UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15015

In the Matter of

RALPH CALABRO;
JASON KONNER; and
DIMITRIOS KOUTSOUBOS

Respondents.

DIVISION OF ENFORCEMENT'S OPPOSITION BRIEF IN RESPONSE TO RESPONDENT JASON KONNER'S BRIEF IN SUPPORT OF REVERSAL OF INITIAL DECISION DATED NOV. 8, 2013

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Pursuant to Rule 450, the Division of Enforcement ("Division") respectfully submits this Opposition Brief in response to Respondent Jason Konner's ("Konner") Brief in Support of Reversal of Initial Decision Dated Nov. 8, 2013 ("Konner's Brief").

I. INTRODUCTION

This is a churning case that presents the Commission with a question: should a broker accused of churning be permitted to place in contest a customer's investment objectives using account documents that were manipulated by the broker? That is exactly what happened here. The answer must be a resounding no, and that dictates the resolution of this appeal.

As the law judge found, the record shows that during 2009, Konner, then a registered representative at broker-dealer JP Turner & Co., LLC ("JP Turner"), churned the account of his customer, [redacted] [redacted]. Having found the type of customer he was truly looking for – someone with little investing experience, no experience at all in high-risk, frequent trading, and sufficiently enticed by Konner's slick sales pitch to send him some money – Konner convinced [redacted] to invest with him, and then proceeded to engage in what amounted to day trading without explaining the risks to the unsophisticated farmer from Iowa.

Making his fraud exponentially worse, Konner tried to game the system for protection. As the Division established and the law judge agreed, Konner carefully manipulated the JP Turner account documents that recorded [redacted]'s investment objectives, risk tolerance and net worth by pre-filling them. In order to get [redacted] to sign them, Konner lied to [redacted] about the import and meaning of those documents, which then became part of Carlson's JP Turner account file. On paper, Konner made [redacted] erroneously look like he could afford, and wanted, to speculate.

Konner manipulated those documents as a means to an end. Once in [redacted]s file, Konner believed those documents gave him carte blanche to recommend hundreds of trades to

[redacted] (not to mention executing dozens more without [redacted]'s authorization), while also shielding Konner from interference by the compliance department. [redacted] expressly told Konner he wasn't worth millions and that he didn't want to lose money, but that didn't matter to Konner because he had manufactured documents saying [redacted] was worth $2.5 million and was an experienced speculator. Even now, Konner is attempting to defend his conduct using the same falsified investment objectives *he marked* on [redacted]'s account documents.

Konner claims this is not a pro forma appeal, but, in fact, it is. Konner's Brief, p. 6. Any conventional approach to the evidence plainly shows that the trading in the [redacted] account was excessive, that Konner had *de facto* control over the account, and that Konner acted with scienter when recommending and carrying out the excessive trading he controlled. However, Konner's rigging of [redacted]s account documents is the key fact of this case because, without those documents, [redacted]s true, conservative objectives are unmistakable, leaving Konner with no defense.

The Commission should reject Konner's attempt to portray [redacted] as an aggressive speculator using the same fake papers he used to defraud [redacted] in the first instance and find that Konner churned the [redacted] account. The Commission should also impose sanctions at least as strong as those imposed below.

II. FACTUAL SUMMARY

The Division alleges that Konner churned [redacted]'s account during 2009. That year, there were 252 transactions in [redacted] JP Turner account involving nearly $8.6 million in buys and sells. The cost-to-equity ratio for [redacted]'s account during the churn period was 34.6% and the turnover ratio was 17. [DOE Ex. 155.] By the end of 2009 [redacted] lost approximately $54,000, while Konner (a high-school graduate who made approximately $200,000 in

commissions that year) made $55,000 on trading in [redacted]'s account alone. [T. 305-06; 359; DOE Ex. 155.]

A. Background on Jason Konner

Jason Ivan Konner, age 39 at the time of the hearing, lives in Brooklyn, New York. [T. 304.] Konner graduated from Abraham Lincoln High School in 1991. [T. 305.] He attended Kingsborough Community College in Brooklyn for approximately three months and did not receive a degree. [T. 305-06.] Konner obtained a Series 7 securities license in September 1994. [T. 307.] He also holds a Series 63 "Blue Sky" license. [T. 307.] He has worked in the securities industry since 1994 and has worked at more than a dozen industry employers over the past eighteen years. [DOE Ex. 16.]

Konner currently works in the securities industry at DPEC Partners in New York. [T. 312.] Prior to that, he was a registered representative in the Brooklyn branch office of JP Turner from September 2006 to December 2011. [T. 308-09; 317-18.] Konner's career in the securities industry has not been without blemish. Konner settled a 2006 case alleging unauthorized trading, for $3000. [T. 310-11; DOE Ex. 16 at JPTURNER-SEC-ATL 010868-69.] Another customer filed a FINRA arbitration against Konner in August 2012, alleging churning, among other violations. [T. 313-14; DOE Ex. 14 at 15.] In 1998, Konner resigned from his employer, Millennium Securities; his FINRA report states that he was "permitted to resign." [T. 314-15; DOE Ex. 14 at 17.]

While working at JP Turner, Konner's primary responsibility was managing customer accounts and updating customers on the market, including making trading recommendations. [T. 319-20; 346] One of Konner's other responsibilities as a registered representative at JP Turner was to generate new business by obtaining new clients. [T. 320-21.] Konner aggressively sought new customers, spending thousands a year on leads and making as many as 200 cold calls

a day, two to three days a week. [T. 321-24.] Konner did not use a trading strategy; instead, he conducted a speculative type of investing that involved active trading, and looked for customers who were willing to go along with it. [T. 323; 325; 4425-26.] Konner admitted that his method was not appropriate for every customer. [T. 4354.] Because of Konner's speculative style of investing, he acknowledged it was important that his customers be knowledgeable about investing, and that they understood, and wanted to engage in, speculation. [T. 321-23; 325.] Konner also understood that it was important that his customers have the financial resources needed to engage in speculation and active trading. [T. 332.]

Konner claims that, as part of the customer prospecting process, he typically asked potential new customers for a wide variety of information meant to make sure that his investment style was suitable for them, including asking about their investment experience and objectives.[1] [T. 324-27] In addition, while he claimed to have given some general warnings about investments possibly losing value, Konner conceded that he did not specifically warn them about the risks and cumulative costs of active trading. [T. 329-31; 333-34.] As a result, Konner never discussed the breakeven rate or turnover ratio of an account with a potential or existing customer, even though "the accounts [he] was handling . . . [were] set up for speculative and high rate of trading." [T. 332-34.]

Konner admitted he typically filled out the account opening documents for his new customers. [T. 342-43.] At the time Konner worked for JP Turner, the firm periodically sent disclosure documents to customers with actively traded accounts, including one called an Active Account Suitability Questionnaire that required customers to reaffirm their investment objectives, sign it, and return the form. When Konner's customers were to receive an Active Account Suitability Questionnaire, Konner either filled out portions of it, or arranged for

[1] The testimony of Konner's customers does not support that assertion. [T. 1671-75; 1930-34.]

someone else in his office to partially fill it out, before sending it to the customer for signature. [T. 370-72.]

At the time Konner worked in the Brooklyn branch of JP Turner, the branch managers were James Sideris ("Sideris") and John Williams ("J. Williams"), who also served as the branch's compliance officer. [T. 308; 318.] Konner did not receive a salary while working at JP Turner; he instead received a percentage of commissions and fees generated by his customers' accounts. At JP Turner, customers were typically charged a commission ranging from 1% to 5% per trade on both purchases and sales. [T. 350.] Under his arrangement with JP Turner, Konner retained 65% of all commissions generated by his customers' accounts. [T. 316-17.] Konner made approximately $200,000 in 2009. [T. 359.] Konner claimed to negotiate with his customers, on a trade by trade basis, the commission charged on every transaction. [T. 349.]

