ORIGINAL

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

BRIEF OF DIMITRIOS KOUTSOUBOS IN SUPPORT OF PETITION FOR REVIEW

Paul J. Bazil, Esq.
Michael D. Mattia, Esq.

PICKARD AND DJINIS LLP
1990 M Street NW; Suite 660
Washington, DC 20036
Tel: (202) 223-4418
Fax: (202) 331-3813
pjbazil@pickdjin.com
mmattia@ pickdjin.com

Attorneys for Respondent Dimitrios Koutsoubos

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Introduction

Petitioner Dimitrios Koutsoubos respectfully makes this appeal pursuant Rule 410 of the Commission's Rules of Practice, 17 CFR §201.410, from the Initial Decision of the Administrative Law Judge dated November 8, 2013 entitled In the Matter of Michael Bresner, Ralph Calabro, Jason Konner and Dimitrios Koutsoubos, Admin. Proc. File No. 3-15015 ("Decision").[1] In the Decision, the ALJ found that Koutsoubos, a 14 year broker with an unblemished disciplinary record, churned the account of [redacted], a multi-millionaire businessman with significant prior investment experience who suffered market losses in his J.P. Turner & Co., Inc., brokerage account during the cataclysmic stock market crash of 2008, and ordered that Koutsoubos be permanently barred from association with any broker, dealer or investment adviser, fined $130,000, disgorge another $30,000 plus prejudgment interest, and to cease and desist from committing or causing violations and future violations.

Standard of Review

In considering an appeal of an Initial Decision, the Commission undertakes an independent *de novo* review of facts and law, and must base its decision on its own findings.[2] A *de novo* review requires a balancing of the evidence which both supports, and refutes, the allegations of misconduct. A decision cannot be justified as being supported by substantial evidence only by reference to the evidence in support of the claims of violation. See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take

[1] Citations to the Decision are noted as "DEC. ___," and citations to the hearing record are noted as "Tr. ___."

[2] SEC Website, Office of Administrative Law Judges, http://www.sec.gov/alj.shtml (last visited Mar. 4, 2014).

into account whatever in the record fairly detracts from its weight."); Buchman v. SEC, 553 F.2d 816, 820 (2d. Cir. 1977).

The Commission's *de novo* posture is critical to the proper consideration of the erroneous Decision against Koutsoubos. In this case, it means that the Commission must do what the Decision improperly failed to do: apply the proper legal standards and make factual findings based upon the totality of the evidence in the hearing record.[3] The Decision not only failed to refer to, much less consider probative information in the evidentiary record which detracts from its finding that Koutsoubos intentionally and deliberately churned [redacted]'s account during 2008, it failed to provide even the slightest explanation as to why it ignored such probative evidence.

Summary of Argument

The Decision is a composite of egregious misapplication of law, numerous material findings of fact that are entirely unsupported in the factual record, and repeated failure to properly consider uncontroverted documentary and testimonial evidence contrary to its factual findings. As a result of the manifest errors of law pertinent to a claim of "churning," and the many materially false findings with respect to the pertinent circumstances of [redacted]'s brokerage account, the finding of violation and imposition of severe sanctions against Koutsoubos is absolutely wrong, both as a matter of law and fact.

To reach the legal conclusion that Koutsoubos churned [redacted]'s account, the Decision was required to find three elements: (1) that [redacted] relinquished control over the activity in his brokerage account to Koutsoubos; (2) that with such control, Koutsoubos conducted excessive trading in [redacted]'s account in contravention of [redacted]'s investment objectives; and (3) that

[3] Citations to the Division of Enforcement's and Respondent Koutsoubos' exhibits are noted as "DX. ___" and "DKX. ___," respectively.

Koutsoubos conducted such excessive trading in [redacted]'s account for the purpose of maximizing his remuneration in regard to such trading in [redacted]'s account, in intentional or reckless disregard of [redacted]'s interests. Although each of these three prongs must have been met by a preponderance of evidence before liability could have attached to Koutsoubos, the record establishes that none were met and the Decision was in error.

First, the Decision's finding that [redacted] relinquished his control over his trading account to Koutsoubos is legally erroneous. In direct contrast to what the law mandates, the Decision erroneously found that Koutsoubos had *de facto* control over the [redacted] account solely on the grounds that Koutsoubos made most of the recommendations and that Bryant typically followed his securities recommendations. Case after case has instructed that 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, in which case the customer retains control of the account. The overwhelming evidence in the record is that [redacted]'s youth, wealth and business sophistication, his significant prior investment experience at other brokerage firms, the fact that Koutsoubos provided only accurate information to [redacted], the fact that [redacted] paid active and close attention to his J.P. Turner account, and the fact that [redacted] did not place undue trust and confidence in Koutsoubos, all point inexorably to a proper finding that [redacted] had the capacity to accept or reject Koutsoubos' recommendations and thus retained control of his account.

Second, the Decision's finding that the activity in [redacted]'s account during 2008 constituted "excessive trading" is legally erroneous. The law is crystal clear that the determination as to whether the trading in an account is excessive must be judged by reference to the customer's investment objectives. In stark contrast to other cases where it might be difficult to determine an investor's risk tolerance and investment objectives because the record does not

contain a clearly articulated statement of the customer's desires, in this case the record is unambiguous. [redacted] repeatedly documented in writing his high risk tolerance and desire to aggressively trade his account by, among other things, deliberately selecting trading profits, speculation and short-term trading as his investment objectives. [redacted] indicated his high risk tolerance in 2005, before Koutsoubos had anything to do with his account, and before ever meeting or speaking to Koutsoubos, he reaffirmed his high risk tolerance in 2006 after Koutsoubos was assigned as the registered representative of his account, and he indicated in writing his aggressive risk tolerance and speculative investment objectives in 2007 (just before the alleged churn period) when he was asked to sign an Account Update form. He further reiterated in writing his aggressive investment objectives in 2009 right after he suffered substantial losses in the 2008 market crash (just after the alleged churn period). Indeed, [redacted]t's last written representation of his speculative investment objectives was in his acknowledgment to J.P. Turner that he understood active trading and that he was willing and financially able to take greater risks in using such an active trading strategy. Although the law makes clear that the most reliable measure of a customer's desire is his own written representation, especially where, as here, it was reiterated more than once, the Decision fails to properly consider this highly probative evidence and improperly applies a standard for conservative investors based upon turnover and breakeven calculations, that as it turns out, were applied incorrectly and were riddled with errors.

Third, the Decision's finding that Koutsoubos acted with the "highest degree of scienter" is legally erroneous. The law provides that establishing scienter in the context of churning requires by the preponderance of evidence that the broker sought to maximize his remuneration in disregard of the interests of his customers. The evidence in this case actually contradicts –

rather than supports – any finding that Koutsoubos' actions were for the purpose of generating commissions by recommending unwarranted trades without regard to [redacted]'s interests. For nearly the entirely of the relevant period, there was a severe maximum commission restriction placed on transactions in [redacted]'s account such that there was simply no pecuniary reason for Koutsoubos to defraud [redacted] or recklessly disregard his interests. The Decision fails to properly consider the undisputed evidence that because Koutsoubos "inherited" the [redacted] account from another J.P. Turner broker, Koutsoubos could receive a payout of only 35% of the gross commission credits, less ticket and other charges. J.P. Turner's Executive Vice President conducted an analysis of the effectiveness of the commission restriction procedures he implemented for actively traded accounts and concluded that, with respect to accounts in which the registered representative received a 50% to 60% gross commission payout, at $100 maximum commission per trade, the broker was "at best breakeven" and at $60 per trade he was "getting crushed." The Decision utterly ignored that Koutsoubos'35% commission payout regarding the [redacted] account meant Koutsoubos earned far less than the "break-even" point and was, in fact, at the "getting crushed" level.

Argument

I. The Decision Erroneously Concluded That Koutsoubos Churned [redacted]'s Account.

Churning occurs "when a securities broker buys and sells securities for a customer's account, without regard to the customer's investment interests, for the purpose of generating commissions." In the Matter of Al Rizek, 1999 SEC LEXIS 1585 at *14 (Aug. 11, 1999) ("Rizek II"). Three elements are necessary to find churning: (i) explicit or *de facto* control over that trading by the salesperson; (ii) trading in the account that is excessive in light of the customer's

investment objectives; and (iii) scienter on the part of the broker, which is established either by evidence of intent to defraud or by evidence of willful and reckless disregard of the customer's interests. See Hotmar v. Lowell H. Listrom & Co., Inc., 808 F.2d 1384, 1385 (10th Cir. 1987). To reach the legal conclusion that Koutsoubos churned [redacted]'s account, the Decision was required to find all three of these elements by a preponderance of the evidence. As described below, we respectfully submit that the overwhelming evidence establishes that none of the three elements are met. Accordingly, the findings against Koutsoubos should be reversed.

