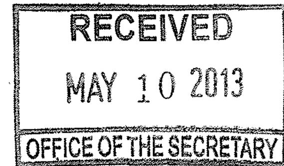

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15015

In the Matter of

MICHAEL BRESNER;
RALPH CALABRO;
JASON KONNER; and
DIMITRIOS KOUTSOUBOS

Respondents.

DIVISION OF ENFORCEMENT'S BRIEF IN RESPONSE TO THE INITIAL POST-HEARING BRIEFS OF RESPONDENTS BRESNER, CALABRO, KONNER AND KOUTSOUBOS

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Pursuant to Rule of Practice 340, the Division of Enforcement ("Division") respectfully submits this Post-Hearing Reply Brief in connection with the hearing held from January 28 – February 20, 2013.

I. INTRODUCTION

The broker Respondents (Raph Calabro, Jason Konner and Dimitrios Koutsoubos) would have the Court believe that each of the customers at issue knowingly chose to engage in a high-risk, aggressive trading strategy. But none of the customers had any significant investment experience prior to opening their account at JP Turner: several had never had a brokerage account before, and those who had prior brokerage accounts had minimal trading in those accounts. Thus, accepting the brokers' story would require this Court to conclude that each of the customers suddenly changed their low-risk, conservative lifestyles once they opened their accounts at JP Turner. Such a conclusion is implausible, to say the least. A more credible explanation is exactly what each of the customers testified to at trial: their broker falsified account documents and/or manipulated them into signing documents that misstated their investment objectives, and then pressured them to acquiesce to aggressive trading that generated significant commissions for the broker. The evidence amply supports this explanation. Each customer testified that the brokers recommended substantially all the trades in their accounts. With very few exceptions, the customers relied on their brokers' recommendations while initiating no trades of their own. The customers succumbed to their broker's tactics because, unfortunately, they trusted their brokers.

All eight of the former customers told similar variations of the same story. Whether they were farmers from Iowa (Carlson and Miller), long-time retirees from Southern California (Willhoft and Williams), or small business owners from the Southeast (Moore, the Mills and Bryant), they all testified that they were unsophisticated investors in their prior brokerage

accounts (for those who had one),[1] the use of margin, and investing in stocks and options. All of the churning victims also consistently demonstrated to the Court that they were not speculative investors, that their risk tolerance was not aggressive, and that the JP Turner account materials that incorrectly indicated they were risky, aggressive investors had been signed in blank and filled in later by their broker, who stood to profit from the risky objectives and tolerance levels; or that they were signed by the customer because they were asked to do by their broker, in whom they then had trust; or that they were told the substance of the JP Turner forms did not matter and were simply a necessary formality for the broker to commence trading on their behalf. Taken as a whole, the testimony adduced shows a clear pattern of these brokers manipulating account suitability information by engineering the account documents they are now attempting to hide behind as a means to an end: engaging in active trading that was contrary to the customers' true investment objectives, but was lucrative for the brokers.

Thus, the trial record establishes that the accounts of all of these JP Turner brokerage customers were churned during their relevant churn periods in 2008 and 2009. The record also establishes that Bresner was required to personally review the excessive trading activity of Konner and Koutsoubos, but took no meaningful supervisory or disciplinary action to stop it, despite numerous red flags indicating that the two representatives were in fact churning the accounts of their customers.

II. REPLY TO RESPONDENT RALPH CALABRO

In his Post-Hearing Brief ("Calabro Brief"), Calabro directly attacks the credibility of his former customers, Moore, Willhoft and Williams. Essentially, Calabro argues that Moore "fabricated" his testimony and is a liar; that the 72-year old Willhoft suffered from a failed memory which made his testimony unreliable; and that the 75-year old Williams "contrived" his

[1] Moore, Miller and the Mills had never had a brokerage account prior to opening their JP Turner account.

testimony, making him an unreliable liar. Nothing could be further from the truth – the earnest and credible testimony of Moore, Willhoft and Williams (together with that of churning expert Louis Dempsey) established each of the elements necessary to prove that their accounts had been churned. Calabro, thus, is left with little more than name calling and weak attempts to discredit these men.

Not surprisingly, Calabro's brief fails to mention the monetary damage that Moore, Willhoft and Williams suffered at his hands. Calabro's brief also avoids mentioning that virtually all of the incorrect account information in those customers' files (including false investment objectives, false risk tolerances, and false net worth and liquid net worth representations) was either handwritten by Calabro, or entered in their files at Calabro's direction. [T. 1175-78; 4191-4358; DOE Ex. 39; 40; 41] Moore, Willhoft and Williams all testified that when they signed the various account documents, the forms were either blank or partially pre-filled. All three witnesses explained that they signed them because Calabro, who they trusted at the time, represented to them that the documents were necessary for him to start or continue trading on their behalf.[2]

A. Calabro Fails to Tarnish Harold Moore's Credibility

Division churning expert Louis Dempsey concluded that between February and November 2009, Calabro engaged in trading patterns indicative of churning by executing over 99 sales transactions totaling $3,496,252.95 and over 123 purchase transactions totaling

[2] The Division notes that Calabro chose not to call his former associate Michael Ucker as a witness. Ucker was the registered representative whose handwriting appears on the account application of Harold Moore, as well as on other documents. The Court will recall from Moore's testimony that Ucker was present at the meeting between Calabro and Moore in North Carolina, prior to the account being opened; and was also present in the March 2009 meeting in Calabro's Parlin, NJ office, between Calabro and Moore. [T. 618-621, 630, 676-679] In the latter meeting, Moore testified as to his impression of Ucker's disapproval of certain promises that Calabro was then making to Moore. [T. 678-679] Despite Ucker's active role in preparing the JP account documents for the Moore account and his presence at meetings of Calabro and Moore, Calabro did not produce his former employee as a witness to buttress Calabro's allegations or his defenses at trial. Given Ucker's role particularly with regard to Harold Moore's account, Calabro's failure to call him is extremely telling.

$4,469,011.82. [DOE Ex. 155] These trades resulted in *losses in the account* of approximately $805,337. Calabro's aggressive trading in Moore's account resulted in an annualized equity turnover of *13 times*, more than double the presumptive churning level of 6. The cost equity factor was *29.3%.* The trading activity generated commissions and fees to JP Turner of $118,917. Dempsey confirmed that virtually all of the transactions in the Moore account were marked solicited, indicating that Calabro exercised control over the trading in the account. Based on Calabro's investigative testimony that his payout ratio was 95% of gross commissions, Calabro earned commissions of over $110,000 as a result of the trading activity in the Moore account during this brief 10 month churn period. [DOE Ex. 155, p. 13]

Calabro argues that Moore fabricated his testimony.[3] Calabro Brief, p. 4. As the Court observed during his testimony, however, Moore is an incredibly trusting small business man who regularly relied upon his secretary, his accountant, his attorneys, engineers and other professionals who he hired to assist him. [T. 815-817] When Moore met Calabro, he similarly afforded a high level of trust to Calabro. [T. 817] Importantly, Moore had no securities trading experience. Before he opened his account with JP Turner in December 2008, Moore had an IRA account with mutual fund holdings, but had not traded equities, options or on margin and had a very limited knowledge of how securities work. [T. 617, 622, 646, 659-60]. In fact, prior to opening his JP Turner account, Moore had never had a brokerage account or traded securities. [T. 617, 657].

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[3] The Court should note that Calabro's citations to the record take substantial liberties with the trial transcript. For example, Calabro quotes Moore's statement that the Division explained "how things were going to go" at the hearing to support the suggestion that the Division prompted Moore to draft the notes he later took with him to the witness stand. Calabro's Brief, p. 4. Looking at the proffered citation, however, the witness's use of "how things were going to go" plainly refers to Division counsel telling the witness "when to get here [to testify at trial] and things like that. That's all." [T. 719] Another more disturbing example also appears on page 4. In a sentence containing two quotations, Calabro uses the latter one to suggest that the witness's notes were needed to help him "remember what [he] had to say." However, the transcript shows that quote is taken from the question posed by Calabro's counsel. [T. 719] Thus, the Court should use caution when reviewing Calabro's record citations.

As Calabro undoubtedly appreciated immediately, Moore was not polished or educated. A high school dropout who later earned his GED, Moore never attended college nor took any business, accounting or investment related courses. [T. 612-13] He makes a living operating the steel fabrication business he started in 1992. [T. 614-15] Moore's testimony that he is an unsophisticated investor was genuine and credible. While perhaps naïve in his level of trust, Moore is not a liar.

Referencing the short notes that Moore took with him when testifying, Calabro argues that Moore needed the notes to remember his testimony. This argument is not supported by the record. Moore testified that he had prepared his handwritten notes the day prior to his testimony to help him remember "mostly the dates and stuff like that." [T. 719, 721] He also testified that he was fully capable of answering counsel's questions without the notes, but for the specific dates. [T. 672] And Calabro Ex. 60, which are Moore's notes, shows that Moore indeed wrote the dates when he deposited money into his JP Turner account along with the amounts of the deposits. Moore's notes also indicate the dates of the New York trip during which he met with Calabro before agreeing to the last two deposits totaling $750,000 from his business line of credit, into his JP Turner account. [Calabro Ex. 60, pg. 1] Moore emphatically testified that he prepared the notes from his personal recollection, and that all of the representations on Calabro Ex. 60 were true and correct as they appear on that document. [T. 819]

Importantly, Calabro makes no argument that it was in any way improper for the witness to have made notes and/or to take them with him to the witness stand. As there is no prohibition for a witness to use notes to remember dates and the notes were admitted into evidence, Calabro has little to complain about on this point.[4] Moreover, Calabro's counsel fully cross examined

[4] Calabro Ex. 60 further proves many of the "lies" that Calabro told Moore to induce him to make additional deposits into his JP Turner account. For example, Calabro falsely told Moore: 1) Calabro wouldn't make money unless Moore made money; 2) the most Moore could lose was $125,000 if he sent Calabro the money from his line

Moore regarding the notes. [T. 717-21] Moore's notes, which were prepared from his memory, have no impact on his credibility.

Calabro argues that Moore's testimony stating that Calabro orchestrated a rushed signature on a blank form was false. First, it should be noted that Moore's claim of receiving only the signature pages of various JP Turner account documents is entirely consistent with the testimony of Calabro's other two client victims, Willhoft and Williams. [T. 633-634] Moreover, Calabro has admitted that most of the file materials of Moore, Willhoft and Williams were personally handwritten by Calabro, or populated using a typewriter under Calabro's direction. Thus, Calabro must be responsible for the inaccurate information contained in the investor files. Second, Moore explained on cross-examination that he signed papers on three separate occasions, but that he could not fully remember what specific documents he signed on each occasion. [T. 749] His confusion as to when he signed specific account documents notwithstanding, Moore confidently testified that he signed papers in blank at his office and that he never saw the completed application form with all of the filled in information until much later. [T. 631-32]. That testimony did not change on cross-examination. [T. 740].

In his brief, Calabro also argues that Moore's stated desire to invest conservatively was

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of credit and that the amount Moore stood to make was "unlimited;" and 3) that Calabro's trading strategy couldn't lose because Calabro made money for his clients even if the market went down. Calabro also convinced Moore that he knew what he was talking about through his adept use of charts, graphs and indicators (a tactic notably similar to that which Calabro used in open Court during his meandering explanation of the parabola cycle). Finally, Moore noted that Calabro told him falsely that his account balance as reflected on his monthly statements were incorrect because the account value increased between the time the statement was printed and when Moore received it. [Calabro Ex. 60, pg. 2] These misrepresentations by Calabro to lull and further induce a victim of securities fraud are also supported by Moore's testimony at trial. Further, the third page of Moore's notes underscores his sworn testimony that Moore tried without success to get Calabro to close the account and return his money as the initial $1.1 million account balance rapidly declined below $650,000 in April 2009, below $500,000 in early June 2009, below $466,000 in late June 2009 and below $400,000 in August 2009. Each time, Calabro said "[the account] would go back up as fast as it had come down and to trust him," or he just did not return the money or he told Moore that the account would "take off any day" or that "the account could make up $100[,000] in a day." [Calabro Ex. 60; T. 690, 805-06, 827]. Ultimately, Moore wound up making a withdrawal from his JP Turner account in the account in February 2010 in the amount of $140,132.90, effectively closing his account. [T. 699-700]. That was the only withdrawal Moore ever made from his JP Turner account. [T. 691-695].

false. Moore testified no fewer than ten times throughout his testimony (which took place over two days) that he told Calabro repeatedly that *he could not afford to lose the money* in his JP Turner account. [T. 626, 627, 628, 629, 640, 641, 678, 695, 696, 779]. Moore also testified repeatedly about Calabro's continuing assurances and representations to him to the effect that the most that Moore could possibly lose in his account was $125,000. [T. 628, 678, 683-684]. Moreover, Calabro knew that Moore opened the JP Turner account because he was looking to increase the value of the account over a period of several years – Moore's express goal was to be able to make a divorce payment of $500,000 due in July 2013, which at the time was 4 ½ years away. [T. 623-624, 625-626, 635, 728, 833] Moore's testimony that he wanted to invest conservatively is consistent with a goal to generate longer term profits years later. [T. 640-41]

Calabro argues that Moore was notified of the investment objectives and risk tolerance recorded in his file but failed to respond or otherwise correct the errors. However, Moore consistently explained that he signed things the way he did on his JP Turner account because of the trust level that he had for Calabro. [T. 647-648, 688, 690]. During cross examination, Moore bluntly told Calabro's counsel:

> "Look, I can save you a lot of time. . . I signed a lot of things that I shouldn't have signed, and I understand that. But I went off of what I was promised by Ralph [Calabro] and I trusted him to do what he told me he was going to do. I didn't feel like I needed to review all of these documents, and I now know I should have.

[T. 795] Moore's trust in Calabro is undisputed. He signed documents that Calabro put in front of him because he trusted his broker. He also failed to closely check various documents because he had a significant trust level in what Calabro independently told him about the documents themselves, or his need for Moore to sign them.

Calabro also tries, without success, to suggest Moore was always a "day-trader" and therefore a risky investor. However, Moore never had a brokerage account prior to his JP Turner

account, and never agreed with Calabro's counsel (despite many attempts to get him to say it) that his goal in any account was ever day-trading. And, even though Moore learned, after the fact, that an employee and friend of 10 years who Moore allowed to manage a post-JP Turner account at Fidelity had engaged in some day-trading activity in that account, Moore insisted that he never hired anyone to day trade in his Fidelity account. [T. 730, 777-778] When asked why he allowed someone else to trade in his Fidelity account, Moore testified he did it because "[he] was desperate to make back the money Ralph [Calabro] had lost" in the JP Turner account. [T. 697]. Moore consistently denied that he knew anything about day-trading, or that he ever wanted to or authorized anyone to day-trade in the account. [T. 782] When pushed on why he trusted his friend to trade in his Fidelity account, Moore stated that he had a bad habit of trusting people "when they tell me they will do something." [T. 821] However, nothing that happened in Moore's post-JP Turner Fidelity account changes the evidence that Moore opened his JP Turner account with the goal of making solid, gradual returns through conservative investing. [T. 833]

Calabro unconvincingly contends that Moore "games the system" to get ahead,[5] and suggests that Moore is gaming the system in this case. Moore acknowledged that prior to his involvement with Calabro, his company had obtained a contract with Phillip Morris that required a minority subcontractor, and that in order to comply, Moore created a company in his then-wife's name that became the subcontractor. [T. 739-741] However, Moore explained that he had set up the company *after* Moore had already obtained the contract. [T. 740-741] Calabro does not assert that what Moore did was illegal, and Moore explained that under the Phillip Morris contract, he was authorized to subcontract up to 99% of the work being done. This issue is a red herring and has no bearing on Moore's testimony related to the extremely active trading

[5] Calabro argues in his brief that Moore once "created a sham company to try to get Phillip Morris" to grant Moore's company a lucrative stock. Calabro's Brief, p. 9. This quotation is misleading in that it suggests that Moore used the words "sham compan," when the transcript reveals they were spoken by Calabro's counsel.

that went on in his JP Turner account. Rather than being some effort to bend the truth as Calabro alleges, a review of the transcript reveals that Moore himself volunteered the subject by way of explanation to earlier questions. Moore was forthcoming and truthful in his testimony.

Moore's testimony reflects the surprise and disbelief he experienced when he learned of the rapid, active trading that Calabro had executed in Moore's JP Turner account. For example, Moore testified:

> Over the entire time I had this account, I was under the understanding that if we invested in something, that it was like buying a stock in a company and their goal is to make money and to make their stock go up. I had no idea we were trading stocks like daily, sometimes more than one time in a day and losing money like – I never thought for a minute I could lose money this fast in any kind of investment.

[T. 696] Disturbingly, as Moore watched the balance in his account drop rapidly below $800,000, then below $750,000, then below $500,000, and again below $388,000, Moore contacted Calabro and told him to "send me my money," effectively directing Calabro to close Moore's account. [T. 690, 695] Moore stated he was "freaking out" over the rapid decline in the balance of his account. Each time Moore told Calabro to return the money, however, Calabro assured Moore, saying that "the account will turn around;" that we will make money "just as fast as we had lost it or faster;" that "we could make $100,000 overnight if we were in the right position;" and/or that "this was normal and to trust him and just stuff—like whatever he needed to say to keep [Moore's] account." [T. 690, 695; Calabro Ex. 60, pg. 3] Moore clearly now regrets that he did not trust his own judgment as Calabro lulled him further into the fraud, and Moore paid significantly for his error as the $1.1 million account declined to approximately $140,000 in less than a year. [T. 692-700; DOE Ex.5]

Calabro's brief asserts that Moore had the financial income and wealth to sustain an investment objective of active trading, and suggests that fact somehow supports Calabro's very active trading in his account. There is no evidence, however, that Moore ever authorized Calabro's active trading. As a general matter, the Division has never asserted that the churning victims in this case are without means. However, having the financial ability to sustain a loss does not equate to permission to engage in an extremely risky shorting strategy. Here, Moore did not specifically authorize the risky strategy, and did not have a complete understanding of the strategy or the degree of risk involved. Calabro's conduct in the Harold Moore account (222 trades in a 10 month period) was not authorized, and Calabro should be held accountable for his actions.

B. Willhoft's Recollection of Calabro's Fraud is Clear and Credible

With respect to the Willhoft 247 account, Dempsey concluded that between December 2008 and November 2009, the trading was consistent with churning, as Calabro executed 68 sales transactions totaling $2,544,060.77, and 77 purchase transactions totaling $2,990,786.24.[6] These trades *resulted in losses* in the Willhoft 247 account of over $123,000. The aggressive trading in this account resulted in an equity turnover of 10 times on an annualized basis. Further, the cost equity factor was 31.8%. The trading activity generated commissions and fees to JP Turner of approximately $98,146. Dempsey also noted from reviewing the account statements in Willhoft 247 that the majority of transactions were marked as solicited indicating that Calabro exercised control over the direction of trading in the account. Based on Calabro's investigative testimony that his payout ratio was 95% of gross commissions, Calabro earned commissions as a result of his activity in this account of over $90,000. [DOE Ex. 155, pg. 7-8]

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[6] For quick reference to the monetary damage inflicted by Calabro on Wayne Willhoft, the Court should look to DOE Ex. 155. Willhoft had two JP Turner accounts, referred to at trial as the 247 and 805 accounts.

With respect to the Willhoft 805 account, Dempsey concluded that the trading during the period from December 2008 to November 2009 was consistent with churning, as Calabro effected over 73 sale transactions totaling $2,763,384.51, and 82 purchase transactions totaling $3,725,840.96. These trades *resulted in losses* in the Willhoft 805 account of approximately $407,491. This trading activity resulted in an annualized turnover of the equity in the account of 9 times. Further, Dempsey determined that the cost equity factor as a result of this activity was 29.3%. Commissions and fees generated by this aggressive trading activity were $116,162. As was the case in the Willhoft 247 account, virtually all of the transactions in the Willhoft 805 account during the review period were solicited by Calabro, thereby evidencing his control over the direction of the trading in the account. Dempsey calculated that Calabro earned commissions in this account of over $110,000 as a result of his activity. [DOE Ex. 155, pg. 10]

In this case, the Court should look with consternation at who lost and who gained as a result of Calabro's conduct in the Willhoft accounts. During the churn period in the two accounts, Willhoft collectively lost more than half a million dollars in principal. Willhoft testified he lost a total of $1.1 million in the two accounts while Calabro was his broker. [T. 1314-15; 1374]. Calabro engaged in 145 total securities transactions in the Willhoft 247 account during the churn period and personally earned commissions in that account of over $90,000. [DOE Ex. 155, pg. 7-8] Calabro engaged in 155 total securities transactions in the Willhoft 805 account during the churn period and personally earned commissions in that account of over $110,000. [DOE Ex. 155, pg. 10] The total commissions that went to Calabro from the two Willhoft accounts totaled approximately $200,000 in only a 12 month period.

Calabro contends that Willhoft's memory has faded such that his testimony is not reliable. Willhoft, a spry, 72-year-old retired man, however, had excellent recall at trial. After approximately 2 hours of direct examination, Willhoft was subjected to a thorough and lengthy

cross-examination bridging two days. Calabro's cross examination of Willhoft was designed more to exhaust the witness and to wear down his stamina than to truly discern what he knew. Willhoft withstood the cross-examination admirably, and was deft in his ability to make distinctions and/or to describe similarities in the activity in the two JP Turner accounts that were the subject of his testimony. Willhoft also had significant recall of conversations that he had with Calabro, including what he told Calabro about his true investment objectives, and had a clear memory of his difficulty keeping up with and monitoring the frequent trading activity that Calabro was generating in Willhoft's two accounts.