While at JP Turner, Konner was so aggressive in seeking new customers that he had a large number of "reneges," or instances in which Konner executed a suggested trade for a prospective customer and the customer later refused to pay. [T. 3671-72; 4349.] As a result, Konner was placed on heightened supervision in 2008 and J. Williams and/or Sideris began confirming trades in Konner's new accounts. [T. 3671-72; 4350-51.]

B. Background on [redacted] and History of his JP Turner Account[2]

[redacted], age 61 at the time of the hearing, is a resident of Winfield, Iowa. [T. 1652.] A lifelong citizen of Iowa, Carlson attended Iowa State University and received a degree in animal science. [T. 1654-55.] [redacted]'s primary occupation for over thirty years has been corn and soybean farming. [T. 1655-56.]

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[2] The relevant exhibits relating to the establishment, maintenance and funding of [redacted]'s account at JP Turner include DOE Ex. 49 (July 18, 2007 account application of JPK 726010), DOE Ex. 50 (April 6, 2008 account update form), DOE Ex. 51 (May 1, 2008 margin account application), DOE Ex. 52 (pre-filled active account letter), DOE Ex. 53 (March 23, 2009 signed version of pre-filled active account letter), DOE Ex. 54 (February 21, 2010 active account letter), DOE Ex. 128 (JPT statement for [redacted]'s account before churn period) and DOE Ex. 129 (JPT statements for [redacted]'s account during churn period).

[redacted] is not a sophisticated investor. [T. 1656.] He does not have the knowledge or expertise to trade stocks on his own. [T. 1656-57.] His investment experience prior to opening his JP Turner account was limited to IRAs holding mutual funds and a single brokerage account that typically traded less than five times a year. [T. 1658-63.] He described the pre-existing brokerage account as conservative. [T. 1662-64.] [redacted] typically relied on the recommendations of his broker for the few trades made each year. [T. 1662-64.] [redacted] does not perform any investment research for that account, and never engaged in active trading. [T. 1662-63; 1669.] Based on his testimony, he does not appear to understand what the term "investment objective" means as it is used in the securities industry, and was unable to articulate the investment objectives in his pre-JP Turner account. [T. 1662.] He does not regularly read investment-related periodicals, nor watch investment-related TV shows. [T. 1664.] He does not own a computer, and while his wife does own one, he uses it "very little." [T. 1656.]

[redacted] opened his JP Turner account in July 2007 following a series of cold calls from Konner. [T. 1666-67.] During the course of these calls, which began in April, [redacted] found Konner to be a good salesman and gained confidence in Konner's knowledge about investing. [T. 1666-69.] By the time the account was opened, [redacted] had begun to trust Konner because he believed Konner knew what he was doing and was looking out for [redacted]'s best interest. [T. 1675-76.]

Konner was on notice regarding [redacted]'s lack of sophistication and investing experience. During the calls before the account was opened, [redacted] told Konner he was a farmer. [T. 1670.] Regarding his personal investment experience, [redacted] told Konner that previously he had not done any research, but instead "had always left it up to somebody else" to direct any securities trading. [T. 1669.] [redacted] did not understand investment objectives and risk tolerance as those terms are used in the securities industry, and in the early discussions, told

Konner in simple terms that he "wanted to make money[3]" and "didn't want to lose money." [T. 1672-73.]

Even though Konner acknowledges that his entire business at the time was speculation trading, Konner did not explain speculation [redacted] in fact, [redacted] has no recollection of speculation or active trading even being mentioned. [T. 1674.] Konner likewise did not make any attempt to determine whether [redacted] could afford active trading, as [redacted] had no recollection of Konner asking him what his annual income or net worth were. [T. 1670; 1673] [redacted] also did not recall Konner asking whether [redacted]'s retirement savings were sufficient. [T. 1671] Regarding these same early calls with Konner before he opened his account, [redacted] does not recall any discussion of the concept of risk tolerance. [T. 1672; 1674-75.] Konner never discussed a trading strategy with [redacted], either before the account was opened or after. [T. 1673-74.]

[redacted] received a brokerage account application from JP Turner that had already been filled out for him. [DOE Ex. 49; T. 1676-77.] He had discussed the form and the information requested with Konner on the phone prior to receiving it. [T. 1678.] The financial figures on the form, including a net worth of $700,000, were accurate for [redacted] as of July 2007. The investment objectives on the form are ranked: (1) trading profits; (2) speculation; and (3) capital appreciation. [DOE Ex. 49] [redacted] did not select the investment objectives, and did not fully understand the choices. [T. 1679-80.] Because he didn't understand them [redacted] could not have agreed in any meaningful way to the choices marked by Konner, although he was willing to

[3] Konner repeatedly cites this testimony as somehow supporting his case. Konner's Brief, pp. 11; 18-19. The fact that [redacted] "wanted to make money" is totally unremarkable – every investor hopes that their investment will increase in value. Konner conveniently ignores [redacted]'s related testimony indicating that he also told Konner he did not want to lose money, thus expressing aversion to risk. [T. 1672-73.]

"take a few chances" with the small amount of money ($6,500) he was using to fund the account. [T. 1676; 1680.]

In April 2008, [redacted] received a pre-filled account update form from JP Turner. [DOE Ex. 50; T. 1693.] By that time, [redacted] had increased his JP Turner account balance to approximately $200,000, using money he obtained from sales of grain and that he would need in the fall to pay farming bills. [T. 1695-96.] The money represented 60-70% of his liquid assets at the time. [T. 1697.] [redacted] told Konner several times that he could not afford to lose his investment, and he conveyed to Konner that having more money at stake reduced his willingness to take risks. [T. 1696-97.] The pre-filled account update form included investment objectives ranked: (1) speculation; (2) trading profits; (3) income; (4) preservation of capital; and (5) capital appreciation. [DOE Ex. 50] The risk tolerance rankings identified on the form were: (1) aggressive; (2) moderate; and (3) conservative. [DOE Ex. 50.] [redacted] still did not fully understand the investment objective and risk tolerance choices, and so the rankings did not accurately reflect [redacted]'s own objectives. [T. 1698-1700.] In an attempt to make his aversion to risk clear, [redacted] again told Konner that he "[couldn't] afford to lose all this money . . . ." [T. 1698.] When reviewing the pre-filled form, [redacted] noticed that the form had an updated net worth figure of $2.5 million (compared with $700,000 as reflected on the account opening form) and investable assets figure of $750,000 (up from $200,000). [DOE Ex. 50.] [redacted] raised the issue and told Konner "I'm not worth near that," but Konner urged him to sign the form anyway. [T. 1700-01.] [redacted] signed the form because "[Konner] said it didn't mean anything. He said just initial it. I told him, I said, well, I'm not worth two and a half million. He said, well, that doesn't really mean anything." [T. 1702.]

[redacted] subsequently received additional pre-filled forms with inflated financials and incorrect investment objectives, including a Supplemental Application for NFS Margin Account

Privileges in May 2008, and an Active Account Suitability Questionnaire and Supplement in March 2009, which he signed despite their errors because Konner had told him that they didn't mean anything.[4] [DOE Exs. 51, 52 and 53; T. 1703-14.] [redacted] never told anyone at JP Turner that his investment objectives were speculation or short-term trading. [T. 1710.] [redacted] did write in 4 per week in the blank for frequency of trades on the March 2009 Active Account Suitability Questionnaire, which equates to about 200 transactions per year. [DOE Ex. 53.] Konner, however, ignored that response and continued to recommend considerably more trades than that as quickly as April 2009, and several months thereafter. [DOE Ex. 129; T. 1725.] By year's end, Konner had recommended 252 transactions in [redacted]'s account, 25% higher than [redacted]'s March Active Account Suitability Questionnaire reflected that he wanted.