A. The Decision Finding That [redacted] Relinquished "De Facto" Control Over His Brokerage Account To Koutsoubos Is Legally Erroneous Since [redacted] Retained The Capacity To Exercise His Final Right To Say Yes Or No To Trades In His Account

The touchstone of implied or *de facto* control of an account by a broker 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." Follansbee v. David, Skaggs & Co., 681 F.2d 673, 677 (9th Cir. 1982). In analyzing whether the broker controlled the plaintiff-customer's account, the Ninth Circuit stated that merely because a "non-professional investor" usually follows the advice of his broker, it does not mean that the investor

> 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. Id.

Accordingly, the correct inquiry is not, as the Decision incorrectly analyzed, whether the broker initiates the trades [see DEC. 100], but rather whether the customer has the capacity to exercise the final right to say 'yes' or 'no', in which case the customer retains control of the

account. See Tiernan v. Blyth, Eastman, Dillon & Co., 719 F.2d 1, 3 (1st Cir. 1983) (whether the broker initiates transactions or whether the investor relies on the recommendations of the broker is insufficient as a matter of law to establish *de facto* control. The fact that a client follows the advice of his broker does not in itself establish control.). Federal courts have recognized that to hold otherwise would prevent imputing control to the competent investor who monitors his account but typically does not disagree with his broker's recommendations; see also Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 956 (E.D. Mich 1978) aff'd 647 F.2d 165 (6th Cir. 1981) (the fact that the broker recommended all or nearly all of the securities purchased does not in and of itself prove that the broker controlled the account; most customers of full-service brokerage firms follow their broker's recommendations to a large extent); Carras v. Burns, 516 F.2d 251, 258-59 (4th Cir. 1975); Moran v. Kidder Peabody & Co., 609 F. Supp. 661, 666 (S.D.N.Y. 1985) ("Where a customer has the independent capacity to accept or reject his broker's recommendations, he cannot accuse his broker of having control of his account even if he habitually follows his broker's recommendations.").

Several factors considered in determining whether or not a customer, based on the information available to him and his ability to interpret it, can independently evaluate his broker's recommendations, include: the investor's sophistication; the investor's prior securities experience; the truth and accuracy of the information provided by the broker; the extent to which the investor passively relies on the recommendations of the broker without significant communication; and the level of trust and confidence the investor has reposed in the broker. In the Matter of Al Rizek, 1998 SEC LEXIS 305 at *45 (Feb. 24, 1998) ("Rizek I") (citing 1 Stuart C. Goldberg, Fraudulent Broker-Dealer Practices, 2.8 [b][1] (1978)). As preponderance of the

credible evidence in the record demonstrated, that [redacted] had the capacity to exercise his right to say 'yes' or 'no,' and therefore retained control of the account.

1. [redacted]'s Youth, Wealth and Business Sophistication

During the relevant period, [redacted] was a vibrant, intelligent, wealthy, and successful entrepreneur in his 40s who had a variety of business interests. [redacted] owned and operated two thriving businesses employing 32 people.[4] [Tr. 890-891] [redacted]'s success in business allowed him to build a substantial home[5] on one of the 14 lots he owns on the golf course at Kirkwood National Gold Club [Tr. 914], of which he is still a member. [Tr. 906] [redacted] also owns two other houses, a 44-acre tract of land, and another property in Holly Springs, Mississippi. [Tr. 908] [redacted] testified that his annual income of $100,000 and net worth of $3,000,000, were an accurate reflection of his financial condition when he completed his J.P. Turner account application in February 2005. [Tr. 858].

As detailed herein and which the Decision fails to properly consider, [redacted] repeatedly represented in writing that he understood the risks associated with the securities traded in his J.P. Turner account, including the risks of using margin and of active trading. The law properly credits brokerage customers' written representations in account agreements and investment-related documents. First Union Discount Brokerage Servs., Inc. v. Milos, 997 F.2d 835, 846 (11th Cir. 1993) (court rejected investor's attempt to avoid summary judgment by claiming he had not read the margin and options agreements he signed because investors "may derive neither

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[4] The Decision's finding that Bryant only employed 12 persons during the relevant period was contrary to the evidence in this case and was false. [DEC. 33]

[5] The only documentary evidence as to the value of Bryant's showed that the average list price for homes in Holly Springs, MI similar to [redacted]'s was $712,091. [DKX. 32] The Decision failed to address the documentary evidence and found that [redacted]'s home was valued at only $339,000, based solely on Bryant's uncorroborated testimony as to the home's value. [Tr. 901]

comfort nor legal protection from their willingness to sign contracts without reading them"); Coleman v. Prudential Bache Sec, Inc., 802 F.2d 1350, 1352 (11th Cir. 1986) ("absent a showing of fraud or mental incompetence, a person who signs a contract cannot avoid her obligations under it by showing that she did not read what she signed."); see also Bull v. Chandler, 1992 U.S. Dist. LEXIS 3686 (N.D. Cal. Mar. 12, 1992) (court entered summary judgment against plaintiff asserting securities fraud who claimed he read neither the offering materials nor the documents he signed and relied exclusively on his broker's misrepresentations because such reliance was unjustified); see also Benoay v. E.F. Hutton & Co, Inc., 699 F. Supp 1523, 1529 (S.D. Fla. 1988) (holding that a brokerage customer "who signs an instrument is presumed to know its content..."). Indeed, the Division's own expert concurred on this elemental point of law. John Pinto, a long-time securities regulator and NASD official, observed that "broker-dealers are entitled to rely upon the written representations of the customers...." [Tr. 3531; DX. 156] [redacted] himself emphasized during his testimony that his signature is his word and that he stood behind his signature. [Tr. 977, 994]

2. [redacted]'s Significant Investment Experience

[redacted] admitted that prior to opening his J.P. Turner account in 2005, he had held brokerage accounts at J.C. Bradford, Wachovia, and Stifel Niclaus. [Tr. 849] Moreover, the evidence showed that until at least February 2007, [redacted] also held a brokerage account at Sky Capital [Tr. 915, DKX. 23], a brokerage firm cited by the SEC for its aggressive trading of penny stocks. See SEC v. Sky Capital LLC, et. al., 09-CV-6129 (PAC) (S.D.N.Y. 2009).

When [redacted] opened his cash and margin accounts at J.P. Turner in February 2005, Jay Bergin – and not Koutsoubos – was the registered representative on [redacted]'s account.[6] [Tr. 924-925] At that time [redacted] signed a New Account Application in which he acknowledged he had 10 years of prior investment experience. [DKX. 16; Tr. 922, 928, 931] [redacted] thereafter reaffirmed his written representation of his securities investment experience on at least two other occasions: in March 2007, he indicated extensive experience in stocks [DKX. 21] and in May 2009, he indicated 20+ years of experience. [DKX. 22]

[redacted]'s admission of his long-time investment experience both at J.P. Turner and at four other brokerage firms - including at the notorious Sky Capital - contradicts the Decision finding that [redacted]'s "experience with the securities markets is limited." [DEC. 100] The Decision's failure to properly consider any of this evidence, which detracts from a finding that [redacted] lacks the capacity to exercise control over his J.P. Turner brokerage account, is error.

3. Koutsoubos Provided Only Accurate Information to [redacted]

There was no evidence to suggest that any of the account information provided to [redacted] was anything other than completely truthful and accurate. [redacted] acknowledged that the account statements he received and maintained set out each purchase and sale transaction effected in his account that month, every deposit and withdrawal of funds and securities in his account that month, and a calculation of the total portfolio value of the account and how that value changed from the prior month. [Tr. 986-987; DKX. 25] [redacted]t acknowledged receipt of all trade confirmations and organized every confirmation in three-ring binders, which he kept and

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[6] [redacted]t opened his J.P Turner account in February 2005 and continued to maintain that account through the hearing. Pinto noted that such a long relationship with this client is indicative of a client who was satisfied with his account. [Tr. 3532]

maintained for his reference. [Tr. 971] The confirmations set out all of the pertinent information regarding the transaction, including the name of the security, the symbol, whether it was a purchase or sale, the quantity and the price per share, as well as the principal amount of the trade, the commission and the postage and service fee. [DKX. 26] [redacted] conceded that from the confirmations he received he could have easily added the commissions disclosed to see exactly how much commissions he paid during any given period. [Tr. 984] [redacted] also acknowledged that the year-end tax information statements he received for his J.P. Turner accounts contained detailed information showing, among other things his proceeds from the transactions in his account, the dividends and other distributions he received and the margin interest he paid on each margin transaction effected during that year. [Tr. 986; DKX. 27]

4. [redacted] Paid Close Attention to His J.P. Turner Account

[redacted] was an attentive securities brokerage customer and closely monitored the activity in his account. For example, and well before Koutsoubos was assigned to his account, [redacted] made it a regular practice to print the quantity and stock symbol of the securities trade he wanted to effect on the memo line of the checks he wrote to pay for the trades in his J.P. Turner account. [Tr. 942, 946; DKX. 18 and 19] Moreover, as described above, [redacted] not only kept and maintained all of the trade confirmation he received from J.P. Turner [DKX. 26], all of the monthly account statements sent to him [DKX. 24] and each of the year-end tax reporting statements sent to him [DKX. 27] for many years after the period in question, he also kept and maintained certain research and other market information that Koutsoubos had sent to him for his review and discussion over the years. [Tr. 971; DKX. 34]