Calabro's initial argument is that Willhoft "forgot" that he had some trading experience. This argument misstates the evidence. First, Willhoft did not change his testimony from that on direct because of any of the described trading activity in which Willhoft engaged in his self-directed Ameritrade account. The trading described by Calabro on page 11 of his brief relates to a relatively isolated set of circumstances where Willhoft engaged in trades in his Ameritrade account. These trades, primarily in June 2007, were limited and essentially mimicked trades that Calabro had executed in Willhoft's JP Turner 247 account. [T. 1195, 1202, 1212]. Willhoft has never executed a stock trade on a computer, and uses his computer exclusively to place auction bids on automobiles that he seeks to purchase. [T. 1354-58, 1105, 1228-29]. Willhoft's testimony on direct that very few trades occurred in the Ameritrade account was uncontroverted on his cross-examination. For Calabro to rely on the trading (which mimicked Calabro's trades in the JP Turner account) over a very brief period to suggest that Willhoft had significant trading experience is disingenuous, and simply not persuasive. Even if the Court takes Calabro's argument as true regarding the June 2007 trading in his Ameritrade account, Willhoft's overall trading experience still remains scant, as he testified.

Willhoft maintained throughout his lengthy testimony that he was not a risk taker and was a conservative investor. Prior to opening his JP Turner accounts, Willhoft had maintained but one Smith Barney account for a 20 year period. [T. 1039-42]. His registered representative in the Smith Barney account for the entire period was a man named Bill Grant, and with Grant's direction, the trading in that account was limited to 2-3 trades per year. [T. 1042]. While Willhoft later opened the Ameritrade account prior to or about the time he opened his first JP Turner account, he described the trading activity in that account before he met Ralph Calabro to have been "hardly any trades in that account, as well." [T. 1043]. Willhoft is insistent throughout his testimony that his prior stock trading experience was very conservative—with mostly tax exempt California municipal bonds, California school bonds and some stocks such as Standard Oil, Mobil Oil and General Motors. [T. 1044]. Moreover, Calabro knew from the beginning of the relationship that Willhoft was a conservative investor who was looking for income producing investments, such as the bonds described above. To prove Calabro's knowledge of Willhoft's conservative investment nature, the Court should look to the evidence which establishes that Calabro early in the relationship pitched two commercial buildings as conservative income-producing investments to Willhoft, and in which the witness thereafter invested $400,000. [T. 1126-1130, 1290-92]. Ironically, even though Willhoft had never lost any money in real estate in his life, he lost his funds in the two real estate investments Calabro and JP Turner brought him—as the investments paid for only a few months and failed to pay thereafter. [T. 1297, 1372]. Calabro knew early on that Willhoft's investment objectives were to be conservative, preferably income producing investments.

Willhoft's expectations for the trading in his two JP Turner accounts was resolute throughout his testimony. He insists that he was a conservative investor, that the 247 account was to be very conservative, and the 805 account could be more moderate. Willhoft told Calabro

those goals. [T. 1065-66, 1067-68, 1080, 1085, 1121, 1125-26, 1132-33]. Like he had with Moore, Calabro had Willhoft sign blank account opening and other forms. [T. 1113, 1147, 1176, 1178]. In 2007 and 2008 Willhoft opened two brokerage accounts with JP Turner. [T. 1055-56, 1111-12]. When he opened these accounts, Willhoft had an annual income of between $50,000 and $100,000 and a net worth of over $500,000. [T. 1061; 1063-64] One of the accounts, the 247 account, was funded largely with money belonging to Willhoft's wife, [T. 1068] while the 805 account, initially opened in Willhoft's individual name, was later converted into an account in the name of the Willhoft family trust. [T. 1073-74]. Willhoft had always held his investments in his Smith Barney account for the long-term. [T. 1044-45]. Prior to opening his accounts with JP Turner, Willhoft had never bought or sold options, nor had he bought or sold commodities. [T. 1048] Willhoft also had never previously used margin. [T. 1049]. There was no substantive discussion between Willhoft and Calabro specifically about Willhoft's true investment objectives, risk tolerance or other pertinent account information [T. 1060-61].

Calabro argues falsely that the oil investment programs in which Willhoft invested were higher risk and therefore constituted some evidence that Willhoft truly possessed a more speculative investment objective for stock trading than he says is the case. However, investment activity outside of stock investing does not reasonably indicate anything meaningful about one's risk tolerance for investing in stocks. As stated by Louis Dempsey, the Division's churning expert "[u]nless it's in similar types of securities or in a similar sector, I don't think there is any relevance." [T. 3298-99]. Dempsey further stated: "So, if someone, like I said, is sophisticated in one area, whether it's real estate or oil and gas technology doesn't necessarily make them sophisticated in market trading practices." [T. 3299]. Moreover, by Willhoft's own blunt testimony, the oil investment programs he engaged in were not risky or speculative and they had always paid him income on a monthly basis. [T. 1369-1371, 1275-1276]. Willhoft had invested

in them for 20 years and insisted they are "[a]bsolutely not" risky investments. [T. 1369-71; 1276].

In a strained effort to unfairly malign Willhoft's memory, Calabro suggests that Willhoft was confused or lying because while he explained his work history initially as buying/selling cars[7] and building houses, but he later recalled that he spent ten years "owning and managing a Christmas tree farm." [See Calabro brief, pg. 14, fn. 8]. This suggestion is misleading and not supported by the record. First, the "farm"—largely counsel's word—was but a 2.7 acre parcel [T. 1262], and hardly a farm by any reasonable standard. Moreover, Willhoft testified that he cut the trees and built houses on the parcel—so a reasonable reading of Willhoft's testimony was that the tree "farm" was part and parcel of Willhoft's house building efforts, and not a separate business that Willhoft *forgot* to mention. [T. 1259-1260]. Calabro's argument is not persuasive.

Calabro tries to suggest that Willhoft's memory was faded about his income and net worth, and that the representations that Calabro recorded in JP Turner file materials for Willhoft that erroneously listed his retirement income was correct as recorded. Much of Calabro's argument is based upon the true value of Willhoft's net worth. Willhoft said it was approximately $3 million, while Calabro listed it in Willhoft's file materials at $8 million.[8] [See Calabro Brief, p. 13-14]. Despite Calabro's creative mathematics to try to convince the Court that Willhoft had a net worth of $8 million, in order to reach that amount he would have the

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7 Willhoft made his principal income selling cars he bought at auction. [T. 1255]. In addition to also building houses on the old Christmas tree land, Willhoft also testified that for a short time he sold fine art and pottery [T. 1253], sold cars at a dealership for a year [T. 1252], and was a substitute teaching for a period of time [T. 1254]. Willhoft had no memory lapses about his work history.

8 Calabro also contends that a post JP Turner account at Prestige supported his conclusion that Willhoft was speculative investor. However, Willhoft testified that he had no recollection of opening this account, and ultimately dismissed it in his testimony as one opened by telemarketers that he had not otherwise authorized. [T. 1319, 1346, 1375-76]. Calabro's argument that this later account is proof of a speculative investment objective is quite strained, as Willhoft had no recollection of it, and testified that he had extensive problems with telemarketers in the brokerage arena in recent years. Willhoft further testified that he had been cold-call solicited by Calabro originally. [T. 1049-1050, 1375-76].

Court specifically include Willhoft's land holdings and house. However, this argument must fail. The account application forms for opening a JP Turner brokerage account specifically provide that for purposes of calculating Estimated Net Worth, it is "exclusive of home and farm." [See DOE Ex. 37, Bates page JPT-SEC-ATL 002477; DOE Ex. 38, p. 2]. Under no theory was Calabro to use Willhoft's allegedly $2 million house for calculating net worth of $8 million. Despite what JP Turner's forms say, Calabro asks this Court to do precisely that. Calabro's strained argument that the JP Turner forms accurately reflect the net worth of Willhoft must fail because Willhoft himself says it was never more than $3 million. [T. 1080-1081]. Calabro's proffered calculation is further distorted by Calabro having included some hypothecated valuation of Willhoft's other undeveloped, mostly desert land holdings in the net worth calculation. Willhoft's point throughout his testimony was that Calabro falsely recorded his net worth to presumably permit active trading that had not otherwise been authorized, or even discussed. Willhoft is credible on this point, and very credible overall.

Like with his conduct in Moore's account, Calabro at times traded in Willhoft's accounts without obtaining authorization from Willhoft to execute particular trades. [T. 1100-1101]. Willhoft learned of those unauthorized trades directly from Calabro *after* the trade had been made or several days later when Willhoft received his trade confirmation in the U.S. mail. [T. 1101-1102]. Further, Willhoft found the trading in his accounts to be so voluminous that he was essentially unable to keep up with all of the trade confirmations he received. [T. 1102-1103, 1170-1171, 1299-1300, 1315-1316]. In fact, Willhoft stated that he thought there were too many trades going on, he couldn't keep track of them all, and in 2008 and 2009 the trades in his account were just overwhelming, particularly at his advanced age. [T. 1315-1316].

Despite all of the confusion going on in his accounts, Willhoft consistently maintained throughout his testimony was that he relied upon Calabro largely because he trusted that Calabro

was operating the accounts in Willhoft's best interest. [T. 1051, 1054, 1075, 1103, 1135, 1176, 1183]. Willhoft's testimony is powerful and credible. Like Moore, Willhoft had great trust in Calabro and allowed the relationship to extend beyond the time that it was in his financial interest to do so. For his trust in Calabro, Willhoft lost approximately $1 million in principal in his two accounts. [T. 1314-1315].

The Division's expert concluded that the numbers in the two Willhoft accounts grossly exceed a presumptive level for churning in both turnover ratios and break-even calculations. Calabro failed to tender an expert witness who could have attempted to rebut Louis Dempsey's calculations and churning conclusions, but did not. Presumably, the respondents' failure to produce a churning expert was most likely because one could not be found who would rebut Dempsey's calculations—given the exorbitant turnover and break-even numbers present in this case. That empty chair speaks volumes about what happened in Willhoft's accounts—and in the accounts of the six other churning victims. Without serious dispute, the turnover ratio and break-even calculations support a finding that Calabro churned the accounts of Willhoft, of Moore and as set forth below of Williams at the expense of his three clients and for Calabro's own personal gain.

C. <u>Calabro Fails to Discredit Williams</u>

With respect to the Williams account, Dempsey concluded that during the period from December 2008 through November 2009, Calabro engaged in trading patterns consistent with churning by executing over 122 sales transactions totaling $8,588,124.41 and over 149 purchase transactions totaling $11,015,161.13. These trades *resulted in losses* in the account of approximately $1,026,546 and generated commissions and fees to JP Turner of approximately $297,515. Calabro's aggressive trading in this account resulted in an annualized equity turnover of *8* times on an annualized basis and a cost equity factor was *22.9%.* Dempsey confirmed that

virtually all of the transactions in the Williams account were marked solicited, indicating Calabro's control over the trading in the account. Based on Calabro's testimony during the investigation that his payout ratio was 95% of gross commissions, Calabro earned commissions of over $282,000 as a result of the trading activity in the Williams account. [DOE Ex. 155, pg. 15-16 **The Williams' Account Trading Activity,** ¶27]

Calabro contends that Williams lacked credibility because his testimony was contrived. His stretched argument is that Williams supposedly "relieved himself of a duty to ensure the truth" because the witness essentially believed that the truth does not matter. This circular contention could not be further from what the record reflects. Indeed, Williams is a very, modest, believable, retired college professor—and it is because of Williams' inherent believability that Calabro attacks him so vehemently. In fact, many of Calabro's arguments against Williams' credibility are so exaggerated, with some unsupported by his citations to the record, that ultimately the finder of fact should conclude them not persuasive.

Williams is a truly modest 75 year old man [T. 1391], who lives a very conservative lifestyle and has very conservative investment goals. For example, Williams has lived in the same house since 1968—what he describes as a 1700 square feet "standard tract home." [T. 1392]. Williams retired from a college professorship in 1995--more than 12 years before he opened his JP Turner account with Calabro [T. 1392, 1421]. Williams has been married for many years to the same woman Alice, herself a retired school teacher. [T. 1393]. Williams drives a 1970 El Camino which he bought used 19 years ago (when the car was 24 years old). [T. 1394-95].[9] In fact, Williams bought the 1970 used car to replace a 1962 Pontiac Catalina that he had bought used in 1965 and drove until 2002—a 37 year period. [T. 1395]. Williams has

[9] Calabro, through his counsel, scoffed at the suggestion that Williams would drive such an old car, and suggested the car a "classic." Williams politely advised him: "[i]t depends on what you call a classic. If you're talking about something that goes in a showroom, you're sadly mistaken. This is a work vehicle." [T. 1530].

never used a computer or even had a log-in password or e-mail account name for the computer that his wife uses. [T. 1446].

Williams also described himself to be an unsophisticated, conservative investor [T. 1402, 1444, 1501, 1503-04, 1577], and had prior to opening his JP Turner account, only had one brokerage account at Smith Barney--which he closed and used the proceeds therefrom to fund his JP Turner account in 2007 [T. 1406-07]. That Williams had but one brokerage account before his JP Turner account is a fact unaffected by Calabro's cross-examination of him. Williams testified that he was not a sophisticated investor [T. 1402, 1656] and that he has always relied (before, during and after his JP Turner account experience with Calabro) upon the advice of registered representative professionals to trade stocks on his behalf. [T. 1410-11, 1423, 1448, 1456, 1560-61]. As for his reliance on Calabro's stock trading recommendations in his JP Turner account, Williams relied upon Calabro "100 percent of the time." [T. 1456]. Williams insisted that Calabro never really consulted him in the calls they had about trades, but was just rather just informed him about the trades that Calabro, himself was doing. [T. 1449-50]. For his part, Williams always accepted what Calabro told him and never tried to change his mind because he had no ability to rebut anything Calabro told him about the account. [T. 1450].

As he had in the accounts of both Moore and Willhoft, Calabro definitely engaged in unauthorized trading in Williams' account. [T. 1451]. Further as Calabro did with Moore, as Williams' account balance declined in value to $500K, Calabro assured Williams that he would turn it around and get the account back to $2 or $ 3 million in value. [T. 1453]. Calabro definitely lied to Williams about making money on specific trades—only for Williams to get all the trade confirmations, from which he later confirmed no money had been made. [T. 1459]. Williams consistently testified how Calabro exaggerated his trading results in his JP Turner

account—and that Williams tried at times to show him that the results were simply not as good as he was presenting them. [T. 1469-72, 1537].

Williams' old Smith Barney account had remained open for about 15 years (when he closed it to fund his JP Turner account) with infrequent trading during the entire time that account was open. In fact, Williams testified that 95% of the stocks purchased in that account were never sold during the time the account was open. [T. 1406-07]. Williams only closed the Smith Barney account because his registered representative Bill Grant had retired, and nobody had "stepped in where he was." [T. 1408]. Williams' trading in that account included stock in Disney, JP Morgan, Chase, Chevron, Exxon, Pfizer and other blue chip stocks to be held long term. [T. 1409].

When read as a whole, one cannot conclude that Williams' assertion that Calabro had him sign blank or partially completed forms for his JP Turner account is untrue, as Calabro argues. In fact, Williams is consistent in his testimony that he did not see all of the questions or all of the responses on the JP Turner forms that he signed for Calabro. [T. 1440-41, 1517-18]. Specifically, *some* of the information was typically included on the forms Williams signed, while other information was missing and filled in later. [T. 1437-1440, 1441-45, 1478, 1497-98, 1517-18, 1519, 1608-09, 1610]. For example, on the Active Account Suitability Questionnaire that Calabro asked Williams to sign, the only information filled in on that form was Williams' name, age and marital status. [T. 1643-44]. All of the information was later filled in which falsely listed Williams as a speculative investor, and falsely stated his stock trades averaged $400,000. [T. 1643-44; DOE Ex. 45].

Moreover, in Williams' account, virtually all of the relevant documents which falsely list him as a speculative investor with an aggressive risk tolerance, and/or falsely inflate his Estimated Annual Income, Net Worth and Liquid Net Worth are in Ralph Calabro's handwriting.

If not in his handwriting, Calabro admits that he populated the typed forms with the substantive information. [T. 4228-4229 (DOE Ex. 10--Williams' Active Account Suitability Questionnaire); T. 4230 (DOE Ex. 11—Williams' JPT account application); T. 4253 (DOE Ex. 43—Williams' JPT account application); T. 4256 (DOE Ex. 45-46-Williams' AASQ and application for Margin Account Privileges); T. 4257 (DOE 47—JPT Options Trading Agreement for Williams)]. Williams insists convincingly that he and Calabro never discussed the substantive information that the forms contain.[10] [T. 1430-32, 1435, 1477-1480, 1485].

From an objective reading, there can be little doubt that Williams *trusted* Calabro, "up until the very end." [DOE Ex. 48; T. 1501, 1503]. As an elderly man who had never lost a penny in his Smith Barney brokerage account and who had dealt with a registered representative who he trusted in that account, his affording of similar trust to Calabro was not a surprising position for Williams to have taken. [T. 1423-24].

In his brief, Calabro contends that Williams' *post JP Turner account* with Newbridge Securities proves him to be a speculative investor. This argument is not persuasive. An account was opened in Williams' name with Newbridge Securities in April 2009. However that account also contained incorrect information---including that Williams was a speculative investor.[11]

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[10] It should not be overlooked that while Calabro had largely claimed he sent no blank forms to Moore, Willhoft and/or Williams, Calabro ultimately admitted upon cross-examination in his case in chief that he had in the past sent out blank forms for signature. [T. 4243, 4245].

[11] Calabro also argues that based upon the information on the Newbridge application that Williams' net worth, investment experience, and investment objectives were correct on the JP Turner AASQ and other Williams account forms. This argument is not persuasive. The Newbridge account was opened long after Williams' JP Turner account had been opened, and deep into the churn period on the relevant account. However, the Newbridge account application is one of which Williams *had no recollection*. [T. 1558]. Reading the transcript carefully, although the account application is handwritten, there is no testimony which establishes it to have been completed by Williams, or even with his complicity. [T. 1559]. Indeed, as he has no recollection of the application, it could not have been Williams who completed the form. The witness consistently stated the information on the Newbridge account form was incorrect. [T. 1560-1561]. Williams' lack of recollection of this information on the form at the time it was signed suggests he had little to do with the substance contained on the 2009 Newbridge application. Moreover, Williams described the account as a small account with but overall few trades. [T. 1403-1406]. Calabro's attempt to use this form to suggest that JP Turner's erroneous information about his objectives or net

Williams' testimony was explicit that he did not fill out the application and that when he learned that he had falsely been listed as a speculative investor he adamantly insisted with Newbridge that the information be corrected. [DOE Ex. 216; T. 1403-06, 1411, 1508-1510, 1512, 1549, 1558-59, 1563-1564, 1635]. Clearly, Williams did not recall the application, did not fill it out himself and did not notice for some time that the small Newbridge account (with a $15,000 balance) had him listed as a speculative investor. [T. 1558-1559, 1563-1564, 1635]. When he learned the account falsely listed him as a speculative investor, he sent more than one directive to correct the error, with the last directive stating as to speculation: *"No, No, No. This is the second time you have been told. This was probably John Quinn's idea in order to save his _ _ _."* [DOE 216, T. 1512].

The Court should note the circumstances as to how Williams came to be aware of active trading in his JP Turner account. Williams had never actively traded in any account in his life. He first discussed the active trading in his JP Turner account when he confronted Calabro about concerns he had over the commissions he was paying. [T. 1460-62]. Calabro's explanation was to tell Williams that now that the economy was volatile, active trading was necessary to "keep his head above water" in the account. [T. 1461-62]. Williams explained that he initiated the discussion with Calabro on the amount of commissions being generated, because he had not been used to paying lots of commissions that he came to find he was paying to JP Turner and Calabro. That was how Williams learned his JP Turner account was an actively traded account—and not because Calabro had vetted with him the issue of an actively traded account.

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worth were in fact true is a large, illogical leap that is unpersuasive, in light of the witness's testimony that it is all substantively untrue, that he did not complete it, and the minimal trading in that account.

Moreover, had Calabro been serious about this argument, he could have called Williams' Newbridge broker as a witness. Yet, he failed to even subpoena Mr. Quinn to appear at trial. Without Quinn's testimony to somehow connect Williams to the erroneous information about him on the Newbridge account, Calabro's argument is meritless and should fail.

As with the other Calabro clients, Calabro's brief takes great latitude with his proffered record citations. For example, in Calabro's brief at page 19, it suggests at the beginning of second paragraph that Williams knew his account was actively traded (and conceded to it) and he "wasn't against it, by any means." However, what Williams really stated in the accompanying transcript citation was that the trading was "more active than I was used to," and that he was not opposed to *how the account performed initially.* [T. 1534]. The citation does not reasonably support Calabro's assertion that Williams had no opposition to active trading in his JP Turner account.

