UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

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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 DIMITRIOS KOUTSOUBOS' BRIEF IN SUPPORT OF PETITION FOR REVIEW

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Pursuant to Rule 450, the Division of Enforcement ("Division") respectfully submits this Opposition Brief in response to Respondent Dimitrios Koutsoubos's ("Koutsoubos") Brief in Support of Petition for Review ("Koutsoubos' Brief").

I. INTRODUCTION

This is a churning appeal. In the Initial Decision, the law judge found that Koutsoubos, then a registered representative at broker-dealer JP Turner & Co., LLC, churned the account of his customer, Teddy Bryant ("Bryant").

By the numbers, this case involves: (1) a turnover rate of 56; (2) a breakeven rate of 73.3%; and (3) investor losses of $190,000 in a single year. Undaunted by the empirical gravamen of those facts, Koutsoubos – who the evidence showed manipulated [redacted]'s account documents to falsely identify risky investment objectives – asserts that the law judge applied incorrect legal standards when finding that he had *de facto* control and recommended excessive trading in the [redacted] account. Koutsoubos also claims that the law judge incorrectly found he acted with scienter.

Koutsoubos's contention that the law judge applied incorrect legal standards is subterfuge. Koutsoubos's real argument is that he disagrees with the law judge's credibility determinations at the heart of his findings with respect to churning. Those determinations are appropriately entitled to considerable deference because the law judge heard the witnesses' testimony and observed their demeanor. In an attempt to bypass that deference, Koutsoubos characterizes his challenges as legal. Make no mistake, however; what he actually contests is the fact that the law judge found the evidence against him credible.

To be clear, a *de novo* review of the record will not help Koutsoubos. Multiple passages of the record support the law judge's conclusions that Koutsoubos's testimony was at times

"knowingly false" and that he "acted with the highest degree of scienter." Michael Bresner, et al., Initial Decision Release No. 517, 2013 WL 5960690 at *103 (Nov. 8, 2013). He testified selectively, admitting only what he felt he had to, and then backpedaled when confronted with contrary evidence. The facts paint a harsh picture of Koutsoubos taking advantage of [redacted], a high school graduate who lacked investment experience, by encouraging him to trust Koutsoubos to manage the account in a manner consistent with [redacted]'s conservative investment objectives and lower risk tolerance. Perhaps the most telling evidence against Koutsoubos is his attempt to conceal his reckless trading from the firm's compliance department by inducing [redacted] to sign account documents that Koutsoubos filled out. Those documents, which Koutsoubos prepared, falsely represented that Bryant had risky investment objectives. This is the key fact of this case. Without the documents filled out by Koutsoubos, Koutsoubos has no plausible argument that the trading he orchestrated in [redacted]'s account is not excessive.

The Commission should reject Koutsoubos's attempt to mask credibility challenges as legal ones, and to his use of falsified account documents to portray [redacted] as an aggressive investor. The Commission should find that Koutsoubos churned the [redacted] account and adopt the sanctions that law judge determined were in the public interest.

II. FACTS

The Division alleges that Koutsoubos churned [redacted]'s account for an entire year, from January to December 2008. During that time, there were 191 total transactions (an average of almost 16 per month) involving approximately $8.2 million in purchases and sales. The annualized turnover rate for [redacted]'s account was a whopping 56%, and the cost to equity ratio was equally shocking at 73.3%. As a result of this trading, [redacted] lost about $190,000 while paying approximately $47,000 in commissions and $6,000 in margin interest to JP Turner. Of that $47,000, Koutsoubos retained over $30,000. [DOE Ex. 155, p. 25.]

A. Background on Dimitrios Koutsoubos

Dimitrious Koutsoubos, age 36 at the time of trial, is a resident of Ocean, New Jersey. [T. 472.] Koutsoubos graduated from high school in 1994, and attended two colleges but never obtained a college degree. [T. 474.] Koutsoubos obtained a Series 7 securities license and a Series 63 "Blue Sky" securities license in 1999. [T. 474.]

Koutsoubos currently works in the securities industry at Caldwell International Securities, and has since June 2011. [T. 484-85; 494-95.] From August 2009 to June 2011, Koutsoubos solicited investors for several companies, including Find.com, Bidthatproject.com and London Metals Market, LLC. [T. 477-81; 485-89; 1965-67.] Prior to that, from November 1999 to August 2009, Koutsoubos was a registered representative with JP Turner. [T. 476.] Koutsoubos split time between the Brooklyn branch of the firm and the Fort Lauderdale/Deerfield Beach branch. [T. 497.]

Koutsoubos' primary responsibility at JP Turner was to manage brokerage customer accounts. One of Koutsoubos's other responsibilities as a registered representative at JP Turner was to prospect new customers through cold calls. [T. 496-97.] Koutsoubos purchased leads on the internet, seeking "[h]igh net worth accredited investors" that "were not investing money that they needed to live on" and that were "able to assume risk." [T. 506-07.] Koutsoubos claimed to verify a potential clients' status as an accredited or speculation-appropriate investor by asking suitability questions during the prospecting process. [T. 507.] This process included asking about their personal investment history, current investor status, age, occupation, annual income, retirement readiness, net worth and investable assets. [T. 508-11.] Koutsoubos was uncertain whether it included discussing asking potential investors about their investment objectives or risk tolerance. [T. 510.] Once a prospect agreed to open an account, Koutsoubos typically went over the brokerage account application with them and filled it out before having it typed up by others

at JP Turner and sent to the customer for signature. [T. 511-14; 579.] In some instances, Koutsoubos also filled out Active Account Suitability Questionnaires for his customers and sent the pre-filled form out for signature. [T. 551-52; DOE Ex. 27.] Koutsoubos claimed that he explained the investment objective and risk tolerance choices to new customers under certain circumstances. [T. 512-13.]