[redacted] also acknowledged that he spoke frequently with Koutsoubos throughout the period that Koutsoubos was his broker, sometimes several times per week. [Tr. 964-965] On the

infrequent occasions when [redacted] did not hear from Koutsoubos, such as when Koutsoubos was out of the office for a few weeks following elbow surgery, [redacted] called in repeatedly so that he could continue to make sure he knew what was going on in his account at all times. [Tr. 965-966] Often, [redacted] proposed investment ideas, particularly in companies in the lumber, materials, home building and metals sectors. [Tr. 569] On numerous occasions, Koutsoubos sent [redacted] research reports, news items and related articles of potential investment interest which he and [redacted] then further discussed. For example, in July 2007, Koutsoubos and [redacted] had been discussing the potential merger of the Intercontinental and NYNEX exchanges as well as the merits of investment in Smith Moore Software, Inc. In this regard, on July 31, 2007, Koutsoubos faxed to [redacted]t pages from the Dow Jones Newswire about a potential IC/NYNEX merger as well as a research report authored by the investment banking firm Piper Jaffrey regarding Smith Micro Software. [Tr. 970-971; DKX. 34]

The existence of similar facts have led numerous courts to conclude that the customer, not the broker, retained control over his account. See Xaphes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 632 F. Supp. 471, 483 (D. Maine 1986) (an investor "who monitored his account constantly and in great detail, checking confirmation slips as they were sent to him, checking his monthly statements, and making notes about the account for himself and his accountants" had "sufficient financial acumen to determine his own best interests"); see Leib, 461 F. Supp. at 954-55 ("[I]f the customer and the broker speak frequently with each other regarding the status of the account of the prudence of a particular transaction, the courts usually find that the customer, by maintaining such an active interest in the account thereby maintained control over it."); Norniella v. Kidder Peabody & Co., Inc., 752 F. Supp. 624, 629 (S.D.N.Y. 1990) (no broker control where investors monitored and raised questions about the accounts with broker).

5. [redacted] Did Not Place Undue Trust and Confidence in Koutsoubos

Prior to [redacted]'s account being reassigned to him, Koutsoubos had never previously met [redacted] and they were not related in any way. Indeed, [redacted] acknowledged that their relationship was purely an arms-length business relationship. [Tr. 956] See M&B Contracting Corp v. Dale, 601 F. Supp. 1106, 1111-12 (E.D. Mich 1984), aff'd 795 F.2d 531 (6th Cir. 1986) (no control by broker where relationship with customer was arm's length and customer had some education or experience). Further, as described above, Koutsoubos was not [redacted]s only stock broker, nor was he [redacted]t's first. Moreover, Koutsoubos proposed investment ideas, particularly in companies in the lumber, materials, home building and metals sectors in which [redacted] expressed particular interest and expertise, and Koutsoubos often sent [redacted] research reports, news items and related articles of potential investment interest for [redacted]'s consideration. [Tr. 540, 4480] Not only did [redacted] decline some of Koutsoubos' investment recommendations, he sometimes came up with his own investment ideas. [Tr. 569, 575; 848-50]

The absence of broker control is evident where the client in some instances declines to follow the broker's recommendations or generates ideas independently.[7] Such actions are "completely inconsistent with dependence upon the broker and with the absence of independent evaluations [of the broker's] recommendations." Follansebee, 681 F.2d at 677-78; In the Matter of IFG Network Securities, Inc., 2005 SEC LEXIS 335 at *106 (Feb. 10, 2005) (citing Follansbee, 681 F.2d at 677 ("If the customer, based on the information available to him and his ability to interpret it, can independently evaluate his broker's recommendations, the customer,

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[7] [redacted]t testified that he closed his Sky Capital account in 2007 because it was not making money. [Tr. 919]. Such action reflects the active and independent nature of [redacted]'s relationships with his stock brokerage accounts and contrasts with any notion that [redacted] passively reposed undue trust and confidence in stock brokers, such as Koutsoubos whom he had never even met.

not the broker, has control of the trading."); see Cummings v. A.G. Edwards & Sons, Inc., 733 F. Supp. 1029, 1031-32 (M.D. La. 1990) (no control by broker where customer declined to follow broker's recommendation, reviewed account statements, and was actively involved in decision-making); Leib, 461 F. Supp. at 956 (the fact that the broker recommended all or nearly all of the securities purchased does not in and of itself prove that the broker controlled the account; most customers of full-service brokerage firms follow their broker's recommendations to a large extent). Rather, as makes perfect sense, the "customer retains control of his account if he has sufficient financial acumen to determine his own best interests and he acquiesces in the broker's management. Carras, 516 F.2d at 258-59.

In direct contrast to what the law mandates, the Decision erroneously found that Koutsoubos had *de facto* control over the [redacted] account solely on the grounds that Koutsoubos made most of the recommendations and that Bryant typically followed his securities recommendations. [DEC. 100] This legally erroneous conclusion also finds no support in the opinion of the Division's churning expert Louis Dempsey, who stated he did not conclude and had rendered no opinion as to whether Koutsoubos had *de facto* control over either the [redacted] account.[8] [Tr. 3162] In fact, Dempsey testified a proper determination as to whether the broker had *de facto* control for purposes of a churning analysis would require what he did not do: an analysis of all relevant factors that pertain to the relationship between the client and the broker,

[8] Dempsey's expert report curiously conflated the use of the word "control" in the context of recommending potential investments with the term of art "control" as an essential element of churning. On cross-examination, Dempsey clarified that by using the phrase "control of the direction of trading activity" in his report he meant only "the selection of transactions and the frequency of the transactions in the account," [Tr. 3168, 3170] and that with respect to [redacted]'s account, he was not referring to control as an element of the definition of churning. [Tr. 3205-06] In response to an attempt by the Division on redirect examination to have Dempsey offer an opinion as to the sophistication of the customers who testified at hearing, the Court sustained objection and noted that it was not clear that Dempsey was qualified to provide his impressions of the sophistications of any of the customers at issue in the case. [Tr. 3295-96]

including interviewing the customer and reviewing the document(s) the customer signed to determine what was in the customer's mind regarding the account. [Tr. 3166-67].[9]

Dempsey elaborated that that if a customer signed a document stating he understood the risks associated with active trading, that is an indicator of the customer's intentions as to the appropriateness of a high level of trading [Tr. 3172-73] and that this indicator is even more relevant where the customer acknowledged such understanding on multiple occasions. [Tr. 3174] In a similar vein, the Division's supervision expert, John Pinto, a long-time top official at FINRA, testified that written representations by a brokerage customer, such as the repeated representations by [redacted] as to his investment experience, cannot be blithely disregarded, explaining that "broker-dealers are entitled to rely upon the written representations of the customers . . . ." [Tr. 3531; DX. 156]

B. The Decision Finding That The Activity In [redacted]'s Stock Brokerage Account Constituted "Excessive Trading" Is Legally Erroneous In Light Of The High Risk Tolerance, Aggressive Investment Objectives And Desire To Conduct Active Trading, And Acknowledgment Of The Risks Of Active Trading That [redacted] Repeatedly Made In Writing Before And After The Alleged Churn Period.

Whether the number of trades in an account is excessive must be judged by reference to the customer's investment objectives. Baselski v. Paine Webber, Jackson & Curtis, Inc., 514 F. Supp. 535, 541 (N.D. Ill. 1981) ("[t]he essence of a churning claim is not a particular transaction, it is the aggregation of transactions, allegedly excessive in number judged in relation to the plaintiff's objectives and the market conditions at that time."); Gopez v. Shin, 736 F. Supp. 51,

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9 Dempsey testified that in preparing his expert report, he was not asked to consider the customers' ages, the relationship between the customer and the broker, the frequency of broker communications, or the customers' risk tolerances, investment objectives, annual incomes, or net worth disclosures [Tr. 3209-11] Cf. Rizek I (in which the Division's expert on churning analyzed various documents, including "the pleadings, the monthly statements of the accounts involved, new account forms, depositions of [the broker] and some of the customers, documents supplied by the [Division] and [the broker], [and] several cases with similar issues pertaining to the accounts," as well as "various reference publications and three databases.")

58 (D. Del. 1990) ("turnover ratios...must be viewed in the context of the investment objectives of the plaintiff and the market conditions that existed in the relevant time period."). The level of trading in an investor's account who has set forth investment objectives of speculation and trading is expected to be a more frequent investor than an investor with a more conservative objective, such as preserving capital or seeking fixed income. See Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361, 1368-69 (7th Cir. 1983); see also Mitchell v. Ainbinder, 214 Fed. Appx. 565, 568 (6th Cir. 2007). Accordingly, any analysis of determining whether an account was excessively traded must begin with the "delineation of the customer's investment goals, for those objectives significantly illuminate the context in which the trading took place and, indeed, form standards against which the allegations of excessiveness may be measured." Costello 711 F.2d at 1369; see Hotmar, 808 F.2d at 1386 (10th Cir. 1987); Nelson v. Weatherly Sec. Corp., 2006 U.S. Dist. LEXIS 11614 at *9 (S.D.N.Y. Mar. 21, 2006) (churning does not occur if the account owner knowingly and intelligently consents to a high volume). Therefore, the appropriate starting point for analyzing the issue of excessive trading is to determine the investment strategy of the customer involved.

