initial decision that asserts that person's inability to pay

(*continued . . .*)

**2. Konner must also disgorge his commissions.**

Konner does not dispute that during the churn period he received approximately $55,000 in commissions and fees from his trading activity in Carlson's account. We conclude that this amount is a reasonable approximation of Konner's ill-gotten gains and order disgorgement in this amount, plus prejudgment interest.

Konner insists that disgorgement is unwarranted because Carlson's account was profitable during the churn period. As explained more fully below, we dispute Konner's characterization that his churning was profitable for Carlson. More fundamentally, however, whether Carlson's account value was net positive or negative during the churn period does not affect the disgorgement analysis because disgorgement corresponds to ill-gotten gains—in this instance, commissions—and not losses suffered by a customer. In churning cases, we have typically ordered the disgorgement of the commissions received by the broker during the churn period, because this is the closest approximation of the broker's ill-gotten gains from the violative conduct.[232] Konner offers no reason to depart from that approach in this case.[233]

**3. Koutsoubos must disgorge those commissions he actually received.**

Koutsoubos argues that any finding of disgorgement should reflect that his payout ratio for commissions from Bryant's account was 35%, not 65%. As noted above, we agree with

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(. . . *continued*)
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).").

[232] *See Murphy*, 2013 WL 3327752, at *24 (finding that disgorgement based on total commissions retained by the broker in a churning case was appropriate even when this amount exceeded the client's net loss in the account); *Roche*, 1997 WL 328870, at *6 (finding that total commissions represented a reasonable approximation of ill-gotten gains retained from churning); *Sweeney*, 1991 WL 716756, at *5 (sustaining the disgorgement of all commissions in a case of excessive trading and noting that "courts have approved action like that taken by the NASD here in civil actions involving excessive trading, basing their determinations on the difficulty of specifying a 'correct' level of trading and the conclusion that the burden of this problem should be borne by the broker who caused it" (citing *Costello*, 711 F.2d at 1374 and *Carras*, 516 F.2d at 259)).

[233] We also reject Konner's contention that the disgorgement amount is too high because his "actual earnings" were "far less than his share of the commissions paid by the customer." That Konner paid for business expenses out of his share of his customers' commissions does not make the disgorgement calculation incorrect. *See SEC v. Brown*, 658 F.3d 858, 861 (8th Cir. 2011) (noting that "'the overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses.'" (quoting *SEC v. United Energy Partners, Inc.*, 88 F. App'x 744, 746 (5th Cir. 2004))). Moreover, even were we to accept Konner's contention that he is entitled to an offset, his unsupported insistence that the disgorgement amount is too high fails to meet his burden to show that the Division's calculation of disgorgement was not a reasonable approximation of his ill-gotten gains.

Koutsoubos that a preponderance of the evidence supports his claim that he was paid 35% of the commissions charged to Bryant.[234] We therefore order the disgorgement of $16,461 (which represents 35% of the approximately $47,034 in commissions that Bryant paid during the churn period), plus prejudgment interest.

## D. Civil Money Penalties

As relevant here, Exchange Act Section 21B(a) and Investment Company Act Section 9(d) each authorize the Commission to assess civil money penalties, among other things, where a respondent has willfully violated any provision of the federal securities laws or the rules or regulations thereunder.[235] In considering whether a penalty is in the public interest, we may consider (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the harm to other persons resulting either directly or indirectly from such act or omission; (3) the extent to which any person was unjustly enriched, taking into account any restitution made to injured persons; (4) any previous Commission, other regulatory agency, or SRO findings that the person violated federal or state securities laws or SRO rules, court orders enjoining the person from violations of such laws or rules, or specified felony or misdemeanor convictions; (5) the need to deter such person and other persons from committing such acts or omissions; and (6) such other matters as justice may require.[236]

The relevant statutes create a three-tier system of civil penalties, with each tier corresponding to increasingly serious misconduct.[237] First-tier penalties require no additional statutory showing.[238] Second-tier penalties require a showing that the act or omission giving rise to the penalty "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement."[239] Third-tier penalties can be imposed on an additional showing that the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain" to the violator.[240]

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234 *See supra* text accompanying note 185.

