UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

RESPONDENT JASON KONNER'S BRIEF IN SUPPORT OF REVERSAL OF INITIAL DECISION DATED NOV. 8, 2013

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INTRODUCTION

This case involves four respondents who used to work for the same broker-dealer. Three are stock brokers accused of churning; the fourth was a senior executive charged with supervisory failures. Though their alleged misconduct was separate and distinct, they were tried together in one case brought by the Division of Enforcement (the "Division") in a 17-day hearing before the Honorable Cameron Elliot. The Initial Decision in the case was issued on November 8, 2013. The Law Judge ruled that each of the three brokers, all of whom were charged with churning the account of either two or three customers, had churned the account of just one customer. The charges regarding the remaining customers were all dismissed.

Respondent Jason Konner ("Konner") was found to have churned the account of customer [redacted] during the period of January-December 2009. The charge that Konner had also churned the account of customer [redacted] was dismissed in its entirety. The sanctions ordered against Konner for churning that one account included an industry bar, disgorgement of commissions totaling $55,000, and interest and financial penalties totaling $156,613, even though during the so-called churn period the [redacted] account was proven at hearing to have been profitable by more than $100,000 (net of commissions). If affirmed, Konner's heretofore unblemished 20-year career in the brokerage industry would effectively come to an end.

It is a comparatively rare circumstance in which the Commission dismisses a proceeding after the ALJ has found liability and ordered a sanction. *See, e.g., In the Matter of James T. Patten*, S.E.C. Rel. No. 34-54710, 2006 WL 6327418 (Nov. 3, 2006). *But that is precisely the result that is warranted here.* Konner, by his attorneys Hutner Klarish LLP, hereby submits this brief to demonstrate that the finding in the Initial Decision that [redacted]'s account was churned is not supported by the weight of the evidence, and as such should be dismissed.

PROCEDURAL HISTORY

Following an extensive investigation of Atlanta-based brokerage firm JP Turner & Co. (hereinafter "JP Turner" or "JPT") conducted by the Division, in which more than 500,000 documents were produced, many witnesses deposed, and dozens of subpoenas issued, JP Turner ultimately settled with the Commission. See Securities Exchange Act Release No. 67808 (Sept. 10, 2012). JP Turner continues in business to this day.

Based on information obtained during the course of that investigation, and on the heels of its settlement with JP Turner, the Division brought charges against four JP Turner employees. As noted above, each of the three broker-respondents, following an extended hearing, were found to have churned the account of one customer. In ruling against Konner, the Law Judge found Konner to be at fault with respect to all three elements of churning with respect to customer [redacted], but not at fault with respect to any of those three elements with respect to customer [redacted].

Significantly, neither customer that Jason Konner was accused of churning has ever made any claim, asserted any charge, or initiated any case alleging misconduct of any type against Konner. In fact, with respect to the one customer found to have been churned, he continued to do business with Konner for more than two more years after the period in question, ending the relationship only when Konner was fired in the wake of the Division's ongoing and protracted investigation.

SUMMARY OF THE INITIAL DECISION, THE EVIDENTIARY FINDINGS AND THE LEGAL CONCLUSIONS CONCERNING KONNER

There are three principal sections in the Initial Decision that relate to the charges brought against Konner and to his appeal:

First, the Initial Decision includes a detailed summary of the testimony of each of the witnesses who testified about one or more of the issues relating to the [redacted] charge: [redacted], Jason Konner, JP Turner compliance officer John Williams, and the expert witness called by the Division to address quantitative trading issues in the [redacted] account, Louis Dempsey. See Initial Decision at 22-28, 37-42, 79-82, 87-94.[1] To a large extent, these sections presented a fair summary of the relevant documentary and testimonial evidence pertaining to the [redacted] charge.

Second, the Law Judge addressed the legal issues raised by the Division's churning charges. See Initial Decision at 98-100. That discussion contains an adequate summary of a number of legal principles that typically come into play in assessing a churning charge, and includes a summary of a number of the leading cases on this point. This summary of the applicable law, as far as it goes, is not being challenged on this appeal.

Third, the application of the law to the facts of the case, and the conclusions drawn therefrom relating to the [redacted] charge, are set forth in the Initial Decision at 103-07. These conclusions, organized around the three elements of a churning charge, are as follows:

(1) The Law Judge concluded that Konner exercised de facto control over the [redacted] account based on the following: (a) [redacted] was not a sophisticated investor and lacked the general investment knowledge to control his account; and (b) [redacted] would not have traded his account without being contacted first by Konner and without Konner's recommendation.

(2) The Law Judge concluded that there was excessive trading in the [redacted] account based on the following: (a) the account application and other forms signed by [redacted] contain misstatements and do not accurately reflect [redacted]'s investment objectives and risk tolerance,

[1] All references herein to hearing testimony will be identified as "Tr. __", and all exhibits referenced herein were admitted into evidence and shall be identified by the designation used in the Initial Decision, e.g., "JKX 1".

evidenced by the fluctuating financial information set forth on these account documents; (b) the fact that [redacted] during the so-called churn period in 2009 only expressed a willingness to trade four times per week (or 208 times per year), yet the level of activity was actually higher; and (c) the analysis of the Division's quantitative expert supports a finding of excessive trading.

(3) The Law Judge concluded that Konner acted with scienter based on the following: (a) Konner provided pre-filled out forms relating to [redacted]'s account and represented that the information on those firms did not mean anything, so that [redacted] in effect obediently signed what Konner told him to sign, even though in direct conflict with his actual investment objectives and desires; and (b) the fact that Konner's testimony concerning the amount of [redacted]'s net worth, as expressed on various [redacted] account documents "was strikingly inconsistent," thus establishing that Konner was making it up as he went along and that the numbers were made up when placed on the forms.

All of these conclusions are challenged on this appeal.

QUESTIONS PRESENTED ON APPEAL

The issues raised by Konner address only the conclusions and findings that resulted in the Law Judge's ruling that Konner churned [redacted] account, which are as follows:

1. Was the finding by the Law Judge that Konner exercised de facto control over [redacted] stock brokerage account supported by the weight of the evidence? Konner submits it does not, for the reasons stated below.

2. Was the finding by the Law Judge that Konner engaged in excessive trading with respect to [redacted]n's stock brokerage account supported by the weight of the evidence? Konner submits it does not, for the reasons stated below.

3. Was the finding by the Law Judge that Konner acted with scienter with respect to [redacted]n's stock brokerage account supported by the weight of the evidence? Konner submits it does not, for the reasons stated below.

4. If the Commission were to affirm the ruling in the Initial Decision that Konner did churn [redacted]'s account, were the sanctions imposed by Law Judge fair,

reasonable and appropriately tailored to the nature of the infraction? Konner contends they do not, and that such sanctions were unduly harsh and unjustified, for the reasons stated below.

STANDARD OF REVIEW AND BURDEN OF PROOF

Three legal elements bear upon the Commission's review of the Initial Decision. First, in cases such as this, the Commission conducts a *de novo* review, that is, without deference to the trial court's rulings. *See* Rule of Practice 411(a), 17 C.F.R. § 201.411(a); *In re David F. Bandimere*, S.E.C. Rel. No. 9512 (Jan. 16, 2014). Such a level of review warrants – especially where the sanction effectively terminates a previously unblemished 20-year career – an extremely careful review of all of the evidence marshaled by the parties during the hearing, and if the findings of the ALJ are not supported by the substantial weight of the evidence, reversal is required.

Second, as demonstrated below, the findings against Konner by the Law Judge turn largely on credibility assessments. While the trier of fact is generally best positioned to assess credibility, the Commission nonetheless evaluates "those determinations against the weight of the evidence." *In re David F. Bandimere, supra,* at n. 12; *In the Matter of Herbert Moskowitz*, S.E.C. Rel. No. No. 45609 (March 21, 2002) (the Commission does "not accept blindly but, rather, will disregard even explicit determinations of credibility where the record contains substantial evidence for [rejecting them].") (internal quotation marks and citations omitted); *In the Matter of Kenneth R. Ward*, S.E.C. Rel. No. 8210, 2003 WL 1447865 (March 19, 2003) ("there are circumstances where, in the exercise of our review function, we must disregard explicit determinations of credibility") (citations omitted).

Third, there is no question that when it comes to proving that Konner churned the [redacted] account, the Division bears the evidentiary burden of proof. As demonstrated below, however, a

fair review and interpretation of all of the pertinent evidence relating to the [redacted] charge establishes that the Division failed to satisfy its burden.

SUMMARY OF ARGUMENT

This is not a pro forma appeal; the Law Judge, respectfully, got it wrong. In analyzing the evidence presented at the hearing, he made unjustifiable and inconsistent credibility assessments, ignored mounds of crucial evidence, misunderstood and misconstrued key facts and events, and drew unwarranted conclusions that make little sense in light of the evidence as a whole. The finding that Konner churned the [redacted] account should be reversed.

The substantial weight of the evidence established that Konner did not have control over [redacted] or his account. It established that he did not engage in excessive trading. And it established that he lacked the requisite mental intent or scienter to be found liable for churning. On none of these points did the Division satisfy its burden of proof.

Specifically, the evidence relied upon by the Law Judge to find that [redacted] had conservative investment objectives is undermined by reams of direct and circumstantial evidence. Similarly, the conclusion that Konner exercised control, drawn from the fact that the broker was making, and the client was accepting, investment recommendations, is unjustifiable. And in relying upon the fact that the figures on the account forms for [redacted] net worth fluctuated "wildly" as the primary pillar for the conclusion regarding excessive trading ignores the clear evidence not only about why those numbers varied over the years, but also how and why Konner and his colleagues at JP Turner justifiably relied upon the figures supplied and/or approved and acknowledged by the customer, facts that in turn undermine the findings of control and excessive trading.