In another argument, Calabro contends that Williams' tax returns confirmed an annual income that exceeds $100,000 per year, from which he argues that Calabro accurately recorded Williams' income. [Calabro Brief, pg. 17]. Calabro's logic is tortuous in that it asks the Court to cumulate retirement pensions (for Williams and wife), social security, interest and dividends of approximately $3,500 combined, and add income distributions from Williams' oil investments. Calabro argues for taking great liberties about income vs. tax write-offs in an effort to cumulate an amount that exceeds $100,000 per year. However, after this litany of supposed revenue sources, Calabro fails to advise the Court that Williams' adjusted gross income as reported on his income tax return for 2009, the year at issue, is but $59,649. [Calabro Ex. 82]. Calabro's argument on this point is simply not persuasive.

In yet another argument Calabro tracks a line of questions that he posed to Williams at trial relating to how much Williams' JP Turner account was up in value early in the churn period, before it declined precipitously. [Calabro Brief, pg. 18]. Calabro argues that a $700,000 increase in Williams' JP Turner account in a three month period should be added to cumulate a liquid net worth for Williams that comports with the inflated amount recorded on Williams' JP Turner forms completed by Calabro. Not surprisingly, at trial Williams completely denied that

an increase in that amount occurred in his account. [T. 1538-1540]. For argument's sake, even if a spike in value had occurred briefly, it was but a fleeting valuation which declined very rapidly as the balance of Williams' churned account dwindled. Calabro's attempt to cumulate valuation to establish a liquid net worth for Williams that comports with Calabro's falsely recorded amount--based upon a momentary high point in an account with an overall rapidly declining balance—is simply not persuasive.

Moore, Willhoft and Williams all told consistent stories, including that: 1) Calabro was an effective salesman who used graphs and charts to persuade them that he knew what he was doing;[12] 2) Calabro told them all he could make them money with the market going up or the market going down; and 3) Calabro sent them blank or partially completed JP Turner account forms including applications, AASQs, margin applications, options agreements and asked them to sign it. Notably Moore, Willhoft and Williams stated consistently that they trusted Calabro and believed him to be looking out for their long term interests. All three of Calabro's churning victims were relative stock trading novices, as Willhoft and Williams had each had one long term brokerage account at Smith Barney that been infrequently traded, while Moore had never had a brokerage account before he opened his JP Turner account.

[12] This tactic of Calabro is particularly interesting because it is the precise sales technique that Calabro used with the Court during the presentation of his defense at the trial in this matter. Specifically, over two days (on February 14 and 15, 2013) Calabro presented lengthy monologues designed to showcase his believed superior intelligence, where he also drew graphs and charts on demonstrative exhibits to suggest an exceptional knowledge of relatively common economic principles, similar to what is normally presented in a basic college economics course. The high school educated Calabro proudly proclaimed that he had self-studied these principles for 15,000 hours over the past 12 or 13 years--a period of time fully within the 18 years that he has worked as a broker executing stock trades on behalf of others. [T. 3953-3954]. As the evidence suggests that Calabro had previously given similar presentations to Moore, Willhoft and Williams to induce their confidence in him, his testimony to the Court was an obviously rehearsed presentation, which also underscores Calabro's willingness to use graphs and charts to persuade his audience.

D. Calabro's Leading Questions Argument Is Unpersuasive

Calabro's argues that the Division asked leading questions that Moore, Willhoft and Williams needed essentially to keep their stories straight. [Calabro Brief, p. 21]. Calabro contends that the three witnesses gave substantially different stories on cross-examination than they had on direct questioning of the Division. This argument is erroneous.

First, several of counsel's form objections were sustained by the Court, and the Division rephrased those questions to the witnesses, resulting in no harm to Calabro. Secondly, many of the questions objected to as leading when read in the transcript reveals they were not objectionable in the first place. Moreover, each of the three churning victim witnesses against Calabro was subject to a thorough, aggressive, exhausting cross-examination which took usually three to four times as long as their testimony on direct. When their entire testimonies are read as a whole, Moore, Willhoft and Williams told consistent stories on cross-examination that conformed with the essential elements of their testimony on direct examination with regard to, among other things: 1) their communications with Calabro; 2) Calabro's failure to discuss with each of them their investment objectives, risk tolerance, net worth, investible net worth or other pertinent information; 3) Calabro's failure to disclose to them the inherently risky nature of the trading program he was conducting in each of their accounts; and 4) that Calabro repeatedly made assurances to each of them to trust him, which each of them did. Moore, Willhoft and Williams each had distinct memory of the relevant facts, which even after lengthy and rigorous cross-examination which yielded largely the same testimony regarding their JP Turner file documents, including account applications, account update forms, AASQs, margin applications and option trading agreements. Calabro's argument that the questions asked of Moore, Willhoft and Williams by the Division created some false memory in these three witnesses is simply unsupported by their individual testimonies, or by the record as a whole.

E. Calabro Engaged In Excessive Trading And Dempsey's Calculations As To Turnover and Break-even Are Correct

In Section II of Calabro's brief, he makes the argument that the Division's expert's calculations of turnover and breakeven rates were based on a faulty methodology because the expert allegedly failed to account for "the 'anomaly' of market forces on a 'short account.'" Calabro's Brief, pp. 23-27. Specifically, Calabro claims that the standard, industry-accepted method of calculating turnover ratio is flawed because (assuming purchases are made) the ratio will be slightly higher if the stocks purchased decrease in value rather than staying the same or going up. The change occurs because when the purchased stock goes down in value, it negatively impacts average account equity at month's end. Calabro further claims that this phenomenon gets worse when one engages in unsuccessful short sales, thus making average account equity go down even further because the trader lost money. Calabro also asserts that the standard, industry-accepted method of calculating breakeven rates is similarly flawed because a declining market and losing on short sales cause account equity to drop, thus causing the cost-to-equity ratio to go up. Id.

These arguments are simple sleight of hand. As an initial matter, his suggestion that fluctuation in account value (whether due to the market declining or transaction losses) is a novel "anomaly" that is so radical that it demands its own turnover and breakeven calculation is absurd. The industry-accepted methods Dempsey used have of course been applied in other situations involving declining average account equity; indeed, such events never play out in a vacuum. In addition, as the Court can see from Calabro's papers, even using his calculations, the turnover and breakeven rates are still very high – his artificial methods result in reductions in turnover from 8 to 6.6 or 10 to 8.2, for example, and in breakeven rate from 29.3% to 21.8% or 29.3% to 13.6%. Id. In sum, Calabro's argument that Dempsey's methods are flawed and that

the Court should reject his calculations fails. Dempsey used the industry-standard method of calculating turnover and breakeven rates, and Calabro's situation is not so unique as to warrant special treatment.

During trial, Calabro essentially had Dempsey conduct several unconventional calculations during his cross-examination for Moore and Williams. Dempsey complied with the request, but, as stated, all of the alternative re-calculations yielded turnover ratios or break-even rates that, when annualized, still exceeded presumptive levels for churning. [T. 3284-3288].[13] Calabro argues for this alternative calculation, yet he offers no cases in which his alternative calculation was used. Moreover, Calabro cites no learned treatises or other sources to suggest his theoretical alternative methodology has been subject to peer-review. This void of authority in Calabro's brief can only be because no such cases or learned treatises exist to support his alternative calculation approach. Calabro has no reasonable basis to ask the Court to reject the turnover ratios and cost-equity calculations offered by churning expert Dempsey.

Dempsey's testimony on redirect examination was unequivocal. The alternative calculations Calabro touts are completely unconventional in the brokerage industry, and there is no legal or other basis for the calculations Calabro proposes. [T. 3284]. Dempsey explained that his conventional turnover and break-even methodology in DOE 155 was more appropriate because it effectively averages out end of the month equities. By doing so, the conventional calculation takes into account market fluctuations that occur over a longer period of time. [T. 3285].

There is simply no basis for Calabro's assertion that Dempsey's calculations are based on faulty methodology—Dempsey's methodology for calculating turnover and break-even rates is

[13] Dempsey testified that specifically the turnover in the Williams account using Calabro's alternative calculation would still have been 6.6% on an annualized basis, which is presumptive of churning. [T. 3285-3286]. Similarly, the alternative calculation for turnover in the Moore account on an annualized basis would have been 6.72%, also presumptive of churning. [T. 3286-3287].

widely accepted by the industry. To "account for market forces" on a "short account" is not a factor that has any legal or other basis in conducting turnover ratios or break-even calculations—and Calabro cites no authority to support it. In fact, Calabro's argument fails because under his analysis, calculations would be static—and not based on movement of the market over time.[14] Even after Calabro's creative but ineffective argument at trial for alternative turnover ratios and break-even calculations, Dempsey insisted that his calculations were done in the conventional methodology used in the industry, and that he stood by his turnover and breakeven calculations as they had been calculated in DOE Ex. 155. [T. 3289].

As a practical matter, Calabro could have subpoenaed and called his own churning expert to testify presumably on his hypothecated alternative turnover ratios and breakeven calculations—but Calabro failed to do so. Louis Dempsey's report, calculations and testimony together comprise the only evidence of actual turnover ratios and breakeven calculations that are before this Court. [DOE Ex. 155]. Because his methods of calculating breakeven ratios and turnover rates are commonly used in the brokerage industry, they are reliable evidence before this Court. The churning expert's testimony was unaltered and his calculations in DOE Ex. 155 were unaffected by Calabro's questions on cross-examination. The turnover and break-even calculations in this case are overwhelmingly excessive and indicative of churning—not only as to Moore, Willhoft and Williams—but to Carlson, Miller, Bryant and the Mills as well.

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[14] Even if an expert considered market conditions in doing turnover and breakeven calculations, that analysis is essentially a static calculation, and not one based on movement in the account over time. As a short account inflates the term over cost equity, the reason that Dempsey and other regulatory professionals calculate turnover ratios and break-even rates over time the way they do, is that it tends to smooth out the calculations giving no moment in time more persuasive authority than another. As a practical matter, the longer period of time that is looked at, the better it is because the calculations will smooth out over time. Essentially, that is precisely the reason that turnover and break-even rates are calculated on an annualized basis.

Moore, Willhoft and Williams were not investing "with" Calabro, as he contends. Rather, they had all placed their funds with Calabro for his management of the trading in their accounts. There is no doubt that Calabro placed Moore, Willhoft and Williams in extremely risky trading programs that sometimes involving shorting in various stocks he recommended. Calabro admitted that he knew he was engaging in very risky, complicated trading activity in the Moore, Willhoft and Williams accounts and that he never really advised them that they had to earn 25% or 30% or more in their accounts just to reach the breakeven point, before each of them could actually begin to earn a trading profit in their brokerage accounts. [T. 4255, 4301-4303]. Calabro argues much about market volatility in 2008 and 2009 and uses that volatility to defend the fact that he placed largely inexperienced stock investors in extremely risky shorting strategies without insuring that they had an understanding of the potential losses they could suffer in their accounts using his shorting strategy. Notably however, the Court should consider that even after the stock market largely corrected itself in March 2009, Calabro failed to alter his shorting strategy in the Moore, Willhoft and Williams accounts. As Calabro was admittedly aware of the riskiness of his shorting strategy, his failure to alter his shorting strategy in those four accounts as the market improved in 2009 amounted to willful and reckless disregard for the interests of his clients. [T. 4213-4214, 4245, 4255, 4274, 4302-4303]. Calabro has in fact churned the accounts of Moore, Willhoft and Williams.[15]

Calabro also argues that Dempsey's expert opinion was based upon the conclusion that Moore, Willhoft and Williams all had conservative investment objectives. As Calabro would have the Court believe that he has disproved conservative investment objectives for the three Calabro investors, he contends that the trading in their respective accounts was somehow

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[15] Although it is not independent proof that Calabro churned the accounts of Moore, Willhoft and Williams, the Court should be mindful of the testimony at trial which establishes that William Mello, the President of JP Turner, settled with the Commission on charges that he failed to supervise Calabro, in conjunction with Calabro's conduct in this case. [T. 2753-2754].

appropriate—even authorized, and that Dempsey's opinion is faulty because he assumed conservative investment objectives for Moore, Willhoft and Williams. Dempsey's opinion that the trading activity in the accounts was consistent with churning, and that the brokers' control of the direction of the trading activity in their respective accounts, was not however dependent upon each customer's investment objectives. Dempsey stated that his churning opinion and calculations were not based upon what the customer's investment objectives actually were. [T. 3170-3172, 3192, 3198, 3200, 3210, 3292-3293]. Moreover, Dempsey stated that it is essential for a client to fully know and understand what he is getting into with actively traded accounts. Dempsey further stated that "most customers they found do not have the time or the sophistication to be able to monitor active trading in an account. That is one of the things you would assess." [T. 3294-3295]. Dempsey stated that the thresholds for churning (with Turnover of 6 being presumptive of churning) *do not actually change* from a conservative investor along the spectrum to a speculative investor. [T. 3297]. Moreover, even if one were deemed to be a truly speculative investor (which has not been proven with any of the investors in this case), it still remains possible for that speculative investor to have his account churned. [T. 3298].[16] Dempsey's conclusion that the trading activity is consistent with churning for the Moore, Willhoft and Williams accounts, is simply unaffected by their investment objectives.

To underscore the level of trading activity in the accounts managed by Calabro at JP Turner in 2008 and 2009, the Court should consider the testimony of the highest ranking JP

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[16] Dempsey explained that even whether a truly speculative investor's account was churned would depend largely on what their investment experience is. For example, if the bulk of their investment experience is outside the securities industry and they are not familiar with securities trading practices, then even a "speculative" investor in oil wells, for example, could be churned in his securities account. The expert stated: "[i]t's a different investment. It's a different analysis." [T. 3298-3299]. However, there is simply no evidence to establish that any of the JP Turner customers in this case were in reality truly speculative in any investments that they made. To the contrary, each was largely inexperienced in trading in securities in a brokerage account and was by no means a sophisticated, speculative investor.

Turner executive who testified—Michael Bresner.[17] Bresner offered executive level insight about Calabro's trading activity. For example, Bresner was aware that Calabro's accounts regularly reached Level 4 reviews in the AARS system, because Bresner personally reviewed many of Calabro's accounts each quarter. [T. 2879, 2883]. Bresner was fully aware that Calabro had very active trading accounts in 2008 and 2009, and was also aware that Calabro had been sued in arbitration for churning the account of his client Adcock. [T. 2880-2882]. Bresner and presumably other executive level management were also aware that Calabro was a large producer for the firm, in terms of generating commissions. [T. 2883]. For example, in 2008, Bresner and others in management knew that Calabro was near the top of all registered representatives in terms of total revenue for the firm. [T. 2884]. Bresner knew Calabro was a top producing broker for the firm[18] because Calabro was in attendance at all the top producing conferences held by the firm. [T. 2885]. By virtue of Bresner's position as the highest ranking reviewer of highly actively traded accounts in the AARS system, he knew Calabro was a registered representative who regularly engaged in active trading.

III. REPLY TO RESPONDENT JASON KONNER

Konner's Brief confirms much of what the Division argued about him in its Initial Post-Hearing Brief. He takes no responsibility for his conduct, but instead argues (at the same time) that the evidence shows he did nothing wrong, yet his former customers Gordon Miller and James Carlson were improperly influenced by the Division and are "liar[s]" who were "just not

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[17] Although Bresner was charged with failure to supervise accounts managed by Konner and Koutsoubos when those accounts reached Level 4 reviews in the AARS system, Bresner was not charged with a failure to supervise the extremely actively traded accounts of Calabro. Rather, the JP Turner President William Mello was charged with failing to supervise Calabro. Mello has settled with the Commission on those charges.

[18] Bresner identified exhibits at trial which listed the top 50 producers by revenue for JP Turner in 2008 and 2009. [DOE Exs. 94, 95, 96 T. 2885-2895]. Calabro, Konner and Koutsoubos all appeared at various rankings for the top 50 JP Turner registered representatives. [T. 2885-2890]. Calabro was the top firm revenue producer with revenue of $4,113,085. Konner was included on the list with revenue totaling $328,837.49. Koutsoubos was included on the list with revenue totaling $137,035. [DOE Ex. 94, T. 2885-2890].

credible." Konner's Brief, pp. 1-4; 11; 19. Likewise, Konner simultaneously takes the position that both men were extremely wealthy, yet told untruths against him in vague hopes of some modest recovery down the road from the government. Id., pp. 11, 13, 18-19, 20-21. As the Court observed, however, both Miller and Carlson gave eerily similar, credible testimony as to how Konner prospected new customers while doing little suitability due diligence and no risk disclosure, manipulated the investment objectives and other suitability information on the accounts, and controlled the trading by finding passive, inexperienced investors and betraying their trust. He now has to answer for that conduct.

In his papers, Konner argues that the evidence failed to demonstrate that he churned Miller's and Carlson's accounts. A review of the record, however, shows that Miller and Carlson were unsophisticated farmers from Iowa who did not understand the risks of the active trading Konner concedes he recommended, and Konner consistently took advantage of both customers for his own gain. The Division submits that the elements of churning were satisfied as to both Miller and Carlson.

First, as set forth in the Division's Dempsey report, the cost-to-equity ratios and turnover ratios for the Miller and Carlson accounts during the churn period – **28.2%/34.6%** and **18/17**, respectively – combine with the raw number of trades to strongly evidence excessive trading. [DOE Ex. 155] Konner claims, of course, that Miller and Carlson (neither of whom had ever done active securities trading before) coincidentally decided to become aggressive stock speculators once they met Konner, and that the trading was not excessive in light of their investment objectives. Konner's Brief, p. 1, 3-4, 9, 11-13, 17-18, 20-22, 31, 35-36. The only evidence allegedly demonstrating that choice, however, are the forms that Konner filled out for Miller and Carlson without explaining the real risks involved. As stated, Miller's and Carlson's testimony shows that they did not understand those risks, especially the risk posed by the ever-

mounting costs of active trading, and that they verbally put Konner on notice that they were actually more conservative than the objectives Konner had marked for them on various forms. Viewed in that light, the conclusion that the trading was excessive becomes irrefutable.

Second, with respect to control, the monthly account statements demonstrate that nearly all of the trades were solicited by Konner, and the testimony from both Miller and Carlson showed that they did not have the ability to independently evaluate Konner's strategy, had limited prior trading experience, trusted Konner and relied on his expertise, and relied exclusively on Konner's recommendations when making trading decisions. In addition, Konner executed a significant number of unauthorized trades in Carlson's account. Thus, Konner had *de facto* control over the accounts.

Finally, Konner's recommendation of substantially all the trades in the customers' accounts, coupled with Konner's inability to identify a legitimate trading strategy explaining the activity, shows that he acted with scienter. In addition, Konner's disregard of his customers' interests was at least reckless, and some of Konner's acts strongly suggest an intentional countermanding of those interests for the ultimate purpose of generating commissions. For example, in a discussion regarding an April 2008 account update form that had come to Carlson pre-filled and included a net worth figure of $2.5 million, Carlson testified that he explicitly told Konner that Carlson's net worth was actually much lower, and in response, Konner told him the figure did not "really mean anything." In addition, Miller, who was 85 at the time, testified that Konner put heavy pressure on him during their calls and just kept talking until Miller agreed to the trades. The nearly $80,000 that Konner made as commissions on the trading in both accounts – buttressed by the extremely high turnover and cost-to-equity numbers – also supports the fact that Konner acted with scienter.

In sum, despite Konner's attempts to suggest the contrary, the trading in the Miller and

Carlson accounts was excessive, Konner had *de facto* control over the accounts, and Konner acted with scienter when recommending and carrying out the excessive trading he controlled. Konner churned Miller's and Carlson's accounts, and the Court should find accordingly.

A. Konner Made No Real Inquiry into Miller's or Carlson's Active Trading Suitability

Konner – who still works in the securities industry [T. 312] but takes no responsibility for his actions herein and has made no assurances against future violations – insists that the analysis in this case should begin, not with the elements of the charges against him, but with his claim that he sought only customers who wanted to engage in speculative, aggressive trading with a small portion of their wealth. Konner's Brief, pp. 2, 4-6. Konner asserts that because he recognized that his "strategy" was not suitable for all investors, he did business only with that sort of customer. Id. Konner also asserts that he "[told] clients about the risks associated with the type of investing he specialized in" and made sure they understood those risks. Id., p. 5. As applied to these customers, Konner's claims defy logic. Both Miller and Carlson had little or no investment experience. Not surprisingly, Carlson and Miller soundly refute Konner's claim, and their testimony shows that Konner preyed on these unsophisticated, inexperienced customers without regard for their actual suitability for active trading, and that he said nothing about the risks they would be taking.

Carlson, for example, testified that Konner never discussed a strategy with him, either during the prospecting process or later. [T. 1673-74] When asked whether he discussed his investment objectives with Konner during prospecting, Carlson's answer did not suggest he had discussed choices such as speculation or trading profits with Konner: "[y]es, I told him I wanted to make money." [T. 1672] When asked more pointedly about speculation, Carlson had no recollection of any discussion of the term. [T. 1674] Regarding these same early calls with

Konner before he opened his account, Carlson does not recall any discussion of the concept of risk tolerance or the risks of active trading. [T. 1672; 1674-75] Konner likewise did not make any attempt to determine whether Carlson could afford active trading – Carlson does not recall Konner asking him what his annual income was, and Konner did not ask about his net worth. [T. 1670; 1673] Carlson also did not recall Konner asking whether Carlson's retirement savings were sufficient. [T. 1671] This is hardly the testimony one would expect from a customer whose suitability for aggressive, speculative, short-term trading had been carefully vetted before being allowed into Konner's book of customers.

