UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

REPLY BRIEF OF DIMITRIOS KOUTSOUBOS IN SUPPORT OF PETITION FOR REVIEW

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Cases

I. Argument

A. The Division's Attempt To Characterize The Legally Erroneous Decision As An Appeal-Proof Credibility Contest Should Be Disregarded As False

The Division's Opposition Brief[1] is a deeply disingenuous document with an obvious and wholly improper game plan. First, it attempts to falsely recast Koutsoubos's appeal as nothing more than a "he said/she said" dispute over the Decision's determination to credit the hearing testimony of the Division's customer witness, [redacted], over that of Koutsoubos. The fact that [redacted] repeatedly wrote, before and after the alleged churn period, that he had a high risk tolerance and aggressive investment objective, that he desired to conduct active trading, and that he acknowledged the risks of active trading poses an obvious problem to the Division's pretense that there is not overwhelming external evidence of [redacted]'s true investment objectives, risk tolerance and desire for active trading. The Division's solution is to simply assert, without the slightest evidence, that Koutsoubos "manipulated" all of these documents to avoid detection by his firm's compliance department. [Opp. Br. 1] The fact that Koutsoubos could not have manipulated the documents, even if he had wanted to because, among other reasons, it was proved at hearing impossible for him to have fabricated, forged, intercepted, or interfered with the fax transmissions between [redacted]t and John Williams, the J.P. Turner branch compliance manager, should have posed an insurmountable impediment to the Division's argument.

Undeterred, the Division simply ignores all these facts and argues that Williams, the independent third-party witness who provided uncontroverted evidence of this roadblock to the

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[1] Citations to the Division of Enforcement's Opposition Brief are noted as "Opp. Br. ___", citations to Respondent Koutsoubos' Brief in Support are noted as "DK Br. ___", citations to the Initial Decision are noted as "DEC. ___", and citations to the hearing record are noted as "Tr. ___".

Division's specious argument, was unworthy of belief because the Decision was correct in judging Williams with the grave sin of appearing "timid" and "quiet," as if the decibel level of, and not the veracity of Williams' in person, sworn testimony was the proper standard.[2] [DEC. 105] The Division offers a simple solution to the fact that Koutsoubos had no pecuniary reason to attempt to defraud [redacted] given that there was a severe commission restriction on the account and that, because Koutsoubos did not prospect but rather "inherited" [redacted]'s account from another J.P. Turner registered representative, Koutsoubos received a 35% rather than 60% gross commission payout. The Division baldly claims that Koutsoubos invented the fact that he received a 35% payout with respect to the [redacted] account, pretending as though the actual proof was not contained in the Division's own Exhibit 146,[3] which it withheld from its own expert to induce him to make a materially false calculation of Koutsoubos' gross commission payout in his report.

Having conveniently dispensed with the uncontroverted evidence which detracts from the Decision's false finding that Koutsoubos churned [redacted]'s account in 2008, the Division argues that the Decision was within its purview to credit [redacted]'s testimony, despite the fact that [redacted] made no complaint about Koutsoubos at any time that he was the broker on the account (until August 2009) or in the three and a half years thereafter. The fact that [redacted] admitted that he testified at hearing in the manner he did because he had lately come to understand that he could receive some money if there were a finding of wrongdoing against Koutsoubos, an admission of

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[2] The hearing room's acoustics may have exacerbated the AJL's difficulty hearing Williams. As the ALJ noted at one point, "[W]e don't have any really good place – there is no desk or anything..." in the hearing room for the court reporter to be able to hear the witnesses well. [Tr. 3633-34]

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

bias the Decision erroneously failed to address or properly consider in assessing Bryant's credibility, would seem to pose a monumental obstacle to the Division's argument.

The Division conveniently "solves" this legal error by utterly ignoring it – nowhere in its Opposition Brief does it mention, much less provide reasoned argument as to why the Decision did not need to consider the extent to which the clear evidence of [redacted]'s bias affected the credibility of his testimony, which, as shown in detail in Koutsoubos's Brief in Support, was contradicted by both [redacted]'s own repeated written representations, and by John Williams, an independent non-party witness. Having brushed aside the mountain of evidence showing Koutsoubos did not churn [redacted]'s account in 2008, the Division administers its *coup de grace* – essentially contending, contrary to established law, that a pure credibility determination by this ALJ must be given such deference that the finding against Koutsoubos may not be disturbed by the Commission on appeal. To permit this type of straw man argumentation would vitiate the Commission's *de novo* review authority, which has never been more important than in this case.