235 15 U.S.C. § 78u-2(a); 15 U.S.C. § 80a-9(d).

236 Exchange Act Section 21B(c), 15 U.S.C. § 78u-2(c); Investment Company Act Section 9(d)(3), 15 U.S.C. § 80a-9(d)(3).

237 Exchange Act Section 21B(b), 15 U.S.C. § 78u-2(b); Investment Company Act Section 9(d)(2), 15 U.S.C. § 80a-9(d)(2).

238 Exchange Act Section 21B(b)(1), 15 U.S.C. § 78u-2(b)(1); Investment Company Act Section 9(d)(2)(A), 15 U.S.C. § 80a-9(d)(2)(A).

239 Exchange Act Section 21B(b)(2), 15 U.S.C. § 78u-2(b)(2); Investment Company Act Section 9(d)(2)(B), 15 U.S.C. § 80a-9(d)(2)(B).

240 Exchange Act Section 21B(b)(3), 15 U.S.C. § 78u-2(b)(3); Investment Company Act Section 9(d)(2)(C), 15 U.S.C. § 80a-9(d)(2)(C).

Each tier of penalties is subject to specified maximum penalties per violation, which are periodically adjusted.[241]

We find that it is appropriate to impose a $150,000 third-tier penalty against Calabro, which is the maximum third-tier penalty for violations occurring between March 2009 and March 2013.[242] Calabro willfully violated Exchange Act Section 10(b) and Rule 10b-5 by engaging in fraud and deceit. He acted with scienter, and, at a minimum, his conduct was extremely reckless. By churning Williams's account, Calabro directly caused Williams to suffer substantial losses, while at the same time Calabro was unjustly enriched through his nearly $250,000 share in commissions.[243] In addition, imposing a civil money penalty will provide general and specific deterrence of future violations and is particularly appropriate given the many factors discussed above that establish the egregiousness of Calabro's conduct.[244]

We reject Calabro's contention that we should not impose a civil money penalty because "there is no need for deterrence given his departure from the industry." As we have recognized, civil money penalties provide specific deterrence even where respondents may no longer work in the industry.[245] And the relevant statutes provide that we may also consider "the need to deter . . . *other persons* from committing" the misconduct at issue.[246] In any event, we find that the

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241 Exchange Act Section 21B(b), 15 U.S.C. § 78u-2(b); Investment Company Act Section 9(d)(2), 15 U.S.C. § 80a-9(d)(2); 17 C.F.R. §§ 201.1003, 1004, and 1005 (effecting adjustment of civil money penalties for violations after, respectively, February 14, 2005, March 3, 2009, and March 5, 2013), Tables III, IV, and V to Subpart E of Part 201 (specifying such adjusted penalty amounts); *see also* Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, ch. 10, sec. 31001 (providing for, among other things, periodic adjustment of penalty amounts).

242 This maximum penalty is available because, although Calabro began to churn Williams's account in November 2008, the churn period did not end until December 2009.

243 Although Calabro settled a FINRA arbitration with Williams, there is no evidence that Calabro financially contributed to that settlement. *See supra* notes 225 and 226 and accompanying text.

244 *See supra* Section VI.A.2.a.

245 *See, e.g.*, *Clifton*, 2013 WL 3487076, at *16 (finding, in case in which an industry bar was imposed, that "[a] single penalty at the maximum end of the third tier is necessary to deter Clifton from future misconduct and will have an additional remedial effect of deterring others from engaging in similar misconduct").

246 15 U.S.C. § 78u–2(c)(5) (emphasis added); *see also Bridge*, 2009 WL 3100582, at *24 ("The Exchange Act also requires that, in determining whether civil penalties are in the public interest, we examine . . . *the need to deter others*, and other matters as justice may require." (emphasis added)).

statutory factors as a whole support the imposition of a single maximum penalty. We thus reject Calabro's argument that the "loss of [his] career is penalty enough."[247]

We find that imposing a maximum third-tier penalty of $150,000 on Konner is also appropriate. As discussed above, Konner acted with scienter and thus his conduct meets the requirement that it involve "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." In addition, we conclude that Konner's violative conduct "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to" Carlson and that Konner received a "substantial pecuniary gain" of $55,000 in commissions. Given the serious nature of the misconduct and the need for appropriate deterrence, we find that the statutory factors as a whole support the imposition of a $150,000 civil penalty.