Miller' s testimony on these points was nearly identical to Carlson's. When asked whether Konner discussed any trading strategy with him, Miller replied "[n]ot that I remember. He would always come with sell this stock and buy another one." [T. 1934]. Much like Carlson, when asked whether he discussed his investment objectives with Konner, Miller said nothing about speculation or trading profits, instead replying "I told him that I just wanted to buy stock that would appreciate in value." [T. 1932] When asked specifically about speculation, Miller said Konner did not discuss the idea with Miller during the prospecting process. [T. 1933] There was no discussion of the risks of active trading, and Konner said nothing about the frequency of trading he typically recommended. [T. 1931; 1934]. Such conversations would seem appropriate if Konner were truly looking only for aggressive speculators, especially given that Miller was emphatic that he told Konner he had no prior experience trading in securities. [T. 1930-31] Similarly, Miller had no recollection of discussing what sorts of losses he was willing to risk in his account. [T. 1933] Regarding Miller's ability to afford Konner's trading style, Miller does not recall any discussion prior to opening his account of his annual income or the sufficiency of his retirement savings. [T. 1931-32]

Thus, when viewed from the perspective of his former customers, Konner's claim that he recognized the high-risk nature of his trading style, and sought carefully to involve only those whom he had determined were suitable for it, is revealed as yet more deceit and manipulation. The fact is that Konner furiously sought new customers – spending thousands a year on leads [T. 321-23] and making as many as 200 cold calls a day, two to three days a week [T. 323-24] – and took anyone willing to open an account. Indeed, his eagerness to bring in any new customers he could find was reflected by the testimony from his own witness and former supervisor, John Williams, who confirmed that Konner was placed on heightened supervision at JP Turner in 2008 for having too many "reneges," which were instances in which Konner executed trades for prospective customers who later refused to pay. [T. 3671; 3672] And he made no effort to disclose the risks. Even in his own testimony, Konner admits that he did not specifically warn his customers about the risks and costs of active trading. [T. 333-34] Konner never discussed the breakeven rate or turnover rate of an account with customers like Miller and Carlson, even though he made sure, by filling out the account forms himself, that "the accounts . . . [were] set up for speculative and high rate of trading." [T. 332-34]

Thus, in Miller and Carlson, Konner found exactly the type customer he was looking for – unsophisticated and inexperienced individuals that he could seduce with promises of big profits and groom into trusting him. Konner then abused that trust, recommending trade after trade while his customers lost money. His attempt to suggest, at this stage, that he could not have churned these accounts because he carefully gauged each customer's suitability shows only his denial about his conduct and his lack of remorse.

B. Konner Churned the Miller Account

In this case, the Division must prove (1) the trading in the account was excessive in light of the customers' investment objectives, (2) Konner had de facto control over that trading, and

(3) Konner acted with scienter. See In re Al Rizek, Exchange Act Release No. 41725, 1999 SEC WL 600427, at *5 (Aug. 11, 1999) (Commission opinion)), aff'd, Rizek v. SEC, 215 F.3d 157 (1st Cir. 2000). Based on the evidence presented at the hearing, the Court should conclude that Konner churned Miller's account.

1. The Trading in Miller's Account was Excessive

The Division alleges that Konner churned Miller's account during the six months after it was opened, from June through November 2009. During that time, there were 63 transactions in the account involving a total of around $2 million in purchases and sales, the annualized turnover rate was 18 (3 times the level of presumptive churning) and the cost to equity ratio was 28.2%. As a result of this trading, Miller lost about $80,000. Thus, even assuming, *arguendo*, that Miller was an aggressive investor who understood the risks of active trading and chose to speculate anyway, the Court should still find churning because as the Commission has noted on a number of occasions, there is a difference between aggressive investing and excessive trading. Customers who agree to aggressive investing do not implicitly authorize their brokers to deplete the account through commissions, markups and margin charges, which is what happened here. Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *3 (Oct. 30, 1991) (Commission opinion); In the Matter of Shearson Lehman Hutton, Inc., Exchange Act Release No. 26766, 1989 SEC LEXIS 778, at *6 (April 28, 1989); See also Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361, 1369 (7th Cir. 1983).

But Miller did not understand the risks of active trading and did not choose to speculate as Konner understood that term. Konner never explained his definition of speculation to Miller before the account was opened, and did not discuss the risks of active trading. [T. 1931; 1933; 1944] Miller had never had an account before, and thus had no context to draw upon when

considering whether to initial the pre-filled form that Konner sent to him.[19] [T. 1926; 1936-40] In fact, Miller did not understand why any of the information on the second page of the brokerage account application (which also included risk tolerance) was being asked for. [T. 1945]

In his brief, Konner claims Miller had a significant investment history, but the bulk of the investments he cites were made *after* Miller's JP Turner account was churned.[20] [T. 2119-20] In reality, Miller's only prior experience that was even remotely similar was a single commodities investment in grain of $20,000 – something which, as a lifelong grain farmer, Miller had a substantial foundation of knowledge and experience about prior to making that investment.[21] [T. 2002; 2103-04] He identified his grain investment as speculative, but then went on to say "speculation means different things to different people" no fewer than four times. [T. 1943; 1956; 2001; 2013] That is an important distinction, as Miller made it clear that he had a very subjective definition of speculation that was based solely on the *profitable results* of his one-time foray into the commodities market and that his definition did not encompass a high risk of loss. [T. 2028 ("**my definition of speculation is my experience with that grain broker and it all**

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19 In fact, Miller's testimony strongly suggests that he did not understand the investment objective choices to be exclusive of one another. [T. 2009 (discussing investment objectives key in Konner Ex. 2; "it says long-term growth with safety [at the top], and I really thought that was what my goals were"); 2108-09 (discussing same document; "I think they [all the listed investment objectives] would have been part of my objectives")]

20 Despite Konner's contention that the post-JP Turner accounts were all aggressive, speculative investments, Miller testified that he did not view them as high risk, and as discussed below, Miller's definition of speculation is highly subjective. [T. 1966; 2120; 2122-23] None of Miller's post-Konner accounts have been actively traded. [T. 2120]

21 Miller's commodities trading experience does not make him a sophisticated securities investor. Cf. In re Cannon, 230 B.R. 546, 555 (W.D.Tenn. 1999) (trading securities and trading commodities are sufficiently different that securities trading experience does not equate to commodity sophistication); Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 433 (N.D.Cal. 1968) (distinguishing between plaintiff's comprehension of securities market and commodities market). The Division's churning expert confirmed the distinction: "if someone . . . is sophisticated in one area, whether it's real estate or oil and gas technology doesn't necessarily make them sophisticated in market trading practices." [T. 3298-99] Moreover, the difference is evident from a regulatory vantage – if securities and commodities trading were essentially identical, there would be no reason for the Commodities Futures Trading Commission to exist.

worked out for my benefit") (emphasis added); 2000; 2001 (discussing commodities investment; "I've had experience in speculation and it was to my good"); 2004 (discussing commodities investment; "Well, I mean, that's my definition of speculating"); 2012 (discussing Konner Ex. 2, which contains definition of speculation; "I would say that the definition, in my mind, would be the same except for the high risk . . . I was willing to take risk but not a high risk"); 2013 ("my experience with speculation was good so that's the reason I was willing to go along with it"); 2082; 2103] Even still, Miller originally refused to sign the brokerage account application because it included speculation as an investment objective and agreed to it only after Konner told him "it was to my advantage to sign it, that he could do a better job trading for me." [T. 1942-43; 1947] And at the time he agreed to open the account, Miller told Konner "I was willing to accept some risk, but I didn't want to go out on a limb." [T. 2106] Thus, Konner knew, or was reckless in not knowing, that Miller did not agree to speculate as Konner understood the term.

Konner also argues that because Miller (according to Konner) had accumulated substantial wealth, and allegedly could afford to speculate, then it must follow that speculation was Miller's true investment objective. Konner's Brief, pp. 6-9; 13-14. As an initial matter, the evidence at the hearing regarding Miller's first disclosure of his estimated net worth (i.e., in his brokerage account application) demonstrated that when filling out the form for Miller, Konner had ignored the instructions on JP Turner's form and had included the value of Miller's farm in that figure, which he recorded as $4 million. As a result, the form was incorrect because Miller's wealth when the farmland was excluded was much more limited:

> Q. What do you think your estimated net worth was at that time exclusive of your home and farm?
> A. A couple hundred thousand.
> Q. So most of your wealth was in your farm, is that correct?

A. Most of the wealth was in the farm. And I don't have a typewriter so somebody else put the X in there.

[T. 1941; DOE Ex. 18] The same error applied to the Active Account Suitability Questionnaire Miller received in December 2009, after the churn period. [T. 1954-55; 1959; DOE Ex. 134] Miller made it clear he never intended to sell any of his farmland, so he had, at most, a couple hundred thousand dollars available for investment. [T. 1955; 1979-80] Konner asserts that the home/farm exclusion on the brokerage account application form is irrelevant to this case, but, to the contrary, it reflects JP Turner's view that such assets should not generally be considered when assessing investment wealth. In addition, Konner never asked Miller whether his retirement plans were already in order. [T. 1932] As a result, Konner is in no position to argue that the record supports his assertion that Miller is a multi-millionaire and that his wealth was somehow indicative of his trading objectives.

In addition, Konner's reliance on former JP Turner supervisor John Williams' testimony is misplaced.[22] Perhaps the least credible witness to testify during 17 days of testimony, Williams admitted that he had no independent recollection of *any* documents he was shown, and he could not recall *any* specific conversations with any of the alleged churn victims, including Miller. [T. 3769-70] Moreover, Miller had no recollection of talking to anyone at JP Turner besides Jason Konner (with the possible exception of someone named Dan Kruger, who was not identified by any other witness nor tied by any evidence to JP Turner). [T. 1935-36]

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22 Konner also cites Williams' testimony in support of his assertion that Williams and individuals up the supervisory chain at JP Turner relied on the information conveyed on the account suitability documents. Konner's Brief, pp. 25-27. The point is, of course, irrelevant to the claims against Konner because the Division alleges that Konner knew, based on statements made to him by both Miller and Carlson, that they were more conservative than the choices Konner consistently marked for them on the forms. Moreover, even if Williams had approved the conduct, a supervisor's approval of the churning does not exonerate Konner. Donald T. Sheldon, Exchange Act Rel. No. 31475, 52 SEC Docket 3826, 3853 (Nov. 18, 1992), *aff'd* 45 F.3d 1515 (11th Cir. 1995); see also Graham v. SEC, 222 F.3d 994, 1005-06 (D.C. Cir. 2000).

Thus, irrespective of what was on the application or any of the pre-filled account documents, Konner knew that his customer was not looking to take large risks. Konner also knew Miller was an 85-year old retired farmer from Iowa who had never traded before. [T. 1930-34] For such an elderly, uneducated, novice investor, a decision to trade in the risky manner Konner concedes he employed can only be validly made after a thorough explanation of the choices and the risks. In this case, Konner talked Miller into making a choice Miller didn't fully understand. [T. 1941-43; 1947] The only thing that Miller recalls about his choice of investment objectives is his statement to Konner that he "just wanted to buy stock that would appreciate in value." [T. 1932]

Accordingly, it would be inequitable in the extreme for the Court to allow Konner to shield his conduct with forms that he filled out for Miller and never fully explained to him. In light of (1) Konner's failure to adequately explain the investment objectives on the account documents; (2) what Konner knew about Miller regarding his background and lack of securities experience; and (3) the statements Miller made to Konner about what Miller wanted out of the account, Konner was on notice that Miller's true investment objectives were not reflected on the forms Konner filled out, and that, as a result, the trading in Miller's account was excessive in light of Miller's investment objectives.

2. Konner Controlled the Trading in the Miller Account

Konner's control over the trading in Miller's account is plainly reflected in Miller's monthly account statements, which show that the vast bulk of the transactions were solicited by Konner. [DOE Ex. 136] This comports with the findings in the Dempsey expert report. [DOE Ex. 155 ("virtually all of the transactions in the account were solicited, implying that Konner controlled the direction of the trading activity in the account")] In addition, the account

statements are consistent with Miller's testimony that he did not initiate *any* trades and always followed Konner's recommendations. [T. 1965]

The factors identified by the ALJ in Rizek also demonstrate that Konner had *de facto* control over the Miller account because Miller lacked the ability to evaluate Konner's recommendations in a meaningful way. Rizek, Admin. Proc. File No. 3-9041, 1998 WL 73209 at *13 (Feb. 24, 1998). First, at the time of the trading in question, Miller was a novice investor with no indicia of sophistication with respect to securities trading, and plainly lacked the ability to make an independent evaluation of Konner's active trading strategy. [T. 1922-27; 1930-34; 1941-45] He certainly was not in a position to understand that the frequency of trading itself was an ever-growing factor in the profitability of the account. [T. 1931; 2110-12] Second, Miller had *no* prior securities investment experience, and as suggested by Miller's testimony generally, Konner either knew, or with a few short questions could have known, that Miller's experience in "speculation" was limited to a single commodities investment. [T. 1926] Third, Miller trusted Konner, and believed he would look out for Miller's best interest when making trading recommendations. [T. 1948-49; 1964-65; 1998; 2020-21; 2026] Fourth, nearly all the trades during the churn period (and beyond) were initiated by Konner's recommendations, and Miller always relied on those recommendations.[23] [T. 1948; 1964-65] Fifth, Miller was doing no independent research on any of the companies recommended by Konner; in fact, he felt like he lacked the knowledge and expertise to do research. [T. 1926; 1963-64; 2116] And finally, regarding the truth and accuracy of the information provided by Konner, Miller knew only what

[23] Konner asserts in his brief that Miller suggested some penny stock trades (which Konner concedes never took place) and that he declined Konner's recommendation of an investment in a REIT. Konner then concludes that those decisions allegedly show that Miller controlled the account, not Konner. Konner's Brief, pp. 15-16. This argument fails on multiple levels. First, the only recommendation that Miller recalled rejecting was the REIT, and his reasoning was simple – he already had a lot of money invested in real estate. [T. 2088; 2126]. Second, even if Miller had suggested or declined some trades, the monthly account statements and Miller's testimony clearly show that the vast majority of the trades were done at Konner's suggestion. [DOE Ex. 136] In addition, Miller denied making the statement "I want to speculate," which appears in Konner's posting page notes and purportedly records Miller rejecting the REIT recommendation. [T. 2126]

Konner told him, and he lacked the sophistication or the research skills to analyze that information. [T. 1963-64] Konner never mentioned the information that should have been conveyed – the level of commissions being charged and their impact when engaging in active trading. [T. 332-34; 1931; 1934]

In addition, Miller's testimony painted a detailed picture of the dynamic through which Konner controlled the trading in Miller's account. Miller described his calls with Konner as "[h]igh pressured salesmanship" in which Konner talked so much "that I very seldom got a chance to get my mind in gear to talk to him about some things." [T. 1949; 2091] Miller only managed to ask questions a few times, and Konner did not ask any questions of Miller. [T. 1949] And when it came to getting Miller to approve the recommendation, Konner "wouldn't take no for an answer," but instead "just talked and talked and talked until I said yes." [T. 1949; 1951] Thus, despite not having discretionary authority to trade in Miller's account, Konner definitely controlled the purchases and sales that took place during the churn period.

As discussed above, Konner argues at length that Miller had significant investment experience, but the undisputed evidence is that, at the time he opened his account with Konner, Miller had never had a brokerage account and had made only a single commodities investment. Konner also argues that Miller's account was not churned because he received trade confirmations and monthly account statements showing the activity. However, the receipt of such records does not negate the *de facto* control Konner exercised over Miller's account. Miller was an unsophisticated securities investor who trusted and relied on Konner, and the mere receipt of account statements and confirmation slips does not establish that a customer understood what was happening in his account. Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *4 (Oct. 30, 1991); Schofield v. First Commodity

Corp. of Boston, 793 F.2d 28, 36 (1st Cir. 1986); Karlen v. Friedman & Co., 688 F.2d 1193, 1200 (8th Cir. 1982).

In sum, the evidence demonstrated that Miller was an unsophisticated investor who lacked the ability to understand or make an independent evaluation of Konner's strategy, including its risks. Konner never explained those risks to Miller. Miller was not doing any research, and Konner provided only pushy salesmanship. But Miller trusted Konner, deferred to his expertise and knowledge regarding securities, and relied on his recommendations when making trades in the account. Konner, therefore, had *de facto* control of Miller's account.

3. Konner Acted with Scienter with Regard to Miller

The specific scienter requirement for churning is met where the registered representative acts to benefit himself by earning commissions, rather than acting for the benefit of his customer. Donald A. Roche, 1997 SEC LEXIS 1283, at *12-13 (June 17, 1997). In the context of churning, the requisite scienter may be "implicit in the nature of the conduct." Franks v. Cavanaugh, 711 F. Supp. 1186, 1191 (S.D.N.Y. 1989 quoting Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983)). Scienter also may be established upon a showing of recklessness. Sharp v. Coopers & Lybrand, 649 F.2d 175, 193 (3rd Cir. 1981). The scienter element may also be inferred from the commissions charged by the registered representatives. See In re David Wong, Exchange Act Release No. 45426 (Feb. 8, 2002); see also Roche, 1997 SEC Lexis 1283 (Commission opinion)(concluding that the fact that accounts sustained large losses while registered representative generated substantial commission income can show reckless disregard customer's interest).

There was ample evidence at the hearing demonstrating that Konner's trading in the Miller account was done, either intentionally or recklessly, to generate commissions rather than for Miller's benefit. Perhaps the strongest evidence of scienter is the lack of a real trading

strategy or other explanation justifying the large number of trades in Miller's account. There were approximately 10 trades in Miller's account every month during the churn period, resulting in a cost-to-equity ratio of 28.2%. Konner testified that he sought investors looking to speculate in the market, but stopped short of explaining why that translated into the intense trading reflected in his customers' accounts. [T. 328-38] Konner could have pursued speculation or trading profits as investment objectives without trading in and out of stocks so frequently, a fact that he conceded. [T. 335] In addition, Konner acknowledged that a high level of trading could pose financial risk to a customer's account, but he never discussed with his customers the impact that the total commissions and fees generated by active trading would have on their account, or the concepts of breakeven rate and turnover ratio. [T. 332-337] In sum, Konner has no justification for the high level of trading he recommended and which resulted in an $80,000 loss in just six months, and although he knew the commissions and fees associated with that trading alone could deplete a customer's account, he never told Miller that. Such conduct is at least reckless, and the more likely inference is that Konner intentionally recommended frequent, sizable trades to Miller, knowing they would always be approved, to generate commissions.

Konner also engaged in deceit and manipulation. Miller was 85 years old at the time, and had never had a brokerage account before. He testified that he believed a broker should look out for the customer's best interest. Yet instead of discussing the risks of his style of trading, Konner convinced Miller to sign the brokerage account application (which, of course, reflected speculation as the number one investment objective) by telling him it was to his advantage to sign it, and that, by signing it, Konner could do a "better job trading for" Miller. [T. 1947] In addition, Miller testified that Konner was a high-pressure salesman who "never took no for an answer." [T. 1930; 1949; 1951; 1965] Miller, who the Court observed had limited energy and became tired and uncertain during his lengthy cross-examination, also testified that "if [Konner]

had it in mind that I should trade, he just talked and talked and talked until I said yes," presenting a telling picture of the badgering dynamic through which Konner manipulated and controlled Miller and his account. [T. 1951]

C. Konner Churned the Carlson Account

The evidence at the hearing showed that Konner churned the Carlson account, as the trading was excessive in light of the account objectives, Konner controlled the trading in that account, and Konner again acted with scienter.

1. The Trading in Carlson's Account was Excessive

The Division alleges that Konner churned Carlson's account from January through December 2009. During that time, there were 252 transactions in the account (a staggering number that significantly exceeded the frequency of 4 trades per week Carlson listed on a March 2009 Active Account Suitability Questionnaire) involving a total of around $8.6 million in purchases and sales. The annualized turnover rate was 17 and the cost to equity ratio was 34.6%. [DOE Ex. 155] As a result of this trading, Carlson lost about $54,000.[24] Thus, even assuming, *arguendo*, that Carlson was, as Konner claims, an aggressive investor who understood the risks of active trading and chose to speculate anyway, the Court should still find churning. There is a difference between aggressive investing and excessive trading, and even customers who agree to aggressive investing do not implicitly authorize their brokers to deplete the account through

[24] Konner claims that Dempsey, the Division's expert on churning, made "very serious errors" with respect to the trading results in the Carlson account and that the errors distorted the expert's finding that Carlson lost $54,000. Konner's Brief, pp. 28-29. As Dempsey explained during his testimony, however, there was no error in his analysis. [T. 3176-85; 3291-92] It is true that Carlson made, at Konner's suggestion, a PIPE offering investment *outside* his account and then *transferred* the securities into his account. [T. 3183-84] Such transfers are routinely treated as an influx of additional capital and any unrealized gains are not properly included in an analysis for churning purposes. [Id.; 3292] Despite the debate over calculation, Konner can hardly question that Carlson's account lost money – his 2009 JP Turner Form 1099 for the account shows a short-term realized loss of approximately $130,000, which did not include a short-term realized disallowed loss of $90,000. [Konner Ex. 39, p. JPTURNER-SEC-ATL 004235] Moreover, as the Commission has recognized many times, the losses suffered by fraud victims bear on what remedies are in the public interest, and are not relevant to liability. Thus, even if the Court considered the PIPE investment when determining profit and loss, it would not prevent a finding of churning. [T. 3233]

commissions, markups and margin charges. Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *3 (Oct. 30, 1991) (Commission opinion); In the Matter of Shearson Lehman Hutton, Inc., Exchange Act Release No. 26766, 1989 SEC LEXIS 778, at *6 (April 28, 1989); See also Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361, 1369 (7th Cir. 1983). The Division submits that is precisely what Konner did to Carlson's account.