While working at JP Turner during 2008 and 2009, Koutsoubos managed the accounts of more than 100 brokerage customers. [T. 520-21.] He "recommended a lot of trades" and often asked customers to make a decision on a recommendation on the spot. [T. 521; 524.] Regarding compensation, Koutsoubos received a percentage of commissions and fees generated by his customers' accounts instead of a salary. [T. 543.] Under his arrangement with JP Turner, Koutsoubos generally retained 60% of commissions generated by his customers' accounts. [T. 541.]

B. Background on [redacted] and History of his JP Turner Account[1]

[redacted] was born in 1957 and was 55 when he testified at the hearing. He is a resident of Holly Springs, Mississippi. [T. 844-45.] [redacted] graduated from Middleton High School in Middleton, Tennessee and attended one semester at the University of Tennessee at Martin. [T. 846.] [redacted] owns Teddy's Discount Building Supply in Holly Springs, Mississippi, which he has operated for 23 years. [T. 846-47; 889.] He also owns and operates Grisham Lumber & Supply, Inc., in Blue Mountain, Mississippi. [T. 890.]

[redacted] does not consider himself to be a sophisticated investor. [T. 847.] [redacted] has virtually no education beyond high school and has never taken any classes in finance, accounting

[1] The relevant exhibits relating to the establishment, maintenance and funding of [redacted]s account at JP Turner include DOE Ex. 32 (February 23, 2005 account application), DOE Ex. 143 (March 15, 2007 account update form), DOE Ex. 27 (May 8, 2009 active account letter), DOE Ex. 25 (JPT statement for Bryant's account during churn period) and DOE Ex. 148 (JPT statements for Bryant's account from February 2005 through August 2010).

or economics. [T. 888.] Prior to opening his account at JP Turner, had two other brokerage accounts with total invested funds of around $70,000. [T. 848-49.] made very few, if any, trading recommendations in those accounts; took a buy-and-hold approach in them. Not surprisingly, these accounts were not heavily traded. [T. 848-49; 878.] He does not watch investment-related TV shows, nor does he subscribe to any investment-related periodicals. [T. 850.]

opened his JP Turner account in February 2005 with a different registered representative. [T. 850-51; DOE Ex. 32.] He initially deposited approximately $4,200 into this account. [DOE Ex. 148.] 's brokerage account application reflects an investment objective of growth and a risk tolerance of medium. [T. 856-57; DOE Ex. 32.] By May 2005, received a call from JP Turner indicating that his registered representative had been changed to Koutsoubos. [T. 851; 853.] Between February and May 2005, when Koutsoubos was not involved, s account saw a total of 7 trades. [DOE Ex. 148.] Upon taking over the account, Koutsoubos told he was going to make him "a lot of money." [T. 853.] Koutsoubos did not ask whether he was an experienced investor, what his investment objectives were, or what his risk tolerance was. [T. 853-54.] independently told Koutsoubos – at the time, and again later – that his risk tolerance was actually conservative. [T. 854-55; 865.] also subsequently told Koutsoubos that he "didn't want to lose money. I wanted to earn money and be conservative." [T. 855-56.]

In March 2007, after Koutsoubos assumed control of the account, received an account update form from JP Turner. [T. 858-59; DOE Ex. 143.] does not recall whether the form was filled out when he received it, but he remembers Koutsoubos "just said, sign where I put the stars and send back, I'll take care of the rest." [T. 859.] None of the substantive account information on the form is in s handwriting. [T. 859-60.] The account update

form reflects a new risk tolerance of aggressive and new investment objectives of speculation, trading profits and capital appreciation. [REDACTED] has no recollection of discussing investment objectives or risk tolerance with Koutsoubos at the time, however, and never told Koutsoubos that his risk tolerance was aggressive or that his investment objectives included speculation. [T. 861-62.] [REDACTED] had no retirement savings as of March 2007, when Koutsoubos took over [REDACTED]s JP Turner account. [T. 823.]

After the account had been open for some time, Koutsoubos complained that he was having difficulty reaching [REDACTED] and they discussed Koutsoubos having discretionary authority to make trades in the account. [T. 865-866.] In addition, when the market started to decline, Koutsoubos suggested to [REDACTED] that he be authorized to day trade in the account. [T. 869.] Koutsoubos subsequently exercised control and in some instances made trades in the account without preauthorization from [REDACTED]. [T. 865-66; 873-74.] [REDACTED] was not comfortable with day trading, but agreed to do it because Kousoubus said that was the way to regain his profits. [T. 869, 1025, 1028]. During the market downturn (presumably in 2008), [REDACTED] suggested coming out of the market by converting his investments into cash, but Koutsoubos talked him out of it. [T. 869-70.]

In May 2009 (after the churn period in his JP Turner account), [REDACTED] received an Active Account Suitability Questionnaire and Supplement from JP Turner. [T.870-72; DOE Ex. 27.] [REDACTED] recalled that by the time he received the forms, "the losses were already pretty substantial" and "we were just kind of grasping at straws." [T. 872.] The Questionnaire contains a variety of information purportedly from [REDACTED], and reflects investment objectives of short-term trading, speculation and trading profits. [DOE Ex. 27.] It has two sets of handwritten brackets on the left side that have a handwritten line above the word "initial," and also includes an "X" and the word "sign" just to the left of the signature line at the bottom. [DOE Ex. 27.]

does not recall whether the Questionnaire was filled out when he received it, but the only handwriting he recognized as his own were the initials and his signature. [T. 871.] He did not circle the investment objectives marked on the Questionnaire. [T. 872.]

Over the life of the account, estimates that he invested around $250,000 with Koutsoubos, which was approximately 25% of his net worth. [T. 864; 876; DOE Ex. 148.] relied on Koutsoubos' recommendations 98-99% of the time when making trades in the account. [T. 866; DOE Ex. 25.] Koutsoubos encouraged to follow his recommendations, telling him "you sell lumber, and I'll take care of the stocks." [T. 867.] did not perform independent research on the companies Koutsoubos recommended. [T. 867.] At the time Koutsoubos was managing his account, believed Koutsoubos was looking out for s best interest when making recommendations. [T. 867.] typically received trade confirmations from JP Turner after trades occurred in the account, but did not always review them due to work commitments. [T. 872-73.] When making recommendations, Koutsoubos generally did not tell Bryant how much he would be paying in commission. [T. 873.]