As stated above, the Division's churning expert, Louis Dempsey testified clearly: if a customer signed a document stating he understood the risks associated with active trading, that is an indicator of the customer's intentions as to the appropriateness of a high level of trading [Tr. 3172-73] and that this indicator is even more relevant where the customer acknowledged such understanding on multiple occasions. [Tr. 3174] The presumption that a customer's investment objectives and risk tolerance is known from the customer's own written representations was amplified upon by the Division's supervision expert, John Pinto, expressing that "broker-dealers are entitled to rely upon the written representations of the customers . . . ." [Tr. 3531; DX. 156].

In stark contrast to other cases where it might prove a difficult task to determine an investor's risk tolerance and investment objectives because the record does not contain a clearly articulated statement of the investment strategy for a customer's account, here the record is clear and unequivocal. Cf. In the Matter of J.W. Barclay & Co., 2003 SEC LEXIS 2529 at *73 (Oct. 23, 2003) (in which there was a question of fact as to a customer's asserted change in investment objective, and the record indicated that the registered representative never "memorialized in writing his conversations with [the client]" nor updated the client's account documents). As described herein, [redacted]t repeatedly documented in writing his high risk tolerance and desire to aggressively trade his account by, among other things, deliberately selecting trading profits, speculation and short-term trading as his investment objectives. [DKX. 16, 17, 18, 21, 22]

1. [redacted] Indicated His High Risk Tolerance Before Koutsoubos Was Involved.

Well before Koutsoubos ever met or spoke with [redacted] or much less became his broker, [redacted] opened new cash and margin accounts at J.P. Turner in February 2005. [Tr. 850-51, 920, 925; DKX. 16, 17, 18] At that time, [redacted]t signed a New Account Application indicating he had 10 years of securities investment experience and sought growth as the investment objective for his account. [DKX. 16] [redacted] also received from J.P. Turner a Margin Account Agreement Suitability Supplement for the express purpose of making "make sure that you understand margin trading, and that you are willing and financially able to take greater risks in using such strategy. Margin trading involves a higher degree of risk than trading on a cash basis and is suitable only for risk tolerant investors." [DKX. 17] The Suitability Supplement contained a heading in bold and underlined entitled "**What You Should Know About Margin Trading**" and set forth 16 important risk factors, including but not limited to:

- **"You can lose more funds that you deposit in the margin account"**
- **If that stock's value declines to a level established by the Margin Account Agreement, you will receive a margin maintenance call.**
- **A margin maintenance call will require you to deposit additional cash or securities within three business days or less. If you fail to respond, securities in your account may be liquidated, without notice.**
- **The current initial margin rate is 50% . . . . A 50% rise in stock price can double your equity, but losses occur twice as fast, if a stock value goes down.**
- **"It may happen that declining stock value will cause you to lose your portfolio to margin calls and you may still owe a debit balance to FISERV Securities."**

The Margin Account Agreement further warned [redacted]: "*Customer understands that current and continuously updated information concerning his/her risk tolerance, suitability, and investor objectives are vital to his/her investment selections." [redacted] acknowledged that he signed directly below the statement "I have read and signed your Margin Suitability Supplement Agreement as required; and I understand it." [Tr. 931; DKX. 17]

2. [redacted] Reaffirmed His High Risk Tolerance to Koutsoubos.

In July 2006, after Koutsoubos had been assigned as the registered representative of [redacted]'s account, J.P. Turner changed clearing firms from Fiserv to NFS. To accommodate [redacted]'s election to continue to maintain his margin account, J.P. Turner sent to [redacted] a Supplemental Application for NFS Margin Privileges. [DKX. 20] [redacted] signed the Supplemental Application dated July 28, 2006 [Tr. 949] and faxed the agreement that same day to J.P. Turner, where it was reviewed by the branch manager who and then forwarded [redacted]'s acknowledgement to J.P. Turner's Compliance Department. [DKX. 20]

3. [redacted] Indicated In Writing His Aggressive Investment Objective Shortly Before the Subject Period.

In mid-March 2007, approximately 8 months before the subject review period, [redacted] signed an Account Update form which reflected, among other things, that [redacted]'s annual income was $150,000, his estimated net worth was $3,000,000, his investable assets were $1,000,000, his investment objectives were trading profits, speculation and capital appreciation and that his risk tolerance was aggressive. [DKX. 21] [redacted] not only signed the Account Update form dated March 15, 2007 [Tr. 960], he also placed his initials in the box to verify his selection of aggressive risk tolerance and speculative investment objectives [Tr. 960, 961], and faxed the signed and initialed the form that same day to J.P. Turner [Tr. 963]. The Account Update form was then reviewed by the J.P. Turner branch compliance manager, John Williams[10], who compared the financial information on the form to the information on file at the firm and, finding no discrepancies, signed the document as branch manager.[11] [Tr. 3625, 3763].

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10 In 2006, John Williams was hired to serve as onsite branch compliance officer in the Brooklyn branch in which Koutsoubos worked and shared in the supervisory responsibilities in the Brooklyn branch [Tr. 3603]. Williams served in this capacity through December 2010. [Tr. 3603] Williams, an MBA in finance [Tr. 3725] had been a ten year veteran compliance officer who had previously been a compliance officer at three other broker-dealers, and served as Chief Compliance Officer at two of those firms. [Tr. 3664-3665] At J.P. Turner, Williams was compensated strictly by salary and he did not receive any commissions or overrides on any transactions occurring in the Brooklyn branch. [Tr. 3603, 3727] Williams augmented the supervision of the registered representatives in the Brooklyn branch to ensure that the Brooklyn branch was compliant within the firm's written supervisory procedures as well as FINRA rules and regulations. [Tr. 3663] As discussed herein, Williams' uncontroverted and independent hearing testimony was virtually ignored by the Decision leading to its erroneous conclusion about Koutsoubos.

11 The Decision noted that the Account Agreement signed by [redacted] in 2005 listed his investment objective as growth and his risk tolerance as medium whereas the Account Update form Bryant signed in 2007 listed his investment objective as speculation and his risk tolerance as aggressive and stated, obtusely, that "other than the form itself, there is no evidence to suggest that [redacted] desired this drastic change." [DEC. 101] This finding is factually incorrect in several respects. First, the fact that Bryant again asserted his investment objectives remained trading profit, speculation and short/term trading in writing in 2009 is ample enough evidence he intended to advise that these were also his investment objectives in 2007. Second, the Decision fails to reflect that the 2007 Account Update Form is different in format from the 2005 Account Application and that "capital appreciation" and "trading profits" were not boxes on the old 2005 form that [redacted] could have selected in 2005. In any case, the Decision essentially flips the legal presumption on its head: the correct inquiry was not whether there is evidence other than the written representation of the customer to suggest the customer's desire, since it is the customer's written representation, particular his repeated written representation, which is the most reliable evidence of his desires.

4. [redacted] Reiterated In Writing His Aggressive Investment Objective Right After The Subject Period

In May 2009, J.P. Turner's Compliance Department sent to [redacted] an Active Account Suitability Supplement ("Active Sup") and accompanying Active Account Suitability Questionnaire ("AASQ") because [redacted] account had a high levels of trading activity, in order make sure that [redacted] understood active trading and that he was willing and financially able to take greater risks in using such a strategy. [Tr. 3635; DKX. 22] The Active Sup warned that "Active trading can involve a higher degree of risk, increased costs and is suitable for risk tolerant investors." [DKX. 22] The Active Sup expressly advised [redacted] in bold letters to "***PLEASE READ CAREFULLY***" and set out, among other important risks:

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 understanding 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**
- **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.**

[redacted] signed and dated the Active Sup on May 13, 2009 [Tr. 871] and signed immediately below the line stating in bold letters, "**I have read and understood the Active Account Suitability Supplement Agreement as required. I am aware of the liabilities which may be incurred through active trading.**" Furthermore, just below [redacted]'s signature on the

same page was the warning: "Customer expressly acknowledges his/her understanding that all investments involve risk, that all securities are not suitable for every customer and that the risks inherent in a particular security may not be appropriate for you, the Customer. Customer understands that current and continuously updated information concerning his/her risk tolerance, suitability, and investment objectives are vital to his/her appropriate investment decisions." [DKX. 22]

At the same time, J.P. Turner also sent t[redacted] an AASQ. [DKX. 22] Consistent with the March 2007 Account Update form that [redacted] signed and acknowledged was accurate, the AASQ reflected, among other things, that [redacted]'s annual income was $150,000, his estimated net worth was $3,000,000, his liquid net worth (all assets readily convertible to cash) was $1,000,000 and that his investment objectives were trading profits, speculation and capital appreciation.[12] [DKX. 22]