The active trading in the [redacted] account was exactly what the client wanted for the part of his net worth placed with JP Turner. His indisputable actions and representations reflect that his investment objectives were speculation and aggressive short-term trading, that he was well able to bear the risk of loss of his account principal, and that he understood the market risk associated with his account. The many documents signed and acknowledged by [redacted] submitted into evidence spoke volumes, yet the Law Judge for all practical purposes ignored them. Indeed, though the ALJ purports to have found [redacted] to be credible, where his testimony was directly inconsistent with the Court's analysis, it went summarily ignored. So when [redacted] testified that his signature on a business document means something, namely, that what he was signing was truthful and accurate, that enormous concession was ignored by the Law Judge. Fairly considered and properly understood, the evidence of [redacted]'s actions before and during the churn period, which occurred *prior* to the date he was first told by the Division about the possibility of a financial windfall should the Division defeat Konner, undermines the Law Judge's ruling and establish this: [redacted] wanted a broker to make him some money, was willing to accept the risk and pay the cost of an aggressive trading account, and he repeatedly acknowledged as much.

ARGUMENT

THE SUBSTANTIAL WEIGHT OF THE EVIDENCE WARRANTS DISMISSAL OF THE CHARGE THAT KONNER CHURNED THE [redacted] ACCOUNT

The legal standard applicable to the charge against Konner is clear: "Churning occurs when a securities broker buys and sells securities for a client's account, without regard to the client's investment interests, for the purpose of generating commissions." *See, e.g., In re Sandra Logay*, S.E.C. Initial Dec. Rel. No. 159, 2000 WL 95098 (Jan. 28, 2000). To be successful, then, the Division must demonstrate three things by a preponderance of the evidence: (1) that Konner

had actual or *de facto* control over the [redacted] account; (2) that the trading in the account was excessive in light of [redacted]'s trading objectives; and (3) that Konner acted with scienter. *See, e.g., Costello v. Oppenheimer & Co.*, 711 F.2d 1361, 1368 (7th Cir. 1983).

The law is clear that churning cannot be based solely on the number of trades per month or the turnover rate of an account. For example, speculative accounts that are used for day trading or short-term gains will often exhibit a high level of activity in a given time period. In these cases, a large volume of trading is consistent with the objectives and goals of the account. Churning does not occur if the account owner knowingly and intelligently consents to a high volume, or if the broker lacked the intent to defraud or recklessly disregard the account owner's wishes. *See, e.g., Nelson v. Weatherly Sec. Corp.*, 2006 WL 708219, at *3 (S.D.N.Y. Mar. 21, 2006).

I. THE SUBSTANTIAL WEIGHT OF THE EVIDENCE ESTABLISHED THAT KONNER DID NOT EXERCISE CONTROL OVER THE [redacted] ACCOUNT

In finding that Konner exercised *de facto* control over [redacted], the ALJ relied on his findings that [redacted] was not a sophisticated investor and lacked the general investment knowledge to control his account, and that [redacted] would not have traded his account without being contacted first by Konner and without Konner's recommendation.

A. Contrary to the Court's Formulation, De Facto Control in the Churning Context Entails Consideration of Many Issues.

The concept of *de facto* control in the context of a churning case is well-established. Thus, in *In re J.W. Barclay & Co.*, SEC Initial Dec. No. 239 at 18, 2003 WL 22415736 (Oct. 23, 2003), the court stated: "The touchstone [of *de facto* control] is whether or not the customer has sufficient intelligence and understanding to evaluate the broker's recommendations and to reject one when he thinks it is unsuitable." Further, a client retains control of his account if he has

enough financial expertise to determine his own best interests, even if he consents to the broker's management of the account. The fact that a client follows the advice of his broker does not in itself establish control. *See In re IFG Network Sec., Inc.,* S.E.C. Initial Dec. Rel. No. 273, at 40-41 (Feb. 10, 2005). Indeed, a broker has de facto control only "if his customer is unable to evaluate his recommendations and to exercise an independent judgment." *Follansebee v. Davis, Skaggs & Co.*, 681 F.2d 673, 677 (9th Cir. 1982). As the Ninth Circuit said:

> That is not to say, however, that a nonprofessional investor who usually follows the advice of his broker is not in control of his account. No one is likely to form a continuing relationship with a broker unless he trusts the broker and has faith in his financial judgment. Usually the broker will have much greater access to financial information than the customer and will have the support of investigative and research facilities. Such a customer will be expected usually to accept the recommendations of the broker or to disassociate himself from that broker and find someone else in whom he has more confidence.
>
> The touchstone is whether or not the customer has sufficient intelligence and understanding to evaluate the broker's recommendations and to reject one when he thinks it unsuitable....
>
> As long as the customer has the capacity to exercise the final right to say 'yes' or 'no,' the customer controls the account.

Id. at 677-78. Furthermore, the absence of broker control is evident where the client in some instances declines to follow the broker's suggestions or generates investment ideas independently. Such actions are "completely inconsistent with dependence upon the broker and with the absence of independent evaluations [of the broker's] recommendations." *Id.*

B. [redacted]'s Purported Lack of Sophistication and Modest Investment Knowledge, and the Fact that Konner Made Recommendations that [redacted] Accepted, is not Tantamount to Broker Control, Especially in Light of the Substantial Contrary Evidence.

The Law Judge's analysis on the issue of control is overly simplistic and ignores the weight of the evidence, which demonstrably establishes that [redacted] was ready, willing

and able to invest aggressively with Jason Konner, and to allocate a portion of his investment assets to aggressive stock trading.

While [redacted] is not the most sophisticated investor and the lion's share of activity was initiated by Konner, and [redacted] accepted most of Konner's recommendations (but not all; see *infra* at 21), when measured against the weight of the evidence that bears upon the issue of control, these facts do not justify the Law Judge's conclusion.

When he first opened his JP Turner account in July 2007, [redacted] was 55 years old, married and his three children were adults. He graduated from a top college in Iowa and as a farmer for 30 years, he managed the business, dealt with government agencies and banks, and personally prepared his and his business's tax returns. Tr. 1654, 1760-64.

[redacted] had also been investing in the stock market and had dealings with stock brokers since the 1980's. He had numerous investment accounts, including a number of retirement accounts with hundreds of thousands of dollars in assets that he considered to be inviolate and to be handled conservatively as they are needed for his retirement. He had invested in stocks and in mutual funds and had accounts that were conservatively handled. Tr. 1658-61, 1671, 1697, 1747-51, 1753-55.

The Law Judge also acknowledged, but completely discounted, the fact that [redacted] had numerous other accounts, which means in turn that he other brokers to go to if he wanted to pursue a different investment approach or philosophy with any or all of his money, or if he needed information or guidance about how to deal with a broker engaged in conduct he didn't understand or thought was misguided. There is, however, no evidence in the record to suggest that Carlson felt any need to utilize those resources vis-à-vis his account activity at JP Turner.

Indeed, even though he had numerous accounts into which he could have deposited and invested the money generated from some good years in his farming business, [redacted] admittedly made the decision to send some of that money to JP Turner. The reason he did so, as he stated repeatedly throughout the hearing, was because "he wanted to make money." Tr. 1754. No one ever held a gun to his head, no one ever pressured him to do anything, no one suggested that he transfer his retirement funds to JP Turner or that he take any risk at all with those assets. Tr. 1748. (In fact, the record demonstrates [redacted] never sent any of his retirement account money to JP Turner. Tr. 1757.) Instead, knowing full well that he could deposit his farming profits into one of his conservatively managed accounts, Tr. 1752-53, he nonetheless chose to send them to JP Turner, because he believed that the aggressive investing and short-term trading program offered by Jason Konner was for him the best way "to make some money." Tr. 1754. His other brokers were too conservative, and he plainly wanted a different broker who offered what he was not getting from them. Tr. 1754-56.

The evidence also substantiates numerous other facts indicative of the absence of broker control. For example, although [redacted] had no recollection of it (as opposed to it never happened), Konner testified that [redacted] had rejected a number of conservative investment opportunities. The Law Judge unjustifiably rejected Konner's testimony on this point, even though it is 100% consistent with the corroborated testimony that Konner recommended conservative investment ideas to the other customer of his who testified at the hearing, [redacted]. That customer -- whose account was not churned -- confirmed that Konner had recommended conservative investments to him, and admitted he rejected them because that was not what he was looking for from his JP Turner account. Konner said he offered the same investments to both men, and [redacted]'s confirming testimony readily establishes the likelihood

that [redacted] received and rejected conservative investment recommendations. Despite this confirming evidence, the Law Judge accepted [redacted]'s failure to recall over Konner's affirmative testimony bolstered by [redacted]'s corroborating testimony. This credibility determination makes no sense.

The Law Judge also acknowledged, but completely discounted, the fact that [redacted] admitted he initiated at least one investment possibility with Konner (Konner testified that he did so on several occasions), a consideration that must be taken into account in evaluating control for purposes of analyzing the possibility of churning. See *supra* at 9.