Like Miller, however, Carlson did not understand the risks of active trading and did not choose to speculate as Konner understood that term. As an initial matter, Carlson's testimony showed that he had very limited investment experience prior to opening his JP Turner account, and no experience with active trading. [T. 1658-63; 1669] He thus had no context or foundation that would allow him to appreciate, without help, the risks inherent in active trading, and as stated earlier, Konner admitted that he did not explain those risks and costs to his customers. [T. 333-34; 1913-14] In addition, Carlson did not understand investment objectives and risk tolerance as those terms are used in the securities industry, and in the early discussions, told Konner in simple terms that he "wanted to make money" and "didn't want to lose money." [T. 1672-73; 1786-87; 1915-16] Konner asserts in his Brief that "of course [wanting to make money] was not one of the options on the account documents, and [Carlson] knew that." Konner's Brief, p. 18. Konner misses the point – Carlson *didn't* know that, and Konner should have explained the choices to Carlson sufficiently to allow Carlson to translate his objectives into one of the choices on the form. But Konner did not explain speculation to Carlson; in fact, Carlson has no recollection of speculation or active trading – which, as set forth in Konner's Brief, was Konner's entire business – being discussed at all. [T. 1674] Instead, Carlson received a brokerage account application that had already been filled out that included trading profits and speculation as Carlson's top objectives. [DOE Ex. 49; T. 1676-77]

Over time, Carlson received and signed a series of pre-filled account documents from Konner that included investment objective choices, but there was ample evidence that, with reasonable effort (and certainly if he had actually done the extensive prospect questioning he claims), Konner could and should have known Carlson did not understand the choices. [T. 1698-1714]. Konner was also confronted with repeated verbal notices from Carlson indicating that he was in fact more conservative than the choices Konner kept marking for him. For example, in connection with the April 2008 account update form Carlson received from JP Turner, Carlson told Konner several times that he could not afford to lose his investment, and he conveyed to Konner that having more money at stake reduced his willingness to take risks. [DOE Ex. 50; T. 1693; 1696-97; 1698]

Konner acknowledges that Carlson's testimony supports the conclusion that Carlson did not understand the forms and the choices on them. Konner's Brief, pp. 18-19. In an attempt to discredit that testimony, Konner shows his true character by calling his former customer a liar: "[Carlson] first testified he never read the forms, but then admitted he was a liar when he signed a false representation which said he had read them." Id. As the Court will recall, the testimony Konner cites does not in any way impact Carlson's credibility. The exchange amounted to nothing more than Carlson testifying that he had not read the form, and Konner's counsel pointing out that the form – which, again, Carlson never read – contained boilerplate legalese stating that by signing, the customer was representing that the document had been read. [T. 1798] It was obvious that Carlson did not intend to make a false representation, and Konner's attempt to twist Carlson's honest and simple testimony so far as to call Carlson a "liar" speaks volumes. When asked about the exchange on re-direct, Carlson confirmed that he had never read the form, and, thus, did not intend to make a false statement. [T. 1910] Moreover, Carlson's answer on re-direct was illustrative of Konner's and the other Respondents' systematic practice

of papering the file with self-serving pre-filled forms: "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." Id.

Konner's attempt to rely on those pre-filled forms to establish the investment objectives he wrote on them as Carlson's is also problematic because Konner knew that at least some of the financial information he wrote in for Carlson was false. [T. 1700-02] Konner cites his own testimony on the question of whether "he knew that the information on client documents was true or not," which Konner answered with "I only knew what [the customer] told me." Konner's Brief, pp. 20-21, citing T. 0432-35, 4331-32, 4358. That testimony, however, is highly ironic, given Carlson's clear and emphatic testimony that he repeatedly told Konner that he could not afford to lose his investment, and that he was not worth $2.5 million – the figure that Konner had written in as Carlson's estimated net worth. [DOE Ex. 50, 51, 52, 53; T. 1696-98; 1700-01; 1800-01; 1913]

Finally, for the same reasons that applied to Miller, Konner cannot rely on former JP Turner supervisor John Williams for support. The Commission has found that a supervisor's approval of illegal conduct does not exonerate the broker. Donald T. Sheldon, Exchange Act Rel. No. 31475, 52 SEC Docket 3826, 3853, (Nov. 18, 1992). Also, as the Court observed, Williams' nervous demeanor and inability to recall any specifics about the documents or individuals in this case discredits the rest of his erratic testimony. [T. 3769-70] Not surprisingly, Carlson had no recollection of talking to anyone at JP Turner besides Jason and Chad Konner, and that included when asked specifically about John Williams and his co-supervisor in the Brooklyn office, James Sideris. [T. 1727; 1710-11; 1852-53]

2. <u>Konner Controlled the Trading in the Carlson Account</u>

Carlson's monthly account statements from JP Turner, which show that nearly all of the transactions were solicited by Konner, are strong evidence of control. [DOE Exs. 128; 129] The Dempsey expert report recognizes and confirms the reflection of control contained in the account statements. [DOE Ex. 155 ("virtually all of the transactions in the account were solicited, thereby indicating Konner's control over the direction of trading in the account")] Carlson's testimony that he initiated no trades and always followed Konner's recommendations likewise confirms Konner's control. [T. 1684; 1689-90; 1722; 1726; 1870-71]

As with the Miller account, the factors identified by the ALJ in Rizek also demonstrate that Konner had *de facto* control over the Carlson account because Carlson, like Miller, lacked the ability to evaluate Konner's recommendations in a meaningful way. Rizek, Admin. Proc. File No. 3-9041, 1998 WL 73209 at *13 (Feb. 24, 1998). First, at the time of trading in question, Carlson, who even today does not believe he has the knowledge or expertise to trade stocks on his own, testified he was not a sophisticated investor. [T. 1656-57] He has no background in securities, and does not regularly read investment-related periodicals, nor watch investment-related TV shows. [T. 1664; 1913-14] Consequently, Carlson did not have sufficient securities knowledge to allow him to make an independent evaluation of Konner's active trading strategy. Similarly, he was not in a position to understand that the frequency of trading itself was an ever-growing factor in the profitability of the account. [T. 1814-15; 1816; 1840-41; 1845] Second, Carlson had very limited investment experience. Prior to opening his JP Turner account, Carlson had a few IRAs holding mutual funds and a single brokerage account. [T. 1658-63] In addition, the pre-existing brokerage account was very different from what Konner was recommending at JP Turner – it typically traded less than five times a year, and Carlson described it as conservative. [T. 1662-64] Third, Carlson trusted Konner, and believed he would look out for

Carlson's best interest when making trading recommendations. [T. 1666-69;1675-76; 1858] Fourth, nearly all the trades during the churn period (and beyond) were initiated by Konner's recommendations, and Carlson relied on those recommendations "100%" of the time; in fact, Carlson made only one recommendation during the entire relationship, and never declined a trade recommended by Konner. [T. 1684; 1689-90; 1722; 1726; 1870-71] Such passive reliance on the broker's recommendations was consistent with how he handled his pre-existing account as well. [T. 1662-64; 1669; 1750-51;1907-08] Fifth, Carlson had not done independent research for trading in his pre-existing account, and did none on any of the companies recommended by Konner. [T. 1663; 1687-89; 1721] And finally, regarding the truth and accuracy of the information provided by Konner, Carlson typically knew only what Konner told him over the phone. [T. 1687-89; 1721-22] As he failed to do with Miller, Konner likewise never told Carlson the information that should have been conveyed – the level of commissions being charged and their impact when engaging in active trading. [T. 332-34; 1675; 1814-16; 1845]

Further evidencing Konner's control over trading in the Carlson account was Konner's extensive unauthorized trading. Carlson testified that based on his review of names of the companies reflected on the trade confirmations and his monthly account statements, he was certain that Konner had executed a significant number of trades without preauthorization from Carlson. [T. 1720; 1722; 1789-91] In fact, when asked whether he received a call before every trade, Carlson replied "No. Oh, no. I would have been on the phone all day." [T. 1720] Konner did it so often that Carlson believed that, as his broker, Konner actually *had* discretion to trade in his account without authorization, which is why Carlson never complained about it. [T. 1791 ("I thought it was okay for him to do that, as my broker.")] As the Commission has previously found, unauthorized trading in non-discretionary supports a finding of de facto control in the churning context. Simpson, 2002 SEC LEXIS 1278, at *53 ("[d]e facto control was shown by

the many unauthorized transactions and the customers' general lack of investment knowledge and sophistication, which left control of the account in the hands of [the respondent]")

Konner argues that because Carlson received trade confirmations or Forms 1099 from JP Turner that reflected a high-level of trading, Carlson must have been aware of the activity in his account and accepted it. Konner's Brief, pp. 22-23. Konner's argument is contrary to law. Mere receipt of the account statements and trade confirmations does not establish that the customers understood and accepted what was happening in their accounts. See Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *4 (Oct. 30, 1991) (Commission opinion; on churning control element, "[t]he fact that the customers received confirmations and monthly statements does not change our conclusion [that broker controlled account]"); Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 36 (1st Cir. 1986) (investor did not ratify firm's unauthorized actions or excessive fees by failing to object to them after receiving account statements); Karlen v. Friedman & Co., 688 F.2d 1193, 1200 (8th Cir. 1982). The truth is that Carlson was an unsophisticated investor who trusted Konner to such a degree that he could not recall ever declining a trade Konner recommended. [T. 1684; 1689-90; 1722; 1726; 1870-71] He only initiated one trade during several years of trading. [T. 1870] Konner argues that Carlson's testimony shows Carlson was aware of the number of trades but was concerned only with net performance. Konner's Brief, p. 23. However, to the extent Carlson was not concerned with the number of trades, it was because he did not appreciate the cumulative impact on his account of the costs of active trading, and Konner never disclosed that risk to him. [T. 332-34; 1675; 1845] Konner cannot seriously contend that Carlson knowingly agreed to trading that would require him to earn a return of 34.6% just to break even. Thus, the vast weight of the evidence supports the conclusion that Konner controlled the trading in Carlson's account.

3. Konner Acted with Scienter with Regard to Carlson

The evidence at the hearing demonstrated that Konner's trading in the Carlson account was done, either intentionally or recklessly, to generate commissions rather than for Carlson's benefit. As stated above with respect to the Miller account, the lack of a real trading strategy or other explanation justifying the large number of trades in strong evidence of scienter. There were approximately 20 trades in Carlson's account *every month* during 2009, resulting in a cost-to-equity ratio of 34.6%. Konner claims he sought investors looking to speculate in the market, but stopped short of explaining why that translated into the intense trading reflected in his customers' accounts. [T. 328-38] Konner concedes he could have pursued speculation or trading profits as investment objectives without trading in and out of stocks so frequently. [T. 335] Konner also acknowledged that a high level of trading could pose financial risk to a customer's account, but he never discussed with his customers the impact that the total commissions and fees generated by active trading would have on their account, or the concepts of breakeven rate and turnover ratio. [T. 332-337] In sum, Konner has no justification for the high level of trading he recommended and which resulted in a significant loss to Carlson, and although he knew the commissions and fees associated with that trading alone could deplete a customer's account, he never told Miller that. Such conduct is at least reckless, and the more likely inference is that Konner intentionally recommended frequent, sizable trades to Miller, knowing they would always be approved, to generate commissions.

Konner also engaged in deceit and manipulation with respect to the Carlson account. Carlson testified that, upon receipt of the April 2008 account update form Konner had filled out and sent to him, Carlson told Konner that the financial figures were inflated. [T. 1700-02] In particular, Carlson noted that the form had an updated net worth figure of $2.5 million (compared with $700,000 as reflected on the account opening form) and investable assets figure

of $750,000 (up from $200,000), and told Konner "I'm not worth near that." [DOE Ex. 50; T. 1700-02; 1781-82; 1902-03; 1912-13] Carlson, with his limited investment experience, did not understand that the form had implications for how actively his account could be traded. [T. 1702;1914] As a registered representative regularly interfacing with JP Turner's compliance department, Konner understood those implications, however, which solves the mystery of why Carlson was receiving a form containing a net worth figure that was wrong and had never been discussed. In response to being told by Carlson that the changes in the account information – which included a jump in net worth from $700,000 to $2.5 million that Konner had no basis for whatsoever – was not even close to accurate, Konner told Carlson "that doesn't really mean anything" and asked him to sign the form. [T. 1700-1702; 1782] Carlson confirmed that he signed the form because "[Konner] said it didn't mean anything. He said just initial it. I told him, I said, well, I'm not worth two and a half million. He said, well, that doesn't really mean anything." [T. 1702]

In a footnote, Konner boldly claims that he "set the record straight" on this point during his testimony, asserting as follows: "He did tell Carlson, when he was filling out account forms, that it did not matter, but not in the sense that he should represent something false, but that he should just feel free to put down whatever was accurate . . . ." Konner's Brief, p. 21, n.10. Amidst all that smoke and backpedaling, however, Konner cannot hide the truth: if Konner really intended for Carlson to just *put down what was accurate*, he could have simply sent Carlson a blank form. Carlson certainly got the point, albeit belatedly; in response to a question from Konner's counsel challenging whether Konner in fact told Carlson that the net worth figure "didn't really mean anything," Carlson stated the obvious:

> Q. [Konner] never really told you its meaningless, did he, Mr. Carlson?

A. Yes. Otherwise, **why would he have sent it out – I would have filled it in myself**, but he said, well, the net worth figure, we just have to have something down, so that's why it came filled in already.

[T. 1784 (emphasis added)] John Williams, the former JP Turner supervisor whose testimony Konner cites as supporting his case, testified that sending such important suitability forms to customers in blank would be the better practice, as opposed to sending them out pre-filled. [T. 3640] Konner's "explanation" also fails to answer where the $2.5 million figure that Konner included on the form came from, or how, if as Konner testified, he filled out the form based on information received over the phone from the customer, Carlson could have received an inaccurate form. In the final analysis, the record is, in fact, straight: Konner made up a wildly inflated figure because he needed to give the appearance that active trading was suitable for Carlson, and his conduct generally shows that he acted with scienter.

IV. REPLY TO RESPONDENT DIMITRIOS KOUTSOUBOS

The Post-Hearing Brief of Respondent Dimitrios Koutsoubos ("Koutsoubos' Brief") argues that he is the victim, having been unfairly accused by the Division of churning the accounts of Teddy Bryant and Bruce and Pamela Mills, two customers out of many, and for so little money that it could not have been worth his effort.[25] With feigned indignation, he offers a handful of excuses in an attempt to explain away the worst turnover and cost-to-equity ratios in the case and asks that the Court dismiss the case against him. As the Court observed during the hearing, however, Koutsoubos lacked credibility – testifying selectively, admitting only what he felt he had to, and then backpedaling when confronted with contrary evidence – while the credible evidence shows that he took advantage of three inexperienced investors by encouraging them to rely on him to manage their accounts in a manner consistent with their true investment

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[25] It is, of course, no defense that Koutsoubos did not defraud more of his customers. Diane S. Farber, 57 SEC 297, 313 n.33 (2004) (failure to engage in other violative conduct does not mitigate violations at issue).

objectives and risk tolerance. Koutsoubos abused the trust he garnered by inducing the customers to sign documents under false pretenses and then entering into a reckless trading pattern, causing great losses to each of the customers while generating commissions for himself. There is no place for him in the securities industry – where he still works, at Caldwell International Securities – and the Court should find he churned his customers' accounts and grant the relief requested by the Division.

In his papers, Koutsoubos makes an argument as to each of three elements of churning. With respect to excessive trading, Koutsoubos makes the only argument he can – that his customers' account documents show they were aggressive, risk-tolerant speculators, and so the high level of trading that he recommended in their accounts was not excessive in light of those objectives. The account documents, however, are inconsistent with the customers' investment experience (to the extent they had any) and history. Moreover, Koutsoubos either filled out or instructed his customer on how to fill out the forms. Both Teddy Bryant and the Mills verbally told him that were in fact more conservative than the forms indicated. Because Koutsoubos had actual knowledge of that disparity, he cannot protect himself with those documents.

With respect to the control element, Koutsoubos simply gets the law wrong. Of course, his customers were physically capable of saying the word "no," which is the standard he appears to assert. Their testimony generally showed, however, that they were unsophisticated investors without sufficient skill or information to make a meaningful independent judgment about the trading that Koutsoubos urged, which is, in fact, the test. Because they could not, and instead relied nearly exclusively on Koutsoubos greater knowledge and expertise when deciding to trade, Koutsoubos had control of the accounts.

On scienter, Koutsoubos makes the argument that because his commissions for these customers were restricted during most of the relative churn periods, he wasn't making money on

the trades and thus lacked the motive and opportunity to commit fraud. As set forth in the Division's Initial Post-Hearing Brief, however, Dempsey's expert report on churning supports the Division's position that Koutsoubos made approximately $50,000 from the trading in those accounts during the churn period. [Division's Initial Post-Hearing Brief, pp. 3, 73-74; DOE Ex. 155] For an employee who admits that he drew no salary and made a living solely off commissions, $50,000 more than provides motive and opportunity to commit fraud.[26] Other actions Koutsoubos took in connection with these customers' accounts also support a finding of scienter as well. Accordingly, the Court should find that Koutsoubos churned the accounts and grant relief as requested in the Division's Initial Post-Hearing Brief.

A. Koutsoubos Churned the Bryant Account

To establish churning, the Division must prove (1) the trading in the account was excessive in light of the customers' investment objectives, (2) Koutsoubos had de facto control over that trading, and (3) Koutsoubos acted with scienter. See In re Al Rizek, Exchange Act Release No. 41725, 1999 SEC WL 600427, at *5 (Aug. 11, 1999) (Commission opinion)), aff'd, Rizek v. SEC, 215 F.3d 157 (1st Cir. 2000). The evidence presented at the hearing established that Koutsoubos churned Bryant's account.

1. The Trading in Bryant's Account was Excessive

The trading that Koutsoubos recommended in Bryant's account was excessive by any standard. The Division alleges that Koutsoubos churned Bryant's account for an entire year, from January to December 2008. During that time, there were 191 total transactions (an average

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[26] Indeed, even if the Court were to accept Koutsoubos' claim, clarified in his brief, that he received only 35% of the commission payout on the Bryant account and 30% on the Mills, based on Dempsey's calculations (which, in turn were based on a review of JP Turner trade blotter information reflecting actual commissions paid for every transaction), Koutsoubos would still have made about $26,000 – more than enough to influence an unsalaried broker relying on commissions to pay living expenses. [Division's Initial Post-Hearing Brief, pp. 3, 73-74; DOE Ex. 155; T. 3267-68]

of almost 16 per month) involving approximately $8.2 million in purchases and sales, the annualized turnover rate was a whopping 56%, and the cost to equity ratio was equally shocking at 73.3%. As a result of this trading, Bryant lost about $190,000 while paying approximately $47,000 in commissions and $6,000 in margin interest to JP Turner. The Dempsey report indicates that Koutsoubos earned over $30,000 as a result of this activity. [DOE Ex. 155, p. 25] By far the worst numbers in this case, these calculations demonstrate the importance of a full and thorough disclosure of the risks of active trading by a broker dealing with an unsophisticated investor.

Koutsoubos argues, of course, that Bryant's account documents identified aggressive investment objectives such as trading profits, speculation and capital appreciation, and that as a result, the eye-popping trading in Bryant's account was not excessive in light of those objectives. There is a difference, however, between aggressive investing and excessive trading. Customers who agree to aggressive investing do not implicitly authorize their brokers to deplete the account through commissions, markups and margin charges. Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *3 (Oct. 30, 1991) (Commission opinion); In the Matter of Shearson Lehman Hutton, Inc., Exchange Act Release No. 26766, 1989 SEC LEXIS 778, at *6 (April 28, 1989); See also Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361, 1369 (7th Cir. 1983). Because it would be ridiculous for Koutsoubos to contend that Bryant – irrespective of his investment objectives – knowingly chose to trade so often that he would have to receive a return of 73.3% simply to break even, the Court should find, based on the numbers alone, that Koutsoubos churned Bryant's account.

