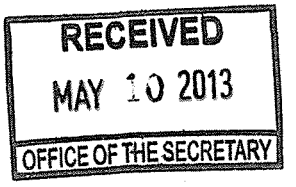
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of	:	
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MICHAEL BRESNER	:	
RALPH CALABRO	:	**ADMINISTRATIVE**
JASON KONNER and	:	**PROCEEDING**
DIMITRIOS KOUTSOUBOS	:	**FILE NO. 3-15015**
	:	
Respondents	:	
	:	

REPLY BRIEF OF RESPONDENT DIMITRIOS KOUTSOUBOS

PICKARD AND DJINIS LLP
1990 M Street, N.W.; Suite 660
Washington, DC 20036
Pho: 202-223-4418
Fax: 202-331-3813
pjbazil@pickdjin.com

Attorney for Respondent Dimitrios Koutsoubos

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The Division's Initial Post-Hearing Brief[1] recites alleged "facts" that were thoroughly contradicted by copious record evidence, contains purported "findings" by the Division's own paid experts which were not only never made but were expressly disavowed by those experts, pretends that the highly credible and probative testimony of an unbiased third-party witness did not exist, and sets forth conclusions that have been long established as unavailing as a matter of law. These gaping failures serve to illuminate the extent to which the Division failed abjectly to meet its burden of proof that Dimitrios Koutsoubos defrauded Teddy Bryant or Bruce and Pamela Mills.

Liberally deployed through the Division's brief is the obviously false assertion that neither Bryant nor the Mills were disclosed the risks or costs of active trading. (See, e.g. "Koutsoubos convinced [Mills and Bryant] . . . to trade often without ever adequately disclosing the risks involved (Div. at p. 1), Koutsoubos "disclosed nothing about the costs of active trading" (Div. at p. 56), "risks of active trading – was never imparted" (Div. at p. 63)) The prevalence of this falsehood in the Division's brief is remarkable given the mountain of evidence in the record that thoroughly contradicted this allegation. The Division conveniently ignores that both Bryant and Mills (twice!) were sent Active Account Suitability Supplements ("active sups") which expressly advised them **in bold letters** to "***PLEASE READ CAREFULLY***" and set out, the important risks of active trading.[2] [See Koutsoubos Ex. 9, 11, 22] The evidence is

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1 Cited herein as Div. at p. --.

2 The important risks the active sub warned Bryant and Mills about included the following:

- **Active trading can involve a higher degree of risk, increased costs and is suitable only for risk tolerant investors.**
- **Active trading in the securities markets can involve a higher degree of risk and may not be suitable for all investors and accordingly, should be entered into only by investors who understanding the nature of the risk involved and are financially capable to sustain a loss of part or all of their capital.**

overwhelming that Bryant and the Mills' expressly advised J.P Turner and Koutsoubos in writing that they understood active trading, were willing and financially able to take greater risks using such a strategy, understood that active trading involves a higher degree of risk and increased costs and is suitable only for risk tolerant investors and that they had an aggressive risk tolerance and wanted to engage in active trading in their accounts. [Koutsoubos Ex. 9, 11, 22] These written advisements by Bryant and Mills of their understanding and agreement to undertake the risks of active trading were reviewed by the branch compliance officer, John Williams, a ten year veteran compliance officer who had previously served as Chief Compliance Officer at two other firms. Williams' undisputed testimony was that beyond the fact that Bryant and the Mills' signed the active sup and thereby expressly acknowledged having read and understood the risks associated with active trading, Williams went over with the customers on the telephone the risk factors set forth on the active sup and asked the customers to verbally acknowledge to him that he or she had in fact read the risk factors. [T. 3753] The Division's unsupported repetitions to the contrary do not obviate the evidence.

It should not escape the Court's notice that the Division brief simply pretends as though Mr. Williams, who appeared on the Division's witness list and who testified for several hours over a two day span, did not exist. There is not a single mention of Mr. Williams in the Division's 81 page brief. In fact, the Division's brief continues to argue that certain information contained on the active sup questionnaires that Bryant and Mills' signed was pre-filled out by Koutsoubos "to avoid compliance interference while pursuing active trading." (Div. at p. 57) – as

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- **Due to the higher degree of activity, overall commissions on your account may tend to be greater than a buy and hold strategy.**