C. Expert Findings on the Account

At the hearing, the Division presented the only expert testimony regarding the churning claims. The Division's churning expert, Louis Dempsey, who had reviewed the activity reflected in the account monthly statements, concluded that, from January through December 2008, Koutsoubos engaged in trading patterns consistent with churning in the account by executing over 99 sale transactions totaling $4,202,728.03 and over 92 purchase transactions totaling $4,032,172.11. [DOE Ex. 155, pg. 24-25 **The Bryant Account Trading Activity,** ¶43.] These trades resulted in losses in the Bryant account of approximately $189,801. [Id.] Koutsoubos's aggressive trading in this account resulted in an annualized equity turnover of 56 times, nearly ten times the presumptive churning level of 6; the cost equity factor was 73.3%.

[Id.] The trading generated commissions to JP Turner of approximately $47,000, and margin interest of over $6,000. Dempsey noted that the month end equity in the account over the entire period ranged from a high of $177,559 to a low at the end of the review period of $7,269. Further, Dempsey noted that although the period covered in his review was all of calendar year 2008, the majority of the activity occurred in the months of January through October 2008. Dempsey concluded that virtually all of the transactions in the [redacted] account were solicited, indicating Koutsoubos's control over the account. [Id.] Based on Koutsoubos's testimony during the investigation that his payout ratio was 65% of gross commissions, Dempsey concluded that Koutsoubos earned commissions of over $30,000 as a result of the trading activity in the [redacted] account.

III. LEGAL DISCUSSION

A. By Churning the [redacted] Account, Koutsoubos 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).[2] 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.

[2] 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).

239, 2003 WL 22415736 at *24 (Oct. 23, 2003);[3] 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).

The law judge found that the Division's evidence satisfied the elements of churning with respect to Koutsoubos's recommended trading in the [redacted] account. Bresner, 2013 WL 5960690 at *100. Here before the Commission, Koutsoubos argues that the law judge erred with respect to each of the three elements of churning.

With respect to excessive trading, Koutsoubos makes the only argument he can – that [redacted] account documents show he was an aggressive, risk-tolerant speculator, and so the high level of trading that Koutsoubos recommended was not excessive in light of those objectives. Koutsoubos' Brief, p. 15-32. He claims the law judge erred by not finding [redacted]'s investment objectives as conclusively established by certain account documents. Koutsoubos' Brief, pp. 15-19. Koutsoubos' singular focus on account documents, however, is erroneous. The Commission has previously looked past an investor's documented investment objective of "speculation" and found excessive trading when the broker knew that was not his customer's true objective. Richard G. Cody, Exchange Act Rel. No. 64565, 2011 WL 2098202 at *2, n.4; *13 (May 27, 2011) (in FINRA appeal, excessive trading found despite broker-filled account objective of speculation where customer had not independently "expressed interest in short-term or

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[3] 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).

speculative trading"). Irrespective of what was on the forms – which Koutsoubos filled out – [redacted] expressly told Koutsoubos that he was in fact more conservative than the forms indicated. The law judge found this testimony to be credible. Bresner, 2013 WL 5960690 at *103. Because Koutsoubos had actual knowledge of that disparity, he cannot protect himself with those documents.

With respect to the control element, Koutsoubos contends that the "ALJ applied an incorrect standard" when he concluded that Koutsoubos had *de facto* control of [redacted]'s JP Turner account. Koutsoubos Brief, pp. 5-15. But Koutsoubos misapprehends the law. There is no question that [redacted] was physically capable of saying the word "no." [redacted]'s testimony showed, however, that he was an unsophisticated investor without sufficient skill or information to make a meaningful independent judgment about the trading that Koutsoubos urged, which is, in fact, the test. Because [redacted] lacked that information and skill, and instead relied nearly exclusively on Koutsoubos' greater knowledge and expertise when deciding to trade, Koutsoubos had control of the account.

On scienter, Koutsoubos makes the argument that because his commissions for the [redacted] account were restricted during most of the relative churn period, he wasn't making money on the trades and thus lacked the motive and opportunity to commit fraud. As set forth in the Dempsey report, however, Koutsoubos made approximately $30,000 from the trading in the [redacted] account during the churn period. [DOE Ex. 155] For an employee who drew no salary and made a living solely off commissions, $30,000 more than provides motive and opportunity to commit fraud.[4]

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[4] Indeed, even if the Commission were to accept Koutsoubos' claim that he received only 35% of the commission payout on the [redacted] account, based on Dempsey's calculations (which, in turn were based on a review of JP Turner trade blotter information reflecting actual commissions paid for every transaction), Koutsoubos would still have made more than $10,000 – more than enough to influence an unsalaried broker relying on commissions to pay living expenses. [DOE Ex. 155; T. 3267-68.]

Moreover, as the Commission will see in its review of the Initial Decision, the law judge's findings on each element turn largely on credibility assessments. While the Commission typically reviews the record *de novo*, the Commission has also afforded considerable weight and deference to the law judge's credibility findings 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). In each instance, Koutsoubos fails to meet this standard.

1. The Trading Recommended by Koutsoubos was Excessive

a. The Trading in the [redacted] Account was Inconsistent with Bryant'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 [redacted] "is not a sophisticated investor and his experience with the securities markets is limited." Bresner, 2013 WL 5960690 at *102; [T. 847.] [redacted]'s understanding of investing in the

securities markets was to purchase one stock, hold it, sell it for a profit, and then purchase another one. [T. 848-49; 878.] Most importantly, before Koutsoubos became his broker, the investment objective for [redacted]'s JP Turner account was "growth," his risk tolerance was "medium," and there was light activity in that account. After Koutsoubos became [redacted]'s broker, he signed an Account Update Form listing his investment objective as speculation and his risk tolerance as aggressive. [DKX. 21.] As the law judge found, "[o]ther than the form itself, there is no evidence to suggest that [redacted] desired this drastic change." Bresner, 2013 WL 5960690 at *103. The law judge went on to say "**I credit [redacted]'s testimony that the updated account form contains 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." Id. (emphasis added.)

