UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

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

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INTRODUCTION

In response to Respondent Jason Konner's Brief in Support of Reversal (hereinafter referred to as the "Konner Brief" and cited as "Konner Br."), the Division of Enforcement filed its Opposition Brief on April 4, 2014 (hereinafter referred to as the "Division Brief" and cited as "Div. Br."). In response to the Division's arguments, and in further support of his contention that the Law Judge ignored and misconstrued the substantial weight of the evidence presented at hearing, respondent Konner hereby submits this reply brief. In the Konner Brief, we addressed the failings in the Initial Decision that warrant reversal. In this reply, we focus on the principal arguments raised by the Division urging affirmance.

ARGUMENT

I. THE NUMEROUS ACCOUNT DOCUMENTS SIGNED BY [redacted] ARE THE TRUE SMOKING GUNS IN THIS CASE WHICH, WHEN FAIRLY AND PROPERLY CONSIDERED, UNDERMINE TWO CRITICAL ELEMENTS OF THE CHARGE THAT KONNER CHURNED THE CARLSON ACCOUNT.

The Division's strategy in seeking affirmance of the Initial Decision becomes evident in the Introduction section of its brief (at 1-2). The position advanced there is to aggressively denigrate and thereby diminish the importance of the many documents freely and voluntarily signed by customer [redacted], documents that the Konner Brief (at 15-18) used to demonstrate [redacted]'s true investment objectives. Seemingly unable to address the transcendent significance of those many documents signed by [redacted] from 2007-10, signed in the years before Division counsel first began talking to [redacted] about how a win by the Division could translate into a financial gain for him, the Division instead pulls out the thesaurus and asserts that those documents (1) were "manipulated" by Konner, (2) were used by Konner to "game the system," (3) were "erroneously" pre-filled out by Konner, (4) were "manipulated [by Konner] as

a means to an end," (5) were "manufactured" by Konner, (6) were "falsified" by Konner, (7) were the result of "Konner's rigging," and (8) were "fake." (Div. Br. at 1-2.)[1]

The Division's strategy forces us to ask the following questions:

> *Is there no legal significance to the conscious actions taken by a grown man, an adult who graduated college, a person engaged in commerce who has successfully run a complicated business for more than 40 years, who by all accounts is of sound mind and of at least average intelligence and not in any way cognitively impaired, where those actions consist of signing, over a number of years, a series of documents that acknowledge, affirm, ratify and adopt very important representations, especially where this man admitted under oath that his signature on a document was intended to convey that he meant and affirmed what he was signing?*
>
> *In other words, is there any legal significance whatsoever to what* [redacted] *signed, document after document, year after year, with no gun to his head, nor even the physical presence of anyone else in the room?*

By focusing on the existence of these documents, and by denigrating them again and again with the most condemnatory of words, it is evident that the Division understands the paramount importance of [redacted]'s signatures and initials on them, and they admit as much in pejorative, but not uncertain, terms: "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." (Div. Br. at 2.) However, unless the documents signed in real time all amount to outright lies and fabrications by the customer who signed and approved them, the substantial weight of the evidence establishes that the customer had aggressive investment objectives and was willing to speculate with that portion of his net worth placed in his JP Turner account. And if that is the case, then the foundation relied upon by the Law Judge (and the Division) for the findings that [redacted]'s account was excessively traded and that Konner exercised de facto control is eviscerated.

[1] Such characterizations appear throughout the Division's brief, and reflect the Division's dominant theme in urging affirmance. *See, e.g.*, Div. Br. at 16, 26 n. 12.

We respectfully submit that [redacted]'s "true investment objectives," Div. Br. at 14, is evidenced by what he said, what he did and what he signed when he was dealing with Konner during the years 2007-10, and not by the tainted and coached testimony of a non-complaining customer who came to Washington, D.C. from a remote Iowa location in the middle of winter at the behest of representatives of the United States government who cleverly informed him that if the Division wins, [redacted] could financially win as well. Thus, while on the one hand the Division argues that Konner was able to prevail upon [redacted] to do what he wanted (namely, falsify and sign documents, and invest aggressively), they utterly ignore that their power to get people to do something is vastly greater and more persuasive. The many documents signed by [redacted] are the true smoking guns in this case, which is why the Division has worked so hard to undermine and diminish them. But if [redacted] is, as the Division implies, completely malleable and will do what he is told to do, and that he lacks the ability to disagree or to have an independent thought, then his testimony at the hearing was beset by the same infirmities and surely cannot reasonably be deemed credible or relied upon as the basis for ruining a man's life and career.[2]