It is undisputed that [redacted] signed this form on May 13, 2009 and faxed it back to J.P. Turner where it was received and reviewed by John Williams. However, even more importantly but not properly considered by the Decision, [redacted] did more than just sign the AASQ - he placed his initials in two other places on the form. In one spot, [redacted] initialed to verify his name, address, age, employment and financial information (such as estimated annual income, net worth, liquid net worth, investment objectives) prior investment experience, prior margin experience, and the size a frequency of trades were correct in all respects. In another spot on the form, [redacted] placed his initials to verify the specific composition of his $1,000,000 liquid net

[12] The AASQ signed by [redacted] also reflected a frequency of trades as of May 2009 of approximately 6 per month. The Division's expert, John Pinto, testified that the level of trading frequency set forth on the AASQ was not inconsistent with the level of trading that occurred in the 7 months preceding and 2 months succeeding [redacted]'s signing of the form in May 2009. [Tr. 3590]

worth, including his $100,000 retirement account and $250,000 in insurance.[13] [Tr. 871] After [redacted] signed and initialed the document, he faxed the signed AASQ with his signed Active Sup to J.P. Turner's Brooklyn office where these two documents were reviewed by Williams. [Tr. 3625-26] At hearing, [redacted] again acknowledged that all of the financial information on AASQ including his annual income, estimated net worth and liquid net worth information was accurate. Moreover, [redacted] testified clearly that he was on board with the idea of trading actively in his account if it might help try to regain the losses he incurred during the 2008 market debacle. [Tr. 1028] Cf. Rizek I at *23-42 (brokerage customers had no understanding of their investments or the investment strategy being employed by the broker.)

Williams considered his review of active accounts to be a very important aspect of his compliance work. [Tr. 3695] When Williams reviewed customer new account applications, he endeavored to determine the suitability of the type and frequency of trading in light of the customer's disclosed financial condition and investment objectives [Tr. 3679, 3728] and in that regard, called customers to verify the accuracy of information set forth. [Tr. 3733-34] It was Williams who was responsible for the coordination and review of the Active Sups and accompanying AASQs sent to the Brooklyn branch clients who had high levels of trading activity. [Tr. 3635] Williams reviewed each Active Sup before it was sent to the client as well as upon received from the client. [Tr. 3617-18] Williams testified that if he became aware that a registered representative filled in wrong information in an Active Sup or AASQ and told the customer to leave it that way, he would raise the issue with the compliance department. [Tr. 3798] However, Williams testified he sat near Koutsoubos for many years, had ample

[13] The Decision's finding that Bryant "has no retirement funds" was contrary to the evidence in the record and was false. [DEC. 102]

opportunity to observe his conduct of his securities business, and never heard Koutsoubos telling a customer to "just sign" a form. [Tr. 3790, 3801]

Furthermore, in Williams' compliance calls with customers, Williams did not limit the conversations solely to the missing information on the questionnaire, but used the opportunity to more broadly discuss with the customer his investment objectives and other information to make certain that the customer understood and agreed with the level of trading in his J.P. Turner account and understood the risks disclosed in the Active Sup. [Tr. 3619] Indeed, even though the customer had signed the Active Sup and thereby expressly acknowledged having read and understood the risks associated with active trading, Williams would go over certain of the risk factors set forth on the Active Sup and ask the customer to verbally acknowledge to him that he or she had in fact read the risk factors. [Tr. 3753] Williams would fill in any missing information on the accompanying AASQ based upon what the customer advised him and would sign or initial next to that information to document that he spoke to the customer who provided him that information. [Tr. 3618]

According to Williams, he bracketed and sought [redacted]'s initials in two separate places on the AASQ to highlight to [redacted] the information filled out by the J.P. Turner branch pursuant to a telephone conversation with [redacted], and to have [redacted] verify the accuracy of the information. [Tr. 3758] Ironically, Williams had hoped that this procedure would provide protection against a customer later claiming that he had "just signed the document" that was pre-filled out and had not read it. [Tr. 3758] Williams testified that he personally reviewed the documents at issue, required that [redacted] place his initials to highlight to [redacted] the information filled out by the J.P. Turner branch pursuant to a telephone conversation with [redacted], and had [redacted] verify to him (not to Koutsoubos) the accuracy of the information. [Tr. 3758]

5. **The Decision Erroneously Failed To Properly Consider The Extent To Which The Clear Evidence Of [redacted]t's Bias Affected The Credibility Of His Testimony, Which Was Unsupported By Any Documentary Evidence And Was Contradicted By Both His Own Repeated Written Representations And John Williams, An Independent Non-Party Witness.**

Ignoring all the substantial credible documentary evidence in the record indicating otherwise, the Decision improperly found that the "updated account forms contained incorrect information, including incorrect investment objectives and risk tolerance, that Koutsoubos usually sent him forms with stars where [redacted] should sign, and that Koutsoubos took care of the rest." [DEC. 101] This false finding is based exclusively upon the weak and self-serving testimony of [redacted], who claimed that could not remember if his signed Account Update was filled out when he signed it but that there was a "real good possibility" that it was blank.[14] [Tr. 859, 963; DX. 143] As stated above, the Decision erroneously fails to consider that [redacted]'s testimony flies in the face of the documentary evidence and the unbiased testimony of John Williams[15], who, as described above, made it his practice to review customer account

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[14] The record evidence reflects the falsity of [redacted]'s implication that he might have signed a blank form. As an accommodation to customers and in an effort to reduce the potential that the customer would not fully complete the AASQ, J.P. Turner branch personnel would sometimes fill in the information on the questionnaire before submitting the document to Williams for review. [Tr. 3638] In these instances, Williams made it the branch practice to highlight that information to the client on the questionnaire and ask the customer to place his initials specifically on those portions to make certain that the customer focused on that information and verified that it accurately reflected what the customer had told the J.P. Turner broker. [Tr. 3626] Upon receiving an Active Sup and AASQ back from the customer, Williams reviewed the document to make certain it was filled out completely, that the financial information added up correctly, that the investment objectives and risk tolerance information comported with the information on file at the firm and that the document was properly signed by the customer (and initialed where needed). [Tr. 3618, 3676] If any information was left off the questionnaire, the information did not add up or was inconsistent with the information on file at the firm, or it was not signed or initialed, Williams spoke directly with the customer. [Tr. 3618]

[15] The Decision improperly closed its eyes and ignored the exculpative evidence provided by John Williams, the only independent witness in the case, cavalierly dismissing the entirety of Williams' testimony for no apparent reason other than he appeared "timid" and "quiet." [DEC. 105] The relevance of Williams' independent, non-party testimony to the facts at issue is reflected in the fact that Williams testified at length during the investigation which led to the charges and the Division included Williams on its list of potential hearing witnesses. The Division ultimately elected not to call him to testify at hearing and thus be subject to cross-examination for the first time. Nevertheless, Williams was subpoenaed to testify by Respondent Bresner and traveled from New York to Washington where he testified at considerable length in the hearing. We respectfully submit that the ALJ's failure to

documentation for substance and to ensure that each document was correctly filled out and initialed. [Tr. 3618, 3675, 3748]

Moreover, the Decision fails to properly consider [redacted]'s startling admission that one of the reasons why he agreed to testify in the SEC hearing – despite having made no complaint about Koutsoubos at any time that he was the broker on the account (until August 2009) or the three and a half years thereafter – was because he had now come to understand that he could receive some money if there were a finding of wrongdoing against Koutsoubos. [Tr. 1000] Accordingly, [redacted] had a strong incentive to bend the truth the way he did in the hope that it would put him in a position to recover money. See Marcic v. Reinauer Transp. Cos., 397 F.3d 120, 125 (2d Cir. 2005) ("A claim for money damages does create an incentive to be untruthful"); In the Matter of Public Finance Consultants, Inc., 2005 SEC LEXIS 433 at *89 (Feb. 25, 2005) (investor credibility questioned where investors were involved in a separate civil action against a broker-dealer and stood to benefit financially if the administrative proceeding resulted in an order against the broker-dealer requiring the payment of substantial civil penalties, disgorgement, and prejudgment interest).

The Decision should have, but did not, consider the extent to which the clear evidence of [redacted]'s bias affected the credibility of his testimony, which, as noted above, was unsupported by any documentary evidence and was contradicted by both his own repeated written representations and John Williams, an independent non-party witness. Although the Commission grants "considerable weight and deference" to credibility determinations of law judges and other

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properly consider Williams' uncontroverted evidence regarding Koutsoubos' overall compliance and the specifics of his own compliance review of [redacted]'s repeated written affirmations of his aggressive investment objectives, high risk tolerance and appetite for and understanding of the risks of active trading, is legal error. The SEC has long instructed that administrative hearings require a proper evaluation of witness testimony for its probative value, reliability, and fairness of use. See, e.g., In the Matter of Warren R. Schreiber, 1998 SEC LEXIS 2393 (Nov. 3, 1998).

initial fact finders, it must judge those determinations against the weight of the evidence. In the Matter of David F. Bandimere, 2014 SEC LEXIS 158 at *12 (Jan. 16, 2014); In the Matter of Leslie A. Arouh, 2004 SEC LEXIS 3015 at *33 n.40 (Dec. 20, 2004); In the Matter of Valicenti Advisory Serv., Inc., 1998 SEC LEXIS 2497 at *15 n.9 (Nov. 18, 1998) (rejecting credibility findings because the record contained "substantial evidence" for doing so). The Commission cannot accept credibility determinations "blindly." Rather, there are circumstances where, as here, in the exercise of its review function, it must disregard explicit determinations of credibility where the record contains 'substantial evidence' for rejecting them. In the Matter of Anthony Tricarico, 1993 SEC LEXIS 1346 at *7 (May 24, 1993).