In his brief, Koutsoubos takes the position that the Initial Decision did not properly consider the investment objectives reflected on the face of this same Account Update Form, as well as other account documents in Bryant's JP Turner file. Koutsoubos' Brief, pp. 15-27. Koutsoubos emphasizes that [redacted] repeatedly signed and initialed them over a period of time that he claims extends from before Koutsoubos was [redacted]'s broker to after the churn period. Id. This argument fails for several reasons.

First, the 2005 account documents cited by Koutsoubos do not support his argument because they do not reflect a desire for high risk. Koutsoubos claims that [redacted] "indicated his high risk tolerance before Koutsoubos was involved" by signing and returning a New Account Application and Margin Account Agreement Suitability Supplement in February 2005. Koutsoubos' Brief, p. 17. [DKX 16 and 17.] Koutsoubos points to the boilerplate disclosure on the margin account form indicating that margin trading involving relatively more risk than cash trading, but that does not in any way indicate that Koutsoubos was representing to JP Turner that

he was looking for high risk investments. In fact, the document reflects that [redacted] was not a speculative investor – on the New Account Application submitted at the same time, [redacted] marked "growth" as his investment objective and "medium" as his risk tolerance. [DKX. 16.] Similarly, Koutsoubos' claim that [redacted] "reaffirmed his high risk tolerance to Koutsoubos" by returning, in July 2006, a Supplemental Application for NFS Margin Privileges is belied by the fact that the form reflects no choices by [redacted] of either investment objectives or risk tolerance. [DKX. 20.]

Second, the 2007 Account Update Form was manipulated by Koutsoubos. Koutsoubos claims that [redacted] "indicated in writing his aggressive investment objective shortly before the subject period" in an Account Update Form dated March 15, 2007. Koutsoubos' Brief, p. 19; [DKX. 21.] Koutsoubos touts the facts that the document indicates that [redacted]'s investment objectives were trading profits, speculation and capital appreciation, that his risk tolerance was aggressive, and that [redacted] both signed and initialed it. But the document he is referencing is the same Account Update Form that the law judge expressly found – based on an affirmative assessment of [redacted]'s credibility – "contains incorrect information, including incorrect investment objectives and risk tolerance." Bresner, 2013 WL 5960690 at *101.

The record supports that finding. Less than a year after Koutsoubos took over as the broker on [redacted]'s account, [redacted] received – unsolicited – the Account Update Form from the firm. [redacted] never told Koutsoubos that his investment objectives or risk tolerance had changed since he opened the account, or that his new risk tolerance was aggressive and new investment objectives included speculation. [T. 861-62] In connection with the execution of the Account Update Form, [redacted] testified that Koutsoubos "just said, sign where I put the stars and send back, I'll take care of the rest." [T. 859] None of the substantive account information on the form – which, as the law judge noted, is the only evidence that [redacted] intended to change his

investment objectives to speculation, trading profits and capital appreciation – is in [redacted]'s handwriting. Bresner, 2013 WL 5960690 at *101; [T. 859-60] [redacted] recalled, however, telling Koutsoubos – in May 2005, and again later – that his risk tolerance was actually conservative. [T. 854-55; 865] [redacted] also told Koutsoubos that he "didn't want to lose money. I wanted to earn money and be conservative." [T. 855-56] Accordingly, Koutsoubos cannot rely on the Account Update Form to establish [redacted]'s investment objectives and risk tolerance. [redacted] never asked for the form, didn't fill it out himself, never told Koutsoubos those were his objectives, and expressly told Koutsoubos that they were *not* his true objectives.[5]

Koutsoubos reliance on the testimony of John Williams ("J. Williams") does not alter these conclusions. The law judge, who heard his testimony and observed his demeanor, found that J. Williams lacked credibility on this issue. Koutsoubos cites, at length, the testimony of J. Williams, the former compliance officer of JP Turner's Brooklyn office, claiming that he vindicates Koutsoubos, yet his testimony was "virtually ignored" in the Initial Decision.[6] Koutsoubos' Brief, pp. 19 n.10; 21-25. In reality, there is an entire subsection of the Initial Decision, spanning approximately ten pages, devoted to J. Williams' testimony. Bresner, 2013 WL 5960690 at *88-98 (See "Section E. Other Relevant Testimony, 1. John Williams") Koutsoubos' true complaint is that the law judge made a clear determination with respect to J. Williams's credibility, and that determination was exceptionally adverse. Bresner, 2013 WL 5960690 at *106-07 (". . . on certain key points, [J. Williams] was not credible at all"); 120 ("J.

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5 The same reasoning applies to the May 2009 Active Account Suitability Questionnaire cited by Koutsoubos as further evidence that [redacted]'s investment objectives included speculation. [DKX. 22] In addition, it is of limited relevance because it comes after the churn period.

6 As the Commission will see in the record, J. Williams was actually called at trial by Respondent Michael Bresner, who was defending a failure to supervise claim, and his testimony was largely unrelated to the churning aspect of the case. Even if J. Williams had done some of the things Koutsoubos claims, it would still be irrelevant, as 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 (Nov. 18, 1992).

Williams was unable to credibly testify or recall conversations between himself and customers, both substantively and generally;" "Additionally, as noted above, J. Williams was generally not credible except on technical issues"). When discussing Respondent Jason Konner (who, along with Koutsoubos, worked in JP Turner's Brooklyn office) and Konner's attempt to rely on J. Williams' testimony for the same points now sought by Koutsoubos, the law judge stated:

> First, **I place little weight on the testimony of J. Williams as it pertains to certain crucial points. . . . J. Williams had a very poor demeanor. He was timid and quiet, and at one point even the court reporter noted how hard it was to hear him.** Tr. 3633. When I asked him whether he would be concerned about a registered representative telling a customer that the numbers on the AASQ "don't matter," he hesitated, with a blank expression on his face, as if he had never considered such a scenario before.