Indeed, for the Division to secure affirmance, it must move the focus away from those documents and instead to [redacted]'s testimony and the Law Judge's take on that testimony, all in an effort to shift the terrain to a credibility contest. Given the deference typically accorded credibility assessments made by any trier of fact, the move to that terrain would quite likely insulate the Initial Decision from reversal. But that effort falls short, as the Law Judge's

[2] Contrary to the assertion made by the Division in arguing for maximum sanctions (Div. Br. at 32), Konner is no longer working in the securities industry. He lost his job at JP Turner after a Wells Notice was issued in 2011, and after the Initial Decision was issued, he had little choice but to leave the firm he joined after JP Turner. He is not presently working in the securities industry. The charge against him, though amply demonstrated in the Konner Brief to be unsupported by the weight of the evidence, has made him virtually unhireable in the only field in which he has worked during his adult life.

credibility assessment is plainly inconsistent with the substantial weight of the totality of the evidence relating to the critical issue of the customer's investment objectives. See Konner Br. at 13-27.

All of the Division's arguments and evidence relating to [redacted]'s investment objectives, and the testimony relating thereto, and their significance vis-à-vis excessive trading and broker-control, were anticipated and addressed in the Konner Brief. In the interest of brevity and due to the limited financial resources available to Konner, they shall not be repeated or reargued here.

II. TO COMPENSATE FOR THE FACT THAT THE [redacted] CHURNING CHARGE IS NOT SUPPORTED BY THE SUBSTANTIAL WEIGHT OF THE EVIDENCE, AS WAS TRUE OF THE DISMISSED MILLER CHARGE, THE DIVISION'S BRIEF MISCHARACTERIZES THE RECORD, MISUSES CASE LAW AND OVERSTATES ITS POSITION.

The Konner Brief carefully explained how and why the substantial weight of the evidence failed to support the findings of the Law Judge with respect to the elements of the [redacted] churning charge. In response, and in an effort to repudiate Konner's position, the Division has been forced to take a number of liberties in its approach both to the hearing record and the arguments in the Konner Brief. To demonstrate this, and given the limitations of resources needed to respond more comprehensively, examples of where the Division's Brief took inappropriate or unfounded liberties are set forth below.[3]

1. Examples of the Misuse of [redacted]'s Testimony.

To bolster its argument, the Division attempts to fabricate evidence through the use of a witness's lack of recollection, as if not remembering a particular fact means it never happened. This tactic was liberally employed with the testimony of the Division's star witness [redacted],

[3] Any arguments or contentions set forth in the Division Brief not specifically addressed in this reply were either anticipated and addressed in the initial Konner Brief or, respectfully, do not warrant a response. A failure to address any should not be perceived as acceptance or acquiescence.

who had a decided inability to recall many things. Thus, the Division argues that "Konner did not explain speculation to [redacted]" because "[redacted] has no recollection of speculation or active trading even being mentioned." (Div. Br. at 7.) And the Division further asserts that Konner "did not make any attempt to determine whether [redacted] could afford active trading" because "[redacted] had no recollection of Konner asking him what his annual income or net worth were" and because [redacted] "did not recall Konner asking whether [redacted]'s retirement savings were sufficient." *Id.* The Division also relies heavily on [redacted]'s inability to "recall any discussion of the concept of risk tolerance." *Id.*

Notably, in each of these references to the record, [redacted] did not at the early 2013 hearing deny the conversations he was queried about took place in 2007 or 2008 or 2009; he just could not remember – hardly affirmative evidence that Konner was fabricating anything. And the lack of recollection by [redacted] is undermined not only by Konner's testimony, but by the testimony of former JP Turner Compliance Officer John Williams (e.g., about the necessity of having spoken with [redacted] before correcting the amount of [redacted]'s net worth on Ex. JKX 34 from $2.5 million to $2 million), and in at least one instance, by Konner customer Gordon Miller.[4] The inability of [redacted] to remember those conversations from between four to six years earlier is not evidence and reliance on such testimony by the Law Judge and the Division was inappropriate.

[4] Although [redacted] could not recall Konner recommending any conservative investments, Konner was clear that he did so for both [redacted] and [redacted] Tr. 0443-44, 2087-89, 4379-82. [redacted] confirmed that testimony, at least as it related to him, see Tr. 2087-89, and that was further corroborated by Konner's contemporaneous notes, see Ex. JKX 6. Given the testimony, as well as the similarities between the two clients (e.g., investing in the same time period of economic and market turmoil), it is surely more likely than not that Konner did recommend one or more conservative investments tha[redacted] rejected.