In his brief, Koutsoubos also takes the position that the Division cannot overcome the account documents, and more specifically the investment objectives on them that he engineered, because the law holds that "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." Koutsoubos' Brief, p. 31, citing Coleman v. Prudential Bache Sec., Inc., 802 F.2d 1350, 1350, 1352 (11th Cir. 1986). Koutsoubos misses the point – the Division's core allegation against Koutsoubos is that he defrauded Bryant because Koutsoubos knew that Bryant's investment objectives were actually much more conservative than the account documents reflect, yet manipulated the account documents to allow active trading.[27]

Bryant was an unsophisticated investor with virtually no education who, prior to opening his JP Turner account, had taken a buy-and-hold approach and never done active trading. [T. 847-50; 878-88] The initial investment objective for his JP Turner account – which was opened with a different registered representative – was simply "growth" and his risk tolerance was medium. [T. 856-57; DOE Ex. 32] Less than a year after Koutsoubos took over as the broker on the account, Bryant received an unsolicited account update form from the firm. Bryant does not recall whether the form was filled out when he received it, but he remembers Koutsoubos "just said, sign where I put the stars and send back, I'll take care of the rest." [T. 859] None of the substantive account information on the form – which not surprisingly, includes a change in his investment objectives to speculation, trading profits and capital appreciation – is in Bryant's handwriting. [T. 859-60] Bryant has no recollection of discussing investment objectives or risk tolerance with Koutsoubos at the time, and never told Koutsoubos that his investment objectives or risk tolerance had changed since he opened the account, or that his new risk tolerance was aggressive and new investment objectives included speculation. [T. 861-62] Bryant did recall,

[27] The Division also notes that the case law cited by Koutsoubos is inapposite. First, even if the account documents were traditional contracts (which is far from clear), Koutsoubos was not a party to any of them and thus has no right to enforce their terms, nor are they binding against the SEC. Second, they all involve private litigants bringing individual claims and are not on point for purposes of claims brought by the SEC. Third and finally, the Division here asserts that Koutsoubos had actual notice that his customers' investment objectives did not match the forms he sent them, which, as discussed above, amounts to fraud. Similarly, Koutsoubos's citations to John Pinto's testimony is also unavailing, as the Court recognized him as an expert with respect to the supervisory aspect of the case, not churning.

however, telling Koutsoubos – in May 2005, and again later – that his risk tolerance was actually conservative. [T. 854-55; 865] Bryant also told Koutsoubos that he "didn't want to lose money. I wanted to earn money and be conservative." [T. 855-56]

To the extent Koutsoubos testified to the contrary on his communications with Bryant, he has no credibility, as demonstrated by his testimony with respect to his work for London Metals Market, LLC in 2010. Koutsoubos boldly testified that he only worked for London Metals Market, LLC, for six days, and "never did a sale, [and] never made a phone call . . . ." [T. 485-91] Yet, DOE Ex. 147 contains London Metals Market, LLC correspondence signed by Koutsoubos plainly evidencing a sale by Koutsoubos to Konner's former customer, Gordon Miller. [T. 488 (denies making any London Metals Market, LLC sales in response to a question from the Court and suggests his signature on DOE Ex. 147 was forged)] Moreover, Miller testified that Koutsoubos was his salesperson for the investment and that he dealt with Koutsoubos for approximately *three months*. [T. 2121-2123] Another example was Koutsoubos' testimony regarding his employment and compensation status in 2010 and 2011. Koutsoubos testified multiple times that he received no compensation during the time period of August 2009 through June 2011. [T. 477, 484] Later in the proceeding, however, Koutsoubos admitted that he had, in fact, been compensated by an employer in 2010 and 2011. [T. 481, 4563; DOE 24] He also conceded that he was, of course, employed when he received that compensation, despite having indicated on his U-4 that he was unemployed during that time. [Id.] Koutsoubos' selective testimony, which was brought to light multiple times, demonstrated his veracity for truth and the Court should not credit any of his self-serving statements.

Accordingly, irrespective of what any of the account documents reflected in terms of investment objectives or risk tolerance, Koutsoubos had actual knowledge that Bryant was a conservative investor and didn't want to lose money. Koutsoubos knew, however, that Bryant

trusted him and relied on Koutsoubos' recommendations, so he simply changed his account to one set up for active trading and began churning commissions. In light of Bryant's true investment objectives, which he clearly communicated to Koutsoubos, the trading that took place during 2008 in Bryant's account was excessive.

2. Koutsoubos Controlled the Trading in the Bryant Account

Koutsoubos' *de facto* control over the trading in the Bryant account is manifest from Bryant's monthly account statements, which show that Koutsoubos solicited most of the transactions. [DOE Exs. 25; 148] This conclusion is consistent with the findings in the Dempsey expert report on churning. [DOE Ex. 155 ("the majority of the transactions in the Bryant account were solicited by Koutsoubos, thereby implying his control over the direction of trading in the account")] The conclusion that Koutsoubos controlled the trading in the account is also consistent with Bryant's testimony that he relied on Koutsoubos' recommendations 98-99% of the time when making trades. [T. 866]

The factors identified by the ALJ in Rizek also demonstrate that Koutsoubos had *de facto* control over the Bryant account because Bryant lacked the ability to evaluate Koutsoubos' recommendations in a meaningful way. Rizek, Admin. Proc. File No. 3-9041, 1998 WL 73209 at *13 (Feb. 24, 1998). First, at the time of the trading in question, Bryant was an unsophisticated investor with a high-school education and no significant investment experience. He, thus, lacked the ability to make an independent evaluation of Koutsoubos' active trading strategy. [T. 847-49; 888] Because Bryant had previously taken a buy-and-hold approach and had never engaged in active trading, he was not in a position to adequately understand how the frequency of trading itself impacted the profitability of the account. [T. 848-49; 878] Second, Bryant had very limited prior securities investment experience, amounting to two brokerage accounts with a total of $40-50,000 invested between them. [T. 849; 863] Third, Bryant placed

great confidence and trust in Koutsoubos, as evidenced by his decision to invest approximately $250,000 with him over the life of the account, which was a quarter of Bryant's net worth. [T. 976 ("I trusted him . . . [t]hat's the reason I sent the money"); 864; 876; 1027 ("I let him make the trades because I really trusted the guy"); DOE Ex. 148] Fourth, Koutsoubos encouraged Bryant to relinquish control of the account to him, telling him "you sell lumber, and I'll take care of the stocks," and Bryant in fact relied on those recommendations virtually 100% of the time when making trades in his account. [T. 866-67; DOE Ex. 25] Fifth, Bryant was doing no independent research on any of the companies Koutsoubos recommended. [T. 867; 979] And finally, regarding the truth and accuracy of the information provided by Koutsoubos, Koutsoubos never discussed with Bryant the most critical information in light of the level of trading that was taking place, which was the commissions being charged and their cumulative impact when engaging in active trading. [T. 873]

In his brief, Koutsoubos argues that, when determining whether *de facto* control existed, "the correct inquiry is not whether the broker initiates the trades, but rather whether the customer has the capacity to exercise the final right to say 'yes' or 'no' . . . ," citing Follansbee v. David, Skaggs & Co., 681 F.2d 673, 677 (9th Cir. 1982). Koutsoubos' Brief, p. 34. To the extent Koutsoubos is suggesting that *de facto* control cannot exist if the customer was physically capable of saying the word "no," and, that the question of whether the broker initiated most of the trading is irrelevant, he is simply wrong. The Commission has consistently held that investor sophistication is critical to determining the control element in the churning context, and that where investors were "lacking in the degree of investor sophistication necessary to understand [the broker's] strategy and unable to make any sort of independent evaluation of that strategy," the broker had *de facto* control. Rizek, Admin. Proc. File No. 3-9041, 1999 SEC LEXIS 1585 at *19 (Aug. 11, 1999); Sandra K. Simpson, Admin. Proc. File No. 3-9458, 2002 WL 987555 at

*15 (May 14, 2002); Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *4 (Oct. 30, 1991); see also Joseph J. Barbato, Admin. Proc. File No. 3-8575, 1996 SEC LEXIS 3138, at *50-51 (1996). Moreover, whether the customer routinely follows the recommendations of the broker is a key factor under that analysis in determining whether *de facto* control exists. Rizek, 1999 SEC LEXIS 1585 at *19 ("The customers placed their reliance on Rizek's supposed expertise, and almost invariably followed his recommendations"); Simpson, 2002 WL 987555 at *15; Sweeney, 1991 WL 716756 at *4 ("There is no merit to [the respondents'] argument that they did not control their customers' accounts. With few exceptions, the customers did not initiate the transactions in their accounts . . . . When the customers decided to effect the transactions at issue, they were relying totally on [the respondents]").

To the extent that Koutsoubos' argument is that Bryant was a sophisticated investor capable of independently evaluating the trading Koutsoubos recommended, neither the facts nor the law support it. As a factual basis, Koutsoubos claims that Bryant was a successful businessman who had a couple small brokerage accounts before, monitored his JP Turner account activity and spoke with Koutsoubos about it, and rejected unspecified recommendations from Koutsoubos while occasionally proposing his own investment ideas. As an initial matter, the Court should note that Koutsoubos' only support for most of these "facts" are citations to his own testimony, and that there is no credible support for his claim that Bryant rejected any recommendations or made any investment suggestions to Koutsoubos. Koutsoubos' Brief, pp. 13-17, 35. Moreover, even if his assertions were true, the facts would not be legally sufficient to establish that Bryant had the requisite investor sophistication to make a meaningful independent analysis of Koutsoubos' recommendations. Rizek, 1999 SEC LEXIS 1585 at * 19 (Commission opinion rejecting respondent appeal of control issue; "Although Rizek's customers may have

been successful businessmen and most of them had some degree of higher education, they were totally lacking in the degree of investor sophistication necessary to understand Rizek's strategy and unable to make any sort of independent evaluation of that strategy."); Barbato, 1996 SEC LEXIS 3138, at *50-51 (Although customer "had some prior investment experience, authorized the transactions in his account, and kept records of his trades, he lacked vital information about the investments he was making ... [and] was unable to make an independent evaluation" of the broker's recommendations").

Contrary to Koutsoubos' self-serving claims, the facts show that Bryant was "lacking in the degree of investor sophistication necessary to understand [Koutsoubos'] strategy and unable to make any sort of independent evaluation of that strategy," much like the customers in Rizek. Moreover, as reflected by the account statements and all credible testimony, Bryant always relied on Koutsoubos' recommendations when making trades in his JP Turner account, and made no attempt to assert control himself through independent research or trade suggestions. Thus, Koutsoubos had *de facto* control over trading in Bryant's account.

3. Koutsoubos Acted with Scienter with Regard to Bryant

The specific scienter requirement for churning is met where the registered representative acts to benefit himself by earning commissions, rather than acting for the benefit of his customer. Donald A. Roche, 1997 SEC LEXIS 1283, at *12-13 (June 17, 1997). In the context of churning, the requisite scienter may be "implicit in the nature of the conduct." Franks v. Cavanaugh, 711 F. Supp. 1186, 1191 (S.D.N.Y. 1989 quoting Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983)). Scienter also may be established upon a showing of recklessness. Sharp v. Coopers & Lybrand, 649 F.2d 175, 193 (3rd Cir. 1981). The scienter element may also be inferred from the commissions charged by the registered representatives. See In re David Wong, Exchange Act Release No. 45426 (Feb. 8, 2002); see also Roche, 1997 SEC Lexis 1283

(Commission opinion)(concluding that the fact that accounts sustained large losses while registered representative generated substantial commission income can show reckless disregard customer's interest).

There was ample evidence at the hearing demonstrating that Koutsoubos' trading in the Bryant account was done to generate commissions rather than for Bryant's benefit. As the Division noted in its Initial Post-Hearing Brief, the strongest evidence of scienter is the lack of a real trading strategy justifying the extraordinary number of trades in Bryant's account. On average, there were approximately 16 trades in Bryant's account every month *for a year*, resulting in a cost-to-equity ratio of 73.3%. Koutsoubos offered no plausible explanation for the high level of trading in Bryant's account, which resulted in a $190,000 loss. In fact, during the hearing, Koutsoubos was specifically asked to explain his in-and-out trading in Informatica stock and was unable to. [T. 4592-4602; DOE Demonstrative Ex. 6] Worse, the evidence shows that, at the beginning of the market downturn in 2008, the conservative Bryant asked Koutsoubos to cash out his positions, thus eliminating any additional market risk, and wait out the downturn. Instead, Koutsoubos convinced Bryant that "for sure, we'll lose if you pull the money out" and told him the only way to make up losses was to engage in active trading. [T. 869-870] Koutsoubos essentially admitted that Bryant made the request and that he talked Bryant out of it. [T. 4609-10]

In addition, Bryant testified that in March 2007, he received a pre-filled account update form changing his original, more conservative investment objectives and risk tolerance to more risk-friendly ones, but Bryant had not discussed those changes with Koutsoubos and never agreed to different, more aggressive investment objectives and risk tolerance. [T. 858-62] The only plausible explanation is that Koutsoubos filled it out and sent it in hopes that Bryant would, as Bryant testified Koutsoubos asked him, "sign where I put the stars and send back." [T. 859]

Thus, Scienter is evident from Koutsoubos' reckless disregard of Bryant's true investment objectives and risk tolerance, which Bryant repeatedly testified he communicated to Koutsoubos, and his efforts to unilaterally manipulate Bryant's account documentation to engage in active trading.

Koutsoubos offers a small handful of scattered arguments as to why he did not act with scienter. For example, Koutsoubos contends that the Division cannot show scienter because JP Turner had placed both the Bryant and the Mills accounts on restricted commissions of $100 per trade for the vast bulk of their respective churn periods, and that Koutsoubos, therefore, lacked the motive and opportunity to commit fraud. Koutsoubos' Brief, pp. 37-38. Curiously, he relies on Respondent Bresner's testimony in support of this argument, which Koutsoubos contends proves that "at $100 maximum commission per trade, the broker was 'at best breakeven.'" Id., p. 6, citing T. 3058-59. Putting aside the irony of Koutsoubos' sudden concern with breakeven rates, the Division's churning expert reviewed the trade blotter data, which recorded actual commissions paid on every transaction, and concluded that Bryant paid $47,000 in commissions during the churn period. [Division's Initial Post-Hearing Brief, pp. 3, 73-74; DOE Ex. 155; T. 3267-68] Dempsey went on to conclude, based on Koutsoubos' investigative testimony indicating he received 65% of gross commissions, that Koutsoubos personally made about $30,000 as a result of that trading. In his brief, without any support apart from his own selective and self-serving testimony, Koutsoubos claims his payout on the Bryant account was only 35%. Koutsoubos' Brief, p. 11. As previously demonstrated, Koutsoubos' testimony is totally unreliable, and especially given his incentive to minimize his compensation in this instance, the Court should not believe that he received any less than his typical percentage payout on Bryant's account. However, even if the Court were to credit Koutsoubos' testimony on this point, he still concedes he would have received nearly $16,500 in profit on the trading during 2008, which, in

light of the fact that Koutsoubos was relying on commissions to pay his bills while working at JP Turner, was more than sufficient to influence his recommendations. Moreover, the Division may also prove scienter by demonstrating that Koutsoubos recklessly disregarded Bryant's true investment objectives, a conclusion certainly supported by the evidence.

Koutsoubos also claims that he acted in good faith because he relied on research and "[t]here was no evidence in the record to suggest that Koutsoubos made recommendations without an investment strategy . . . ." Id., p. 37-38. As the Court is aware, however, Koutsoubos never articulated an actual strategy, instead claiming that he got "ideas" for his recommendations from sources including Investors Business Daily, and that he adopted the "Can Slim" methodology for evaluating stocks. Koutsoubos' Brief, pp. 4-5. Even if the Court were to accept Koutsoubos' assertion, which, like most of his claims, is supported only by his own testimony, good faith belief in a trading strategy does not provide a basis for recommending trading that Koutsoubos knew was inconsistent with the conservative investment objectives Bryant communicated to him. Rizek, Admin. Proc. File No. 3-9041, 1999 SEC LEXIS 1585 at * 19-20 (Aug. 11, 1999) (rejects defense of good faith belief in active trading strategy, which was "no justification for recommending it to unsophisticated customers who were incapable of making an independent judgment"); Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *3 (Oct. 30, 1991) ("although the list may have provided support for the purchase or sale of individual stocks, the [brokers] had an obligation to analyze the particular situation "); David Wong, Exchange Act Release No. 45426 (Feb. 8, 2002).

Finally, Koutsoubos also contends that because Bryant "received every monthly account statement detailing their investment performance and every confirmation detailing the exact amount of commissions charged for each transaction," nothing was concealed from him and thus Koutsoubos could not have deceived Bryant. Koutsoubos' Brief, p. 38. However, Bryant was an

unsophisticated securities investor who trusted and relied on Koutsoubos, and it is well established that the mere receipt of account statements and confirmation slips does not establish that a customer understood what was happening in his account. Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *4 (Oct. 30, 1991); Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 36 (1st Cir. 1986); Karlen v. Friedman & Co., 688 F.2d 1193, 1200 (8th Cir. 1982).

B. Koutsoubos Churned the Mills Account

As set forth above, to establish churning, the Division must prove (1) the trading in the account was excessive in light of the customers' investment objectives, (2) Koutsoubos had de facto control over that trading, and (3) Koutsoubos acted with scienter. See Rizek, Exchange Act Release No. 41725, 1999 SEC WL 600427, at *5 (Aug. 11, 1999). The evidence presented at the hearing established that Koutsoubos churned the Mills account.

1. The Trading in the Mills Account was Excessive

The Division alleges that Koutsoubos churned the Mills' account for eight months, from December 2008 to July 2009. During that time, there were 187 total transactions (an average of *almost 24 per month*) involving approximately $3.1 million in purchases and sales, the annualized turnover rate was 28, and the cost to equity ratio was 41.2%. As a result of this trading, the Mills lost about $4,000 while paying approximately $31,500 in commissions and $1,500 in margin interest to JP Turner. Koutsoubos earned about $20,000 as a result of this activity.[28] [DOE Ex. 155]

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[28] As the Division noted in its Initial Post-Hearing Brief, Dempsey inadvertently did not make a finding with respect to the portion of commissions from the Mills' account retained by Koutsoubos. However, the section of Dempsey's report dealing with Koutsoubos' other customer, Teddy Bryant, expressly specifies that Dempsey used Koutsoubos' investigative testimony that he retained 65% of gross commissions when approximating Koutsoubos' retained commissions. Using simple math, the Division multiplied that percentage by $31,486, the commissions total for the Mills account that Dempsey calculated by reference to the trade blotter data, to determine the amount retained by Koutsoubos: $20,465.90.

As with Bryant, Koutsoubos argues that the Mills' account documents identified aggressive investment objectives such as trading profits and speculation, and that as a result, the 24 trades per month he recommended in the Mills' account were not excessive in light of those objectives. There is a difference, however, between aggressive investing and excessive trading. Customers who agree to aggressive investing do not implicitly authorize their brokers to deplete the account through commissions, markups and margin charges. Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *3 (Oct. 30, 1991) (Commission opinion); In the Matter of Shearson Lehman Hutton, Inc., Exchange Act Release No. 26766, 1989 SEC LEXIS 778, at *6 (April 28, 1989); See also Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361, 1369 (7th Cir. 1983). Just as in Bryant's case, it would be incredible for Koutsoubos to contend that the Mills understood that following Koutsoubos' numerous recommendations would necessitate returns of 41.2% simply to break even, and chose to go forward while knowing that they were nearly certain to lose money.

As discussed above, Koutsoubos also takes the position that the account documents, and the investment objectives reflected on them, preclude a finding of excessive trading as a matter of law. Koutsoubos' Brief, p. 31, citing Coleman v. Prudential Bache Sec., Inc., 802 F.2d 1350, 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"). Again, however, Koutsoubos' argument is not on point. This case is not about the Mills trying to void a contract provision; it is an enforcement action brought by the regulatory body with the authority to judge whether brokers like Koutsoubos can behave as he did. Moreover, the evidence adduced by the Division demonstrated that Koutsoubos defrauded the Mills by manipulating their account documents to give the appearance they were aggressive

investors despite knowing (or being reckless in not knowing) they were actually much more conservative.[29]

The testimony at the hearing showed that the Mills are not sophisticated investors. [T. 2135-36; 2342-43] When asked to characterize her knowledge of the stock market, Mrs. Mills responded "[z]ero," and when the same question was posed to him, Mr. Mills answered "[p]retty much none." [T. 2135; 2342] They both have high school educations, and neither has ever worked in the securities industry. [T. 2134-35; 2341] They have very limited experience trading in securities, and in fact, neither of them had ever opened a brokerage account before they opened their JP Turner account, which they opened in September 2006 following a cold call from Koutsoubos. [T. 2135-38; 2342-44; DOE Ex. 144] Koutsoubos knew, or should have known, all these relevant data points. At the time the account was opened, Koutsoubos did not ask the Mills about their investment objectives or risk tolerance, and the Mills never told Koutsoubos they wanted to speculate or take a lot of risk in the account. [T. 2139-2143; 2345-2346; 2349] Both the Mills testified that their true risk tolerance was conservative. [T. 2142; 2350] Yet, the Mills' brokerage account application somehow reflects investment objectives of speculation and trading profits and a risk tolerance of aggressive. [DOE Ex. 144] Tellingly, the Mills testified that they did not fill the form out, and it may have been blank when they received it. [T. 2141-42; 2348-49; DOE Ex. 144] The Mills did not understand the investment objective choices. [T. 2142; 2349; 2353]

Moreover, to the extent Koutsoubos claims he was unaware of the Mills' lack of understanding regarding account suitability information, his ignorance cannot extend beyond

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[29] Koutsoubos' allegation that his former supervisor at JP Turner, John Williams, verified the Mills' (and Bryant's) investment objectives and risk tolerance is unsupported by the evidence. As stated previously, Williams was completely incredible and, in any event, conceded that he had no specific recollection of any conversation with the Mills or Bryant. [T. 3650, 3654] Moreover, the Commission has found that a supervisor's approval of illegal conduct does not exonerate the broker. Donald T. Sheldon, Exchange Act Rel. No. 31475, 52 SEC Docket 3826, 3853, (Nov. 18, 1992), *aff'd* 45 F.3d 1515 (11th Cir. 1995).