Bresner, 2013 WL 5960690 at *107 (emphasis added). The law judge went on to conclude that he was "**not credible at all**" on certain key points. Id (emphasis added). Moreover, his inability to recall any specifics about the documents or individuals in this case further discredits his testimony: J. Williams did not recall a specific conversation with [redacted] and [redacted] had no recollection of talking to J. Williams. [T. 1012-1013, 3624, 3652-54, 3658, 3660.] In sum, the law judge made the strongest credibility assessment he could against J. Williams, and Koutsoubos cites no evidence that justifies setting aside the appropriate deference that should be accorded that assessment.[7]

In the final analysis of whether the trading in [redacted]'s account was excessive, Koutsoubos' efforts to establish [redacted] as an aggressive investor using blank or pre-filled account documents underscore the problem. Koutsoubos had actual knowledge that [redacted] was a

[7] Koutsoubos repeatedly claims J. Williams was an "independent" witness. Koutsoubos' Brief, pp. 24-25. It is plain from the record, however, that J. Williams was friends with both Konner and Koutsoubos, and J. Williams sometimes socialized outside the office with Koutsoubos. [T. 3786.] In addition, J. Williams was a former JP Turner employee whose work as a supervisor in the Brooklyn office was very much at issue in the case. As a securities industry employee for fifteen years, Koutsoubos had every incentive to shade his testimony in favor of his performance of his duties in a hearing before the Commission. [T. 3601, 3664.]

conservative investor and didn't want to lose money. Koutsoubos is willfully blind to the Initial Decision's finding, based on the credibility of [redacted]'s testimony, that Koutsoubos manipulated the investment objectives and risk tolerance choices on [redacted]'s account documents during this period. Bresner, 2013 WL 5960690 at *102-04. Thus, the law judge did not, as Koutsoubos asserts, "miss[] the legal mark" when he refused to evaluate the Account Update Form, or any of the other account documents, within their four corners. Koutsoubos' Brief, p. 27. The Initial Decision is correct in holding that brokers cannot insulate themselves from liability for churning unsophisticated investors by manufacturing account documents with false investment objectives.

b. The Turnover Ratio and Breakeven Rate of the Trading Koutsoubos 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 Koutsoubos recommended for the [redacted] account during 2008 was staggeringly excessive, involving a breakeven rate of 73.3% and a turnover ratio of 56. [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 2008, there were 191 transactions in the account involving a total of around $8.2 million in purchases and sales. As stated, the annualized turnover rate was 56 and the cost-to-equity ratio was 73.3%. [DOE Ex. 155.] As a result of this trading, [redacted] lost about $190,000. Thus, even assuming, *arguendo*, that Bryant was, as

Koutsoubos claims, an aggressive investor who understood the risks of active trading and chose to speculate anyway, [redacted] did not implicitly authorize Koutsoubos to deplete his account through commissions. Because it would be ridiculous for Koutsoubos to contend that [redacted] – irrespective of how aggressive his investment objectives allegedly were – knowingly chose to trade so often that he would have to receive a return of 73.3% simply to break even, the Commission should find, based on the numbers alone, that Koutsoubos churned [redacted]'s account.

Koutsoubos makes a number of arguments asserting that the law judge erred by relying on the Dempsey report. Koutsoubos' Brief, pp. 27-33. None of these arguments is persuasive. Koutsoubos argues for example, that Dempsey's calculations do not demonstrate churning because [redacted]'s investment objectives included active trading. As noted by the law judge, however, there is no evidence suggesting that [redacted] intended to engage in active trading beyond the account documents that were manipulated by Koutsoubos, and substantial, credible evidence contradicting these forms. Bresner, 2013 WL 5960690 at *103.

Koutsoubos also argues that Dempsey's calculations were unreliable. He claims the calculations were unreliable because: (a) they ignored "that the transactions occurred during a unique period of market decline" that skewed the results; (b) they ignored the use of stop loss orders in the account, which also skewed the results; (c) they included miscalculations; and (d) they were biased in favor of the SEC because Dempsey's wife works in the SEC's Miami Regional Office. Koutsoubos' Brief, pp. 28-33. Both (a) and (b) – the market decline and the stop loss orders – fail because, as the evidence showed, [redacted] did not want to be in the market during the market downturn in 2008. [T. 869-70.] [redacted] suggested coming out of the market by converting his investments into cash, but Koutsoubos talked him out of it. [T. 869-70.] It was during this same time that Koutsoubos convinced [redacted] to allow him to trade without

authorization. [T. 865-69; 873-74.] Koutsoubos cannot now shield himself with market decline and stop loss orders when his customer expressly asked to get out of the market altogether and Koutsoubos talked him out of it.

Regarding (c), the alleged miscalculations, Koutsoubos identifies two. As conceded by Koutsoubos, however, one of the alleged errors pertains to customers whose accounts were not found to be churned. Koutsoubos' Brief, p. 31, n.18. Moreover, Dempsey did not make a mistake – as set forth in his testimony, his view was that funds in question came from taxable income and should be treated as a dividend, which is how Dempsey calculated them. [T. 3231-32.] With respect to the other alleged miscalculation, Koutsoubos 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. As Dempsey explained during his testimony, however, there was no error. [T. 3176-85; 3291-92.] The PIPE offering investment on which Konner based his argument was made *outside* Carlson'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.] Thus, there was no miscalculation in the Dempsey report.

Finally, regarding (d), Dempsey's alleged bias in favor of the SEC, Dempsey disclosed the fact that his wife worked in the Commission's Miami Regional Office in his report, which was filed well in advance of the hearing. He acknowledged the fact during the hearing, and confirmed that he did not feel there was a conflict of interest. [T. 3115-16.] Respondents' counsel conducted lengthy voir dire of Dempsey on this and many other points, and the law judge determined Dempsey was qualified to testify as an expert witness on the issue of churning. [T. 3108-53.] Moreover, as the Commission has previously noted in cases involving allegation of expert bias, Koutsoubos "was free to call an expert witness of his own to challenge

[Dempsey's] testimony, but he did not do so." Luis Miguel Cespedes, Exchange Act Rel. No. 59404, 2009 WL 367026 at *8-9 (Feb. 13, 2009). In sum, the law judge did not err in considering the expert testimony of Louis Dempsey.