Further, the record is clear that [redacted] was never misled and never complained about the level of activity; he admitted being aware of all trades and that he never complained about anything. He was continuously informed about the activity in his account, evident from the exhibits comprising transaction confirmations, monthly account statements detailing all activity during the preceding 30 days, and annual summaries listed on tax documents that were provided before, during and after the so-called churn period. See, e.g., JKX 41-74, 80-83; Tr. 1772, 1832-48. He also acknowledged in writing on multiple occasions that the activity in his account was consistent with his investment objectives, and he affirmed as much when contacted by JP Turner Compliance personnel (see *infra* at 37-38).

Finally, to the extent the Law Judge found that Konner exercised control because [redacted] routinely accepted his broker's stock recommendations, following the advice of a broker is hardly tantamount to broker control. See *Follansebee v. Davis, Skaggs & Co.*, *supra*, 681 F.2d at 677; *In re IFG Network Sec., Inc., supra*, at 40-41.

These facts in combination and viewed in their entirety establish that [redacted] had a presence of mind, *had control*, with respect to the management of his money, his financial affairs

and his brokerage account. However, rather than draw that obvious conclusion, the Law Judge drew from this evidence the exact opposite conclusion, namely, that since [redacted] had a number of conservatively managed accounts, he could not possibly have wanted to engage in aggressive, speculative investing. The many facts established in the record, for which there is little room to disagree based on an assessment of credibility, demonstrate that the ALJ got it wrong. The evidence overwhelmingly establishes the absence of control by the broker, or at a minimum, that the Division failed to establish such control by a preponderance of the evidence. And that warrants dismissal of the charge that Konner churned the [redacted] account.

II. THE SUBSTANTIAL WEIGHT OF THE EVIDENCE ESTABLISHED THAT [redacted]'S INVESTMENT OBJECTIVES WERE SPECULATION AND SHORT-TERM TRADING.

The Law Judge concluded that there was excessive trading in the [redacted] account primarily because [redacted]'s account applications and other forms that he signed contained misstatements and did not accurately reflect his investment objectives and risk tolerance. He concluded from that finding that Konner did not explain what the objectives meant and that incorrect financial information was put on the forms to avoid detection by JP Turner compliance personnel. He was further convinced because during the so-called churn period in 2009 [redacted] expressed a willingness to trade four times per week (or 208 times per year), yet the level of activity was actually higher. Finally, the Law Judge relied upon the analysis of the Division's quantitative expert to support a finding of excessive trading.

A. [redacted]'s Testimony and the Many Documents He Personally Approved Overwhelmingly Demonstrate that the Law Judge's Conclusion About [redacted]'s Investment Objectives was Inconsistent with the Substantial Weight of the Evidence.

Over a period of many years, before he had been led by Division lawyers to believe that he might recover money if Konner were found to have churned his account, see Tr. 1768-70,

[redacted] signed many documents indicating that his investment objectives were Speculation and Short-Term Trading. And despite his best efforts to dissociate from the representations he repeatedly made to JP Turner about his investment objectives, he ultimately acknowledged and stood behind his written representations, admitting that he appeared to any observer like someone who wanted to invest in an aggressive manner.

Before turning to the many documents that [redacted] signed and otherwise acknowledged, and what those documents indicate about [redacted]'s risk tolerance and investment objectives, it is crucial to note how this witness, whom the Law Judge found to be eminently credible, stood behind the validity of documents that he signed:

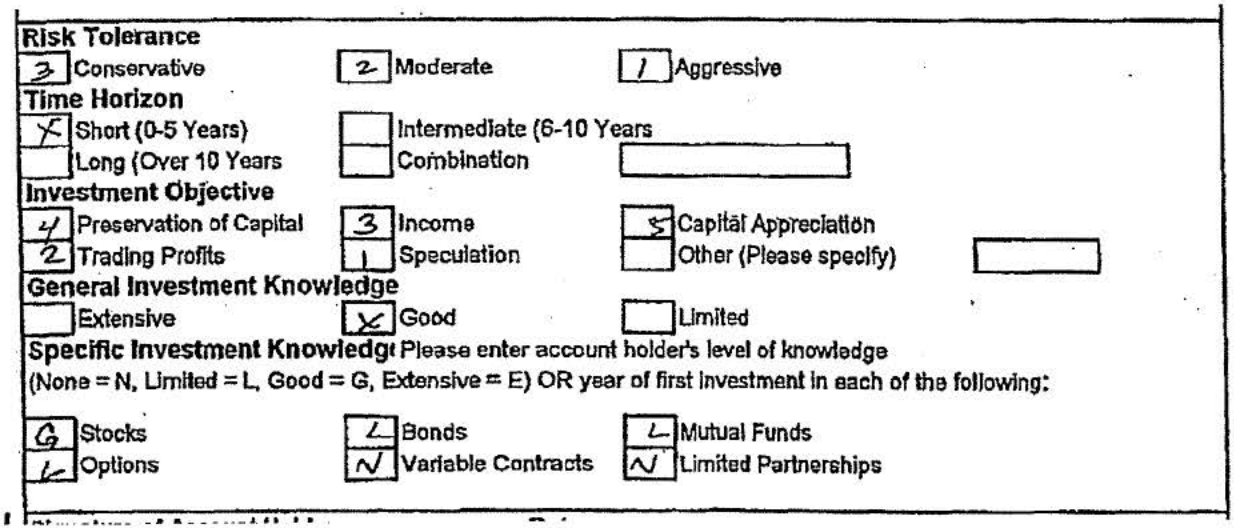
> *Q: [redacted], does your signature mean anything to you?*
>
> *A: Yes.*
>
> *Q: Is it something people can rely upon? Or is it just worth the paper it's written on?*
>
> *A: I wouldn't know how to answer that question.*
>
> *Q: Well, when you sign your name on a document, do you intend to mislead or misrepresent or misstate anything?*
>
> *A: I would assume not.*
>
> *Q: And when you're dealing with people in business and they get a document with your signature, do you want them to believe that what you signed is truthful – whatever it is your signing represents a truthful and accurate statement?*
>
> *A: Yes.*
>
> *Q: And wouldn't you, in fact, be disappointed if people didn't think you were a man whose signature meant something?*
>
> *A: Yes.*
>
> *Q: And that's because, when [redacted] signs something, he means it, and you expect people to take that at face value?*
>
> *A: Yes.*

Tr. 1829-30. The position taken by the Law Judge, that [redacted] did not know what he was doing when he signed these various forms over a multi-year period, is baseless, and the conflicted witness's testimony that would support that position is not credible. After all, [redacted] 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. Tr. 1793-1800. The testimony that these were the only documents he never read, coming after being told by the Division's lawyers that a win for them might translate into a financial win for him (Tr. 1768-70), is just not credible. Indeed, he admitted that no one forced him to do anything, and that it would not have been hard to revise the form or insert correct information. Tr. 1802.

At the end, [redacted] was simply unwilling to deny the obvious. He knew that these forms all mattered, and he would not at the end of the day deny that they did. It was thus no surprise that John Pinto, the Division's supervisory expert who has a long history of working for the NASD and FINRA, admitted that broker-dealers may routinely rely on written representations from their clients. Tr. 3573-74. Oddly, this testimony from [redacted] quoted above was ignored by the Law Judge, even as he ruminated about [redacted]s overall credibility. This failure demonstrates precisely how the Law Judge misunderstood and misapplied the weight of the evidence.

The substance of the documents signed and initialed by [redacted] speak volumes:

(1) In April 2008, [redacted] initialed and signed an Account Update Form (JKX 32) which set forth his account objectives as follows:



Risk Tolerance
3 Conservative | 2 Moderate | 1 Aggressive

Time Horizon
X Short (0-5 Years) | Intermediate (6-10 Years
Long (Over 10 Years | Combination

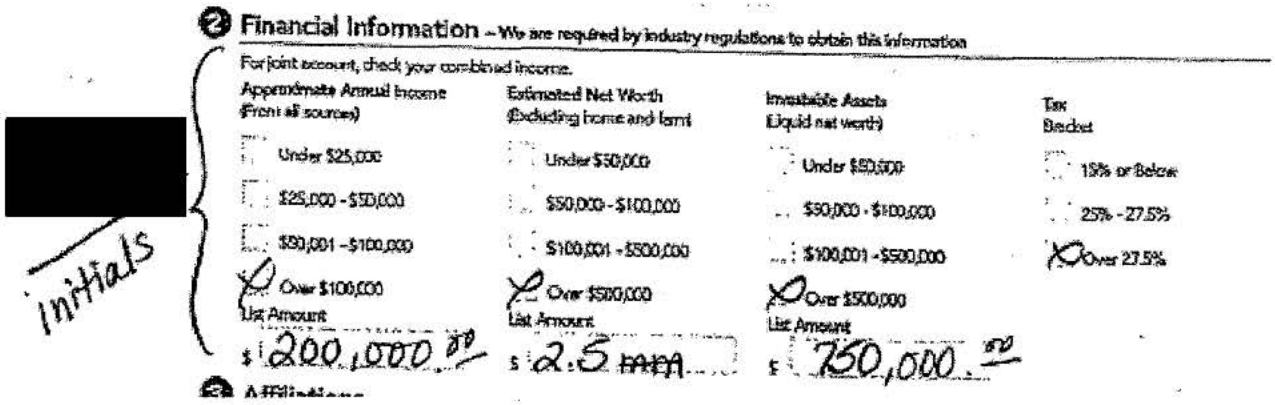
Investment Objective
4 Preservation of Capital | 3 Income | 5 Capital Appreciation
2 Trading Profits | 1 Speculation | Other (Please specify)

General Investment Knowledge
Extensive | X Good | Limited

Specific Investment Knowledge Please enter account holder's level of knowledge
(None = N, Limited = L, Good = G, Extensive = E) OR year of first investment in each of the following:

G Stocks | L Bonds | L Mutual Funds
L Options | N Variable Contracts | N Limited Partnerships

(2) In May 2008, Carlson initialed a section of margin account application (JKX 33) which disclosed his net worth:



Financial Information – We are required by industry regulations to obtain this information

For joint account, check your combined income.