September 2007 because it was at that time that he instructed Pamela Mills how to fill out the Active Account Suitability Questionnaire the Mills had received. Mrs. Mills testified that she circled the investment objectives on the form, but had done so at Koutsoubos' direction, after asking for help "because [she] didn't know what to put in the blanks and what to fill out." [T. 2361-62] Koutsoubos "told [her] what to put" on the form and directed her to circle those investment objectives. [T. 2362-64] Mrs. Mills also recalled discussing the March 2009 form with Koutsoubos, and likewise recalled Koutsoubos telling her how to fill out the "[i]nvestment objectives, prior investment experience, size of trades, frequency of trades." [T. 2371] From those conversations, Koutsoubos had to have known that the Mills were not aggressive speculators, but instead were inexperienced investors who trusted him. Instead of looking out for their interests as he claimed, however, Koutsoubos took advantage of them.

Accordingly, irrespective of the "choices" reflected on the Mills' account documents, Koutsoubos knew, or should have (and with a few appropriate questions, could have) known, that the Mills were not aggressive investors. In light of the Mills' true investment objectives, the trading that took place in their account during the churn period was excessive.

2. <u>Koutsoubos Controlled the Trading in the Mills Account</u>

Koutsoubos' *de facto* control over the trading in the Mills account is reflected in the monthly account statements, which show that Koutsoubos solicited most of the transactions. [DOE Exs. 26; 149] This conclusion is consistent with the findings in the Dempsey expert report on churning. [DOE Ex. 155 ("I also observed that Koutsoubos solicited a significant number of the transactions in the Mills' account, thereby evidencing his control over the direction of trading in the account")] The conclusion that Koutsoubos controlled the trading in the account is also consistent with Mr. Mills testimony that he typically trusted Koutsoubos' experience and agreed to his recommendations. [T. 2145; 2157-58]

The factors identified by the ALJ in Rizek also demonstrate that Koutsoubos had *de facto* control over the Mills account because the Mills lacked the ability to evaluate Koutsoubos' recommendations in a meaningful way. Rizek, Admin. Proc. File No. 3-9041, 1998 WL 73209 at *13 (Feb. 24, 1998). First, at the time of the trading in question, the Mills were unsophisticated investors with a high-school education and no securities background, and, thus, lacked the ability to make an independent evaluation of Koutsoubos' active trading strategy. [T. 2134-36; 2341-43] Because the Mills had never engaged in active trading before, they were not in a position to understand that the frequency of trading was a factor in the profitability of the account. Second, the Mills had *no* prior securities investment experience, having never had a brokerage account before. [T. 2135-36; 2342-43] Third, the Mills had great trust and confidence in Koutsoubos, as evidenced by their decision to invest approximately $300,000 of their retirement savings with him, which was 100% of their liquid net worth. [T. T. 2143-2145; 2317; 2353-54] Fourth, the Mills relied heavily on Koutsoubos' recommendations; approximately 95% of the trades in the account were made in response to his recommendations. [T. 2148; 2356; DOE Ex. 26] The only stocks the Mills ever recommended were Apple and L'oreal cosmetics. [T. 2147-48; 2356] Fifth and finally, regarding the truth and accuracy of the information provided by Koutsoubos, Koutsoubos never discussed with the Mills the commissions being charged and their cumulative impact when engaging in active trading. [T. 2156; 2386]

The Division has already addressed Koutsoubos' argument that, when determining whether *de facto* control existed, "the correct inquiry is not whether the broker initiates the trades, but rather whether the customer has the capacity to exercise the final right to say 'yes' or 'no' . . . ," citing Follansbee v. David, Skaggs & Co., 681 F.2d 673, 677 (9th Cir. 1982). Suffice it to say that the customer's decision to routinely follow his or her brokers' recommendations is, for purposes of these proceedings, a key factor under that analysis in determining whether *de*

facto control exists, and the Mills followed Koutsoubos' recommendations nearly 100% of the time. Rizek, 1999 SEC LEXIS 1585 at *19; Simpson, 2002 WL 987555 at *15; Sweeney, 1991 WL 716756 at *4. [T. 2148; 2356]

Koutsoubos also trumpets the fact that the Mills were business owners, but as the Commission has noted, running a business does not make them sophisticated with respect to the stock market. Rizek, 1999 SEC LEXIS 1585 at * 19 (Commission opinion rejecting respondent appeal of control issue; "Although Rizek's customers may have been successful businessmen and most of them had some degree of higher education, they were totally lacking in the degree of investor sophistication necessary to understand Rizek's strategy and unable to make any sort of independent evaluation of that strategy."). Koutsoubos alleges that the Mills exerted control over trading in the account by "reject[ing] recommendations in favor of their own and placed various very large unsolicited trades in the account;" the Mills, however, testified that the only stocks they ever recommended were Apple and L'oreal cosmetics. [T. 2147-48; 2356] Barbato, 1996 SEC LEXIS 3138, at *50-51.

As with Bryant, the facts show that the Mills were "lacking in the degree of investor sophistication necessary to understand [Koutsoubos'] strategy and unable to make any sort of independent evaluation of that strategy." Moreover, as reflected by the account statements and all credible testimony, the Mills relied on Koutsoubos' recommendations when making trades in their JP Turner account, and, with only two exceptions, made no attempt to assert control through trade suggestions. Koutsoubos, therefore, had *de facto* control over trading in the Mills' account.

3. Koutsoubos Acted with Scienter with Regard to the Mills

The specific scienter requirement for churning is met where the registered representative acts to benefit himself by earning commissions, rather than acting for the benefit of his customer.

Donald A. Roche, 1997 SEC LEXIS 1283, at *12-13 (June 17, 1997). In the context of churning, the requisite scienter may be "implicit in the nature of the conduct." Franks v. Cavanaugh, 711 F. Supp. 1186, 1191 (S.D.N.Y. 1989 quoting Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983)). Scienter also may be established upon a showing of recklessness. Sharp v. Coopers & Lybrand, 649 F.2d 175, 193 (3rd Cir. 1981). The scienter element may also be inferred from the commissions charged by the registered representatives. See In re David Wong, Exchange Act Release No. 45426 (Feb. 8, 2002); see also Roche, 1997 SEC Lexis 1283.

The evidence at the hearing, combined with the high level of trading Koutsoubos recommended, demonstrated that Koutsoubos' trading in the Mills' account was done to generate commissions rather than for the benefit of the Mills. Koutsoubos had no real trading strategy justifying the extraordinary number of trades in the Mills' account. On average, there were approximately 24 trades in the Mills' account over a seven month period, resulting in a cost-to-equity ratio of 41.2% and an annualized turnover rate of 28. In addition, the high level of trading in the Mills's account resulted in thousands in losses. As evidenced by the very high cost-to-equity rates, turnover ratios and commission levels, Koutsoubos acted with scienter by executing the transactions in the Mills' account for his personal monetary benefit. Koutsoubos knew that the Mills were unsophisticated securities investors who relied on him to manage their account and ensure that their investments were in compliance with their true risk tolerances and investment objectives. Instead of honoring those expectations, however, Koutsoubos recommended hundreds of trades for the purpose of generating additional commissions.

In addition, Mrs. Mills testified that her and her husband's communications with Koutsoubos were a manipulative means to an end: "most of the time he would talk us into whatever he wanted us to do at that time." [T. 2357] When filling out the account opening documents, Koutsoubos did not even ask the Mills about their investment objectives or risk

tolerance, and the Mills never independently indicated they wanted to speculate or take a lot of risk in the account. [T. 2139-2143; 2345-2346; 2349] Mrs. Mills also recounted that when they received the March 2009 Active Account Suitability Questionnaire and didn't understand it, Koutsoubos told her how to fill it out, including the "[i]nvestment objectives, prior investment experience, size of trades, frequency of trades," but did not explain to her what those choices meant. [T. 2371-73; DOE Ex. 29] As stated earlier, both the Mills testified that their true risk tolerance was conservative. [T. 2142; 2350] Thus, Scienter is evident from Koutsoubos' reckless disregard of the Mills' true investment objectives and risk tolerance, and Koutsoubos' manipulation of the Mills' account documentation and investment objectives.

As also discussed in connection with Bryant, Koutsoubos contends that the Division cannot show scienter because JP Turner had placed the Mills account on restricted commissions of $100 per trade for the vast bulk of their respective churn periods, and that Koutsoubos, therefore, lacked the motive and opportunity to commit fraud. Koutsoubos' Brief, pp. 37-38. However, the Division presented credible evidence that the Mills paid approximately $31,500 in commissions during the churn period, and that Koutsoubos received approximately $20,000 of that personally. [Division's Initial Post-Hearing Brief, pp. 3, 73-74; DOE Ex. 155; T. 3267-68] Koutsoubos conveniently claims, of course, that his payout on the Mills account was only 30%. Koutsoubos' Brief, p. 25, n.22. Even if the Court were to credit Koutsoubos' testimony on this point (which, as discussed, it plainly should not), he still concedes he would have received nearly $10,000. Such an amount is more than sufficient to influence his recommendations. Moreover, the Division may also prove scienter by demonstrating that Koutsoubos' numerous in-and-out transactions show reckless disregard for the Mills' true investment objectives.

In addition, and as discussed with respect to Bryant, Koutsoubos also claims that he acted in good faith because he relied on research and "[t]here was no evidence in the record to suggest

that Koutsoubos made recommendations without an investment strategy . . . ." Id., p. 37-38. But there was no evidence in the record that Koutsoubos actually had an investment strategy, and even if he had one, good faith belief in a trading strategy does not provide a basis for recommending trading that Koutsoubos knew was inconsistent with the Mills' true investment objectives. Rizek, Admin. Proc. File No. 3-9041, 1999 SEC LEXIS 1585 at * 19-20 (Aug. 11, 1999); Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *3 (Oct. 30, 1991); David Wong, Exchange Act Release No. 45426 (Feb. 8, 2002). And finally, Koutsoubos again contends that because he did not act with scienter because the Mills received monthly account statements. It is not clear, however, what impact the Mills' receipt of account statements could have on Koutsoubos' state of mind, and in any event, it is well established that the mere receipt of account statements and confirmation slips does not establish that a customer understood what was happening in his account. Michael David Sweeney, Admin. Proc. File No. 3-7126, Rel. No. 29884, 1991 WL 716756 at *4 (Oct. 30, 1991); Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 36 (1st Cir. 1986); Karlen v. Friedman & Co., 688 F.2d 1193, 1200 (8th Cir. 1982).

V. REPLY TO RESPONDENT MICHAEL BRESNER

If the Court concludes, as the evidence shows, that Konner churned the account of his client James Carlson (Turnover Ratio 17; Breakeven Rate 34.6%) and that Koutsoubos churned the account of his client Teddy Bryant (Turnover Ratio 56; Breakeven Rate 73.3%) and that he churned the account of his clients Bruce and Pamela Mills (Turnover Ratio 28; Breakeven Rate 41.2%), then the Court must thereafter determine whether Michael Bresner, the executive vice president and head of supervision at JP Turner, failed to supervise those three accounts of Konner and Koutsoubos for the period the three relevant accounts were respectively churned.

The evidence that Bresner failed to carry out any meaningful supervisory responsibility in his Level 4 reviews of these accounts is substantial.

A. BRESNER'S ARGUMENTS ARE NOT PERSUASIVE

In his Post-Hearing Brief ("Bresner's Brief"), Bresner acknowledges that, pursuant to JP Turner's WSPs, he was responsible for supervising accounts that reached Level 4 in JP Turner's Active Account Review System ("AARS").[30] [Bresner's Brief, p. 10 ("Mr. Bresner Reasonably Supervised the Level 4 Accounts"); 11 (setting forth WSP provisions relating to active account review); DOE Exs. 79-86] Bresner argues, however, that he "delegated review of the Level 4 accounts to the AVPs." Bresner's Brief, pp. 11-12. Bresner further contends that, for the brokers at issue in this case, that meant instructing the relevant AVP to consult with Brooklyn branch supervisor John Williams to reach a conclusion about what action, if any, to take, and then to communicate it to Bresner. Id., p. 12.

As will be discussed in more detail below, this argument fails for at least two reasons. First, while there is no documentation to support Bresner's alleged delegation of his Level 4 responsibility, his duties appear in black and white in JP Turner's WSPs: "Customers with an activity ratio for Level IV will have their accounts managed at the discretion of [Bresner]." [DOE Exs. 79, p. 268; 80, p. 272; 81, p. 271; 82, p. 272; 83, p. 275; 84, p. 274; 85, p. 274; 86, p. 276] Bresner's obligation to personally take appropriate measures also appears in a 2008 e-mail from JP Turner's Admin. System notifying Bresner of some Level 4 accounts, which states, "[a]t this level, the EVP has discretion to take any measures deemed appropriate." [DOE. Ex. 97 (emphasis added)] The evidence at the hearing confirmed that at Level 4, Bresner, as EVP, had sole responsibility for reviewing the accounts. [T. 2805; DOE Exs. 79-86] Bresner was the only

[30] Bresner also concedes that despite the WSPs provision that "[t]he EVP will establish criteria and procedures for conducting the active account review," he did not adopt written procedures for the review of accounts at Level 4. [Bresner's Brief, p. 11]

person allowed to even enter the AARS system to review accounts at Level 4, and was the only person who could take supervisory action with respect to accounts flagged at that level and prevent them from becoming locked. [T. 2775-76] Accordingly, all Level 4 entries made in AARS during 2008 and 2009 were required to be, and in fact were, personally entered by Bresner. [T. 2794-95]

Second, Bresner cannot seriously contend her relied on the work of Williams and the AVPs to meet his responsibilities at Level 4. As a branch principal, Williams had no supervisory responsibility or authority with respect to accounts that escalated past Level 2. [DOE Ex. 172; 2550-75] And as observed by the Court, he lacked the slightest trace of credibility. Moreover, Bresner's delegation theory is contrary to the entire framework of the AARS. For Level 3, which involved accounts with even greater activity, the AVPs were responsible. [Id.] As discussed, at Level 4, Bresner was responsible for personally reviewing those accounts and taking appropriate action. [DOE Exs. 79-86] Each tier was designed to bring a fresh perspective to the activity in the firm's most active accounts. If the AARS tiers of supervision were to have any effect, additional, more experienced supervisors were required to review the accounts and use their judgment, particularly as the frequency of trades increased and the account(s) progressed on the AARS from Level 2 (where Williams had supervisory responsibility) to Level 4. Bresner, as one of its architects, knew that, but failed to meet his personal responsibilities under the system.

1. As The Highest Ranking Supervisor And The Only Person With Systemic Responsibility For Level 4 Reviews In The AARS System, Bresner's Reliance On Unproven Work Of John Williams And Other Lower Level Supervisors Is Misplaced

At trial, Bresner described himself "as a person who was at the top of the supervisory food chain." [T. 2762, 2951]. Bresner argued from both the witness stand and in his brief that

(presumably in that self-described capacity) he was largely entitled to depend upon the actions and representations of his down-queue supervisors including area vice presidents ("AVPs") and branch principals regarding the specific accounts which traded at such extremely high levels that the accounts consistently appeared at Level 4 reviews (accounts with ROI greater than 25%) in JP Turner's AARS system. To follow Bresner's argument to its logical end, his supervisory responsibilities at Level 4 reviews were limited to consulting with his AVPs solely on the imposition of and amounts of possible commission restrictions, after which Bresner would in ministerial fashion simply record that action in the electronic AARS system, at that level. [T. 2853, 2895, 2897, 2899, 2920, 2925-2926, 2951, 2969, 2977-2978, 2980, 3073]. While Bresner denies that he operated as a simple scrivener in the AARS system for his supervisory responsibilities undertaken at Level 4 reviews, Bresner paints an overall picture that he was incapable of doing anything more to prevent excessive trading than to simply impose the commission restrictions that he did. [T. 2978]. Bresner's defense on this point is seriously flawed. The evidence in this record that Bresner turned a blind eye to the churning activity of Konner and Koutsoubos at JP Turner is substantial.

In his brief, Bresner contends that the firm's supervisory system relied primarily on its direct supervisors to prevent and detect churning, effectively suggesting that his own executive level of supervisory responsibility consisted of his being able to rely solely upon the actions taken by direct supervisors and AVPs of the churning representatives. [Bresner Brief, pg. 4]. This argument is no surprise, given Bresner's testimony on the witness stand upon cross-examination at trial, where he consistently invoked supposed (but unproved) supervisory actions allegedly undertaken by John Williams a compliance officer/principal in the Brooklyn branch office of JP Turner, where Konner and Koutsoubos worked; or later supposedly undertaken by James McGrath, the AVP for Calabro's branch office at JP Turner. This is a meritless defense.

On cross-examination by the Division, a strident Bresner *either volunteered or suggested* no fewer than twenty (20) times that John Williams, a principal in the Brooklyn branch, was responsible for the direct supervision of Konner and Koutsoubos and ultimately had supervisory responsibility with respect to the Carlson, Bryant and Mills accounts that were churned by Konner and Koutsoubos. [T. 2865-2866, 2867, 2868-2869, 2896-2897, 2899, 2901, 2916, 2920, 2921, 2923, 2925, 2926, 2946, 2951, 2970, 2972, 2973, 2974, 2978]. Bresner aggressively used the supposed but unproven supervisory actions of John Williams to suggest the structure of supervision at JP Turner was adequate, that Bresner could rely on it, and that Bresner himself should be allowed to avoid any responsibility for his own failure to supervise the Carlson, Bryant and Mills accounts that repeatedly advanced to Bresner's Level 4 reviews in the AARS system, over extended calendar quarters. However, this is a dishonest argument that must fail. First, Bresner's assertion that John Williams ever actually talked to Carlson, Bryant and Williams (supposedly to verify investment objectives, risk tolerance, net worth and other pertinent information about the clients) is completely unproven in this case. Secondly, Bresner is asking the Court to rely on pure hearsay evidence about supervisory actions supposedly taken by branch principal John Williams and/or others—that Williams when called to testify could never specifically verify had actually occurred. Finally, Bresner failed to call essential witnesses to prove this defense including James Sideris (the principal of the relevant Brooklyn branch office), Jim McGrath (Calabro's AVP)[31] or any of his other AVPs who could have ostensibly offered admissible evidence of lower level supervisory action that was in fact taken in conjunction with

[31] In a gratuitous (even bizarre) effort to support Calabro's defenses and his very risky trading strategy (as Bresner himself was not charged with failure to supervise Calabro), Bresner offered pure unsubstantiated hearsay testimony to speculate that AVP Jim McGrath may have called some of Calabro's clients to verify that they understood the very risky nature of Calabro's trading strategy. [T. 3078-3079]. Bresner later admitted he had no knowledge that any supervisor ever having called Moore, Willhoft or Wayne Williams—the relevant Calabro customers. [T. 3078-3079]. Of course, neither Bresner nor Calabro subpoenaed or called Jim McGrath to otherwise confirm Bresner's inadmissible hearsay on that point.

the Carlson, Bryant and Mills accounts. As Bresner failed to call Sideris, McGrath or other AVPs as witnesses at trial, he is left with a record that fails to establish that any meaningful supervisory action was indeed undertaken by those individuals at JP Turner regarding the Carlson, Bryant and Mills accounts.

Bresner's testimony is that he "*was told* Mr. Williams regularly called his clients--the clients of that branch..." [T. 2866], or that "I *was informed* that Mr. Williams made these calls regularly." [T. 2970]. When pushed, an ultimately "confused" Bresner admitted again and again that he had no real knowledge about the substance of supposed conversations between John Williams and the clients. [T. 2923, 2972, 2974]. Not surprisingly, the three account holders had no knowledge of John Williams, and had no recollection of ever having spoken with him.

Moreover, Bresner acknowledged that he had been present in the courtroom and had heard the testimony of Carlson,[32] Bryant[33] and Mills[34] and was fully aware that the JP Turner clients for their part testified they had never heard of or from John Williams regarding their accounts. [T. 2868-2869]. Despite his knowledge that the three clients all denied having spoken with Williams regarding their accounts, Bresner's testimony continued, (no doubt as planned and rehearsed) that Williams was the supervisor of the accounts [T. 2916]; or speculatively that "I have no idea what Mr. Carlson would have said to me if I called him, but I'm sure it would not

[32] Konner's client Carlson had no recollection of ever having spoken with John Williams [T. 1852-1853], and when confronted with DOE Ex. 50 bearing Williams' initials Carlson definitively said as to the false amount recorded for Carlson's net worth "I wouldn't have told him the $2 million figure.... [t]he same thing I told Jason. I wasn't worth that much." [T. 1902-1903].

[33] Koutsoubos's client Bryant had no recollection of ever having spoken with a John Williams from JP Turner. [T. 1012-1013].

[34] Koutsoubos's client Bruce Mills stated he had never spoken with anyone at JP Turner other than Konner and Koutsoubos and that he had never spoken with John Williams, concluding with "[b]eyond a shadow of a doubt, I don't ever recall speaking to this gentleman period." [T. 2149, 2282, 2283-2284, 2289]. Koutsoubos's client Pamela Mills stated she had not heard of John Williams and did not recall speaking with anyone from JP Turner other than Konner and Koutsoubos. [T. 2359].

be different than what he would have told Mr. Williams" [T. 2925]; or that Mr. Williams "claims he spoke to the clients regularly" [T. 2951].