Once the account was open and trading, Konner would communicate with [redacted] by phone, calling him to recommend purchases and sales in the account. [T. 1681-83.] Konner typically did most of the talking, and [redacted] seldom asked any questions. [T. 1683.] [redacted] took a passive role and relied on Konner to direct the trading in the account. [T. 1684.] [redacted] could only recall one trade that he initiated during 2008 and 2009, and even that stock had been recommended to him by someone else. [T. 1726.]

As time went on, [redacted] found it "very difficult" to keep up with the trading in the account due to the number of trades and the number of companies involved, most of which he had never heard of. [T. 1686; 1725-26.] [redacted] was not doing any independent investment research, and when making decisions on Konner's recommendations, [redacted] typically had only the information Konner gave him over the phone for purposes of making a decision. [T. 1687; 1688-89; 1721-22.] [redacted] trusted Konner and relied on his knowledge and expertise, and in

[4] [redacted] received another Active Account Suitability Questionnaire in February 2010 that was not pre-filled. [DOE Ex. 54.] On it, he listed his net worth as $800,000 and his liquid net worth as $400,000. He did not mark either speculation or short-term trading as investment objectives.

2008 and 2009, followed Konner's recommendations "100%" of the time. [T. 1689-90; 1722.] Konner also executed a significant number of trades without authorization from [redacted] when asked whether he received a call before every trade, [redacted]n replied "No. Oh, no. I would have been on the phone all day." [T. 1720; 1722.] [redacted]n never discussed commissions with Konner after the first couple trades in 2007. [T. 1675.] [redacted] did not keep track of commissions on trades in his account. [T. 1690.]

C. Expert Findings on the [redacted]n Account

At the hearing, the Division presented the only expert testimony adduced regarding the churning claims. The Division's churning expert, Louis Dempsey, who had reviewed the activity reflected in the [redacted] account monthly statements, concluded that, during the period from January through December 2009, Konner engaged in trading patterns consistent with churning by executing over 118 sale transactions totaling $4,163,638.86 and over 134 purchase transactions totaling $4,419,365.84. These trades resulted in losses in the [redacted] account of approximately $54,119[5] and generated commissions to JP Turner of $87,686, and margin interest of $3,546. Konner's aggressive trading in this account resulted in an annualized equity turnover of 17, almost triple the presumptive level for churning (i.e., 6), and the cost equity factor was 34.6%. Dempsey also concluded that virtually all of the transactions in the [redacted] account were marked solicited, indicating Konner's control over the trading in the account. Based on Konner's testimony that his payout ratio was 65% of gross commissions, Dempsey concluded

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5. Konner claims that Dempsey made an error with respect to the trading results in the [redacted] account and that, in fact, [redacted] made money in the account during 2009. Konner's Brief, pp. 20-21. As Dempsey explained during his testimony, however, there was no error. [T. 3176-85; 3291-92.] The PIPE offering investment on which Konner bases his argument was made *outside* [redacted]s JP Turner account. [T. 3183-84.] [redacted] later *transferred* the securities into his JP Turner account, but such transfers are routinely treated as an influx of additional capital for purposes of calculating profit and loss, and unrealized gains are not properly included. [Id.; 3292.] Moreover, Konner can hardly question that [redacted]'s account lost money – his 2009 JP Turner Form 1099 shows a short-term realized loss of approximately $130,000, which did not include a short-term realized disallowed loss of $90,000. [Konner Ex. 39, p. JPTURNER-SEC-ATL 004235.]

that Konner earned commissions of over $55,000 as a result of the trading activity in the [redacted] account. [DOE Ex. 155, pg. 18-19 **The Carlson Account Trading Activity**, ¶33.]

III. LEGAL DISCUSSION

A. By Churning the Carlson Account, Konner Violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

"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." Al Rizek, Initial Decision Release No. 121, 1998 WL 73209 at *13 (Feb. 24, 1998) (internal quotation marks omitted).[6] The three elements of churning are (1) control of the account by the broker, including *de facto* control through acquiescence, trust, or reliance; (2) excessive trading in light of the investor's trading objectives; and (3) 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. J.W. Barclay & Co., Initial Decision Release No. 239, 2003 WL 22415736 at *24 (Oct. 23, 2003);[7] Al Rizek, 1999 WL 600427 at *5. Churning is a violation of Section 17(a) of the Securities Act and of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Donald A. Roche, Exchange Act Release No. 38742, 1997 WL 328870 at *5 (June 17, 1997); J.W. Barclay, 2003 WL 22415736 at *11. "Churning, in and of itself, may be a deceptive and manipulative device under section 10(b), the scienter required by section 10(b) being implicit in the nature of the conduct." Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983).

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[6] The Commission issued an opinion in this case generally affirming the Initial Decision, but reducing the disgorgement amount and imposing a permanent associational bar. Al Rizek, Exchange Act Release No. 41725, 1999 WL 600427 at *7-9 (Aug. 11, 1999), *aff'd*, Rizek v. SEC, 215 F.3d 157 (1st Cir. 2000).

[7] The Commission also issued an opinion in this case generally affirming the Initial Decision, but without reaching the issue of churning. Edgar B. Alacan, Exchange Act Release No. 49970, 2004 WL 1765507 (Jul. 6, 2004).

The law judge found that the Division's evidence satisfied the elements of churning with respect to Konner's recommended trading in the Carlson account. Michael Bresner, et al., Initial Decision Release No. 517, 2013 WL 5960690 at *107 (Nov. 8, 2013). Here before the Commission, the scope of Konner's appeal is quite narrow. He concedes that the Initial Decision's recounting of the facts is a "fair summary of the relevant documentary and testimonial evidence pertaining to the [redacted]charge," and that the law judge's "summary of the applicable law, as far as it goes, is not being challenged on this appeal." Konner's Brief, p. 3. Having accepted both the facts and the law, Konner argues that the Commission should reverse the Initial Decision because the law judge's findings on each of the three elements of churning are "against the substantial weight of the evidence." Id. As the record shows, however, the Division adduced substantial evidence at the hearing proving, by more than a preponderance, that Konner churned the [redacted] account.

Importantly, Konner acknowledges that "the findings against Konner by the Law Judge turn largely on credibility assessments" and that "the trier of fact is generally best positioned to assess credibility." Konner's Brief, p. 5. The Commission has long held that a law judge's credibility findings are entitled to considerable weight and deference because they are based on hearing the witnesses' testimony and observing their demeanor. See Leslie A. Arouh, Exchange Act Rel. No. 50889, 2004 WL 2964652 at *8, n.40 (Dec. 20, 2004). These credibility findings can be overcome only where the record contains substantial evidence for doing so. Guy P. Riordan, Exchange Act Rel. No. 61153, 2009 WL 4731397 at *10, n.54 (Dec. 11, 2009); Robert M. Fuller, Exchange Act Rel. No. 48406, 2003 WL 22016309, at *7 (Aug. 25, 2003) (internal quotation marks and citation omitted), *petition denied*, 95 F. App'x 361 (D.C. Cir. 2004).[8]

[8] The Division is aware that the Commission reviews the record *de novo*. 17 C.F.R. § 201.411. Rule of Practice 411(d), however, specifies that the Commission's review of an Initial Decision is limited to the issues raised by the petitioning party unless the Commission exercises its discretion to raise and determine other material issues

Konner fails to meet this standard. The evidence Konner cites as substantially outweighing the law judge's rulings falls into one of three categories: (1) self-serving, uncorroborated testimony from Konner himself; (2) investment objective choices appearing on [redacted]'s account documents that Konner made for [redacted] without explaining them to him and contrary to his true objectives; and (3) vague testimony from J. Williams, who the law judge concluded lacked credibility and who admitted he had no definite recollection of anything relevant to [redacted]'s account. These sources do not outweigh the evidence cited by the law judge or justify setting aside the considerable deference that the Commission should give to the credibility assessments Konner identifies.[9]