Approximate Annual Income (From all sources)	Estimated Net Worth (Excluding home and farm)	Investable Assets (Liquid net worth)	Tax Bracket
Under $25,000	Under $50,000	Under $50,000	15% or Below
$25,000 - $50,000	$50,000 - $100,000	$50,000 - $100,000	25% - 27.5%
$50,001 - $100,000	$100,001 - $500,000	$100,001 - $500,000	X Over 27.5%
X Over $100,000	X Over $500,000	X Over $500,000	
List Amount $ 200,000.00	List Amount $ 2.5 MM	List Amount $ 750,000.00	

[redacted] Initials

(3) In March 2009, during the so-called churn period, [redacted] signed an Active Account Suitability Form (JKX 34) which disclosed important information about active trading and also set forth his account objectives:

ACTIVE ACCOUNT SUITABILITY SUPPLEMENT

PLEASE READ CAREFULLY

J.P. Turner & Company, L.L.C. ("J.P. Turner") wants to make sure that you understand active trading and that you are willing and financially able to take greater risks in using such a strategy. Active trading can involve a higher degrees of risk, increased costs and is suitable only for risk tolerant investors.

4Q'08 spec

What You Should Know About Active Trading

- Active trading in the securities markets can involve a higher degree of risk and may not be suitable for all investors and, accordingly, should be entered into only by investors who understand the nature of the risk involved and are financially capable to sustain a loss of part or all of their capital.
- Due to the higher degree of activity, overall commissions on your account may tend to be greater than a buy and hold strategy.
- Tax consequences can be affected due to shorter-term buys and sells. You may want to consult your tax accountant.
- Many active traders may use stop orders*. A stop order will not necessarily guarantee against a greater loss than the stop price that was entered. For example, ABC Co. stock may be purchased at $40 a share. It is then decided to place a stop order at $30 a share. If it reaches the stop price it would become a market order. However, if the stock were to halt trading to announce an adverse news event and opened trading at $20, it is deemed to have traded through the stop price and would become a market order at that time. Due to the nature of shorter term or more active trading strategies, higher degrees of risk may be associated with these types of activities.
- Your portfolio value may tend to be more volatile with shorter-term or more active trading.
- High-risk tolerance and investment objectives consistent with high-risk investing are appropriate to an active account. In addition, a customer who is frequently trading the market should not have short-term needs for the funds invested in an equity account.

I have read and understand the Active Account Suitability Supplement Agreement as required. I am aware of the liabilities which may be incurred through active trading.

[redacted] 3-23-09
Date

Customer Signature (if Joint Account) *Date*

Employer: Self Occupation: Farmer

Estimated Annual Income (all sources)*: 200K Net Worth*: 2.5mm

Liquid Net Worth (all assets readily convertible to cash)*: 750000

INVESTMENT OBJECTIVES: * *(Please CIRCLE all that may apply to your account)* :

Safety of Principal | Income | Growth | Trading Profits | (Speculation) | (Short-Term Trading)

Prior Investment Experience?(Y/N) Y # Years 20 Prior Margin Experience?(Y/N) Y # Years 5

Size of Trades $ 200,000 Prior Options Experience? *(Yes/No)* No #Years ____ Tax Status ST?

Frequency of Trades 4 a week
(Approximate # times Daily/Weekly/Monthly)

(4) In March 2010, less than two months after the end of the so-called churn period, [redacted] signed another Active Account Suitability Form (JKX 35) which disclosed again important information about active trading and also set forth his account objectives:

ACTIVE ACCOUNT SUITABILITY SUPPLEMENT
PLEASE READ CAREFULLY

J.P. Turner & Company, L.L.C. ("J.P. Turner") wants to make sure that you understand active trading and that you are willing and financially able to take greater risks in using such a strategy. Active trading can involve a higher degree of risk, increased costs and is suitable only for risk tolerant investors.

What You Should Know About Active Trading

- Active trading in the securities markets can involve a higher degree of risk and may not be suitable for all investors and, accordingly, should be entered into only by investors who understand the nature of the risk involved and are financially capable to sustain a loss of part or all of their capital.
- Due to the higher degree of activity, overall commissions on your account may tend to be greater than a buy and hold strategy.
- Tax consequences can be affected due to shorter-term buys and sells. You may want to consult your tax accountant.
- Many active traders may use stop orders*. A stop order will not necessarily guarantee against a greater loss than the stop price that was entered. For example, ABC Co. stock may be purchased at $40 a share. It is then decided to place a stop order at $30 a share. If it reaches the stop price it would become a market order. However, if the stock were to halt trading to announce an adverse news event and opened trading at $20, it is deemed to have traded through the stop price and would become a market order at that time. Due to the nature of shorter term or more active trading strategies, higher degrees of risk may be associated with these types of activities.
- Your portfolio value may tend to be more volatile with shorter-term or more active trading.
- High-risk tolerance and investment objectives consistent with high-risk investing are appropriate to an active account. In addition, a customer who is frequently trading the market should not have short-term needs for the funds invested in an equity account.

UPA

I have read and understand the Active Account Suitability Supplement Agreement as required. I am aware of the liabilities which may be incurred through active trading.

[redacted] Date 2-21-10

Customer Signature (If Joint Account) _____ Date _____

Account Number: JPK726010

The record contains other examples of such documents. See, e.g., JKX 36 (January 2011); JKX 37 (August 2011).

[redacted] is a farmer-businessman whose business generated a substantial amount of free cash flow. For this money – his non-retirement assets – by word and deed he rejected a conservative approach to investing. His goal, his investment objective, was simple and he stated it in simple terms: "I told him I wanted to make money." Tr. 1672; see Tr. 1673, 1674, 1685. Plainly, by that shorthand he was not saying "earn me the same modest return I get from my other conservative brokers." But of course "make me some money" was not one of the options

on the account documents. Again and again, he signed his name to account documents, be they new account forms, or Active Account Supplements and Questionnaires, in which he acknowledged that his investment objectives were Speculation and Trading Profits. Never did "Preservation of Capital" or "Income" come ahead of Speculation and Trading Profits, and nowhere in the record is there evidence that either of those two conservative investment objectives were ones that [redacted] sought to further in his JP Turner account, and this is all recorded on the documents excerpted above (JKX 31, 32, 34, 35, 36, and 37). The contemporaneous record establishes time and again over a period of years, in fact whenever [redacted] needed to restate in writing what his investment objectives were, that they were Speculation and Trading Profits. And he understood that by signing and/or initialing those documents he was affirming the accuracy of the information on the documents, Tr. 1774, 1781, 1805-06, 1809-13, 1819-30.

[redacted] acknowledged in writing – and at the hearing despite his efforts to walk away from the obvious -- that his account objectives were the most aggressive on the investment objectives spectrum. He also well understood that those objectives entailed financial risk. Tr. 1778-79. He also admitted that he was familiar with the concept of speculating, and that he was telling JP Turner that he was willing to speculate. Tr. 1787-88.

[redacted] nest egg – his retirement funds – was held safely in a number of 401k accounts; he never sent any of those assets to JP Turner and held them sacrosanct. However, when he had excess cash to invest, he did not place it with any of the conservative brokers that he knew and worked with, and from whom he expected a modest rate of return. Instead, he invested with JP Turner, hoping that they could make him substantial profits. His actions comport 100% with the representations that he made about his investment objectives.

Finally, in concluding that [redacted]'s investment objectives had to be conservative and that he was merely duped by Konner into signing a plethora of documents indicating otherwise, the Law Judge failed to give proper weight to a crucial fact (and a crucial error) established during the cross-examination of the Division's so-called quantitative expert, James Dempsey. Mr. Dempsey's "expert" report, however, did nothing more that attempt to put a patina of independence on the work of the Division's staff, and in so doing he dutifully reported that [redacted] incurred a net loss of $50,000 during the churn period. But as revealed during the hearing, the investment results during the churn period were *positive*, not negative: [redacted] account generated a profit in 2009, and this explains why [redacted] was on board with Konner's aggressive, short-term trading program. It was the possibility of a potentially large investment gain. Unfortunately, both the Division and its putative expert made an enormous mistake in analyzing the results of activity in the [redacted] account during the so-called churn period, a fact about which the Law Judge was silent and seemingly unconcerned.

Specifically, on cross-examination, Dempsey first admitted that his starting point was the Division staff's analysis, and that the work he was paid to do largely consisted of verifying the staff's conclusions. However, the error made by the staff, and not detected by Dempsey, concerned the treatment in September 2009 of the deposit into [redacted]'s account of shares of Quantum Fuel Systems Technologies Worldwide, Inc. stock that Carlson had bought in a PIPE transaction at JP Turner earlier in 2009. Instead of recognizing that the $325,000 recorded value of the stock consisted of a $150,000 investment and a $175,000 profit (a gain about which [redacted] was "ecstatic," see Tr. 4390), Dempsey "blessed" the Division's error by recording it all as an investment of new client money. By making that mistake – calling an investment profit new client money – Dempsey's report wrongly concludes that during the period in question the

[redacted] account had a net loss of $54,199. However, if the transaction had been properly treated, there would have been a gain during the period in excess of $100,000. Tr. 3176-84.