For example, In the Matter of Herbert Moskowitz, the Commission refused to accept the ALJ's credibility findings because there was substantial evidence in record for rejecting them. 2002 SEC LEXIS 693 (Mar. 21, 2002) In Moskowitz, a stockholder was charged with improperly failing to timely file a Schedule 13D upon becoming the "beneficial owner" of more than 5% of the outstanding shares of a publicly traded corporation. The ALJ concluded that the evidence did not support a finding of a violation "relying in large part on [the stockholder's] testimony" that he wasn't really the "beneficial owner" of an investment account "owned by his daughter and son-in-law" and over which he had written trading authority due to the alleged existence of an unwritten side agreement between the stockholder and the son-in-law. Id. The Commission reversed the ALJ's findings, ruling that the self-serving hearing testimony regarding the existence of a subsequent oral agreement was the only evidence of such an agreement and was inapposite to the substantial, contradictory documentary evidence that the stockholder had the unconditional authority to dispose of the shares in the son-in-law's account. Id. Similarly, In the Matter of Kenneth R. Ward, the Commission disregarded an ALJ's explicit credibility

findings. 56 S.E.C. 236 (Mar. 19, 2003), aff'd 75 Fed. Appx. 320 (5th Cir. 2003). In Ward, the ALJ dismissed the allegations against a broker charged with making material misrepresentations and omitting to state material facts in recommending the purchase of "inverse floater" securities to two municipalities based upon his determination that the broker's testimony was credible and the city officials' testimonies were not. However, as the Commission noted on appeal, the broker's testimony was the only evidence to support his claim that he made the appropriate disclosures to the city officials, and the only evidence suggesting that the city officials were not forthcoming about their contacts with the broker and their level of sophistications and appreciation of the risks associated with inverse floaters. Id. Moreover, the broker's testimony was contradicted by overwhelming testimonial and document evidence in the record, including the consistent testimony of the city officials. Under the circumstances, the Commission rejected the ALJ's credibility findings and concluded that the weight of the evidence made plain that the broker did not make the requisite disclosures. Id.

Lastly, the Decision's strange lament that "Koutsoubos essentially asks that I evaluate the Account Update Form within its four corners" [DEC. 101] clearly misses the legal mark. Moreover, it misleadingly diminishes the pertinent facts: it was not just one document, but several over the course of years, each signed or signed and initialed by Bryant, by which he indicated his high risk tolerance and aggressive investment objectives and desire for and understanding of the risks of active trading in his J.P. Turner account. [DKX. 16, 17, 18, 21, 22]

6. Dempsey's Turnover And Breakeven Calculations Do Not Demonstrate Churning Where, As Here, [redacted]'s Investment Objective Was To Trade Actively.

Given the overwhelming preponderance of evidence that [redacted] had a high risk tolerance, that he intended to use his J.P. Turner account for speculative and aggressive trading

in the hopes of generating high returns, and that he understood the costs and risks of loss of active trading, the Decision's reliance upon turnover ratios and break-even rates appropriate for considering whether conservative investors are excessively traded is entirely misplaced. See Nelson, 2006 U.S. Dist. LEXIS 11614, at *9 ("[T]he law is clear that 'there is no such thing as churning as a matter of law based simply on the turnover rate of an account without regard to other factors.'"). Quantitative benchmarks do not demonstrate churning where, as here, the investment objectives of the customers and the structure of their accounts were intended to trade actively. Costello 711 F.2d at 1369; see also Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1070 (2d Cir. 1977) (a greater volume of activity will normally be expected in an account where speculation is the objective); see also Landry v. Hemphill, Noyes & Co., Inc., 473 F.2d 365, 373 (1st Cir. 1973). Indeed, it is well established that "[n]o turnover rate is universally recognized as determinative of churning," see J.W. Barclay at *75 and that "if a customer wants to speculate, the portfolio turnover rate could be unlimited." Id. Even Dempsey agreed that there is no established benchmark for somebody who has a higher risk tolerance or who has a very aggressive risk tolerance. [Tr. 3199]

7. Dempsey's Turnover And Break-Even Calculations Were Unreliable.

The Decision improperly relies upon turnover and break-even calculations of Louis Dempsey, who had never been qualified as a churning expert and based his opinions solely on a review of "the Division's technical analysis relating to the alleged churning."[16] [Tr. 3140; 18-21;

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16 As noted extensively by Respondents' counsel during *voir dire*, Dempsey had never previously been qualified as an expert and had never testified on the subject of churning in any federal court proceeding, state court proceeding, or SEC matter. [Tr. 3117-19] Dempsey never completed any graduate work, or received a graduate degree, in any related field [Tr. 3123-24] nor had he published any academic studies, law review articles or securities industry publications on the subject of churning. [Tr. 3133-3134] While Dempsey was previously employed in the SEC's Division of Enforcement, he was never promoted above branch chief and never served as a

DX. 155 at 2] Beyond the fact that the Initial Decision should not have relied upon Dempsey's turnover ratios applicable to conservative investors in reaching its erroneous conclusion that Bryant's account was excessively traded, the turnover and break-even ratios – even if they had been correctly calculated, which they were not - have little if any probative value in this case because they entirely ignore the extreme and unusual market volatility which prevailing during much of the alleged "churn" period. As the record reflects but the Decision fails to properly consider, Dempsey's turnover and break-even calculations were riddled with material errors involving over-counting of transaction and repeated miscalculations of account valuations, rendering his work unreliable. [DX. 155]

a. The Decision's Reliance On Dempsey's Calculations, Which Ignored That The Transactions Occurred During A Unique Period Of Market Decline And Dramatically Skewed The Calculations, Was Erroneous

The alleged churn period of the [redacted] account was exactly the calendar year 2008 – probably the most calamitous year in the stock market since 1929. Amazingly, Dempsey failed to take into account, much less mention in his report, the "anomaly" of the downward market forces during 2008, which dramatically inflated turnover and cost/equity since the account values declined rapidly. Furthermore, as the record reflected and which Dempsey's calculations entirely disregarded, the monthly level of trading activity in [redacted]'s account during the cataclysmic year

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senior policy-maker at the SEC. [Tr. 3135] Given his utter lack of expert qualification, Dempsey's own concession that he did not analyze or render any opinion as to whether Koutsoubos was given *de facto* control over [redacted] account, did not consider whether [redacted] was in fact a conservative investor such that his turnover and breakeven calculations were even arguably applicable, or whether Koutsoubos acted with scienter in connection with the securities recommendations he made to [redacted], it is respectfully submitted that Dempsey's report and hearing testimony should not have been considered at all. SEC Rule 320 (irrelevant evidence shall be disregarded); see also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993) (expert testimony must be relevant and reliable).

2008 varied greatly as market conditions varied widely.[17] [DX. 155] Baselski, 514 F. at 541 (N.D. Ill. 1981); Gopez, 736 F. Supp. at 58.

b. The Decision's Reliance On Dempsey's Calculations, Which Ignored That The Frequent Use Of Stop Loss Orders Dramatically Overstated The Number Of Transactions Effected In Bryant's Account During 2008, Was Erroneous

In 2008, the stock markets suffered cataclysmic declines and to deal with the precipitous increase in volatility, Koutsoubos developed a strategy of extra caution to deal with the downside risk, implementing various hedging and stop loss strategies for his clients. [Tr. 4481-82] Koutsoubos took extra time to discuss with his clients not only the pros and cons of making the investment itself, but at the same time the price at which they were prepared to sell the investment should the market price decline. [Tr. 4482] By entering stop loss orders, Koutsoubos sought to assist the client in managing his risk of loss their risk tolerance. [Tr. 4483]

In many instances during the relevant period, Koutsoubos made a single recommendation to [redacted] of a stop loss order which resulted in two transactions; the initial purchase and the automatic sale if the price fell to the stop price. [Tr. 4483] The Decision erred in relying upon Dempsey's turnover analysis, which did not take this fact into account in his calculations of the number of transactions effected in the [redacted] account during the period at issue. [DX. 155] Furthermore, the evidence showed that many of the buy orders entered on behalf of [redacted]