- **High-risk tolerance and investment objectives consistent with high-risk investing are appropriate to an active account. In addition, a customer who is frequently trading the market should not have short-term needs for the funds invested in an equity account.** [Koutsoubos Ex. 9, 11, 22]

if Mr. Williams - the Branch Compliance Manager himself - did not unequivocally testify that he personally reviewed the documents at issue, required that Bryant[3] place his initials to highlight to Bryant the information filled out by the J.P. Turner branch pursuant to telephone conversations with Bryant and have Bryant verify the accuracy of the information. [T.3758] Mr. Williams' role in supervising Koutsoubos, approving his customers' orders for suitability, reviewing to ensure there were no unauthorized trades[4], calling customers to verify the accuracy of new account information, and his responsibility for the coordination and review of the active sups and the accompanying active sup questionnaires to Bryant and Mills is detailed in Mr. Koutsoubos' Post-Hearing Brief of Mr. Koutsoubos at pages 6-10, 15 and 22-24 and need not be repeated in these pages. By so ignoring the proverbial "elephant in the room," the Division brief provides no assistance to the Court, which cannot similarly close its eyes and wish away exculpative evidence, but which is required to evaluate Mr. Williams' testimony for its probative value, reliability and fairness of use. See In the Matter of Warren R. Schreiber, Admin. Proc. File No. 3-9378, Exchange Act Rel. No. 40629, 1998 SEC LEXIS 2393; 53 SEC 912 (Nov. 3, 1998).

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[3] The Division brief concedes that both of the Mills' active sup questionnaires were not pre-filled out by Koutsoubos or anyone else at J.P. Turner but by Mrs. Mills herself. (Div. at p. 40) Nevertheless, Williams spoke directly with Mr. Mills on at least two occasions and verified the information on the active sup questionnaire and went over the risk disclosures on the active sup. Mr. Williams' contemporaneous notations of these conversations is on the active sup questionnaires themselves. [T. 3627, 3649, 3652-53, 3746; Koutsoubos ex. 9, 11]

[4] Mr. Williams described that in addition to his review of every order ticket, he conducted an end of day trade blotter review to, among other things, make certain there had been no unauthorized trades effected in the Brooklyn branch [T. 3604, 3730-31] and regularly called customers if he saw any trading out of the ordinary or inconsistent with the investment objectives on file at the firm. [T. 3733-34] Williams' supervisory review, coupled with the fact that neither Bryant nor Mills ever previously complained about unauthorized trading in their accounts (despite receiving every monthly account statement, every trade confirmation, every year-end tax summary setting forth all of the trading activity in their accounts, and active sups and active sup questionnaires which required an estimation of the number of trades being effected in their accounts at that time), vitiates the Division's brief's false claim that Koutsoubos in many instances engaged in unauthorized trading in the customers' accounts. (Div. at p. 63)

Another falsehood that permeates the Division's brief is the discredited contention that Koutsoubos retained 60% of the commissions generated by the Bryant and Mills' accounts [Div. at p. 3, 34, 38, 74] Indeed, to create the illusion of mathematical precision, the Division's brief contains a chart to "calculate" the commissions allegedly retained by Koutsoubos in connection with the Bryant and Mills' accounts during the subject periods based upon this fundamentally false premise. [Div. at p.3] The Division's claim was demonstrated to be wrong in two material respects. First, as the Division's own exhibit [SEC Exhibit 146] shows and the undisputed testimony reflects, with respect to the Bryant account, Koutsoubos received a payout of 35% of the gross commission credits [T. 4535-36; Division Ex. 146] and with respect to the Mills' account, Koutsoubos received half of the gross commission credits payout which ranged monthly between 50% and 60% such that his share of the gross commission payout was between 25% and 30%. [T. 597; Division Ex. 146] Thus, the Division has grossly overstated the gross commission credits Koutsoubos earned with respect to these two accounts. Moreover, the Division has entirely ignored the undisputed evidence that the gross commission credit was not Koutsoubos' actual take-home pay; rather, from the gross credit was deducted a variety of charges and credits, including but not limited to: errors and omissions insurance, write offs if there was insufficient funds in an account, ticket charges, contributions to the payroll for non-registered employees of the branch, training, test preparation and other expenses of broker trainees in the branch, lead sheets, office materials, overnight delivery charges, wire transfer fees and desk fees. [T. 4530-36; Division Ex. 146] The Division offered no rebuttal to the testimony of J.P. Turner EVP Michael Bresner that at the $100 maximum commission per trade (in effect for the entirely of the relevant Mills' period and nearly the entirely of the Bryant period)[5], these charges meant that the broker was "at best breakeven."[6] [T. 3058]