[redacted] saw that over the course of a very difficult year in which the U.S. economy was just starting to recover from the Great Recession, Konner had obtained a significant investment profit for [redacted] in his JP Turner account. The big gain he was looking for had come through, and that was why he was willing to take risk.

B. A Broader Review of All of the Evidence Undeniably Rebuts The Findings that [redacted] Investment Objectives were Not Conservative and that his Account was Excessively Traded.

All of [redacted] conduct – that is, what occurred before he heard from the Division's lawyers about a possible financial recovery (Tr. 1769-70) – is consistent with his oft-declared investment objectives and more importantly with the actions of a client willing to invest aggressively in order to generate significant investment profits:

a) He repeatedly furnished "new" money to pay for additional stock purchases, all drawn from his personal checking account, many for tens of thousands of dollars. See JKX 78. When asked about these further investments, [redacted] repeatedly said he knew what he was doing with his money, it was what he wanted to be doing with his money, and that aside from results, he had no regrets. Tr. 1868.

b) [redacted] invested $150,000 in the Quantum PIPE offering (JKX 76 and 77), only to regret that he hadn't invested more. In making those speculative investments, [redacted] affirmed that he was an accredited investor, yet another representation of being a high income/high net worth investor. Tr. 1882. When this account generated a return in excess of 100% in just a few months, he told Konner that this was the kind of outsized gain he was looking for. Tr. 4381. Indeed, as [redacted] admitted, the reason he opened this account and did not invest more money in his accounts in Iowa was because he was hoping to have an opportunity to "hit some things big." Tr. 1918-19.

c) [redacted] rejected Konner's recommendations to establish an anchor in his account in light of the volatile markets they were dealing with in 2008-09. Each conservative recommendation, such as the American Capital real estate investment trust, certain mutual funds, and other conservative investments, was rejected by the client, evidencing an independent mind and the absence of broker control. Tr. 4379-82.

d) [redacted] from time to time suggested stocks to invest in, but Konner said take them to a discount broker – [redacted] should not have to pay the full commission if the idea was his own. Tr. 0400-01. [redacted] admitted that he did from time to time independently develop ideas for possible investments. Tr. 1749-50.

e) [redacted] admitted he was not unhappy with Konner's handling of the account, and in fact remained his client for more than two years after the so-called churn period ended, and then continued to remain a JP Turner client after Konner left the company. Tr. 1758. [redacted] frankly admitted that after all those years, after all that activity, after all the commissions, he was only unhappy that his account was not profitable.

The Law Judge failed to give due consideration to these facts. If he had, it would be clear from the totality of the evidence that the investment objectives for the [redacted] account were not conservative but were, as indicated on the forms signed by [redacted], speculative in nature.

III. THE WEIGHT OF THE EVIDENCE DOES NOT SUPPORT A FINDING OF EXCESSIVE TRADING BECAUSE THE [redacted] ACCOUNT WAS DESIGNED FOR SHORT-TERM TRADING AND ITS PRIMARY INVESTMENT OBJECTIVE WAS SPECULATION.

A. The Question of Excessive Trading Must be Analyzed In the Context of an Account Designed for Short-Term, Speculative Trading.

Proper analysis of whether an account was excessively traded requires consideration of multiple factors, and no simple quantitative analysis is applicable to all clients and accounts: "No turnover rate is universally recognized as determinative of churning." *In re J.W. Barclay & Co.*, SEC Initial Dec. No. 239, at 19, 2003 WL 22415736 (Oct. 23, 2003). An inquiry into whether an account was excessively traded should focus on "whether the volume of transactions, considered in light of the nature and objectives of the account, was so excessive as to indicate a purpose on the part of the broker to derive a profit for himself at the expense of the customer." *Costello v. Oppenheimer & Co.*, 711 F.2d 1361, 1368 (7th Cir. 1983). The first step in this analysis is to evaluate the client's investment goals, as they provide the standard for evaluating account activity.

Investors who wish to invest aggressively will often require a much higher frequency of trading in order to satisfy their investment objectives. *E.g., Mitchell v. Ainbinder*, 214 Fed. App'x. 565, 568 (6th Cir. 2007). "Of course, if a customer wants to speculate, the portfolio turnover rate could be unlimited." *In re J.W. Barclay & Co., supra*, at 18. And "if the goals of an investor are aggressive or speculative, as opposed to conservative, it is easier to conclude that a given course of trading has not been excessive." *Costello, supra,* 711 F.2d at 1368, *citing Marshak v. Blyth Eastman Dillon & Co., Inc.*, 413 F. Supp. 377, 379-80 (N.D. Okla. 1975) (no liability where plaintiff's stated objective was "quick short-term profits" ... "We wanted profits").

As explained below, *infra* at 32-33, the weight of the evidence plainly shows that Konner geared his business to clients looking to obtain profits through short-term trading, investors who are willing and able to bear the risk of loss from such trading. Such varied circumstances – purpose of account, investor objectives and more – bear heavily on whether frequent trading and high turnover are or are not appropriate. The weight of the evidence further demonstrates that [redacted], by all objective measures, plainly intended to use his JPT account, funded with money he could afford to place at risk, for speculative and aggressive trading in the hope of generating high returns. *See, e.g., Follansebee v. Davis, Skaggs & Co.*, 681 F.2d 673, 674-75 (9th Cir. 1982) (the proper comparison was between the actual trading activity and the investment objective listed on the new account form, even when written by the broker; broker justifiably relied on a false statement by the plaintiff regarding his finances and suitability for an investment).

The Law Judge failed to take into account all of these considerations, as well as the extreme and unusual market conditions prevailing during much of the relevant time period, 2009. For at least the first part of that year, the financial and stock markets were buffeted by extreme

volatility, and all investors faced the added risk associated with the Great Recession. Some investors made money during this period, many did not, but virtually all U.S. investors knew there was a significant amount of risk involved.

B. The Inferences Drawn by the Law Judge About Excessive Trading from Evidence Concerning the Apparently Fluctuating Nature of [redacted]'s Net Worth and Income on Various Account Documents is Unjustified, Unwarranted, Unreasonable and Ignores the Realities of the Brokerage Business.

The Law Judge was evidently disturbed by the fact that the amounts listed on multiple [redacted] account documents, some pre-completed by JPT staff, some not, varied significantly. He concluded that the higher amounts on those forms were wrong, and that they significantly overstated [redacted]'s financial condition. He characterized those variances as "inexplicable," and cited this as one of the main reasons why he concluded the account was excessively traded, as well as why he concluded that Konner acted with scienter (see *infra* at 29).

The Court's finding is unsupported by the substantial weight of the evidence, fairly and reasonably considered in light of the practicalities of the brokerage business.

When [redacted] first opened his account, he reported that his annual income was $100,000, his net worth was $700,000, and his investment assets were $200,000. See JKX 31. When he decided to embark in 2008 and 2009 upon a more active trading strategy and to use margin, he was more forthcoming, not only sending more money to invest (see, e.g., JKX 78, a series of checks sent by [redacted] to JP Turner to pay for securities purchases, including five from 2009 for a total of $250,000), but by noting on a number of documents an annual income of about $200,000, an estimated net worth of approximately $2-2.5 million, and investment assets of $750,000. See JKX 32, 33, 34 (Account Update Form, Margin Account Application, Active Account Suitability Questionnaire).

In finding the changes on the [redacted] documents "inexplicable," the Law Judge failed to recognize that there are very ordinary and reasonable explanations for these discrepancies. First, Konner was asked again and again if he knew that the information set forth on client documents was true or not, and each time he answered "I only knew what they told me" and that he trusted his clients to be truthful with him. See Tr. 0432-35, 4331-32, 4358 (ability to get information is based on what clients tell him). No effort is made, and none is required, to verify that the client is being honest and is providing accurate information. So all Konner knew was that [redacted] repeatedly acknowledged the accuracy of his financial situation and that it reflected a significant level of wealth. Tr. 1781. True, the numbers varied over the course of several years, in part because they were changing, in part because there was some confusion as to which category some assets went into (liquid assets vs. stocks vs. other assets), but the big picture was that [redacted] [redacted] on multiple occasions confirmed in writing that he had a net worth in the seven figures and a six-figure income. And he acknowledged under oath an awareness that people would rely on the figures that he had represented. Tr. 1829-30.

Second, the varying information on [redacted]'s forms also reflects a truism known to brokers: clients often do not reveal the full extent of their net worth at the beginning, when they are just getting to know their broker. Tr. 0403, 0464-65. More details, especially about the client's wealth, are often made available as time goes by. Tr. 0404, 0465.

Based on this, the conclusion drawn from the information on the forms, that the account was excessively traded, is unjustifiable and unwarranted.

C. The Inference Drawn by the Law Judge About Excessive Trading from Evidence Regarding the Number of Trades [redacted] Expressly Acknowledged is Unreasonable.

The Law Judge further justified his conclusion that there was excessive trading in the [redacted] account because, in March 2009, roughly the half-way point in [redacted]'s dealings with

JP Turner and Jason Konner, [redacted] expressed in writing (JKX 34) a willingness to trade 4 times per week (or 208 times per year), but the level of activity was actually higher.