However, when John Williams was called to the witness stand by Respondent Bresner, the witness was significantly unimpressive in both his demeanor and substance. John Williams, the man touted by Bresner as the direct supervisor of Konner and Koutsoubos, had no recollection of a specific conversation between himself and Carlson regarding the client's risk tolerance or investment objectives [T. 3646]; never overheard or had been part of any conversations between Konner and Carlson [T. 3648]; recalled no dates or specific substantive conversations with the Mills, and suggested *if* he had talked to them he assumed the conversation would be about forms [T. 3649-3650]; that he had no recollection about any particular conversation with the Mills about their risk tolerance or investment objectives [T. 3652]; and that Williams had no recollection about speaking with Bryant [T. 3652, 3654]. For Bresner to suggest that he relied upon the supervisory work of John Williams, given that that Williams himself had no specific recollection that he had in fact reached out in any meaningful manner to Carlson, Bryant and Mills, is simply not a credible position for Bresner to take—or for this Court to adopt. As the clients themselves deny they ever spoke with John Williams, the only credible evidence leads to the conclusion that *no proof exists* that any manager at JP Turner ever reached out to Carlson, Bryant and the Mills about the extremely active trading in their accounts, either as to the victims' true investment objectives, their risk tolerance or other factors relevant to their accounts. Bresner as the highest ranking firm individual responsible for reviewing the highest ROI accounts which reached Level 4 in the AARS system (which was designed to monitor active trading) is precisely the person who failed reasonably to supervise the accounts of Carlson, Bryant and Mills.

2. Bresner's Long Experience In The Securities Industry And His Disciplinary Supervisory Past Is Evidence Of Bresner's Knowledge Of His Own Supervisory Responsibilities

Bresner has been in the securities brokerage industry for more than 45 years.[35] [T. 2751, 2807]. In addition to being an executive level employee at JP Turner, he has held other executive level positions at other firms, including the position of President of National Securities from June of 1998 through January 2005. [T. 2756-52757]. Bresner's long high-level experience in the brokerage industry establishes that he was fully aware of the extent of his supervisory obligation. An incident in his disciplinary history also underscores that knowledge.

In 2004 in a mutual fund sweep by the state of New York, Bresner's supervisory license was suspended for a 30 day period and he was fined $25,000 for his failure to spot supervisory red flags. [T. 2750-2751]. In his FINRA broker check report on the same incident, Bresner is reported to have failed to ensure that National Securities Corporation had an "*adequate supervisory system and written procedures* designed to prevent and detect the deceptive market timing activities and possible late trading." [T. 2758-2759; DOE Ex. 90, p. 9-10]. Bresner fully knows that adequate supervisory procedures must exist at all brokerage houses, and is also fully aware that those procedures *must be written.*

For its part, the AARS system was a fully internal creation of JP Turner which began in late 2007 to monitor active trading in accounts at the firm. [T. 2795-2796]. Bresner admits that he believed that churning was a concern and a risk for JP Turner managers, and that churning throughout his long career has always been a concern in all places he'd worked in the securities brokerage industry. [T. 2807, 2809]. Bresner was also aware that the AARS system was not designed so that the electronic system itself automatically detected churning—but rather that a

[35] Bresner holds series licenses 7 (general securities license), 63 (blue sky state registration), 66 (registered investment adviser license), 53 (municipal principals license), 24 (general securities principal), 27 (financial and operations principal) and a separate supervisory analyst license. [T. 2742-2746]. He has held many of these licenses since the 1960s, with the later ones held since the 1980s.

human supervisor had to intervene and independently determine that churning occurred. [T. 2810]. Yet he contends that the primary responsibility for preventing and detecting churning is with the direct supervisors. [Bresner Brief, pg. 5]. However, John Williams and other front line principals only reviewed accounts in the AARS system at Levels 1 and 2, while the AVPs reviewed accounts at Level 3, Bresner alone reviewed accounts at Level 4. [T. 3614-3615, 3723]. As a practical matter, commission restrictions were not imposed for excessive trading except and until accounts reached Level 3 reviews--then well past the John Williams/principal review stage. [T. 2835]. As a result, Bresner's argument that John Williams, or other front line supervisors, were primarily the persons positioned to detect churning simply makes little sense, because as the account became increasingly more actively churned, it moved further and further from the responsibility of the branch principal and directly to the supervisory responsibility of Bresner himself. As Bresner cannot logically rely upon John Williams to prove that any supervision of the accounts of Carlson, Bryant and Mills actually occurred at that Level 4, Bresner's insistent deflection of his supervisory responsibility only serves to underscore his own personal supervisory failure in this case. Bresner's long history as an executive level supervisor puts him in a position where he had to know that his reliance on lower level supervisors, especially in the absence of written procedures (themselves Bresner's own responsibility) is simply not persuasive.

3. Bresner's Supervisory Options Were Much Broader At Level 4 Reviews Than Simply Entering Or Continuing Commission Restrictions

Bresner had a variety of options available to him when taking action in response to the AARS Level 4 flagging of these accounts. As reflected in an April 11, 2008 e-mail from JP Turner's Administrative System to Bresner notifying him of Level 4 accounts for 1st quarter

2008, "[a]t this level, the *EVP has discretion to take any measures deemed appropriate*."[36] [DOE. Ex. 97 (emphasis added)]. Bresner admits that he could have contacted the customers to confirm their investment objectives and risk tolerance (among a wealth of other information relevant to active trading), and/or used the questionnaires that were part of AARS for that purpose. [T. 2863; DOE Ex. 93]. He also admitted he could have restricted trading in the accounts, and did not dispute that he could have placed a registered representative on heightened supervision in connection with a Level 4 review. [T. 2927-28; 2952-53; 2975-76]. In addition, Bresner also sat on JP Turner's hiring committee. [T. 2765-67]. One of the functions of the hiring committee was to deal with disciplinary and other adverse actions to be taken against registered representatives at the firm. [T. 2768]. One of the areas of focus for the committee was sales practice concerns such as churning. [T. 2501]. As a member of the hiring committee, Bresner had a number of disciplinary tools available to him for dealing with registered representative misconduct, including churning. [T. 2770] These included fines, mandated continuing education, heightened supervision,[37] letters of admonishment, or recommended termination, among others. [T. 2501-02; 2770].

Bresner never took the most basic and prudent supervisory actions for the accounts over which he had direct supervisory responsibility. In 2008 and 2009, in connection with his responsibilities for Level 4 account review, he never: (1) personally contacted any customers[38] to

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[36] Bresner chose to distribute the quarterly Level 4 notification e-mails to the AVPs, and to confer with them and seek advice regarding what action to take with respect to the flagged accounts, but ultimately Bresner made the required entries in Level 4 because he was the only supervisor who could. [T. 2837-38]

[37] Bresner testified that at JP Turner, heightened supervision was imposed in response to certain types of misconduct that did not typically include excessive trading or suspected churning. [T. 2787-92]. He gave no explanation of why the firm limited heightened supervision in such a way.

[38] Bresner acknowledged that there was nothing to prevent him from calling clients to confirm investment objectives. [T. 2863]. He also complained that he should not be expected to call clients because to verify their investment objectives and risk tolerance because Level 4 reviews each quarter involved sometimes 200 or more clients, and would involve many calls. [T. 3070]. Bresner's insistence that he could not call investors is simply not

confirm that they were comfortable with the level of trading in their accounts and that such trading was consistent with their actual investment objectives; (2) explored with the representatives the reasons for the high level of activity, or whether that activity was consistent with any legitimate trading strategy; (3) placed any representative on heightened supervision based on trading activity; (4) imposed a reduction or limitation on the volume of trading in an account; (5) temporarily or permanently closed an account or (6) never had an AARS questionnaire[39] completed for Carlson, Bryant or Mills which would have shown some rudimentary interest in the three relevant accounts, all of which were extremely actively traded. [T. 2841-43; 2853-55; 2896-2901; 2860-2865, 2867-2868.] Such action was particularly appropriate because, as set forth in the Division's initial post hearing brief, the level of trading in the Carlson and Mills accounts exceeded the frequency of trades listed on on-file Active Account Suitability Questionnaires for those accounts. The only action Bresner took with respect to any of the approximately 250 accounts he reviewed quarterly was to impose (or, in most instances, simply keep in place AVP-imposed) commission restrictions.[40] [T. 2838-40]. Moreover, neither Bresner nor the firm ever imposed any disciplinary action against Calabro, Konner or Koutsoubos during the time they worked at JP Turner. [T. 2768-69].

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credible as Jason Konner testified early in the trial that when he prospected for clients he made as many as *200 calls a day or more*. [T. 324, 2955].

[39] The Division produced substantial evidence to show that the AARS questionnaire was a supervisory option that was used in calling customers for several actively traded accounts that appeared at higher trading levels in the AARS system in 2008 and 2009. (DOE Ex. 93; T. 2860-2865]. The questionnaire in the AARS system contained a suggested dialogue for engaging the client and for confirming basic account information. Bresner's cavalier testimony as to whether the questionnaire was available to supervisors during the relevant period of the active trading in the Carlson, Bryant and Mills accounts, that he had "used it extensively *in the prior program*," meaning the predecessor Online Compliance System that predated the AARS system. [T. 2863]. Bresner had many supervisory tools available to him that would have helped him to detect and prevent churning in the three relevant accounts, but failed to use them.

[40] JP Turner did impose commission restrictions on registered representatives, including Calabro, Konner and Koutsoubos, based on active trading as identified by the AARS system. Neither Bresner nor Chief Compliance Officer Michael Isaac, however, considered commission restrictions to be a disciplinary action. [T. 2502; 2779-80]

B. The Expert Testimony Of John E. Pinto Proves Bresner Failed Reasonably To Supervise The Accounts Of Carlson, Bryant And Mills

John E. Pinto was engaged by the Division to render an expert opinion and provide testimony concerning the adequacy of the supervision exercised by Bresner when he had sole and direct responsibility for reviewing and taking appropriate action relative to the trading activity in certain customer accounts for which Koutsoubos or Konner acted as registered representative that had reached Level 4 classification under JP Turner's AARS. Specifically, Pinto's opinion addresses Bresner's supervision of the trading activity that took place in the account of Konner's customer Carlson, and in the accounts of Koutsoubos' customers Bryant and the Millses. [DOE Ex. 156, Pinto Report, **Scope of Engagement**, ¶4, pg. 5]

Pinto's report states that NASD Conduct Rule 3010 sets forth the basic duty of a broker-dealer to establish, maintain and enforce a system to properly supervise all of its businesses, and the activities of each of its registered representatives and associated persons that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD/FINRA rules. A supervisory system includes elements such as automated exception reports and surveillance programs to monitor for unusual trading activity in customer accounts. Written supervisory and compliance procedures that are reasonably designed to prevent and detect violations are also a critical aspect of an overall supervisory system. Importantly, these "...written supervisory procedures would instruct the supervisor on which reports produced by the supervisory system the supervisor is to review as part of his or her supervisory responsibilities, including a description of how often these reports should be reviewed, the steps to be taken if suspicious activity is discovered, and how to document the supervisor's oversight activities."[41] [DOE Ex. 156, Pinto Report, **Industry Supervision**

[41] NASD Notice to Members 99-45

Standards, ¶VII, pg. 7]

Pinto's report notes that the AARS was put in place by JP Turner as its primary source to track actively traded customer accounts. All Level 4 customer accounts were the direct supervisory responsibility of Bresner to review and take appropriate actions, the latter being an undefined and unspecific term in JP Turner's written supervisory procedures. [DOE Ex. 156, Pinto Report, **JP Turner Active Account Review System**, ¶VII, pg. 8] Pinto concluded that it is uncontested that Bresner, as the Executive Vice President and head of supervision, was designated pursuant to JP Turner's written supervisory procedures with the responsibility to personally perform a review of all Level 4 customer accounts and to take appropriate actions. Simply stated, in this very important role involving customers who experienced the highest level of account trading activity and commissions charged, Bresner as the designated front line supervisor failed to reasonably meet his supervisory responsibilities. [DOE Ex. 156, Pinto Report, **Bresner Had Responsibility for All Level 4 Customer Accounts**, ¶VII, pg. 8]

Regarding his opinions, Pinto concluded that Bresner failed to reasonably meet his supervisory responsibilities as the Executive Vice President and head of supervision designated pursuant to JP Turner's written supervisory procedures with the responsibility to personally supervise and perform a review of all customer accounts whose level of active trading activity reached an ROI that was greater than 25 percent, and to take appropriate action. [DOE Ex. 156, Pinto Report, **Summary of Opinions**, ¶VI(1), pg. 6] Pinto also concluded that as the person with frontline supervisory responsibility for the Level 4 accounts of Bryant, Mills and Carlson, Bresner ignored and failed to follow up on several red flags that warranted his immediate attention and review which demonstrated that the trading activity in the Bryant, Mills and Carlson accounts was excessive, far exceeded the levels of trading frequency defined as acceptable by these customers, and not appropriate in light of these customers' investment

experience, risk tolerance and investment objectives. [DOE Ex. 156, Pinto Report, **Summary of Opinions**, ¶VI(2), pg. 6]

Pinto further concluded that Bresner failed to place Koutsoubos or Konner on heightened supervision or to take any other disciplinary action against either representative for excessive trading activity in any Level 4 customer account, including Mills, Bryant and Carlson, when in Pinto's opinion, such action was warranted under the circumstances. [DOE Ex. 156, Pinto Report, **Summary of Opinions**, ¶VI(3), pg. 6] Pinto concluded that Bresner never restricted trading or took any other supervisory action to address the underlying issue of excessive trading activity in the Mills, Bryant and Carlson Level 4 accounts in 2008 or 2009, when in Pinto's opinion, such action was necessary. The only action taken by Bresner in carrying out his supervisory responsibilities for Level 4 customer accounts was to impose limitations or took other actions relative to the amount of per trade commissions to be charged, which actions were wholly inadequate and failed to meet regulatory standards. Further, Bresner never imposed any restrictions or took other actions relative to the extent or frequency of the trading activity itself. [DOE Ex. 156, Pinto Report, **Summary of Opinions**, ¶VI(4), pg. 6] Finally, Pinto concluded that Bresner failed to develop and follow policies or procedures as to what actions he would take to review customer account activity in Level 4 accounts, or to set forth the type of actions deemed appropriate in follow up. [DOE Ex. 156, Pinto Report, **Summary of Opinions**, ¶VI(5), pg. 6].

C. Bresner Expert Henry Sanchez's Testimony Is Not Helpful To Bresner's Case

Respondent Bresner called Henry Sanchez, Jr. who opined essentially on the "reasonableness" of commission restrictions taken by Bresner at Level 4 reviews to satisfy his supervisory responsibilities in the AARS system. (T. 3856). However, there are some disturbing

inconsistencies in Sanchez's testimony. For example, Sanchez first testified that he did not dispute that Bresner was in fact, a supervisor. [T. 3858]. Later, Sanchez changed his testimony and stated that he did not believe Bresner was a supervisor. [T. 3872-3873]. Sanchez further opined that he did not believe that Bresner's acts of imposing commission restrictions at Level 4 reviews constituted a supervisory action. [T. 3877]. When asked a question by the Court on the issue, Sanchez stated that he thought Bresner's own testimony that he was a supervisor was incorrect or wrong. [T. 3877-3878]. Sanchez testified that he believed (contrary to the testimony of Bresner and contrary to testimony of the former compliance officer Michael Isaac) that entering commission restrictions was a *disciplinary*, and not a supervisory action. [T. 3877-3878].

In addition to being inconsistent internally, and inconsistent with other fact witnesses who worked at JP Turner, Sanchez's testimony is simplistic—so as to be of little assistance to the Court. For example, a very important part of Sanchez's written report is his opinion that imposing commission restrictions did not make Bresner the direct supervisor of Konner of Koutsoubos. [T. 3855-3856]. However, the Division has not alleged a direct supervisory relation between Bresner and the representatives, but rather that Bresner was directly responsible for supervising them as it related to review of the account activity at Level 4 and taking appropriate actions. Sanchez's failure to grasp the subtle but important distinction renders his opinion of little value to Bresner's case.

Moreover, Bresner's own expert Sanchez admitted that in reviewing the file, the WSPs and learning about Bresner's actions at Level 4 reviews, Sanchez never saw any evidence that Bresner had established written criteria and procedures for conducting active account reviews. [T. 3891], and that it is a best practice to have written documentary support to establish that the WSPs had been followed, to have written procedures regarding the AARS reviews, and that

supervisory actions were taken. [T. 3900, 3936]. Sanchez also acknowledged that rules and regulations have to be written, and that from a compliance or regulatory standpoint, verbal (non-written) direction is not a valid procedure. [T. 3891, 3936-3937]. Sanchez also acknowledged that written procedures are required to operate a brokerage house, and that it would have behooved Bresner to have had written procedures for conducting active account reviews. [T. 3891-3892; 3893-3894]. Given that his own expert found deficiencies in Bresner's failure to have written procedures for conducting account reviews in the AARS system [T. 3938], Bresner's claimed supervisory actions are verifiable only through his own self-serving testimony—clearly not a best practice. Bresner's failure to have written procedures only underscores his failure to supervise the Carlson, Bryant, and Mills accounts that appeared at Level 4 reviews in the AARS system.[42]

Bresner's conduct at Level 4 reviews in the AARS system, and his attitude about it at trial and in his post-trial briefing, is simply disturbing. As a whole, the respondent takes a "see no evil" position.[43] He apparently believes that if no lower level supervisor had concluded that an account was churned, then Bresner, "as a person who was at the top of the supervisory food chain" [T. 2951] is somehow relieved of his own supervisory obligation to reach the conclusion

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[42] In his brief, Bresner improperly cites the Court to irrelevant, impermissible opinion evidence offered by a lay witness. Specifically, Bresner argues that certain opinion testimony from the former JP Turner compliance officer Michael Isaac, a lay witness, is somehow a substitute for the failure of Bresner's own expert witness on supervision issues. For example, what Isaac believed about whether Bresner took appropriate or inappropriate action, whether Isaac believed Bresner fulfilled some role he had at the firm, or what Isaac perceived about the level of Bresner's commitment is simply irrelevant to the issues in this case. [See Bresner Brief, p. 7]. Similarly, Isaac's belief about whether an account is churned because it reaches Level 4 is also irrelevant and unpersuasive testimony. [See Bresner Brief, p. 20].

[43] While the Division's case against Bresner has been narrowly charged and narrowly proven as to but three investor accounts managed by Konner and Koutsoubos, the Court should be mindful that in the four week trial and the 5000 pages of trial transcript there is no evidence that any supervisors *ever* detected churning in any accounts at JP Turner in 2008 and 2009, when the Carlson, Bryant and Mills accounts were churned. As Konner and Koutsoubos (and Calabro as well) were all top 50 revenue producing representatives for the firm [DOE Exs. 94, 95, 96; T. 2885-2895], it is reasonable to conclude in light of all the evidence that Bresner took a "see no evil" approach to his supervisory responsibilities.

that the account was churned. Bresner was fully aware that the accounts of Konner and Koutsoubos (and even Calabro) were regularly reaching Level 4 reviews—for accounts with ROI exceeding 25%--reserved for the very highest level of trading activity recognized by the AARS system. Whether Bresner simply took a supervisory path of least resistance or whether he simply yielded to the pressures of his "powers that be" including Chief Operating Officer Vernoia, President Mello and CEO McAfee, this Court need not decide. [T. 2777-2778].

If the four distinct levels of review in JP Turner's AARS system (which mandated a review by increasingly higher level supervisors as the account became increasingly more actively traded) meant anything, Bresner failed completely in his supervisory duties as to the accounts of Carlson, Bryant and the Mills. Bresner's attitude can be summed up accordingly: if the branch principals or the AVPs did not conclude that churning occurred, then it must not have happened. The problem with Bresner's defense is that because of that attitude, the significant monetary damage that was done in the accounts of Carlson, Bryant and Mills was not abated in any reasonable or meaningful way by the minor commission restriction action that Bresner undertook at Level 4 reviews in those accounts. As Bresner knew for an extended period how frequently the Level 4 reviews were recurring in the Carlson account,[44] in the Bryant account,[45] and in the Mills account,[46] it was unreasonable for him to make no meaningful inquiry or to take no reasonable supervisory action other than to continue commission restrictions.

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[44] Bresner knew Carlson's account appeared at Level 4 in the AARS system for 6 of 8 quarters between the first Quarter of 2008 and the 4th Quarter 2009. [T. 2908-2909; DOE Ex. 98; DOE Ex. 113].

[45] Bresner knew Bryant's account appeared at Level 4 in the AARS system for 8 of 9 quarters between the 3rd Quarter of 2007 and the 3rd Quarter of 2009. [T. 2935; DOE Ex. 99; DOE Ex. 114].

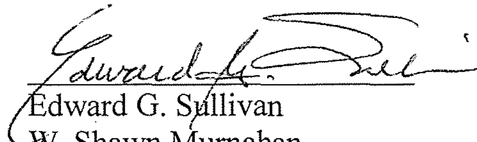
[46] Bresner knew the Millses' account appeared at Level 4 in the AARS system for 5 of 8 quarters between the first Quarter of 2008 and 4th Quarter of 2009. [T. 2955-2959; DOE Ex. 100; DOE Ex. 115].

V. CONCLUSION

For the foregoing reasons and those set forth in the Division's Initial Post-Hearing Brief, the Court should find that Calabro, Konner and Koutsoubos willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and that as a result of that conduct, Bresner failed reasonably to supervise Konner and Koutsoubos, persons subject to his supervision, with a view to preventing and detecting violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by Konner and Koutsoubos. Further, the Court should impose sanctions in the public interest as requested in the Division's Initial Post-Hearing Brief.

Respectfully submitted, this 9th day of May, 2013.

Respectfully submitted,



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