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[5] The Division's brief misleadingly states that the "commissions charged to customers of JP Turner typically

The Division goes even further and puts words in its expert's mouth, claiming that a finding that Koutsoubos retained 65% of the gross commissions charged to Mills should be attributed to Mr. Dempsey on the grounds that his failure to make such finding was "inadvertent" because he made a similar finding with respect to the Bryant account. (Div. at p. 3) Beyond the fact that it would be unfair to Mr. Dempsey to impute a false finding to him – he was forced to concede that his finding regarding the Bryant commissions was not based upon the actual documentary evidence of a 35% gross commission payout, but incorrectly upon an amorphous statement in Koutsoubos' uncross-examined investigative testimony about commission payout rates at J.P. Turner generally [T. 3238-39] - it should be obvious that it would be improper to base a finding of fact out of whole cloth - based solely upon what the Division wishes its paid expert had stated, but did not.

More egregious than the imputation to its expert of a false commission payout finding, the Division's brief falsely asserts - without any citation to any evidence - that Mr. Dempsey found that Koutsoubos controlled the Bryant and Mills account and that the trading in the accounts was consistent with churning. (Div. at pp. 38 and 41) Nowhere in Mr. Dempsey's report or his testimony did he render any such opinions. Mr. Dempsey expressly stated that he did not conclude that Koutsoubos had *de facto* control over either the Bryant or Mills account. [T.3162] Mr. Dempsey explained that the phraseology in his report that the broker respondents

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ranged between one and five percent of each trade, depending on the size of the trade. [Div. at p. 3, footnote 1] In reality, for nearly the entirety of the relevant period, there was a $100 maximum commission restriction place on transactions in the Bryant and Mills accounts – precisely because they were active trading accounts. [Koutsoubos Ex. 14, 26] The Division's brief does not even acknowledge the existence of the commission restrictions until page 50!

[6] The Division brief compounds its error by misapplying its gross overstatement in the amount Koutsoubos received in connection with the trades at issue to materially overstate its disgorgement calculation (Div. at p. 74), its prejudgment interest calculation (Div. at p. 75) and its civil penalties calculation (Div. at p. 79). Thus, even if the Division had established Mr. Koutsoubos' liability, which it did not, these calculations could not be relied upon for assessing sanctions.

exercised a degree of "control over the direction of trading" did not imply or suggest broker control for purposes of a churning but meant only that it brokers made most of the securities recommendations in the account. [T. 3168] Mr. Dempsey conceded that to determine broker control in the churning context would require an analysis of all relevant factors that pertain to the relationship between the customer and the broker, including reviewing the documents the customers signed to determine what was in the customer's mind regarding the account – which he did not do. [T. 3166-67] The Division's continued attempt to conflate the unfortunate phrase "control the direction of trading" with the legal concept of *de facto* control - an essential element of a churning violation – should not be countenanced.

In at least two major respects, the Division's brief applies its phony facts to reach conclusions that have been long established as unavailing as a matter of law. First, the Division argues, "to the extent [Bryant and Mills] read the [various account opening, risk acknowledgements and active sup] documents they did not understand the implications of the investment objectives and risk tolerance selections . . . ." (Div. at p. 5) Yet, the law is crystal clear: brokerage customers may not disavow, in hindsight, their written representations in account agreements and investment-related documents that they expressly **in writing** - and in this case also verbally to the compliance officer in real time - acknowledged they read and understood. See e.g. Coleman v. Prudential Bache Sec., Inc., 802 F.2d 1350, 1352 (11th Cir. 1986)("absent a showing of fraud or mental incompetence, a person who signs a contract cannot avoid her obligations under it by showing that she did not read what she signed.")[7] The Division has made no claim that either of its millionaire customer witnesses, Bryant or the Mills', was mentally incompetent. Even the Division's own expert, John Pinto, a long-time securities

[7] Neither the Coleman case nor any of the other three federal court decisions that applied this same well-settled legal principle cited in Mr. Koutsoubos' Post-Hearing Brief at pages 31 and 32, were addressed in the Division's brief.

regulator and NASD official, observed that "broker-dealers are entitled to rely upon the written representations of the customers . . . ." [T.3531; Division Ex. 156] Mr. Pinto's observation could not be more valid than in this case, in which the customers' written representations that they understood the risk disclosures and risk tolerance levels were verified by a member of the firm's compliance staff who spoke directly to the customers.