The Law Judge's reliance on this number as a basis for finding excessive trading is problematic in numerous respects. First, there is no evidence to suggest that this number was ever intended to be anything more than a back-of-the-envelope approximation, not a well-thought out quantification of what the customer definitively believed was an acceptable number of trades in any given week. But more importantly, the reliance placed on this figure as a hard fast measure of excessive trading cannot be reconciled with, and is inconsistent with, the Law Judge's critical view of the value of JPT documents signed and initialed by [redacted]. On the one hand, when it comes to stated investment objectives, he concluded that [redacted] did not understand the documents he was signing and that they were rife with broker-driven misstatements. But that view takes a 180-degree turn, as the Law Judge would treat the little jotting of "4 per week" as definitive, correct, and the final nail in the coffin of Jason Konner's brokerage career. The Law Judge's analysis is inconsistent and his reliance upon this figure is nothing short of unreasonable cherry-picking.[2]

D. [redacted]'s Conduct Evidenced A Clear Awareness That His Account Was Actively Traded, And That There Was A High Cost Associated With That Activity.

Aside from his numerous written acknowledgements about account activity and aggressive investment objectives, the record is replete with other acknowledgements by [redacted] of the level of activity in his account and the associated cost of that activity. Plainly, he knew what was going on and accepted it.

[2] The Law Judge also ignored a critical admission from the second of the Division's expert witnesses, long-time industry veteran John Pinto, who conceded from this "4 per week" affirmation by the client that this indicated a certain awareness by [redacted] of the significant level of activity in his account. Tr. 3576-78.

For example, he never complained about Jason Konner, or about the activity, despite having a clear understanding of the commissions he was paying. Tr. 1867. [redacted] admitted that he had no problem with the mail, and had received all of the transaction confirmations for his account ((Tr. 1772; JKX 80-83), and that he could readily see what the commission was or calculate it based on the markup or markdown that appeared on the confirmations. Tr. 1832-48. He admitted he was aware that there was a commission on every trade (Tr. 1846).

[redacted] also was plainly aware of the turnover of his account assets by early 2009, when he received his Form 1099 from JP Turner for tax year 2008 (JKX 38). From the dollar value of securities bought in his account in 2008 -- $5,856,000 – he had become aware of the turnover. And knowing that he was paying a commission each time, he saw no need to either transfer out of JP Turner or tell his broker at that time to change anything. Here again, his concern was only net performance – where you finish, not how you get there. Tr. 1855-63. Indeed, even after seeing the level of activity in 2008, [redacted] continued to fund new purchases in the account in 2009. Tr. 1858; JKX 78. And his ability to write checks as he made additional investments confirmed what he had told Konner about the size of his net worth. Tr. 4364.

These facts were apparently all ignored by the Law Judge; they certainly did not figure into his unjustifiable conclusion about excessive trading.

E. The Law Judge Failed to Properly Recognize that the Analysis Provided by the Division's Quantitative Expert Has No Relevance In Evaluating the [redacted] Account.

Finally, in concluding that the [redacted] account was excessively traded, the Law Judge referred to the analysis of Division expert witness Louis Dempsey, who was proffered solely to address the quantitative element of excessive trading.[3] But even in the limited area for which he

[3] Dempsey did not at all speak to the qualitative issues of churning -- broker control, investment objectives, scienter, etc. Tr. 3160-61, 3168-70. Indeed, the limited nature of Dempsey's role was hardly surprising; he has never qualified to testify as an expert witness in a litigated proceeding about the qualitative aspects of churning. Tr. 3116-

was proffered, Mr. Dempsey's testimony cannot reasonably be relied upon for two principal reasons: (1) for purposes of assessing whether there was excessive trading, he failed to take into account the nature of the account or its investment objectives; and (2) with respect to the [redacted] account, Dempsey made very serious errors which had the effect of grossly distorting the financial results in that account during the so-called churn period (*supra* at 20-21).

Mr. Dempsey conceded that there are differences in what clients want to do with their brokerage accounts, and that some want to invest conservatively while others want to invest aggressively, or speculatively, through short-term trading. Tr. 3163-64. However, in describing benchmarks for the turnover ratio and cost equity factor which are often used to assess whether an account has been churned, he was unable to say whether there were any established benchmarks useful for analyzing the level of activity for a risk-tolerant investor whose account was set up for short-term trading, as opposed to a conservative investor. Tr. 3201-03. In light of that concession, and given the fact that the [redacted] account was designed to be an aggressive, short-term trading account, any reliance upon turnover ratios and other indicia of excessive trading used to evaluate a conservative investment account must be discarded, for there is no evidence that they have any meaning in the context at issue *in this case*.

As such, the Law Judge erred in accepting the validity of Dempsey's quantitative analysis. The complete and utter failure to address the numbers in light of the actual account objectives, compounded by the massive error in calculating profit or loss in the account, renders the figures useless and not a justifiable ground on which to find excessive trading.

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22. The Division's other expert witness, John Pinto, confirmed on cross-examination that he was not offering any opinion about whether Konner churned the [redacted] account. Tr. 3559-61, 3581.

IV. THE SUBSTANTIAL WEIGHT OF THE EVIDENCE DOES NOT SUPPORT A FINDING THAT KONNER ACTED WITH SCIENTER.

The Law Judge concluded that Konner acted with scienter primarily because Konner provided pre-filled out forms relating to [redacted]'s account and represented that the information on those firms did not mean anything. The Law Judge was also convinced that Konner acted with scienter because Konner's testimony concerning the amount of [redacted]n's net worth, as expressed on various [redacted] account documents, "was strikingly inconsistent," thus demonstrating that Konner was making it up as he went along and that the numbers were made up when placed on the forms.

Scienter is defined as a mental state embracing the intent to deceive, manipulate or defraud. *E.g.*, *Rizek v. S.E.C.,* 215 F.3d 157, 162 (1st Cir. 2000). To prove churning, scienter is required, and a broker must have either fraudulent intent or a willful or reckless disregard for the interests of his clients. *In re Brian J. Kelly*, 2008 WL 5273298 (NASDR) (Dec. 16, 2008). And while it is true that scienter may be implied through the actions of the broker, there must be sufficient evidence that he possessed the requisite mental state. Churning will not exist in situations where the broker's investment activity results from negligence. *E.g., S.E.C. v. Ficken*, 546 F.3d 45, 47 (1st Cir. 2008).

The case of *Hotmar v. Lowell H. Listrom & Co.*, 808 F.2d 1384, 1386 (10th Cir. 1987), provides an example of how high rates of turnover and the like do not in and of itself demonstrate scienter in a churning context. Hotmar was an aggressive investor who had already experienced significant losses prior to the alleged period of churning. Hotmar was "prepared to take risks and hopefully recoup his prior losses," and as a result, his portfolio consisted of many speculative investments with a high turnover rate. The court in *Hotmar* noted -- in a case much like this one -- that where there was (a) no question that confirmation slips were sent which

described each transaction, (b) where monthly statements which detailed the overall account performance were sent, (c) where there was no evidence that the broker withheld any information, and (d) where there is no evidence to suggest any actual deception surrounding the trades, it will be difficult if not impossible to prove the existence of scienter, even if the client suffers substantial losses and the broker received substantial commissions.

The uncontested evidence presented at hearing is consistent with what the four factors identified above in the *Hotmar* case, demonstrating the absence of scienter.

Moreover, in evaluating whether or not Konner acted with fraudulent intent or a willful or reckless disregard for [redacted]s interests, it is imperative to take into account what [redacted] was looking for fro m his JPT account and from the money he invested at JP Turner. The weight of the evidence establishes not that Mr. Konner sought to take advantage of the situation for his own gain or that he acted with an utter disregard of the interests of his client. Instead, the record demonstrates that [redacted] was willing to invest aggressively and was fully on board with that. There was nothing misleading or deceptive. Rather, there was a program, it entailed high risk trading, the risks were disclosed, the costs were known, and the client proceeded voluntarily and deliberately. There was no fraudulent intent.

With respect to the Law Judge's reliance on the fact that account forms furnished to Mr. Carlson were pre-filled out either by Konner or by JP Turner staff, the inference drawn from that fact in unwarranted, unjustified, and illogical, and as such was not supported by the evidence. As explained by John Williams (Tr. 3796-97), the only independent voice to address this issue, pre-filling out forms was an accommodation, as a service, to customers who wanted the work done by someone else, and to ensure the form is accurate and filled out completely.

And with respect to the Law Judge's reliance on the varying income and net worth figures on [redacted] account documents as evidence of scienter, we note that there are clear reasons why that information evolved over the course of several years. See *supra* at 25. To infer scienter based on that is unwarranted.

The totality of the circumstances here demonstrates that the Law Judge's conclusion that the Division proved by a preponderance of the evidence that Konner acted with scienter is wrong, and for that reason, the charge against Konner should be dismissed. Indeed, as the Law Judge said in dismissing the charge concerning Konner's customer [redacted], "That Konner pursued a speculative and short-term trading strategy is also not evidence of scienter, unless it is knowingly inconsistent with the customer's objectives." Initial Decision at 112. As such, once recognized that [redacted]'s objectives were not conservative, the predicate for the scienter conclusion dissipates. Konner did not act with a knowing recklessness or intent to defraud.

V. THE LAW JUDGE FAILED TO GIVE ADEQUATE AND REASONABLE CONSIDERATION TO SEVERAL STRANDS OF EVIDENCE THAT UNDERMINE MOST OF THE KEY CONCLUSIONS THAT LED TO A FINDING OF CHURNING.

A. [redacted]s Admitted Interest in a Win for the Division, Especially in Light of his Inconsistent Testimony, Established that He Was not a Credible Witness as Found by the Law Judge.