Konner also raises a number of ancillary arguments that are not supported by law. For example, Konner argues that the law judge made "inconsistent credibility assessments." As the Commission has previously noted, however, the factfinder is not required to find a witness credible on every point. Riordan, 2009 WL at *11, n.56 ("finder of fact is free to believe part of a witness's testimony and to reject other parts;" internal quotes and cites omitted.) In addition, Konner complains because the law judge ruled against the Division on the claims based on the account of another Konner customer, [redacted]. But evidence of other, non-fraudulent conduct is not relevant to negate specific evidence of fraud. See Dane S. Faber, Exchange Act Rel. No. 49216, 2004 WL 239507 at *7, n.33 (Feb. 10, 2004) (finding failure to engage in other violative conduct did not mitigate violations at issue); U.S. v. Winograd, 656 F.2d 279, 284 (7th

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sua sponte. Because Konner expressly limits his challenges to the credibility assessments made by the law judge, the Commission should hold Konner to the standard in Riordan and other cases upholding credibility assessments unless substantial evidence in the record warrants reversal.

[9] The Division notes that none of the Commission cases cited by Konner with respect to disregarding a law judge's determinations of credibility are successful appeals by a respondent specifically contesting those determinations. David F. Bandimere, Exchange Act Rel. No. 71333, 2014 WL 198175 at *3, n.12 (Jan. 6, 2014) (following timely appeal, Commission denies Division's motion for summary affirmance of Initial Decision); Herbert Moskowitz, Exchange Act Rel. No. 45609, 2002 WL 434524 (Mar. 21, 2002) (Division appeal of ALJ's finding of no violation granted); Kenneth R. Ward, Exchange Act Rel. No. 47535, 2003 WL 1447865 (Mar. 19, 2003) (Division appeal of ALJ's dismissal of proceedings granted).

Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Konner also asserts that neither [redacted] nor [redacted] complained about Konner and that [redacted] continued to do business with Konner well after the churn period. However, evidence that investors may have been satisfied customers and/or did not believe they had been defrauded does not bear on whether Konner actually committed fraud. U.S. v. Elliott, 62 F.3d 1304, 1308 (11th Cir. 1995).[10]

1. The Trading Recommended by Konner was Excessive

a. The Trading in the Carlson Account was Inconsistent with [redacted]'s True Investment Objectives

When determining whether trading is excessive, the test is whether the transactions effected by the registered representative were excessive in light of the customer's investment objectives. Miley v. Oppenheimer & Co., 637 F.2d 318, 324 (5th Cir. 1981), *reh'g denied*, 642 F. 2d 1210 (5th Cir. 1981); Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361, 1368 (7th Cir. 1983) ("The essential issue of fact is 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 his customer.").

Looking at [redacted]'s intent with respect to investment objectives, the evidence shows he was not an aggressive investor who knowingly chose to speculate through active trading. When he opened his JP Turner account, [redacted] did not understand the terms "investment objectives" and "risk tolerance" as they are used in the securities industry. [T. 1672-73; 1786-87; 1915-16.] In the discussions leading up to opening his JP Turner account, [redacted] simply told Konner that he "wanted to make money" and "didn't want to lose money." [Id.] [redacted]'s testimony showed that he had very limited investment experience prior to opening his JP Turner account, and no

[10] As stated by the Eleventh Circuit, "[t]o the extent that [defendant] proffered the witnesses to show that these investors did not believe that they had been defrauded, that they had received a portion of their money back upon request, . . . , or that [defendant] had backed these investors with the appropriate collateral as he had promised, the district court properly excluded this testimony as irrelevant." 62 F.3d at 1308.

experience with active trading. [T. 1658-63; 1669.] He thus had no context or foundation that would allow him to appreciate, without help, the risks inherent in active trading, and as stated earlier, Konner admitted that he did not explain those risks and costs to his customers. [T. 333-34; 1913-14.]

In the Initial Decision, the law judge "conclude[d] that the account application form and Account Update Forms were filled out for [redacted] by Konner, and that they contain misstatements relating to [redacted]'s financial information and/or investment objectives and risk tolerance. In short, Carlson's investment objectives and risk tolerance are not accurately reflected." Bresner, 2013 WL 5960690 at *106. Konner cites these same JP Turner account documents as demonstrating that [redacted]'s investment objectives included speculation and that he wanted to take risks. As the evidence showed, however, it was Konner who decided to mark speculation and trading profits without explaining to [redacted] what those choices meant; in fact, [redacted] has no recollection of speculation or active trading – which Konner concedes was his entire business – being discussed at all. [T. 1674.] It thus was no accident that, as the law judge found, the JP Turner account forms on which Konner relies do not accurately reflect [redacted] investment objectives and risk tolerance. [redacted] did not choose to speculate as Konner understood that term, nor did he understand the risks of active trading. Instead, [redacted] received a brokerage account application that Konner had already filled out, pre-marking trading profits and speculation as [redacted]'s top objectives. [DOE Ex. 49; T. 1676-77.]

Over time, [redacted] received and signed a series of pre-filled account documents from Konner that included pre-marked investment objective choices, but there was ample evidence – that the law judge found credible – that [redacted] repeatedly told Konner that [redacted] was in fact more conservative than the choices Konner kept marking for him. For example, in connection with the April 2008 account update form [redacted] received from JP Turner, [redacted] told Konner

several times that he could not afford to lose his investment, and he conveyed to Konner that having more money at stake reduced his willingness to take risks. [DOE Ex. 50; T. 1693; 1696-97; 1698.]

Konner's attempt to rely on those pre-filled forms to establish the investment objectives he wrote on them as [redacted]s is also problematic because Konner knew that the financial information he wrote in for [redacted] was false. [T. 1700-02] Konner cites his own testimony on the question of whether "he knew that the information on client documents was true or not," which Konner answered with "I only knew what [the customer] told me." Konner's Brief, pp. 25, citing T. 0432-35, 4331-32, 4358. That testimony, however, is highly ironic, given [redacted]'s clear and emphatic testimony that he repeatedly told Konner that he could not afford to lose his investment, and that he was not worth $2.5 million – the figure that Konner had written in as [redacted]'s estimated net worth.[11] [DOE Ex. 50, 51, 52, 53; T. 1696-98; 1700-01; 1800-01; 1913] The law judge focused on this point when determining that excessive trading took place, noting that "Konner failed to provide a credible explanation for the change in the financial information on the forms or the inaccuracies contained thereon." Bresner, 2013 WL 5960690 at *106.

Moreover, as a matter of policy, the Commission should not permit Konner to defend himself using account documents he filled out for an unsophisticated customer such as [redacted] who told Konner he could not afford to lose his investment. Richard G. Cody, Exchange Act Rel. No. 64565, 2011 WL 2098202 at *2, n.4; *13 (May 27, 2011) (in FINRA appeal, excessive

[11] The law judge found [redacted] to be "particularly credible on the subject of his net worth." Bresner, 2013 WL 5960690 at *105. In an attempt to discredit that testimony, Konner shows his true character by calling his former customer a liar: "[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." Konner's Brief, p. 15. This is a gross mischaracterization. In the testimony Konner cites, [redacted] testified that he had not read a given form, and Konner's counsel then pointed out that the form – which, again, [redacted] had never read – contained boilerplate legalese stating that by signing, the customer was representing that the document had been read. [T. 1798.] Thus, [redacted]n did not lie, and Konner's attempt to twist [redacted]'s answer into an admission of lying is unfounded. When asked about the exchange on re-direct, [redacted] confirmed that he had never read the form, and, thus, did not intend to make a false statement. [T. 1910.]

trading found despite broker-filled account objective of speculation where customer had not independently "expressed interest in short-term or speculative trading").