Second, the Division argues, the turnover rates it incorrectly calculated for the Bryant and Mills' accounts during the selected periods (for description of the various miscalculations, see Koutsoubos Post-Hearing Brief page 5 at footnote 3 and at page 25 at footnote 23) reached a presumption that Koutsoubos excessively traded the accounts. (Div. at p. 59). Yet, the law is abundantly clear that whether the number of trades in an account is excessive must be judged by reference to the customer's investment objectives and that investors who – like Bryant and Mills – wish to invest aggressively will often require a much higher frequency of trading in order to satisfy their investment objectives. See e.g. Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361 (7th Cir. 1983) More to the point, the turnover benchmark cited by the Division is applicable to conservative investors – and the overwhelming evidence, including **all** of the documentary evidence in this case, indicates these customers were not conservative investors.[8] Contrary to the Division's claim, "if a customer wants to speculate, the portfolio turnover rate could be unlimited." In re J.W. Barclay & Co., Inc., SEC Initial Decision No. 239 (Oct. 23, 2003) at 19. Even the Division's own paid expert acknowledged this concept, conceding that there is no

[8] Compare to inapposite cases cited by the Division's brief, such as In the Matter of Sweeney, Admin. Proc. File No. 3-7126, 1991 SEC LEXIS 2455 (October 30, 1991) in which "the four customers in question did not ask or seek to have their accounts aggressively traded. The customers were not speculative investors. They were elderly, at or near retirement, and had never previously traded stocks." There "the[brokers] admitted that the [customers] initially wanted conservative investments as alternatives to certificates of deposit, and that their objective never changed.") and In the Matter of Shearson Lehman Hutton, Inc, Admin. Proc. File No. 3-6939, 1989 SEC LEXIS 778 (April 28, 1989) in which broker was given the proceeds of a 70 year old widow's life insurance policy proceeds to invest on a discretionary basis.

established benchmark for somebody who has a higher risk tolerance or who has a very aggressive risk tolerance. [T. 3199]

There are numerous other instances in which the "facts" cited in the Division's brief were contradicted by record evidence or were based solely upon self-serving after-the-fact customer testimony unsupported by documentary evidence. For the sake of brevity, they need not be all be addressed in this Reply.[9] The Division was required to prove that the trading activity in the Bryant and Mills' accounts contravened their repeatedly stated trading objectives of trading profits, speculation and short-term trading; it failed to meet this burden. The Division was also required to prove that Bryant or Mills lacked the capacity to exercise the final right to say 'yes' or 'no' thereby relinquishing *de facto* control of their trading accounts to Koutsoubos; it failed to meet this burden as well. The Division was also required to provide that Koutsoubos intended to defraud Bryant and Mills by recommending unwarranted trades solely for his own pecuniary gain; it failed to meet this burden as well. For all of the reasons set forth above, and in Mr. Koutsoubos' Post-Hearing Brief, the claim of "churning" by Mr. Koutsoubos in connection with the trading activities in these accounts is entirely groundless and an Initial Decision should be entered in his favor.

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[9] Two obvious falsehoods should be noted however. First, the Division brief asserts that "the strongest evidence of [Koutsoubos]' scienter is the lack of trading strategy" and that Koutsoubos "stopped short of explaining why his search for speculative investors translated into the intense trading reflected in the customers' account statements." (Div. at p. 65). Koutsoubos did not testify that he searched for speculative investors. More to the point, Koutsoubos testified at considerable length (perhaps more than the Division wanted to listen to) about his application of the Can Slim investment strategy developed by the publisher of Investors Business Daily. [T. 4475-77] Second, the Division brief asserts that Bryant invested approximately $250,000 in his J.P. Turner account, which was approximately 25% of his net worth: in other words, that Bryant's net worth was approximately $1 million. (Div. at p. 37) On four separate documents: Bryant's February 2005 New Account Application [Koutsoubos Ex. 16], Bryant's February 2005 Margin Account Agreement [Koutsoubos ex. 18], Bryant's March 2007 Account Update form [Koutsoubos ex. 21] and Bryant's May 2009 active sup questionnaire [Koutsoubos ex. 22] –all of which Bryant testified contained accurate net worth information [T.858, 925] - his net worth was shown to be either $3 million or $3.5 million.

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Respectfully Submitted,

Paul J. Bazil, Esq.
PICKARD AND DJINIS LLP
1990 M Street, N.W.; Suite 660
Washington, DC 20036
Pho: 202-223-4418
pjbazil@pickdjin.com
Attorney for Respondent Dimitrios Koutsoubos