What [redacted] told Division lawyers prior to the hearing and testified to at the hearing in 2013 was diametrically opposite to what he said and did in 2008 and 2009 when he had direct dealings with Konner and JP Turner. Despite that, the Law Judge concluded that [redacted] was a credible witness in all respects save one: when it came to his testimony that he was a man of his word, that his signature on documents was his way of telling the world that what he was signing was truthful. See *supra* at 14. But the Law Judge offered no reason why the

witness he relied upon to buttress his conclusions was unreliable only where the sworn testimony was inconsistent with the court's ruling.

[redacted] admitted he was told by Division lawyers that a win for them might translate into a financial win for him (Tr. 1768-70). He also met with Division counsel Shawn Murnahan in Cedar Rapids, Iowa a month before the hearing began for three hours, in a sort of "dress rehearsal" of his testimony. Tr. 1764-66. Division counsel also spoke with [redacted] on a number of other occasions, about his testimony, but he steadfastly refused to speak with Konner's counsel. Tr. 1767-71. True or not, [redacted] felt he had some "skin in the game," thereby tainting his credibility, good body language and stolid Midwestern demeanor notwithstanding. His story repeatedly flip-flopped, evidence the ALJ was unjustifiably willing to ignore, but yet the very reason to reject relying upon such testimony to destroy a man's career.

B. The Law Judge Ignored that Konner's Business Model was to Focus on Investors Such as [redacted] Willing to Pursue Aggressive Trading with a Small Portion of Their Net Worth.

Unjustifiably short shrift was given by the Law Judge to the kind of brokerage business that Konner was looking to do at JP Turner, and the fact that [redacted] fell squarely within the category of clients with whom Konner was looking to do business.

Jason Konner has been a successful broker for almost twenty years, supporting his wife, two young daughters and numerous members of an extended family. Tr. 4408, 4412. During the hearing, he made two points quite clearly. First, there is a particular type of business that he likes to do: aggressive, short-term trading. Second, recognizing that this type of investment activity is *not* suitable for all investors, he will do business only with certain investors.

Specifically, Konner has focused on developing brokerage relationships with high net worth individuals interested in deploying a small portion of their liquid assets in short-term,

speculative trading. In other words, his business is geared toward clients who have the financial wherewithal, and the personal desire and inclination, to use a portion of their money to invest aggressively. He knows that his approach is not geared to those for whom the money placed with him would constitute an appreciable part of their life savings, their nest egg, or assets that might be required for current or future needs or contingencies for themselves or their families. See Tr. 4355-57, 4419, 4425-26, 4438-39. Konner repeatedly indicated that his standard practice was to tell clients about the risks associated with the type of investing he specialized in and to make sure they understood what he told them. He emphatically acknowledged that he did not want as a client the proverbial "little old lady" who depended upon her investments and the income drawn therefrom to pay for basic living expenses. Tr. 4414. As Konner said, he was looking for:

> "investors that want to invest a small portion of their liquid monies in order to speculate the market, not using the nest egg, as you guys would put it. I was looking for people that wanted to trade the market the way I like trading the market, trying to find the next big thing."

Tr. 4352. He acknowledged that not all investors were right for him, and that before he started with a client, he needed to make a match between what they wanted and what he offered. Tr. 4354. And finally, he noted that he was not looking to manage anyone's complete portfolio, just that portion for which they were comfortable taking on additional risk and making speculative investments. Tr. 4356-57. He testified that he was looking for people with the mind set to speculate, and he always assessed a prospective client's suitability for aggressive trading. Tr. 325, 372-73.

Because he understands the limits of what he wants to do and with whom he is going to do it, Konner has successfully navigated for twenty years through the shoals of high risk stock market investing in volatile and dangerous markets: no client has ever accused him in an arbitration, civil lawsuit or even customer complaint of misconduct in the handling of their

account. Tr. 4355.[4] Certainly, [redacted] never complained about Konner, about the trading in his account, about the commissions he paid, or about any other matter. [redacted] fit squarely within the category of investor that Konner was willing to work with, and this very important fact was ignored by the Law Judge. Indeed, the other customer whose account the Division had alleged had been churned, [redacted], also fell squarely within the range of prospective Konner clients. That charge was of course dismissed.

C. The Rejection of the Testimony of Former JP Turner Compliance Officer John Williams, An Independent, Unimpeachable Witness, Which Corroborated All of the Evidence that Undermines The Churning Charge Against Konner, is Unjustifiable.

Co-respondent Bresner called former JP Turner compliance officer John Williams [redacted]) to testify about various issues relating to the supervisory charge against Bresner. However, before Williams was done testifying, his testimony completely corroborated the mounds of evidence that undermine the finding that Konner controlled and churned the Carlson account.

1. The rejection of Williams's testimony by the Law Judge was unwarranted.

The Law Judge stated that he placed little weight (really, none) on Williams's testimony "as it pertains to certain crucial points," Initial Decision at 105, for two reasons:

First, in the context of the increase in net worth of [redacted]'s reflected on the March 2009 AASQ (JKX 34), he concluded that the increase was so "remarkable" "that if a reasonable supervisor had actually taken note of it, he would have investigated." The Law Judge then found that Williams "clearly neither took note of, nor investigated, [redacted]'s amazing wealth increase."

[4] The Division tried to dispute this at the hearing by noting that Konner was mentioned in two customer complaints. However, as he explained each time he was asked, his conduct was never in question, and he was identified in those matters not based on anything he had said or done, but because he was listed a co-broker on another broker's account, and that "joint rep" relationship was nothing more than a vehicle for commission-sharing and covering for the other broker when away from the office. See Tr. 0310-12, 4454-56, 4462-63. The Division did not dispute this, and made no effort to establish that Konner's conduct was in any way involved.

On this point, the Law Judge is plainly wrong. Williams could not specifically recall a conversation four years earlier with [redacted], but he did testify that he saw the form and would have had to have spoken with [redacted] because there was a material change on the form, and Williams' initials were all over the document. Not specifically recalling the conversation is hardly unreasonable, and the Law Judge's conclusion about this evidence makes no sense and should be rejected.

Second, the Law Judge was also singularly unimpressed with Williams's demeanor, finding him timid and quiet. Aside from the fact that the witness left his home in New York City at 4 a.m. to travel to Washington in order to be there by 9 a.m. (as he was instructed), and then sat around waiting to be called for another six hours, his demeanor in an intimidating courtroom hardly tells the whole story. But what was obviously the bigger problem for the Law Judge was how Williams responded to a question propounded by the judge, namely, would he be concerned if a registered representative told a customer that the numbers put on the AASQ "don't matter." The judge found that Williams answered that question with a bewildered look and said that he had never encountered such a scenario, which led the Law Judge to believe Williams was not credible on any non-technical issue in the case.

But the Law Judge's question was vague and ambiguous: did it presuppose a broker telling a customer to lie on the form (for who wouldn't immediately acknowledge that such a statement would be a cause for concern), or did it posit a very different scenario, where the broker told the customer just put down whatever you think is right, and we will proceed from there (which is what Konner testified to when the issue was raised at the hearing). To find fault with Williams on crucial evidentiary issues based on his difficulties responding to an inartful question by the Court is not fair, justifiable, or warranted.

The fact is that John Williams was the only completely independent witness to testify about the issues relating to the [redacted] part of the case. And as explained below, his unimpeached testimony, even if presented in a quiet, self-effacing tone, spoke volumes about the facts and was not reasonably rejected by the Law Judge.

2. The import of Williams's testimony is critical.

Williams's testimony should not have been so easily discarded, as it provides, properly and fairly construed, unimpeached and uncontradicted evidence about three important things: (1) Jason Konner and how he conducted his brokerage business; (2) relevant practices and procedures at JP Turner; and (3) [redacted] and his JP Turner account.

Williams served as compliance officer and co-supervisor of the JP Turner branch where Konner worked, Tr. 3662-63, and worked in close physical proximity to Jason Konner, close enough to hear him deal with his clients on the telephone on virtually a daily basis. Tr. 3666. Williams testified that he never observed Konner being overbearing or exerting undue pressure on any client, and would have reported it up the chain of command if he did. Tr. 3669-70. He also confirmed that there were no customer complaints against Konner, and that he would recall if there were. Tr. 3665

Regarding JP Turner practices and procedures, Williams expressly acknowledged the importance of the receipt and review of account documents signed, initialed and/or corrected by clients. Tr. 3671. He typically conducted a substantive review of them, often confirming information directly with the client, to establish that the information on the form was accurate. Tr. 3675-76. He routinely relied on the information confirmed by the client, and knew that others at JP Turner did as well, and he never thought that a client such as [redacted] was trying to mislead him with mis-information. Tr. 3676.

Williams testified that accurate information was especially important for the branch's clients who had active trading accounts. Given the risks involved, there was a clear need to ensure that the client was suitable for active trading, and that the broker's clients fit within the parameters for this type of business. Tr. 3679, 3695. The information on the client forms – once confirmed by the client with his signature or initials, or perhaps by Williams by phone -- was extremely important. Tr. 3679-80.

Significantly, Williams had a hand in reviewing many of the documents signed and initialed by [redacted], notably JKX 31, 32, 34. The first of these, from 2007, was reviewed and signed by Williams after it came back signed from the client, and the information affirmed by the client about investment objectives, risk tolerance, and financials was considered to be meaningful and was relied upon. Tr. 3699-3700.

Williams also received and signed off on JKX 32, [redacted]'s 2008 update form in which the client signified his approval of the information by initialing (among other things) a net worth of $2,500,000, Aggressive Risk Tolerance and that his top two investment objectives were Speculation and Trading Profits. Tr. 3699-3700. It was in this context that Williams testified that when account documents were pre-filled out, as an accommodation and service to the client and to ensure the form is accurate and fully completed (Tr. 3796-97), his expectation was that if the information was grossly inaccurate, the client would not sign it and not return it. Williams was not aware of any such issue with respect to [redacted], Tr. 3700-01. He also had absolutely no reason to think that Jason Konner ever put a client up to submitting or acknowledging false information on a JP Turner document. Tr. 3796-98.