Excessive trading is also apparent from looking at the evidence and testimony specific to [redacted]'s account. As noted by the law judge, in March 2009, three months into the churn period, [redacted] himself wrote on a JP Turner account document a trade frequency of four per week. [T. 1712.] There is no rational interpretation of that figure apart from [redacted] indicating, clearly and in his own hand, a trade frequency with which he was comfortable. Despite this, Konner recommended significantly more trades than this (including unauthorized trades) knowing that [redacted] would passively acquiesce.

Finally, Konner cites the testimony of former JP Turner supervisor J. Williams for support. The law judge made a clear credibility determination with respect to J. Williams, however, concluding that he was "not credible at all" on certain key points, and that his testimony specifically with respect to the net worth reflected on [redacted]'s March 2009 Active Account Suitability Questionnaire (which inexplicably jumped from $700,000 to $2.5 million) was "very low." The law judge also noted Williams' nervous and poor demeanor – which included a voice so inaudible and faint that the court reporter had to move adjacent to the witness stand in order to hear him – and inability to recall any specifics about the documents or individuals in this case, all of which discredits his erratic testimony. [T. 3769-70.] Not surprisingly, [redacted] had no recollection of talking to anyone at JP Turner besides Jason and Chad Konner, and he reaffirmed this when asked specifically about John Williams and his co-supervisor in the Brooklyn office, Sideris. [T. 1727; 1710-11; 1852-53]. Moreover, even if J. Williams had some recollection of the facts, the Commission has found that a supervisor's approval of illegal conduct does not exonerate the broker. Donald T. Sheldon, Exchange Act Rel. No. 31475, 1992 WL 353048 at *19, n.130 (Nov. 18, 1992) (Commission opinion).

b. The Turnover Ratio and Breakeven Rate of the Trading Konner Recommended in [redacted]'s Account Far Exceeds Levels Presumptive of Churning

The Commission has typically used two metrics when determining whether trading in churning cases is excessive: turnover rate and cost to equity ratio (also known as cost equity factor or breakeven ratio). J.W. Barclay, 2003 WL 22415736 at *26; Rizek, 1999 WL 600427 at *5; Rizek, 1998 WL 73209 at *15; DOE Ex. 155 at 5.

Turnover rate measures the number of times per year the securities in an account are replaced by new securities, and is calculated by dividing the total dollar value of purchases in one year by the average equity. Rizek, 1998 WL 73209 at *15. A turnover rate in excess of six (sometimes calculated by including any margin extended to the investor in the average equity) is generally presumed to reflect excessive trading. See Shearson Lehman Hutton Inc., Exchange Act Rel. No. 26766, 1989 WL 257097 at *3 (Apr. 28, 1989) (finding excessive trading where the turnover rate was 7.4); J.W. Barclay, 2003 WL 22415736 at *26; Rizek, 1999 WL 600427 at *5; Rizek, 1998 WL 73209 at *16; see also DOE Ex. 155 at 5.

The other metric is cost-to-equity ratio, sometimes called a breakeven rate or (as in JP Turner's AARS) return on investment. The cost-to-equity ratio measures the "damage done" to an account by excessive trading. Rizek, 1999 WL 600427 at *5; Rizek, 1998 WL 73209 at *16. Cost-to-equity ratio is calculated by determining the percentage return on the investor's average net equity needed to pay broker commissions and other expenses. Rizek, 1998 WL 73209 at *16; J.W. Barclay, 2003 WL 22415736 at *26. A registered representative is presumed to have excessively traded an account when the trading is so extensive that the account requires a 20% cost-to-equity ratio. See Sage Advisory Serv.'s, Exchange Act Release No. 44600, 2001 WL 849405, at *7 (July 27, 2001) (citing Rizek, 1999 WL 600427 at *5); Sandra Simpson, Exchange Act Release No. 45923, 2002 WL 987555 at *14 (May 14, 2002) (Commission opinion)

(Annualized turnover rates of 2.10 to 8.09 and annualized breakeven rates of 11.98% to 54.95% are excessive); Laurie Jones Canady, Exchange Act Release No. 41250, 1999 WL 183600 at *6 (Apr. 5, 1999) (Annualized turnover rates ranging between 3.83 and 7.28 and breakeven levels of 8.96% to 27.48% are excessive).

Based on these commonly used metrics, the trading Konner recommended for the [redacted] account during 2009 was clearly excessive, involving a breakeven rate of 34.6% and a turnover ratio of 17. [DOE Ex. 155.]

In addition, as the Commission has previously recognized, there is a difference between aggressive investing and excessive trading. Even customers who agree to aggressive investing do not implicitly authorize their brokers to deplete the account through commissions, markups and margin charges. Michael David Sweeney, Exchange Act Rel. No. 29884, 1991 WL 716756 at *3 (Oct. 30, 1991); Shearson Lehman Hutton, Inc., 1989 WL 257097 at *2; see also Costello, 711 F.2d at 1369. From January to December 2009, there were 252 transactions in the account (a staggering number that significantly exceeded the frequency of 4 trades per week [redacted] listed on a March 2009 Active Account Suitability Questionnaire) involving a total of around $8.6 million in purchases and sales. As stated, the annualized turnover rate was 17 and the cost-to-equity ratio was 34.6%. [DOE Ex. 155]. As a result of this trading, [redacted] lost about $54,000. Thus, even assuming, *arguendo*, that [redacted] was, as Konner claims, an aggressive investor who understood the risks of active trading and chose to speculate anyway, [redacted] did not implicitly authorize Konner to deplete his account through commissions. Accordingly, the Commission should conclude that the trading that Konner recommended in the [redacted] account from January through December 2009 was excessive irrespective of the account objectives.

2. Konner Controlled the Trading in the [redacted] Account

A key factor in determining whether control exists is whether the customer lacks the ability to manage the account and routinely follows the recommendations of the registered representative (as opposed to exercising independent judgment). Mihara v. Dean Witter & Co., Inc., 619 F.2d 814, 820-21 (9th Cir. 1980). Registered representatives may "exercise *de facto* control where a customer places his trust and faith in a broker and routinely follows his broker's advice." Cruse v. Equitable Sec. of New York, Inc., 678 F. Supp. 1023, 1030-31 (S.D.N.Y. 1987). De facto control of an account may be inferred from all the facts and circumstances, and requires an inquiry into whether the broker or the customer is responsible for the level of trading. J.W. Barclay, 2003 WL 22415736 at *24. "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." Id. (citations omitted).

Factors to consider in evaluating de facto control include the investor's sophistication, the investor's prior securities experience, the trust and confidence the investor has in the broker, the amount of independent research conducted by the investor, the truth and accuracy of information provided by the broker, and whether the investor "habitually" follows the advice of the broker. Rizek, 1998 WL 73209 at *13-14; Roche, 1997 WL 328870 at *4, n.14; see also Rizek, 1999 WL 600427 at *6 (considering whether the broker explained the trading risks, whether the investor understood the trading risks and the implications of trading on margin, and how often the investor followed the broker's recommendations).