2. Examples of the Misuse of Konner's Testimony.

In arguing that Konner falsely filled out forms for [redacted]'s signature, the Division quotes Konner's testimony as follows: "I only knew what [the customer] told me." (Div. Br. at 16.) Konner did testify as quoted, but the obvious point of his testimony was that he wrote down what the customer told him, knowing full well that the form (pre-filled out for the convenience of the customer, and to ensure completeness, as explained previously, see Konner Br. at 37), would be sent to the customer for his review, approval, and written signed acknowledgement. Only if the document was *not* sent to the customer for review and approval, but instead filed away and not ratified by the client, would the "irony" found by the Division make any sense at all. Either that, or the Commission must concede that its star witness is incapable of independent judgment and will simply do as told, like a child. This use of Konner's testimony distorts the record and the plain meaning of the witness's words.

3. Examples of the Division's Misuse of, and Unjustifiable Reliance on, the Testimony of its Quantitative Expert.

The Division also attempts to gain undue advantage from the testimony of quantitative expert Louis Dempsey. For example, Dempsey conceded that he did not use the word "control" to refer to one of the three legal elements to establish churning, but merely to show the specific activity in the account was at Konner's direction because all of the trades were marked "solicited." Tr. 3160-61, 3168-70. Despite that, the Division Brief nonetheless attempts to imbue Dempsey's testimony with a meaning he admittedly never intended when, in arguing that Konner exercised de facto control, it states as follows: "The Dempsey expert report recognizes and confirms the reflection of control contained in the account statements." (Div. Br. at 22.) As such, despite Dempsey's own acknowledgement of the limits of his testimony and opinion, his

testimony was wrongfully presented by the Division as providing ammunition for a finding that control as an element of churning was found by the expert. See Konner Br. at 27 n. 3.

The Division also rather astonishingly hews to Dempsey's eviscerated conclusion that [redacted] suffered an investment loss during the churning period. In Konner's initial brief, we demonstrated the error in Dempsey's analysis (which of course merely parroted the results he was fed by the Division's own staff). Konner Br. at 20-21. During the year of 2009 when Konner was accused of churning, [redacted] accepted a Konner investment recommendation to buy stock directly from an issuer. He did so, and shortly thereafter such stock was placed in his JP Turner account at a market value that reflected the kind of outsized gain that was at the heart of [redacted]'s decision to invest aggressively with some of his money at JP Turner. Dempsey unjustifiably treated that gain not as an investment profit that offset investment losses (and then some), but instead treated it as new investor capital, thus ensuring an investment loss during the churn period. Plainly, if the money to buy that stock was deposited directly into the JP Turner, and the stock was then purchased, the investment gain would unquestionably have been recorded as a profit. This distinction without a difference – of where the money to buy this stock was initially deposited – makes no sense and the fact is that the gain from that stock rebuts the contention that [redacted]'s JP Turner account lost money during the so-called churn period, and the Division cannot rationally continue to argue otherwise.[5]

[5] The Division's attempt to explain away the error (Div. Br. at 10 n. 5) is problematic and utterly unconvincing, offering only that the investment that [redacted] made as a result of Konner's recommendation did not initially flow through the brokerage account. How the investment funds flowed would certainly never make a difference for evaluating taxable gains and losses, or any other financial or business purpose. The Division doubles down on its use of Dempsey's error when it wrongfully points to the existence of an investment loss during the so-called churn period to justify the imposition of the maximum civil penalty. See Div. Br. at 32.

4. Examples of the Mischaracterization of Counsel's Argument.

In an effort to frame the issues of this review as narrowly as possible, the Division misapprehends and then twists the nature of the "concessions" made by counsel and the scope of the argument set forth in the Konner Brief. See Div. Br. at 12-13 & n. 8. Thus, the Division there asserts that the "concession" in the Konner Brief that the section of the Initial Decision where the Law Judge gave a detailed summary of the testimony (without analysis of conclusion) was "fair," and that the "concession" in the section of the Initial Decision containing a summary of the general legal principles applicable in all churning cases was "not being challenged," establishes that Konner in effect "accepted both the facts and the law." The Division seeks to create this misimpression in a misguided attempt to narrow this appeal into one where the only issue is witness credibility. But that contention is disingenuous, wrong, and given the fact that we submitted a lengthy brief challenging multiple factual and legal conclusions, nonsensical.