Williams's involvement with [redacted] account documents continued into 2009, evidenced by him initialing [redacted]'s March 2009 Active Account Suitability Questionnaire, JKX 34. It

was on this document that the figure for [redacted]'s net worth was changed from $2.5 million to $2.0 million. Although Williams was unable to specifically recall talking to the client about the change (hardly surprising given the passage of time and the routine nature of a follow-up call by the compliance officer with a branch customer), he initialed that change from $2.5 to $2.0 million in net worth. That signified to him that, consistent with his general practice, he had called the client to verify the net worth information. Tr. 3704-05. This testimony from Williams confirms that at the beginning of the so-called churn period, [redacted] had reaffirmed that he had the financial wherewithal, the investment objectives, and the risk tolerance, to invest in an actively traded, speculative brokerage account. Indeed, it was [redacted] who acknowledged in his own hand his awareness that his account was traded approximately four times per week, or 200 trades per year, which as noted above, Division expert John Pinto testified was proof of a client's awareness of an actively traded account.

The Law Judge's credibility assessment about Williams, and the resultant discarding of critical testimony that undermined the Division's charge, does not stand up against the great weight of the evidence adduced at the hearing of this case.

VI. THE SANCTIONS ASSESSED AGAINST KONNER WERE UNREASONABLY EXCESSIVE AND SHOULD BE REDUCED AS A MATTER OF FAIRNESS AND JUSTICE.

A. The Imposition of a Bar is Unwarranted.

Should the Commission affirm the ruling that Konner churned [redacted]'s account, the Commission should reduce the harsh and unfair sanctions imposed by the Law Judge. Not only was there a significant quantum of evidence pointing away from a finding of churning, Konner was found to have churned the account of one only client, was completely exonerated with respect to the other customer charged, and was never anywhere accused by anyone of similar

misconduct. The commissions from the churn period were approximately $54,000, yet the customer's account was profitable by more than $100,000 during that period. And all of this occurred in the tumultuous year of 2009, when U.S. and world markets were reeling in the wake of the Great Recession. And as stated above, even [redacted] has never to this day made any kind of complaint about Konner's conduct.

A finding that a single brokerage account was churned does not always call for the imposition of a bar. When determining appropriate sanctions, the Commission considers the "egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." *S.E.C. v. Blatt*, 583 F.2d 1325, 1334, n. 29 (5th Cir. 1978).

As a matter of fairness and equity, a broker such as Konner who arguably churned the account of one customer for a period of one year, should not receive the same punishment as a broker who, for example, over several years traded on margin, violated customer specific suitability requirements, undertook discretionary trading without authorization and churned the accounts of multiple customers. *See, e.g., In re William J. Murphy*, 2011 WL 5056463 (NASDR) (Oct. 20, 2011). For this reason, the Commission should "tailor sanctions to the conduct at issue" and reduce the sanction imposed on Konner. See FINRA Sanction Guidelines, General Principles Applicable to All Sanction Determinations No. 3.

Indeed, there are cases where the Commission has considered the issue of aggressive trading vs. excessive trading, where the conduct was palpably worse, and yet the sanctions were far less severe than what has been ordered here. *See In the Matter of Shearson Lehman Hutton*

Inc., 1989 SEC LEXIS 778 (Apr. 28, 1999) (SEC found excessive training where the turnover rate was 7.4, and broker and his supervisors were censured and fined jointly only $3,000); *In re Michael David Sweeney*, 50 S.E.C. 761, 1991 WL 716756 (Oct. 30, 1991) (brokers engaged in excessive trading in multiple customer accounts and were sanctioned with a censure and combined fine and disgorgement of approximately $20,000).

Additionally, many adjudicators and regulators recognize that recidivists, and Konner is no recidivist, should receive higher sanctions than those with a single infraction. *See e.g.*, *Dep't of Enforcement v. Matz*, 2007 WL 1434907 (NASDR) (February 20, 2007) (Matz committed additional infractions and had a prior Letter of Acceptance, Waiver and Consent); *In re Clyde J. Bruff*, 1997 WL 1121302, at *7 (NASDR) (Aug. 1, 1997) ("Bruff's disciplinary history weighs strongly in favor of the imposition of a bar" partially because Bruff was previously disciplined by NYSE for similar infractions); FINRA Sanction Guidelines, General Principles Applicable to all Sanction Determinations No. 2 ("Disciplinary sanctions should be more severe for recidivists").

Konner has never been found to have engaged in any other misconduct; he has never even been charged with any, nor was his conduct ever the subject of any customer complaint, arbitration or lawsuit. The Commission should take these facts into account; plainly the Law Judge did not.

The FINRA Sanction Guidelines for churning (p. 77) recommend 10 days to one year, and in egregious cases consideration of a longer suspension (of up to two years) or a bar. And in one case, FINRA's National Adjudicatory Council reduced a bar to concurrent suspensions due to mitigating factors, including: (1) the misconduct involved a single customer account; (2) the transactions at issue occurred during a unique period of market decline; and (3) since the

violation occurred, the broker indicated that he changed his practice model and for years has not engaged in the type of short-term day trading strategy that led to this disciplinary action. *In re Brian J. Kelly*, 2008 WL 5273298 (NASDR) (Dec. 16, 2008). Many facts of Konner's situation parallel the points raised in *Kelly*, and this was fully ignored by the Law Judge.

Finally, in a case before the FINRA Office of Hearing Officers, a sanction less than a bar was imposed on a broker with marked similarities to the circumstances here:

> Respondent, with over three years of industry experience at the time he opened [the client's] accounts, had no prior disciplinary history. Respondent testified that he had not been the subject of any additional customer complaints during the following years, and there is no evidence to the contrary. His improper recommendations, though egregious as to [the client], involved just that one customer.

In re Frank Rocky Mazzei, 1998 WL 1768418, at *15 (NASDR) (June 24, 1998). The factors in that case mirror the facts here, and warrant a reduction in the sanction imposed here.

Simply put, if Konner's conduct warrants disciplinary action, we respectfully urge the Commission to recognize that the same sanction is not warranted for one case of misbehavior as for more egregious cases with multiple offenses against multiple clients. Konner worked hard for his clients and had an unblemished career in the securities industry until he was charged in a case that was at least 50% unsustainable (referring to the dismissal of the [redacted] charge). Facts like these do not justify ending Konner's 20-year, and in evaluating the appropriateness of the sanctions, the Commission should consider not only absolute principles of fairness, and not only its own precedents, but also the precedents and guidelines issued by FINRA/NASD, the other body charged with regulating the brokerage industry. The Commission should exercise its

discretion and modify the bar imposed by the Law Judge. Whether or not disciplinary action is required, the facts of this case do not merit ending a career.[5]

B. The Financial Sanctions Assessed by the Law Judge Are Unduly Excessive.

The financial sanctions imposed on Konner are excessive and the Commission should reduce them. Disgorgement is unwarranted because the customer was profitable during the so-called churn period, and the financial penalty of $150,000, the highest civil penalty, is unwarranted. (Also, regarding disgorgement, we note that while JP Turner does pay a relatively high pay-out rate to its brokers, the brokers do pay the lion's shares of expenses associated with running their brokerage business. Tr. 0454-58. As such, the actual earnings received by Konner is far less than his share of the commissions paid by the customer.) The Law Judge's conclusion that the conduct was egregious is wrong on so many grounds, that a lesser penalty would be appropriate. Fairly read, the conduct was not egregious: it is plainly subject to alternative interpretations, it only involved one customer who provided significant evidence of his willingness to trade aggressively, and whose account was significantly profitable during the period in question. The hefty financial penalty is not justified.

CONCLUSION

For the reasons set forth above, respondent Konner respectfully submits that the Law Judge ignored and/or misconstrued the great weight of the evidence in finding that he churned the [redacted] account. The evidence demonstrates that Konner geared his business to clients who wanted to trade aggressively and had the means to do so, that [redacted] fell within that

[5] The Law Judge made two passing references to Konner making unauthorized trades in the [redacted] account based on offhand testimony from [redacted]. However, not only was that testimony hotly contested, unauthorized trading was not alleged by the Division, [redacted] or anyone else. Such offhand and unsupported testimony, by a witness who had limited recollection, who changed his story and who tried to disingenuously walk away from multiple written representations at the hearing, is irrelevant to the issues of this case.

category, that [redacted] was fully aware of what was happening at all times and was engaged in the handling of his account. [redacted] never complained nor sought redress based upon any perceived breach of duty or misconduct, because Mr. Konner did what he wanted him to do – try to generate significant profits following the decline in the stock market in the wake of the 2008 financial crisis. The evidence demonstrates conclusively that the high level of trading was not excessive in the context of the client's investment objectives, that Mr. Konner never took control of the account, and that there was no fraud or reckless misconduct. For these reasons, the ruling set forth in the Initial Decision that Konner churned the [redacted] account should be reversed, and the case against Jason Konner should be dismissed in its entirety.

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CERTIFICATE OF COMPLIANCE WITH SEC RULE 450(c)

I hereby certify that this brief complies with the length limitation set forth in SEC Rule 450(c). According to the word processing system used to prepare this document, the brief contains 12,819 words.

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Eric S. Hutner