In this case, the factors previously recognized by the Commission demonstrate that Konner had *de facto* control over the [redacted] account because [redacted] lacked the ability to evaluate Konner's recommendations in a meaningful way:

- First, [redacted] testified – and the law judge found – he was **not a sophisticated investor** and lacks the knowledge or expertise to trade stocks on his own. [T. 1664; 1656-57; 1913-14; Bresner, 2013 WL 5960690 at *105.] [redacted] was incapable of making an independent evaluation of Konner's active trading strategy, and he did not understand that the frequency of trading itself was an ever-growing factor in the profitability of the account. [T. 1814-15; 1816; 1840-41; 1845.]
- Second, [redacted] **had very limited investment experience**. Prior to opening his JP Turner account, [redacted] had a few IRAs holding mutual funds and a single brokerage account. [T. 1658-63.] In addition, the pre-existing brokerage account was very different from what Konner was recommending at JP Turner – it typically traded less than five times a year, and [redacted] described it as conservative. [T. 1662-64.]
- Third, [redacted] **trusted Konner, relied on his knowledge and expertise in the financial markets, and believed he would look out for [redacted]'s best interest when making trading recommendations**. [T. 1666-69;1675-76; 1858.] [redacted]n relied to his detriment on Konner's assurances that investments that were not doing well in his JPT account would "go the other way," even after Konner made unauthorized trades in his account because he trusted Konner to act in his best interest. [T. 1687, 1788-92.]
- Fourth, nearly **all the trades were initiated by Konner's recommendations**, and [redacted] relied on those recommendations "100%" of the time; in fact, [redacted] made only one recommendation during the entire relationship, which was made pursuant to a recommendation from someone else, and never declined a trade recommended by Konner. [T. 1684; 1689-90; 1722; 1726; 1839-40; 1870-71.] Such passive acquiescence to Konner's recommendations was consistent with how he handled his pre-existing account as well. [T. 1662-64; 1669; 1750-51;1907-08.]

- Fifth, [redacted] **had not done independent research** for trading in his pre-existing account, and did none on any of the companies recommended by Konner. [T. 1663; 1687-89; 1721.]
- And finally, regarding the truth and accuracy of the information provided by Konner, [redacted] **knew only what Konner told him** over the phone. [T. 1687-89; 1721-22.] Konner likewise never told [redacted] the information that should have been conveyed – the level of commissions being charged and their impact when engaging in active trading. [T. 332-34; 1675; 1814-16; 1845.]

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

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

unauthorized trading in non-discretionary supports a finding of de facto control in the churning context. Simpson, 2002 WL 987555 at *15.

In the Initial Decision, the law judge found that the facts "provide overwhelming support for a finding that [redacted] lacked the general investment knowledge and sophistication to control his account, which left *de facto* control of the JPT account in Konner's hands." Bresner, 2013 WL 5960690 at *105. In his brief, Konner makes a number of arguments on the issue of *de facto* control, none of which are persuasive. For example, Konner claims [redacted] "rejected a number of conservative investment opportunities" that Konner purportedly offered him. Konner's Brief, pp. 11-12. Dealing with the same argument below, however, the law judge found [redacted] testimony that he had no recollection of ever rejecting a trade more credible than Konner's self-serving testimony that he had recommended conservative options. Bresner, 2013 WL 5960690 at *105; [T. 1839-40.] Konner fails to provide substantial evidence suggesting that credibility assessment should be disturbed – the evidence he cites is his own testimony and testimony that he offered conservative investments to the other customer whose account the Division alleged Konner churned, [redacted]r. Even if that were true (and Konner provides no citation to the record to establish it), the fact that he may have offered conservative investments to another customer does not make it likely he offered them to [redacted]. Moreover, the notion of Konner offering conservative investments is contrary to the Konner's substantial testimony indicating that he only looked for clients interested in speculation. [T. 321-3; 325; 332; 4425-26.]

Another argument forwarded by Konner is that [redacted]n viewed his JP Turner account as having different, more risky investment objectives than his other accounts, and that his decision to put money in the JP Turner account meant he intended to take huge risks. Konner's Brief, pp. 10-13. This argument fails on multiple levels. First, [redacted]s testimony demonstrates that he did not really understand investment objectives:

> Q. What are the investment objectives for [your Wells Fargo] account?
> A. It's local so it's just a place to put some spare money and money I don't think I'm going to need for a while and then he gives me a recommendation on maybe buying stock or something. So that's why it's there, I guess.
> Q. Do you understand what the term investment objective means?
> A. Well, I guess I do. I don't know.

[T. 1662; see also 1672-73.] Second, there is no evidence to support the contention that [redacted] viewed his JP Turner account as qualitatively different from his pre-existing Wells Fargo account, which he viewed as conservative. [T. 1663-64.] Regarding investment objectives for his JP Turner account, [redacted] told Konner that he "wanted to make money" (which, of course, is every investor's intent) but in the same passage said that "I realized that certain things were a little more risky. . . . But I also know there is also some good stuff out that will make you money, you know, if you buy it and hold it, too." [T. 1672-73.] The fact that [redacted] did not view Konner's style of trading as inconsistent with a buy and hold philosophy speaks volumes both about [redacted]'s lack of investor sophistication and about Konner's failure to make his intent to pursue speculation clear. [T. 1668-76.] [redacted] did not view his JP Turner account differently.

Konner also argues that because Carlson received account statements, trade confirmations and/or tax forms from JP Turner that reflected a high-level of trading, [redacted] must have been aware of the activity in his account and accepted it. Konner's Brief, pp. 12. Konner's argument is contrary to law. Mere receipt of the account statements and trade confirmations does not establish that the customers understood and accepted what was happening in their accounts. See Sweeney, 1991 WL 716756 at *4 (Oct. 30, 1991) (Commission opinion; on churning control element, "[t]he fact that the customers received confirmations and monthly statements does not change our conclusion [that broker controlled account]"); Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 36 (1st Cir. 1986) (investor did not ratify firm's

unauthorized actions or excessive fees by failing to object to them after receiving account statements); Karlen v. Friedman & Co., 688 F.2d 1193, 1200 (8th Cir. 1982).

3. Konner Acted with Scienter

The scienter requirement for churning is met where the registered representative acts to benefit himself by earning commissions, rather than acting for the benefit of his customer. Roche, 1997 WL 328870, at *4, (citing Mihara., 619 F.2d at 820-21). In the context of churning, the requisite scienter may be "implicit in the nature of the conduct." Franks v. Cavanaugh, 711 F. Supp. 1186, 1191 (S.D.N.Y. 1989). Scienter also may be established upon a showing of recklessness. Sharp v. Coopers & Lybrand, 649 F.2d 175, 193 (3rd Cir. 1981).

Scienter in a churning case may be established by proof that the broker acted with the intent to defraud or with reckless disregard for the investor's interests. Roche, 1997 WL 328870 at *4. Factors to consider in evaluating scienter include whether the broker investigated and evaluated the suitability of his recommendations, and whether the recommendations were in fact suitable for his customers. Rizek, 1998 WL 73209 at *18. Another consideration is the change in portfolio value relative to transaction costs; large portfolio losses, or even small profits, combined with considerable transaction costs, are consistent with churning. Roche, 1997 WL 328870 at *4; Samuel B. Franklin & Company, Exchange Act Rel. No. 7407, 1964 WL 66447 at *3 (Sept. 3, 1964) (portfolio gain of $3,884 on initial investment of $118,098, with $23,694 paid in commissions, held consistent with churning, even though portfolio value would have dropped had there been no trading at all); Behel, Johnsen & Co., Exchange Act Rel. No. 3967, 1947 WL 24844 at *3 (June 24, 1947) (portfolio gain of $2,400 on initial investment of $61,731, with $18,879 paid in commissions, held consistent with churning).

In the Initial Decision, the law judge found "Konner acted with scienter and churned [redacted]'s JPT account." Bresner, 2013 WL 5960690 at *107. The ruling on scienter emphasized

two points, both of which turned on credibility assessments. The first point was that Konner's manipulation of [redacted]'s account documents showed intent to defraud:

> During the alleged churn period, **Konner provided pre-filled out forms relating to [redacted]'s account, and represented, knowing fully the implications of his representations and the fact that [redacted] did not, that certain financial information did not really mean anything.** Konner, having earned the trust and confidence of [redacted], and knowing he was not a sophisticated investor, directed him to sign various forms without first explaining their meaning or implication, for the sole purpose of generating activity and commission for his personal gain.