Konner insists that the financial penalty is not justified because Carlson's account was profitable during the churn period due to the PIPE transactions. This argument is disingenuous. As the Division points out, Carlson's realized losses during the churn period were well over $100,000, and given the high turnover in the account, these losses are the direct result (and certainly the indirect result) of Konner's violations. Even accepting Konner's argument that his conduct caused Carlson's account to be net profitable on paper in 2009, we still conclude that his churning, which involved aggressive and speculative short-term trading, created a significant risk of substantial losses to Carlson. Indeed, the precipitous drop in the value of Carlson's account in the first few months of 2010 showed that the risk became reality.[248] In any event, we conclude that Konner's retention of approximately $55,000 in commissions satisfies the alternative requirement for the imposition of a third-tier penalty—the violation "resulted in substantial pecuniary gain" to the violator.

Finally, we find that a third-tier penalty of $130,000—the maximum penalty for conduct occurring between February 2005 and March 2009—is appropriately imposed on Koutsoubos.[249] Like the other Respondents, Koutsoubos's scienter-based conduct involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." Koutsoubos's conduct also resulted in significant harm to Bryant, who lost nearly $200,000 during the churn period. In addition, Koutsoubos retained over $16,000 in ill-gotten gains from his churning. Koutsoubos insists the penalty is too severe and that he "actually received a pittance" from the commissions Bryant paid. But Koutsoubos's ill-gotten gains of over $16,000 are hardly a "pittance," and the harm to Koutsoubos's client from his violative conduct is far greater. Upon our consideration of all the relevant statutory factors, we conclude that the imposition of a $130,000 civil penalty on Koutsoubos is appropriate.

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[247] Calabro also asserts that the civil money penalty ordered by the law judge should be eliminated or reduced because the law judge determined that Calabro acted with the "lowest level of scienter" of the three appealing Respondents. We make no such finding and, in any event, find it appropriate to determine the sanction applicable to Calabro based on the factors relevant to his misconduct, rather than by comparison to the other Respondents.

[248] *See supra* note 137 and accompanying text.

[249] Koutsoubos's misconduct occurred before March 2009, so the maximum penalty is $130,000 rather than $150,000. *See supra* note 241 and accompanying text.

An appropriate order will issue.[250]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN; Commissioners GALLAGHER and PIWOWAR concurring in part and dissenting with respect to the bars from association with municipal advisors and nationally recognized statistical rating organizations).

Brent J. Fields
Secretary

[250] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9798 / May 29, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 75076 / May 29, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31657 / May 29, 2015

Admin. Proc. File No. 3-15015

In the Matter of

RALPH CALABRO,
JASON KONNER, and
DIMITRIOS KOUTSOUBOS

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Ralph Calabro, Jason Konner, and Dimitrios Koutsoubos be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and it is further

ORDERED that Calabro, Konner, and Koutsoubos cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder; and it is further

ORDERED that Calabro disgorge $247,945, plus prejudgment interest of $45,997.68 such prejudgment interest calculated beginning from December 1, 2009, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Konner disgorge $55,000, plus prejudgment interest of $9,982.61, such prejudgment interest calculated beginning from January 1, 2010, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Koutsoubos disgorge $16,461, plus prejudgment interest of $3,826.79, such prejudgment interest calculated beginning from January 1, 2009, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Calabro pay a civil money penalty of $150,000; and it is further

ORDERED that Konner pay a civil money penalty of $150,000; and it is further

ORDERED that Koutsoubos pay a civil money penalty of $130,000.

Payment of the amounts to be disgorged and the civil money penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

By the Commission.

Brent J. Fields
Secretary