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17 This evidence also belies the allegation that Koutsoubos disregarded [redacted]s interests in order to excessively trade the account to generate outsized commissions. As reflected in [redacted]'s account statements, during January 2008 to April 2008, during which the portfolio value of the account declined precipitously from $177,559 to $80,179.45, there was moderate trading activity. [DKX. 24] Bryant's account statements reflect that these losses stemmed from sharp declines in the value of only a few large securities positions. [DKX. 24; Tr. 4507-08] Pursuant to Koutsoubos' recommendation that [redacted] diversify his portfolio to better manage the downside risk of an increasingly volatile market, the level of trading activity increased in May 2008, which coincided with a large gain in portfolio value from $80,179 to $123,854. [DKX. 24] The level of trading again was again quite moderate in June and July 2008; however following the collapse of Lehman Brothers in September 2008, the equity markets went into freefall. [Tr. 4509-10] Much of the remainder of 2008 was a desperate, and ultimately unsuccessful, attempt to "catch a falling knife" by implementing various short-term hedge positions, stop losses and other strategies to manage precipitous losses in portfolio value. [Tr. 4510-13]

resulted in multiple executions at slightly varying prices, based solely upon how the orders to sell were stacked up in the electronic trading system. [Tr. 4515-16] Dempsey's turnover analysis also did not take this fact in to account in his calculation of the number of transactions effected in the [redacted] account during the period at issue. [DX 155]

c. The Decision's Reliance On Dempsey's Calculations, In Light Of The Evidence Of His Repeated Miscalculations Of Account Values And Turnover, Was Erroneous

At hearing it was also demonstrated that Dempsey made at least two other material mistakes in calculating gains and losses in other customer accounts which undergirded the faulty calculations upon which the Decision is improperly reliant. We respectfully submit that the Decision's failure to properly consider these mistakes in determining the reliability of Dempsey's highly compromised calculations is legal error.

As to another of Koutsoubos' clients, [redacted], Dempsey made an elemental but significant mistake in calculating the net asset value of their account. Dempsey miscalculated that the [redacted] account suffered a loss during the period because he incorrectly treated a dividend as a customer deposit even though it was a distribution from a security the [redacted] had already purchased. Dempsey was forced to concede that the dividend was not new funds coming into the account, but rather a gain to the [redacted]. [Tr. 3231-32] This fundamental mistake rendered Dempsey's turnover calculation as to [redacted] inaccurate, since as Dempsey conceded, as account value goes down, turnover rates go up.[19] [Tr. 3202]

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[18] The Decision found that Koutsoubos did not churn the [redacted] account at J.P. Turner. [DEC. 1]

[19] Dempsey further conceded that if an investor is investing in stocks and losing money, the same level of activity yields a higher turnover ratio than if the investor was making money, and if the investor was removing money from the account, it would increase the turnover ratio assuming the level of activity remained the same. [Tr.

Nor this Dempsey's only significant math mistake in this case; he made a similar mistake in connection with the account of a brokerage customer of Respondent Konner. There, Demspey misclassified the stock purchased by the customer in a PIPE transaction. Instead of recognizing that the $325,000 recorded value of the stock consisted of a $150,000 investment and a $175,000 profit, Dempsey incorrectly recorded it all as an investment, thereby mistaking an investment of client money for a profit. As a result, Dempsey incorrectly calculated the account to have lost over $54,000 during a period that there was in fact a gain of over of $100,000.[20] [Tr. 3176-84]

d. The Decision's Failure To Properly Consider Dempsey's Bias Towards The SEC Division Of Enforcement In Relying Upon His Calculations, Was Erroneous

The Decision notes that while Dempsey has left the employment of the Division of Enforcement after two separate stints, "his wife currently works for the Commission in the Miami, Florida, regional office's trial unit...." [DEC. 73-74, n. 17] Without a scintilla of analysis as to how the fact that Dempsey's household continues to be on the SEC's payroll might impact whether his testimony might be biased in favor of the SEC, the Decision blithely states that Dempsey "did not feel there was a conflict of interest when he accepted the engagement." [DEC. 73-74, n. 17]

Whether Dempsey believed he could accept the engagement from his wife's employer to act as an independent "expert" witness hardly absolves the Decision from critically analyzing whether Dempsey met the standard of independence necessary to qualify as an expert and the

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3202] Given the dramatic freefall in account value experience by millions of investors in 2008, including [redacted] this dramatically skewed turnover and breakeven rations calculated for that year's activity in [redacted]'s account.

[20] The fact that, as Dempsey admitted, his "expert" work was merely to verify the Division's calculations and that he failed to catch the Division's error [Tr. 3212], does not absolve him from this mistake or render his expert report or testimony any more reliable. Rather, it confirms that neither should have been admitted under the Daubert standard for admission of expert evidence.

degree to which, if at all, his analysis should be properly considered. The Decision's abject failure to undertake this inquiry is legal error.

C. The Decision Finding That Koutsoubos Acted With Scienter With Respect To The Trading Activity In [redacted]'s Brokerage Account Is Legally Erroneous Because It Fails To Properly Consider That It Was Contrary To Koutsoubos's Financial Interest To Recommend Excessive Trading In Intentional Disregard Of Bryant's Interests.

The U.S. Supreme Court has defined scienter as an intention "to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). Proving scienter requires "a showing of either conscious intent to defraud or a high degree of recklessness." ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 58-59 (1st Cir. 2008) (citations omitted). Recklessness is "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious the actor must have been aware of it." J.W. Barclay at *33 (quoting Sunstrand Crop. v. Sun. Chem. Corp., 553 F.2d 1033, 1044-45 (7th Cir. 1977)); Rizek v. SEC, 215 F.3d 157, 162 (1st Cir. 2000).

To establish scienter in the context of churning, the Decision must find that the broker sought to maximize his remuneration in disregard of the interests of his customer. In the Matter of William J. Murphy, 2013 SEC LEXIS 1933 at *66 n.88 (Jul. 2, 2013) (citing In the Matter of Michael T. Studer, 2004 SEC LEXIS 2347 (Nov. 30, 2004) ("The generation of commissions as a goal overriding the client's interests evidences scienter in churning.")

1. There Was No Pecuniary Reason For Koutsoubos To Attempt To Defraud [redacted]t Or To Recklessly Disregard His Interests.

The evidence in this case contradicts rather than supports any finding that Koutsoubos' actions were for the purpose of generating commissions by recommending unwarranted trades

without regard to [redacted]'s interests. Cf. Thompson v. Smith Barney, Harris Upham & Co, 709 F.2d 1413, 1416 (11th Cir. 1983); Costello, 711 F.2d at 1369; Craighead v. E.F. Hutton & Co., 899 F.2d 485, 489 (6th Cir. 1990). Rather, in this case, for nearly the entirety of the relevant period, there was a maximum commission restriction placed on transactions in the [redacted] account. Indeed from March through October 2008, [redacted] was charged no more than $100 per trade and after October 31, 2008, he was charged no more than $60 per trade. [DEC. 37] By virtue of this severe maximum commission restriction, imposed precisely because [redacted] was an active trading account, any motive and opportunity for Koutsoubos to line his pockets with unwarranted commission dollars was extinguished. There was simply no pecuniary reason for Koutsoubos to defraud [redacted] or even to recklessly disregard his interests.

The Decision fails to properly consider the undisputed evidence that as an inherited account, [redacted]'s account was designated such that Koutsoubos could receive a payout of only 35% of the gross commission credits, less ticket and other charges.[21] [Tr. 4535-4536; DX. 146] The Decision also fails to properly consider the fact that Koutsoubos was financially responsible for a variety of charges and credits against his gross commission payout, including but not limited to: errors and omissions insurance, write offs if there was insufficient funds in an account, ticket charges, contribution to the payroll for the non-registered employees of the branch, training, test preparation and other expenses of broker trainees in the branch, lead sheets, office materials, overnight delivery charges, wire transfer fees and desk fees. [Tr. 4530-36; DX. 146]

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21 As noted above, on numerous occasions a single order resulted in multiple trade executions, which Dempsey's turnover ratio failed to properly consider. Despite the multiple execution prints, however, Koutsoubos received his 35% gross commission payout solely from the single commission (either $100 or $60 maximum) charged by J.P. Turner, less various charges and expenses. [DKX. 26]

J.P. Turner's Executive Vice President, Michael Bresner, conducted an analysis of the effectiveness of the commission restriction procedures he implemented for actively traded accounts and concluded that, with respect to those accounts in which the registered representative received a 50% to 60% gross commission payout, at $100 maximum commission per trade, the broker was "at best breakeven" and at $60 per trade he was getting crushed."[22] [Tr. 3058] As Bresner reported, based upon a $100 commission maximum with 60% payout less the ticket charges and desk fee, a broker writing 100 tickets in a month would receive on average $15 per ticket. Because he would then still have to pay the insurance, secretarial, telephone, federal express and other miscellaneous fees, "the economic incentive to do trades was taken away." [Tr. 3058-59] As discussed herein, Koutsoubos' 35% commission payout regarding the [redacted] account meant that he earned far less than the "break-even" point with respect to transactions in the [redacted] account but was, instead at the "getting crushed" level.