Accordingly, the Commission should conclude that the trading that Koutsoubos recommended in the [redacted] account from January through December 2008 was excessive.

2. Koutsoubos 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 Koutsoubos had *de facto* control over the [redacted] account because [redacted] lacked the ability to evaluate Koutsoubos's recommendations in a meaningful way:

- First, [redacted] testified – and the law judge found - he was **not a sophisticated investor** with a high-school education, and lacked the ability to make an independent evaluation of Koutsoubos' active trading strategy. [T. 847-49; 888.] Because [redacted] had previously taken a buy-and-hold approach and had never engaged in active trading, he was not in a position to understand that the frequency of trading itself was an ever-growing factor in the profitability of the account. [T. 848-49; 878.]
- Second, [redacted] had **very limited prior securities investment experience**, amounting to two brokerage accounts with a total of $40-50,000 invested between them. [T. 849; 863.] In marked contrast to [redacted] JP Turner account, neither of these accounts were actively traded. [T. 848-49; 878.]
- Third, [redacted] **placed great confidence and trust in Koutsoubos**, as evidenced by his decision to invest approximately $250,000 with him over the life of the account, which was a quarter of [redacted]'s net worth. [T. 976 ("I trusted him . . . [t]hat's the reason I sent the money"); 864; 876; 1027 ("I let him make the trades because I really trusted the guy"); DOE Ex. 148.]
- Fourth, **Koutsoubos encouraged [redacted] to relinquish control of the account to him**, telling him "you sell lumber, and I'll take care of the stocks," and [redacted] in fact relied on those recommendations virtually 100% of the time when making trades in his account. [T. 866-67; DOE Ex. 25.]

- Fifth, [redacted] was **doing no independent research** on any of the companies Koutsoubos recommended. [T. 867; 979.]
- And finally, regarding the truth and accuracy of the information provided by Koutsoubos, **Koutsoubos never discussed with** [redacted] **the most critical information** in light of the level of trading that was taking place, which was the commissions being charged and their cumulative impact when engaging in active trading. [T. 873.]

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

Further evidencing Koutsoubos' control over trading in the [redacted] account was the fact that Koutsoubos convinced [redacted] to give Koutsoubos trading discretion. As noted in the Initial Decision, at one point, Koutsoubos told [redacted] that he wanted to be able to trade without first getting approval from [redacted] because he had trouble reaching [redacted]. Bresner, 2013 WL 5960690 at *102; [T. 865-66.] [redacted] agreed and Koutsoubos thereafter had undeniable control over trading in the account, and he then traded without advance approval. Id. The law judge expressly stated that "[i]nasmuch as [redacted] and Koutsoubos differ as to whether [redacted] gave such approval, I find [redacted] to be more credible on this point." Bresner, 2013 WL 5960690 at *102.

In the Initial Decision, the law judge concluded "that Koutsoubos exercised *de facto* control over [redacted]s JPT account." Bresner, 2013 WL 5960690 at *102. In his brief, Koutsoubos argues that, when determining whether *de facto* control existed, "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' . . . ." Koutsoubos' Brief, p. 6-7.

As an initial matter, the Commission should note that the standard used by the law judge is correct. The Initial Decision cites applicable Commission precedent when articulating the test for *de facto* control:

> 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, 81 SEC Docket at 1657. "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). Thus, a customer does not give up control of his account if he has sufficient financial acumen to determine his own best interests, even if he acquiesces in the broker's management of the account. Id. 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, 66 SEC Docket at 1892; Roche, 64 SEC Docket at 2049 n.14; see also Rizek, 70 SEC Docket at 936 (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).

Bresner, 2013 WL 5960690 at *99. Nowhere does it limit the scope of inquiry to whether the broker initiates the trades. Moreover, Koutsoubos has no Commission authority to support his argument that a customer retains control of the account as long as he "had the capacity to exercise his right to say 'yes' or 'no.'" Koutsoubos' Brief, p. 8.

To the extent Koutsoubos is suggesting that *de facto* control cannot exist if the customer was physically capable of saying the word "no," and, that the question of whether the broker

initiated most of the trading is irrelevant, he is simply wrong. The Commission has consistently held that investor sophistication is critical to determining the control element in the churning context, and that where investors were "lacking in the degree of investor sophistication necessary to understand [the broker's] strategy and unable to make any sort of independent evaluation of that strategy," the broker had *de facto* control. Rizek, 1999 WL 600427 at *6; Simpson, 2002 WL 987555 at *15; Sweeney, 1991 WL 716756 at *4. Moreover, based on Commission precedent, whether the customer routinely follows the recommendations of the broker is a key factor under that analysis in determining whether *de facto* control exists. Rizek, 1999 WL 600427 at *6 ("The customers placed their reliance on Rizek's supposed expertise, and almost invariably followed his recommendations"); Simpson, 2002 WL 987555 at *15; Sweeney, 1991 WL 716756 at *4 ("There is no merit to [the respondents'] argument that they did not control their customers' accounts. With few exceptions, the customers did not initiate the transactions in their accounts . . . . When the customers decided to effect the transactions at issue, they were relying totally on [the respondents]").

To the extent that Koutsoubos' argument is that [redacted] was a sophisticated investor capable of independently evaluating the trading Koutsoubos recommended, neither the facts nor the law support it. Koutsoubos claims that [redacted] was a successful businessman who had a couple small brokerage accounts before, monitored his JP Turner account activity and spoke with Koutsoubos about it, and rejected unspecified recommendations from Koutsoubos while occasionally proposing his own investment ideas. Koutsoubos' Brief, pp. 8-12. As an initial matter, the Commission should note that Koutsoubos' only support for most of these "facts" are citations to his own testimony, and that there is no credible support for his claim that [redacted] rejected any recommendations or made any investment suggestions to Koutsoubos. Koutsoubos' Brief, p. 13. [redacted]'s testimony at T. 848-850, which Koutsoubos cites, does not include

testimony that [redacted] ever declined a trade recommended by Koutsoubos or ever made an investment suggestion to Koutsoubos.