Not challenging those portions of the Initial Decision which contain (1) non-judgmental and non-conclusory summaries of the evidence, or (2) a plain vanilla recitation of basic legal principles, is a far cry from conceding the facts and the law. What should have been obvious to the Division is that the judgments made and the conclusions drawn from that evidence is what form the basis of the challenge to the Initial Decision. And not taking issue with the limited case law that the Law Judge cited is hardly a concession that all relevant cases were identified and properly relied upon. To the contrary, and as explained in the Konner Brief (at 8-9, 22-23, 29-30) and in the briefs submitted by other parties, the Law Judge in fact failed to take many relevant legal considerations into account. The effort to pigeonhole this case into a credibility contest that is virtually unwinnable by a challenger to a Law Judge's initial decision is profoundly disingenuous.

5. Examples of the Misuse of Case Law in the Division Brief.

The Division's reliance upon a number of judicial and administrative cases is similarly misguided. For example, the Division cites (at 14) *U.S. v. Elliott*, 62 F.3d 1304, 1308 (11th Cir. 1995), for the proposition that "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." However, we made reference to the customer in question, [redacted], for a totally different purpose. In *Elliott*, the issue was whether or not to exclude evidence from one group of non-complaining witnesses to rebut the existence of fraudulent intent with respect to the alleged victims of a Ponzi scheme. Relying upon that case completely misses the point of why [redacted]'s testimony is relevant and important. [redacted]'s testimony corroborated (at least in part) Konner's testimony that he had recommended conservative investments to both [redacted] and [redacted], and that both had declined those recommendations. Given that [redacted] could not remember either way, and that [redacted] and [redacted] are similarly situated, the reference to the [redacted] evidence (see n. 4, *supra*) surely is probative as to Konner's credibility on a very key point, namely, whether he did in fact recommend that Carlson establish the anchor of a conservative investment in his JP turner account given the extreme market volatility in 2009. [redacted]'s failure to follow that recommendation not only evidences the absence of broker control, but is consistent with Konner's assertion regarding [redacted]'s true investment objectives.

Next, the Division cites (Div. Br. at 16-17) *Richard G. Cody*, Exchange Act Rel. No. 64565 (May 27, 2011), for the proposition that "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]." Of course, Konner is not here attempting to establish policy; he just wants a fair review of all of the evidence. But more to the point, *Cody* is

fundamentally distinguishable because the broker in that case admitted that the listing of speculation as an investment objective on one of a number of pre-filled forms was inaccurate. In the instant case, the customer signed multiple documents over a period of years representing that speculation was an investment objective, and it is certainly not conceded (as in *Cody*) that the forms were wrong. The case does not support any valid argument relevant to this case.[6]

And despite its undeniable ability to bring greater resources to bear in searching for cases that would further its analysis, the Division not only took a number of missteps with the cases cited above, it was also plainly unable to locate a case like the one here in which the allegedly churned customer signed multiple documents over a period of years indicating a willingness to invest in an aggressive and speculative fashion. This of course is no surprise, and suggests that affirmance would be a dangerous precedent that will likely disable firms from being confident that they can reasonably rely on representations affirmatively made by their own customers in account documents even after the customers sign them.[7]

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[6] The Division also cites (Div. Br. at 24-25) *Michael David Sweeney*, Exchange Act Rel. No. 29884 (Oct. 30, 1991), and *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28 (1st Cir. 1986), for the proposition that "[m]ere receipt of the account statements and trade confirmations does not establish that the customers understood and accepted what was happening in their accounts." Konner never argued that it did, and in fact these cases do not in any way, shape or form address the relevant proposition in this case, namely that a customer is hard pressed to argue that he was neither aware nor approved the active, speculative trading in his account when he receives not only account statements and confirmations, but also annual tax forms detailing a year's worth of activity, as well as a plethora of other account documents (all acknowledged and signed by the customer) that explicitly speak of aggressive investment objectives, that ask the customer to acknowledge that his account was an active account, and which disclose the inherent risks associated with active accounts. The factual contexts of the two cases are also vastly different.