Id. at 106 (emphasis added). In order to make that finding, the law judge, who heard the witnesses' testimony and observed their demeanor, found [redacted]'s version of events more credible than Konner's. The second point the law judge emphasized on scienter was Konner's inability to credibly explain the various changes in [redacted]'s net worth as recorded on his JP Turner account documents. Id. [redacted]'s testimony on the issue was clear – in response to being told by [redacted] that the changes in the account information (which included a jump in net worth from $700,000 to $2.5 million that Konner had no basis for whatsoever) was not even close to accurate, Konner told [redacted] "that doesn't really mean anything" and asked him to sign the form. [T. 1700-1702; 1782] [redacted] signed the form because "[Konner] said it didn't mean anything. He said just initial it. I told him, I said, well, I'm not worth two and a half million. He said, well, that doesn't really mean anything."[12] [T. 1702] The law judge's scienter finding contrasted that testimony with Konner's ever-changing account of what happened:

> As noted above, Konner was strikingly inconsistent when questioned about the source and accuracy of [redacted]'s net worth figure. . . . By contrast, [redacted] was emphatic and consistent and had a very persuasive demeanor in testifying that he was not worth anywhere near $2.5 million. The only plausible explanation for Konner's shifting explanations of Carlson's listed net worth is that he was making it up during the hearing as he went along, and that he made up the numbers when

[12] Konner repeatedly argues that [redacted] made an "enormous concession" by testifying that "his signature on a business document means something," and that, consequently, Konner was justified in relying on documents [redacted] signed. Konner's Brief, pp. 7, 13-15. Konner cannot rely on documents that he knew he had falsified, and [redacted]'s credibility is not in any way impeached by signing a document that Konner told him "didn't mean anything." [T. 1700-02; 1782.]

they were placed on the forms. This is powerful evidence of a high degree of scienter.

Bresner, 2013 WL 5960690 at *106. Konner fails to cite any credible evidence to the contrary, much less sufficient evidence to outweigh the facts and logical inferences drawn by the law judge, and thus, those credibility assessments should be sustained.

Moreover, other evidence adduced at the hearing demonstrated that Konner's trading in the [redacted] account was done to generate commissions rather than for Carlson's benefit. For example, Konner engaged in additional deceit and manipulation with respect to the [redacted] account, including executing a significant number of unauthorized trades. [T. 1720-22.] Konner's lack of a trading strategy or other explanation justifying the large number of trades he recommended is also strong evidence of scienter. Konner testified that he looked for investors looking to speculate in the market, but stopped short of explaining why that translated into the intense trading reflected in his customers' accounts. [T. 328-38.] The lack of a trading strategy is strong evidence of scienter when viewed in the context of the trading volume – there were 252 trades in [redacted]'s account during 2009 (25% more than [redacted] indicated he was comfortable with in March) resulting in a cost-to-equity ratio of 34.6%. Moreover, the trading wasn't necessary to Konner's goal of speculation, as Konner concedes he could have pursued speculation or trading profits as investment objectives without trading in and out of stocks so frequently. [T. 335.]

Konner also acknowledged that a high level of trading could pose financial risk to a customer's account, but he never discussed with his customers the impact that the total commissions and fees generated by active trading would have on their account, or the concepts of breakeven rate and turnover ratio. [T. 332-337.] In sum, Konner has no justification for the high level of trading he recommended and which resulted in a significant loss to [redacted]n, and

although he knew the commissions and fees associated with that trading alone could deplete a customer's account, he never told [redacted] that.

As found by the law judge, Konner's manipulation of [redacted]'s account forms, combined with the difference between [redacted]'s credible testimony and Konner's shifting explanations on the net worth issue, warrants a finding that Konner intended to defraud [redacted] Konner fails to offer any credible evidence to the contrary, and thus, the law judge's credibility assessments should be affirmed.

IV. RELIEF REQUESTED/PUBLIC INTEREST

A. Cease-and-Desist Order

Section 8A of the Securities Act and Section 21C of the Exchange Act and authorize the Commission to impose cease-and-desist orders against any person who, among other things, has committed or caused violations of the Securities Act or the Exchange Act respectively. While there must be "some" risk of future violations to impose such relief, that risk:

> need not be very great to warrant issuing a cease-and-desist order. Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation. To put it another way, evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist.

KPMG Peat Marwick, LLP, Exchange Act Rel. No. 43862, 2001 WL 47245 at *24 (Jan. 19, 2001). When determining whether to impose a cease-and-desist order, the Court should consider a range of traditional factors, including:

> 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.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); see also Richard C. Spangler, Inc., Exchange Act Rel. No. 12104, 46 S.E.C. 238, 254 n.67 (1976). No one criterion is dispositive.

At the hearing, the Division demonstrated that Konner's violative conduct was egregious. He willfully and/or recklessly disregarded his customer's investment objectives and recommended trading that resulted in staggeringly high turnover and breakeven rates while generating thousands of dollars in commissions. In addition, the infraction was not isolated, but instead took place over a full calendar year, involving hundreds of trades. Moreover, Konner has made no gesture towards recognizing the wrongful nature of his conduct, insisting instead that no violations occurred, and he has made no assurances against future violations. And because he continues to work for DPEC Partners, Konner's occupation presents opportunities for future violations.

Accordingly, based upon the evidence presented at the hearing in this matter, the Commission should order Konner to cease and desist from committing or causing violations of and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Disgorgement Plus Prejudgment Interest

Section 8A(e) of the Securities Act, Section 21C(e) of the Exchange Act and Section 9(f)(5) of the Investment Company Act allow the Commission to seek an order requiring disgorgement, including prejudgment interest, in cease-and-desist proceedings brought under Section 8A of the Securities Act, Section 21C of the Exchange Act, and Section 9 of the Investment Company Act. In addition, Section 21B(e) of the Exchange Act and 9(e) of the Investment Company Act provides a basis for disgorgement in administrative proceedings.

Disgorgement is designed to deprive a wrongdoer of his ill-gotten gains, which in a churning case equate to the portion of the commissions retained by the broker. Rizek, 1999 WL 600427 at *7. Because separating legal from illegal profits exactly may at times be a near-impossible task, disgorgement need only be a reasonable approximation of profits causally connected to the violation. SEC v. First City Financial Corp., Ltd., 890 F.2d 1215, 1231 (D.C. Cir. 1989). In this case, Division churning expert Dempsey reviewed and verified the staff's analysis of trade blotter commission for the trades in question and calculated the portion of those commissions retained by Konner using the retention percentages he testified to in the underlying investigation (and which was not materially different at the hearing). [DOE Ex. 155.] Based on Dempsey's calculations, Respondent Konner should be ordered to disgorge $55,000. [DOE Ex. 155, pp. 18-23.]

Regarding prejudgment interest, Rule of Practice 600 specifies that it should begin on the first day of the month following each violation. 17 § C.F.R. 201.600(a). Accordingly, the Division has computed prejudgment interest using the first day of the month following the relevant churn period. Under these facts, prejudgment interest for Konner totals $6,306.20.[13]

C. Civil Penalties

Section 21B of the Exchange Act, Section 203(i) of the Advisers Act, and Section 9(d) of the Investment Company Act authorize the Commission to impose civil monetary penalties in public administrative proceedings against any person who, among other things, has willfully violated the Securities Act or the Exchange Act. Additionally, Sections 8A(g) of the Securities Act, 21B(a) of the Exchange Act and Section 9(d) of the Investment Company Act authorize the imposition of civil monetary penalties in cease-and-desist proceedings instituted pursuant to

[13] For the Commission's convenience, the Division is including a Prejudgment Interest Report supporting its calculation as Exhibit A to this Post-Hearing Brief.