In this regard, the Decision falsely found that the trading activity in the Bryant account generated commissions to J.P. Turner of $47,000... [and] Koutsoubos would have earned commissions of over $30,000 as a result of this trading.[23] [DEC. 82] Even if the $47,000 commission figure were correct, the Decision should have applied the correct 35% payout rate and calculated the gross commissions (from which the aforementioned ticket and other charges were further deducted) earned by Koutsoubos was only $16,450 and not $30,000. Based entirely

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22 The fact that Koutsoubos's payout rate on the [redacted] account was 35% and not 65% of gross commissions was found in the Division's own hearing exhibits but was withheld by the Division from its churning expert. [DX. 146] Dempsey admitted that he did not review Koutsoubos' actual commission statements and he did not believe he had been provided access to those statements when he was preparing his report. [Tr. 3237-38] However, Dempsey agreed that he recalled testimony during the hearing that the commission rate for the [redacted]t account was actually between thirty and thirty-five percent and he did not have any reason to doubt that figure. [Tr. 3239]

23 Elsewhere and inconsistently, the Decision falsely found that the commissions charged to [redacted] during that period was $53,000. [DEC. 102]

upon this false premise, the Decision goes to great pains to argue that the further reduction of the maximum commission from $100 per trade to $60 per trade (in essence a 40% reduction) caused Koutsoubos to stop churning the account since it was no longer in his pecuniary interest. [DEC. 103] Simple arithmetic demonstrates that applying the correct 35% payout rate on the [redacted] account rather than the fictitious 65% payout ratio results in a 46% reduction in Koutsoubos' gross commission calculation, and thus negates the Decision's specious argument.

2. There Is No Evidence To Suggest Koutsoubos Made Recommendations Without Investment Strategy Or Research Or For Other Than A Good Faith Belief It Was Consistent With [redacted]'s Stated Investment Objectives.

The record is replete with uncontroverted evidence of Koutsoubos' hard work and good faith in recommending transactions consistent with Bryant's stated investment objectives, which the Decision failed to properly consider.

During the relevant period, in addition to ideas generated by his branch management and his review of various market research generated by J.P. Turner, Koutsoubos subscribed – at his own cost - to various research reports and internet sites that provided him with news, analysis and ideas for successful investment recommendations, including Investors Business Daily ("IDB"), Morningstar and Daily Graphs. [Tr. 4473-79] Koutsoubos described that IBD, published by William J. O'Neill, was one of the most helpful pieces of research he used to generate investment ideas for potential recommendations.[24] Only after conducting a significant amount of research work did Koutsoubos consider whether any investment ideas could be recommended to his clients. [Tr. 4480] Before presenting any investment idea to a client,

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[24] O'Neill is the developer of the Can Slim investment approach to growth stocks which Koutsoubos adopted as a methodology for evaluating stocks whose prices were poised to move significantly in a positive direction. [Tr. 4475-77]

Koutsoubos determined whether the investment was suitable for the client, based upon a review of his or her financial condition and investment objectives. [Tr. 4480]

As Koutsoubos demonstrated and [redacted] conceded, Koutsoubos was in frequent contact with [redacted] discussed various investment ideas and strategies. [Tr. 964-965] Koutsoubos explained the investment strategies and theories he followed, the copious financial and market research analyzed and the extent to which he worked in good faith to present investment recommendations that were well thought out and suitable for the customer. There is simply no evidence in the record to suggest that Koutsoubos made recommendations without an investment strategy, devoid of research or otherwise in anything but a good faith belief that it was consistent with the customer's investment objectives. See Hotmar, 808 F.2d at 1386 (noting there was no evidence of scienter, despite high turnover rates, where there no was: (i) no question the customer received confirmation slips on every transaction and monthly statements detailing the activity in his account; (ii) no evidence that the broker withheld information from the client; and (iii) no evidence to suggest any actual deception surrounding the trades.); Cf. Rizek I (in which the Division's expert witness noted that there was no economic logic to the broker's trading strategy).

II. The Sanctions Imposed Upon Koutsoubos, Including The Most Extreme And Punitive Sanction Possible – A Permanent Bar, Are Unwarranted, Unduly Punitive And Not In The Public Interest

Given the complete lack of evidence that [redacted] was deceived by Koutsoubos and that Koutsoubos had nothing financially to gain by intentionally disregarding [redacted]'s interests, the Decision finding that the most severe of sanctions – a permanent bar from the securities industry – is justified because Koutsoubos acted with the "highest degree of scienter" is simply without basis.

The Decision backs its finding by two alleged facts – each of which were proven false. First, as stated above, the finding that "during the alleged churning period, JPT received significant amount of Commissions, including approximately $53,000 between January and December 2008." (DEC 102-103) and that "at $100 per trade [Koutsoubos] was "making some money" [DEC. 103] is a misleading attempt to argue that Koutsoubos received an outsized pecuniary benefit from his alleged actions. As set forth in detail herein, the Decision improperly ignores the fact that Koutsoubos actually received a pittance from JPT's commissions earned in connection with the Bryant account and that the undisputed evidence was that at a maximum commission of $100 where Koutsoubos received a 35% payout, he was "getting crushed" not "making some money" which is directly contrary to the Decision's findings. Second, the finding that "Koutsoubos misled [redacted] by stating he would waive his commissions" [DEC. 103] is unsupported by the totality of evidence in the record. In fact, the only possible basis for such a finding is the self-serving and unsupported hearing testimony of [redacted] himself, who – the Decision ignores – had an admitted pecuniary motivation to testify as such. Koutsoubos completely disputes that he ever said any such thing, there were no witnesses who testified in support of [redacted]'s version and there is no documentary evidence in the record to support the finding that Koutsoubos agreed to waive [redacted]'s commissions. Moreover, [redacted]s actions belie his testimony, which the Decision erroneously failed to consider. [redacted] admitted he not only timely received, but kept and maintained every confirmation which disclosed the commission. Had he believed he should not have been charged a commission, he would have complained or at least raised a question.

Applicable case law make abundantly clear that mitigating as well as aggravating factors must be considered in imposing sanctions. The factors to be considered in assessing sanctions are

those cited by the Fifth Circuit court in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) aff'd on other grounds, 450 U.S. 91 (1981). The Decision did not make even the slightest attempt to consider, among other undisputed facts that:

- Throughout his 14 year career, Mr. Koutsoubos has maintained a pristine disciplinary record and has never before been named as the subject of any SEC or SRO disciplinary proceeding nor named as a defendant in any arbitration proceeding. Indeed, when Mr. Koutsoubos left the employ of J.P. Turner after a decade, in August 2009 [DKX. 2; Tr. 476], there was not a single customer complaint lodged against Mr. Koutsoubos nor had Mr. Koutsoubos been subject to any internal discipline or special supervision at J.P. Turner. [DKX. 1; Tr. 505]

- The alleged misconduct involved a single customer account. See Dep't of Enforcement v. Kelly, FINRA Complaint No. E9A2004048801 (December 16, 2008) (where, based upon the fact the broker's misconduct involved a single customer account during period of unique market decline, the FINRA National Adjudicatory Council reduced the Hearing Officer Decision imposition of a permanent bar, citing FINRA Principal Consideration in Determining Sanctions, No. 18)

- The transactions at issue occurred during a unique period of market decline, i.e., the cataclysmic market crash of 2008. See Dep't of Enforcement v. Kelly, supra.

The Decision's complete failure to take any of these mitigating facts into consideration in imposing the most severe sanction available to the SEC is improper and resulted in an unjust and excessively punitive sanction.

Lastly, to compound insult to injury, the Decision ordered that Koutsoubos disgorge $30,000 plus prejudgment interest of $5,028.18 based upon Dempsey's demonstrably wrong calculation of the retention percentage Koutsoubos purportedly testified to in the underlying investigation, i.e. 65% payout ratio – and not the actual evidence in the case – a 35% payout ratio. [DEC. 121] Where, as here, an order of disgorgement far exceeds the amount of the defendant's supposed unjust enrichment, it is excessive and oppressive. See Hately v. SEC, 8 F.3d 653 (9th Cir. 1993). The Decision's blithe disregard of actual evidence to materially

overstate the disgorgement figure is indicative of Decision's overall failure to properly consider the overwhelming record evidence in this case.

Conclusion

For all the above reasons, we respectfully request that the Decision be reversed and the sanctions imposed be vacated.

Respectfully Submitted,

Paul J. Bazil, Esq.
Michael D. Mattia, Esq.

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

Attorneys for Petitioner Dimitrios Koutsoubos

CERTIFICATE OF COMPLIANCE

I hereby certify that on this 5th day of March, 2014, Brief of Dimitrios Koutsoubos in Support of Petition for Review contains 13,443 words (11,227 words in text and 2,216 words in footnotes) as counted by Microsoft Word, complying with the length limitations set forth in Rule 450(c) of the Commission's Rules of Practice.

Paul J. Bazil, Esq.
Michael D. Mattia, Esq.

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

Attorneys for Petitioner Dimitrios Koutsoubos