[7] Even though *Michael David Sweeney*, Exchange Act Rel. No. 29884 (Oct. 30, 1991), does not support the Division's position, the case is instructive for at least one reason. In that case, the Commission affirmed an NASD ruling that a father-son team of brokers had excessively traded multiple accounts belonging to eight customers over a two year period. The sanctions imposed consisted of a censure, disgorgement and a $5,000 fine. The disparity between the sanctions imposed there, and what has been imposed here by the Law Judge is striking, and strikingly unfair and disproportionate. Should the Initial Decision be affirmed, a significantly reduced sanction is warranted.

6. Other Examples of the Misuse of the Record.

In trying to justify the finding that there was excessive trading in the [redacted] account, the Division relies on "presumptive" levels of churning (Div. Br. at 18-19) and the "loss" incurred by the customer during the churn period (Div. Br. at 19). In making that pitch, however, the Division first conveniently ignores the line of cases which state that the "usual" metrics may well be irrelevant in cases were speculation was an investment objective (which of course explains why the Division so aggressively challenged the documents in which [redacted] affirmed that speculation was his number one investment objective). See Konner Br. at 22-23. And of course we have elsewhere debunked the notion that [redacted] incurred an investment loss during the so-called churn period. See *supra* at 6-7; Konner Br. at 20-21. Relying on the existence of a loss in its analysis makes no sense: there was a loss only if you accept that the $175,000 unrealized gain on stock recommended by Konner is a new capital investment and not an actual investment gain.

Furthermore, in trying to justify the finding that Konner exercised control over the [redacted] account, the Division repeatedly points to the existence of "extensive unauthorized trading" by Konner (see Div. Br. at 2, 10, 22, 27). But harping on that grossly overstates the record. Not only was no charge of unauthorized trading made after the Division completed an exhaustive investigation of JP Turner, the sole piece of evidence on the subject was [redacted]'s offhand remark not even followed up by Division counsel:

> *Q: So is it your testimony that you typically approved recommendations that he made?*
>
> *A: Yes, but I didn't get recommended – I mean, he didn't tell me about all of them then. I mean, he didn't call on every stock..*
>
> *Q: So you didn't receive a call every time a trade was made?*
>
> *A: No. Oh, no. I would have been on the phone all day.*

(Tr. 1720.) This offhand remark, from a witness whose lack of recollection is palpable, hardly provides a reasonable foundation for accusing Konner after the fact of "excessive unauthorized trading" as either grounds for finding control by Konner (Div. Br. at 22) or for the imposition of the harsh sanctions sought by the Division.

In this regard, it is worth noting how the Division never comes to terms with the fact that [redacted], in his own handwriting, acknowledged his awareness that there was a great deal of trading activity in his account, namely "four trades per week" (see Ex. JKX 34). Those 208 trades per year is a number that the Division concedes [redacted] was "comfortable with" (Div. Br. at 27). By pointing out that the actual number of trades (254) in the period following the date [redacted] said he was comfortable with, 208 trades per year hardly supports a finding that [redacted] was not aware of or disapproved investing in an account that was heavily traded.

Finally, in an effort to further besmirch Konner's integrity and rationalize the need for maximum sanctions, the Division argues that Konner's record "has not been without blemish" (Div. Br. at 3, 33-34). A fair and complete review of the record, however, establishes that Konner's conduct was never before in question. See Konner Br. at 34 n. 4. The critical distinction between being named in a complaint and actually being accused of misconduct, as was established, is one the Division too readily glosses over.[8]

[8] To this end, the Division could not resist bringing out the half-story about Konner customer reneges (Div. Br. at 5). While pointing out that he "had a large number of reneges," such information is presented in a vacuum. In context, the record shows that the reneges occurred during a period when the market was in free fall (so a stock price might be down significantly even before settlement date of a customer's first trade with JP Turner), see Tr. 3791-94 (John Williams), and also because Konner was one of the bigger producers in the office, so accordingly had a larger number of reneges, see Tr. 4349-50 (Konner). Without this essential context, the Division mischaracterizes the record.

CONCLUSION

Even with the limited resources available to Konner, it has been demonstrated that the Division's opposition brief – indeed the entirety of the one remaining charge against Konner in the case -- has been discredited. As such, and for the reasons set forth above and in Konner's initial brief, respondent Konner respectfully submits that the Initial Decision of the Law Judge should be reversed inasmuch as it ignored and/or misconstrued the great weight of the evidence in finding that he churned the [redacted] account. This august body should not countenance the railroading of this respondent,[9] should not ruin his career based on the record presented, and the case against Jason Konner should be dismissed.

Dated: New York, New York
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[9] See footnote 2, *supra.*