Section 8A of the Securities Act, Section 21C of the Exchange Act and Section 9 of the Investment Company Act, respectively.

In considering under this section whether a penalty is in the public interest, the Commission may consider:

> (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;
> (2) the harm to other persons resulting either directly or indirectly from such act or omission;
> (3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;
> (4) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization . . .;
> (5) the need to deter such person and other persons from committing such acts or omissions; and
> (6) such other matters as justice may require.

Section 21B(c) of the Exchange Act, 15 U.S.C.A. § 78u-2(c); Section 9(d)(3) of the Investment Company Act, 15 U.S.C.A. § 80a-9(d)(3). "Not all factors may be relevant in a given case, and the factors need not all carry equal weight." Robert G. Weeks, Initial Decision Rel. No. 199, 2002 WL 169185 at *58 (Feb. 4, 2002).

Section 21B(b) of the Exchange Act provides that the Commission may impose one of three tiers of civil penalties. 15 U.S.C.A. § 78u-2(b). The penalty amounts are periodically adjusted by the Commission to account for increases in the cost of living. The bulk of the violative conduct (i.e., the churn period) herein ended after March 3, 2009. The amounts of civil monetary penalties applicable are, therefore, the amounts reflected in that revision to the penalties provided for in Section 21B(b) of the Exchange Act, 15 U.S.C.A. § 78u-2(b). See Adjustment of civil monetary penalties—2009, Table IV, 17 C.F.R. § 201.1004. Accordingly, first tier penalties for any violation may be imposed up $7,500 for a natural person. When the

violation involves fraud, second tier penalties may be imposed up to $75,000 for a natural person. A third tier civil penalty of up to $150,000 for a natural person if the violation involved fraud or deceit and the violation resulted in substantial losses to other persons, created a significant risk of substantial losses to other persons, or resulted in substantial pecuniary gain to the person who committed the violation.

In this case, a civil penalty against Konner is in the public interest. As discussed above, Konner's conduct involved fraud, deceit, and manipulation. [redacted] suffered significant harm ($54,000 in losses) resulting directly from that conduct, which created a significant risk of even greater losses to [redacted]. By corollary, Konner received substantial pecuniary gain, retaining approximately $55,000 in unjust enrichment from the commissions [redacted] paid. And because Konner continues to work in the securities industry, there is a need to deter him and others from committing such acts or omissions in the future.

The Division respectfully requests that the Commission impose a maximum amount third tier penalty against Konner for churning the [redacted] account. Section 21B(b)(3) of the Exchange Act provides that a third tier penalty shall be imposed if the act involved fraud, deceit, or manipulation, and resulted in substantial losses to other persons, or resulted in substantial pecuniary gain to the person who committed the act. As detailed above, Konner engaged in a course of conduct marked by fraud, deceit and manipulation, [redacted], his customer, lost $54,000, and Konner profited approximately $55,000. Thus, in this case, the civil penalty against Konner should be $150,000.

D. Collateral Industry Bar

Section 15(b)(4)(D) of the Exchange Act authorizes the Commission to censure, place limitations on the activities, functions, or operations of, or suspend for a period not exceeding twelve months, or revoke the registration of any broker, where it is in the public interest to do so,

and where the broker has been found to have violated the securities statutes. Section 15(b)(6)(A) of the Exchange Act authorizes the Commission to impose similar sanctions on persons associated with an broker or dealer, including barring such person from the securities industry. In addition, Section 15(b)(4)(E) of the Exchange Act works in tandem with Section 15(b)(6)(A) of the Exchange Act to authorize the Commission to bar a person associated with a broker or dealer from the securities industry for failure "reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision." 15 U.S.C.A. § 78o(b)(4)(E); see also Sections 203(e) and (f) of the Advisers Act (15 U.S.C.A. §§ 80b-3(e) and (f)).

The established criteria for determining what sanctions are appropriate in the public interest include deterrence and:

> 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.

Steadman, 603 F.2d at 1140; see also Eric J. Brown, Exchange Act Rel. No. 34-66469, 2012 WL 625874 at *12-13 (Feb. 27, 2012); Spangler, Inc., 46 S.E.C. at 254 n.67. As the Commission recently noted in Brown, the inquiry into the public interest is a flexible one, and no one factor is dispositive.

For the reasons discussed in Section IV.A. above, applying the Steadman factors in support of a cease-and-desist order, the Division submits that the Commission should impose a collateral industry bar against Konner. Konner argues that the Commission should not bar him from the securities industry, citing his 20-year career and noting that the law judge dismissed the claims with respect to [redacted]. As noted above, however, Konner's career has not been unblemished, and the fact that he may have been found liable for defrauding one client rather

than two is not a sufficient basis for allowing him to continue working as a broker.[14] Faber, 2004 WL 239507 at *7 n.33; William L. Kicklighter, Jr., Exchange Act Rel. No. 30096, 1991 WL 288619 at *6 (Dec. 18, 1991) (Commission opinion) (fact information disclosed to one customer immaterial to alleged non-disclosure to another customer and properly excluded by ALJ); see also Winograd, 656 F.2d at 284 (affirming ruling that evidence of a currency trader's legal trading activity for a customer was irrelevant to the issue of whether on other occasions he engaged in fraudulent trading in same account).

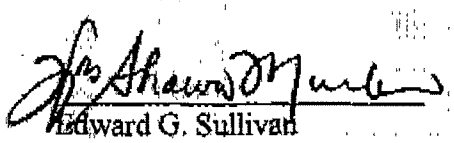
V. CONCLUSION

For the foregoing reasons, the Commission should find that Konner willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by churning the [redacted] account. Further, the Commission should impose sanctions in the public interest as requested by the Division.

[14] Of at least equal importance on this point, the evidence in the record with respect to Konner customer [redacted], an 89-year old farmer from Iowa whose JP Turner account had a turnover ratio of 18 and a breakeven rate of 28.2%, does not in any way exonerate Konner.

Respectfully submitted, this 4th day of April, 2014.

Respectfully submitted,



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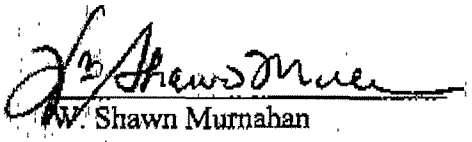
CERTIFICATE OF COMPLIANCE WITH SEC'S RULE OF PRACTICE 450(c)

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 11,700 words.



W. Shawn Murnahan

EXHIBIT A

U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Jason Konner Prejudgment Interest Calculation - Admin. Proc. File No. 3-15015

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$55,000.00
02/01/2010-03/31/2010	4%	0.65%	$355.62	$55,355.62
04/01/2010-06/30/2010	4%	1%	$552.04	$55,907.66
07/01/2010-09/30/2010	4%	1.01%	$563.67	$56,471.33
10/01/2010-12/31/2010	4%	1.01%	$569.35	$57,040.68
01/01/2011-03/31/2011	3%	0.74%	$421.94	$57,462.62
04/01/2011-06/30/2011	4%	1%	$573.05	$58,035.67
07/01/2011-09/30/2011	4%	1.01%	$585.13	$58,620.80
10/01/2011-12/31/2011	3%	0.76%	$443.27	$59,064.07
01/01/2012-03/31/2012	3%	0.75%	$440.56	$59,504.63
04/01/2012-06/30/2012	3%	0.75%	$443.85	$59,948.48
07/01/2012-09/30/2012	3%	0.75%	$452.07	$60,400.55
10/01/2012-12/31/2012	3%	0.75%	$455.48	$60,856.03
01/01/2013-03/31/2013	3%	0.74%	$450.17	$61,306.20

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
02/01/2010-03/31/2013	$6,306.20	$61,306.20