Moreover, even if his assertions were true, the facts would not be legally sufficient to establish that [redacted] had the requisite investor sophistication to make a meaningful independent analysis of Koutsoubos' recommendations. Rizek, 1999 WL 600427 at *6 (Commission opinion rejecting respondent appeal of control issue; "Although Rizek's customers may have been successful businessmen and most of them had some degree of higher education, they were totally lacking in the degree of investor sophistication necessary to understand Rizek's strategy and unable to make any sort of independent evaluation of that strategy."); Joseph J. Barbato, Initial Decision Rel. No. 101, 1996 WL 664616 at *16 (Nov. 12, 1996) (Although customer "had some prior investment experience, authorized the transactions in his account, and kept records of his trades, he lacked vital information about the investments he was making ... [and] was unable to make an independent evaluation" of the broker's recommendations").

In sum, there is no legal error here. The standard applied by the law judge is correct, and the Initial Decision correctly applied the facts to conclude that "Koutsoubos exercised *de facto* control over [redacted]'s JPT account." Bresner, 2013 WL 5960690 at *102. [redacted] was "lacking in the degree of investor sophistication necessary to understand [Koutsoubos'] strategy and unable to make any sort of independent evaluation of that strategy." Rizek, 1999 WL 600427 at *6. Moreover, as reflected by the account statements and all credible testimony, [redacted] always relied on Koutsoubos' recommendations when making trades in his JP Turner account, and made no attempt to assert control himself through independent research or trade suggestions.

3. Koutsoubos 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 concluded "Koutsoubos acted with the highest degree of scienter in churning [redacted]'s account." Bresner, 2013 WL 5960690 at *107. In his analysis, the law judge noted that two factors were particularly probative of scienter:

> First, Figure One, [Bresner, Initial Decision Rel. No. 517, p. 37] shows an obvious pattern of churning. **Trading activity in [redacted]'s account increased over the course of the alleged churn period, albeit unsteadily, until October 2008**, when there were forty-nine trades in the account, which was vastly in excess of anything indicated on any account forms. **At the end of that month, Koutsoubos' commission restriction was changed from $100 per trade to $60 per trade. The rate of trading thereafter plummeted.** Koutsoubos admitted

> that at $100 per trade he was making some money, but that at $60 per trade he was getting "crushed." There is only one plausible explanation for the sharp drop in trading activity: Koutsoubos decided to stop churning [redacted]'s account. **I find Koutsoubos' testimony that his commission made no difference in his trading in [redacted] account to be knowingly false.** Second, Koutsoubos did not even bother to ensure that [redacted] had adequate documentation on file. There is no AASS or AASQ for [redacted] account prior to March 2009, and Koutsoubos clearly did not document [redacted]'s desired frequency of trades.

Id. (emphasis added.)

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

In addition, [redacted] testified that in March 2007, he received a pre-filled account update form changing his original, more conservative investment objectives and risk tolerance to more risk-friendly ones, but [redacted] had not discussed those changes with Koutsoubos and never agreed to different, more aggressive investment objectives and risk tolerance. [T. 858-62] The

only plausible explanation is that Koutsoubos filled it out and sent it in hopes that would, as testified Koutsoubos asked him, "sign where I put the stars and send back." [T. 859] Thus, scienter is evident from Koutsoubos' reckless disregard of 's true investment objectives and risk tolerance, which repeatedly testified he communicated to Koutsoubos, and his efforts to unilaterally manipulate 's account documentation to engage in active trading.

Koutsoubos offers two arguments as to why he did not act with scienter. First, Koutsoubos contends that he did not act with scienter because JP Turner had placed the account on restricted commissions of $100 per trade (and then later $60 per trade) for the bulk of the churn period, and that Koutsoubos would not have churned the account because it was not profitable at that point. Koutsoubos' Brief, pp. 33-36. Curiously, he relies on Respondent Bresner's testimony in support of this argument, which Koutsoubos contends proves that "at $100 maximum commission per trade, the broker was 'at best breakeven' and at $60 per trade, he was getting crushed." Id., p. 35, citing T. 3058-59. But the Division's churning expert reviewed the trade blotter data, which recorded actual commissions paid on every transaction, and concluded that paid $47,000 in commissions during the churn period. [DOE Ex. 155; T. 3267-68] Dempsey went on to conclude, based on Koutsoubos' investigative testimony indicating he received 65% of gross commissions, that Koutsoubos personally made about $30,000 as a result of that trading.

Without any support apart from his own selective and self-serving testimony, Koutsoubos claims his payout on the account was only 35%. Koutsoubos' Brief, p. 35. Koutsoubos' testimony is totally unreliable, and especially given his incentive to minimize his compensation in this instance, the Commission should not believe that he received any less than his typical percentage payout on 's account. Moreover, as demonstrated by the Figure One graphic

in the Initial Decision, the pattern of trading shows exactly when it quit being profitable to churn [redacted]'s account: the end of October 2008. Bresner, Initial Decision Rel. No. 517, p. 37. "At the end of that month, Koutsoubos' commission restriction was changed from $100 per trade to $60 per trade. The rate of trading thereafter plummeted." Bresner, 2013 WL 5960690 at *107. Even if the Commission were to believe Koutsoubos on this point, Koutsoubos still would have received nearly $10,000 in profit during 2008, which, in light of the fact that he was compensated solely while working at JP Turner, was more than sufficient to influence his recommendations. Moreover, the Division may also prove scienter by demonstrating that Koutsoubos recklessly disregarded [redacted]'s true investment objectives, a conclusion certainly supported by the evidence.

Koutsoubos also claims that he acted in good faith because he relied on research and "[t]here was no evidence in the record to suggest that Koutsoubos made recommendations without an investment strategy . . . ." Id., p. 36-37. As the record reflects, however, Koutsoubos never articulated an actual strategy, instead claiming that he got "ideas" for his recommendations from sources including Investors Business Daily, and that he adopted the "Can Slim" methodology for evaluating stocks. Koutsoubos' Brief, p. 36. Even if the Commission were to accept Koutsoubos' assertion, which, like most of his claims, is supported only by his own testimony, good faith belief in a trading strategy does not provide a basis for recommending trading that Koutsoubos knew was inconsistent with the conservative investment objectives [redacted] communicated to him. Rizek, 1999 WL 600427 at *6 (rejects defense of good faith belief in active trading strategy, which was "no justification for recommending it to unsophisticated customers who were incapable of making an independent judgment"); Sweeney, 1991 WL 716756 at *3 ("although the list may have provided support for the purchase or sale of individual

stocks, the [brokers] had an obligation to analyze the particular situation"); David Wong, Exchange Act Release No. 45426, 2002 WL 2000089 (Feb. 8, 2002).

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 Koutsoubos'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, Koutsoubos 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 in the securities industry, Koutsoubos's occupation presents opportunities for future violations.

Accordingly, based upon the evidence presented at the hearing in this matter, the Commission should order Koutsoubos 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 Koutsoubos 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 Koutsoubos should be ordered to disgorge $30,000.[8] [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 Koutsoubos totals $4,853.44.[9]

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 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:

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[8] At the hearing, Koutsoubos claimed that he received only 30% of the commissions generated by the [REDACTED] account. In his investigative testimony, Koutsoubos provided a different percentage. [DOE Ex. 155.] The Division's expert used the percentage that Koutsoubos identified in his investigative testimony to calculate the portion of [REDACTED]'s commissions retained by Koutsoubos. In the Initial Decision, the law judge did not find Koutsoubos' testimony that he received only 30% credible, and in fact found that Koutsoubos promptly stopped churning the [REDACTED] account after October 2008, when it became unprofitable. Bresner, 2013 WL 5960690 at *103. In the event the Commission determines that Koutsoubos in fact received only 30% of the commissions paid by [REDACTED] it need only apply that percentage to the raw commission totals verified by Dempsey in DOE Ex. 155.

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

(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 violative conduct (i.e., the churn period) herein ended prior to 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—2005, Table III, 17 C.F.R. § 201.1003. Under Table III, the Commission may impose a third tier civil penalty of up to $130,000 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 Koutsoubos is in the public interest. As discussed above, Koutsoubos's conduct involved fraud, deceit, and manipulation. [redacted] suffered significant harm (approximately $190,000 in losses) resulting directly from that conduct, which created a significant risk of even greater losses to [redacted]. By corollary, Koutsoubos received substantial pecuniary gain, retaining approximately $30,000 in unjust enrichment from the commissions [redacted] paid. And because Koutsoubos 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 Koutsoubos for churning the [redacted] account. This is the same penalty imposed by the law judge, and it is fully justified by the record. Bresner, 2013 WL 5960690 at *125. 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, Koutsoubos engaged in a course of conduct marked by fraud, deceit and manipulation, [redacted], his customer, lost $189,801, and Koutsoubos profited approximately $30,000. Thus, in this case, the civil penalty against Koutsoubos should be $130,000.

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-4(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 v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); see also Eric J. Brown, Exchange Act Rel. No. 34-66469, 2012 WL 625874 at *12-13 (Feb. 27, 2012); Spangler, 46 S.E.C. 238, 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.

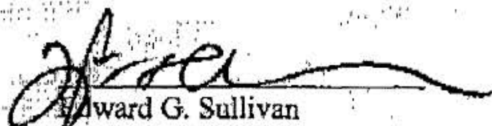
For the reasons discussed in Section IV.A. above, applying the Steadman factors in support of a cease-and-desist order, the Division submits that the Commission should impose a collateral industry bar against Koutsoubos.

V. CONCLUSION

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

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

Respectfully submitted,

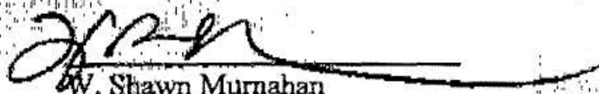


Edward G. Sullivan
W. Shawn Murnahan
Senior Trial Counsel

Securities and Exchange Commission
950 East Paces Ferry Road, NE, Suite 900
Atlanta, GA 30326-1382
Telephone: 404.842.7612
Email: sullivane@sec.gov

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 11,846 words.



W. Shawn Murnahan

EXHIBIT A

U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Dimitrios Koutsoubos Prejudgment Interest Calculation - Admin. Proc. File No. 3-

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$30,000.00
02/01/2009-03/31/2009	5%	0.81%	$242.47	$30,242.47
04/01/2009-06/30/2009	4%	1%	$301.60	$30,544.07
07/01/2009-09/30/2009	4%	1.01%	$307.95	$30,852.02
10/01/2009-12/31/2009	4%	1.01%	$311.06	$31,163.08
01/01/2010-03/31/2010	4%	0.99%	$307.36	$31,470.44
04/01/2010-06/30/2010	4%	1%	$313.84	$31,784.28
07/01/2010-09/30/2010	4%	1.01%	$320.46	$32,104.74
10/01/2010-12/31/2010	4%	1.01%	$323.69	$32,428.43
01/01/2011-03/31/2011	3%	0.74%	$239.88	$32,668.31
04/01/2011-06/30/2011	4%	1%	$325.79	$32,994.10
07/01/2011-09/30/2011	4%	1.01%	$332.65	$33,326.75
10/01/2011-12/31/2011	3%	0.76%	$252.01	$33,578.76
01/01/2012-03/31/2012	3%	0.75%	$250.46	$33,829.22
04/01/2012-06/30/2012	3%	0.75%	$252.33	$34,081.55
07/01/2012-09/30/2012	3%	0.75%	$257.01	$34,338.56
10/01/2012-12/31/2012	3%	0.75%	$258.95	$34,597.51
01/01/2013-03/31/2013	3%	0.74%	$255.93	$34,853.44

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
02/01/2009-03/31/2013	$4,853.44	$34,853.44