B. The Division's Pretense That Koutsoubos "Manipulated" The Various Documents Bryant Signed To Indicate His True Active Trading Investment Objectives And Risk Tolerance Should Be Disregarded

As described in detail in Koutsoubos's Brief in Support [DK Br. 15-23] and which need not be reargued in this Reply, [redacted] repeatedly documented in writing his high risk tolerance and desire to aggressively trade his account by, among other things, deliberately selecting trading profits, speculation and short-term trading as his investment objectives. [DKX. 21, 22] Each of the Division's two experts conceded that where a customer, such as [redacted], signed a document stating he understood the risks associated with active trading, that it is an indicator of the customer's intentions as to the appropriateness of a high level of trading – and that this indicator is even more relevant where, as here, the customer acknowledged such understanding on

multiple occasions. [Tr. 3172-74, 3531] As also described in detail in Koutsoubos's Brief in Support [DK Br. 18-21] and which need not be reargued in this Reply, neither the mid-March 2007 Account Update form signed and initialed by Bryant [DKX. 21], nor the May 2009 Active Account Suitability Supplement ("Active Sup") and accompanying Active Account Suitability Questionnaire ("AASQ") [DKX. 22], each document also signed and initialed by [redacted], were faxed by Koutsoubos to [redacted] or received by fax from [redacted] to Koutsoubos. Rather, they were faxed to and received from [redacted] by the salaried J.P. Turner Brooklyn Branch Compliance Officer who carefully reviewed the documents sent to and received from [redacted] and, after having approved the same, forwarded [redacted]'s signed and initialed documents directly to J.P. Turner's compliance department in Atlanta, Georgia. [Tr. 3617-18] Like all of the other registered representatives of that branch, Koutsoubos was physically barred from the area in which the fax machine was located – a compliance "best practice" employed in J.P. Turner's Brooklyn branch. [Tr. 3736-3739]

[Intentionally Left Blank]

The Account Update for Bryant's account (DKX. 21, shown in reduced size below) was reviewed by the J.P. Turner Branch Compliance Manager, John Williams, who compared the financial information on the form to the information on file at the firm, and finding no discrepancies, signed the document as approving branch manager. [Tr. 3625, 3763]

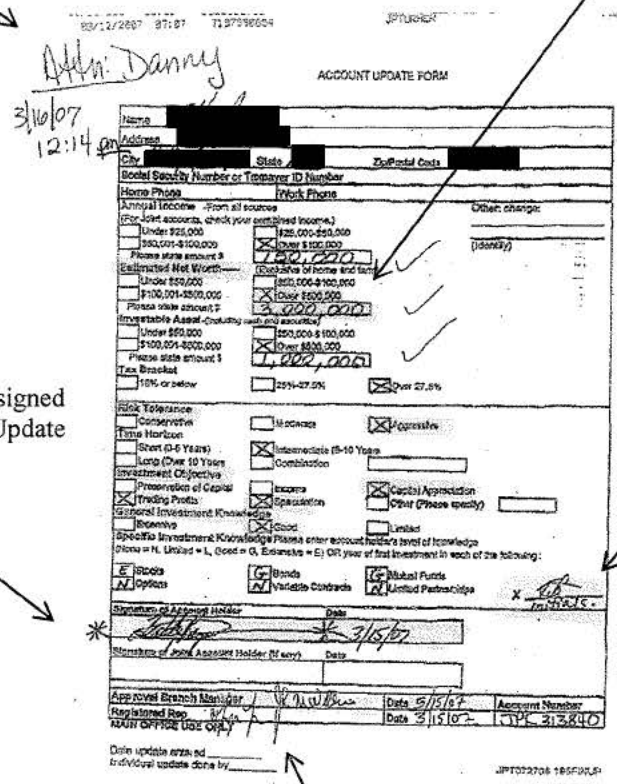
Williams testified that he received this fax from [redacted] and sent it directly to the J.P. Turner Compliance Department in Atlanta. [Tr. 3764-65]

[redacted] verified that his estimated $3,000,000 net worth was correct [Tr. 925]

[redacted] identified his initials here. [Tr. 960-61] Williams expressly required [redacted] to initial here in addition to his signature below to focus on and verify that the aggressive risk tolerance, and investment objectives of capital appreciation, trading profits, and speculation, were all correct. [Tr. 3625, 3758-59, 3762]

[redacted] admitted that he signed and dated the Account Update Form. [Tr. 960-61]

Williams testified that the initials seen here are his and that of Branch Manager James Sideris, reflecting their supervisory reviews of the incoming and outgoing faxes to and from [redacted] without the possibility of interception or interference by Koutsoubos. [Tr. 3625, 3761, 3765]



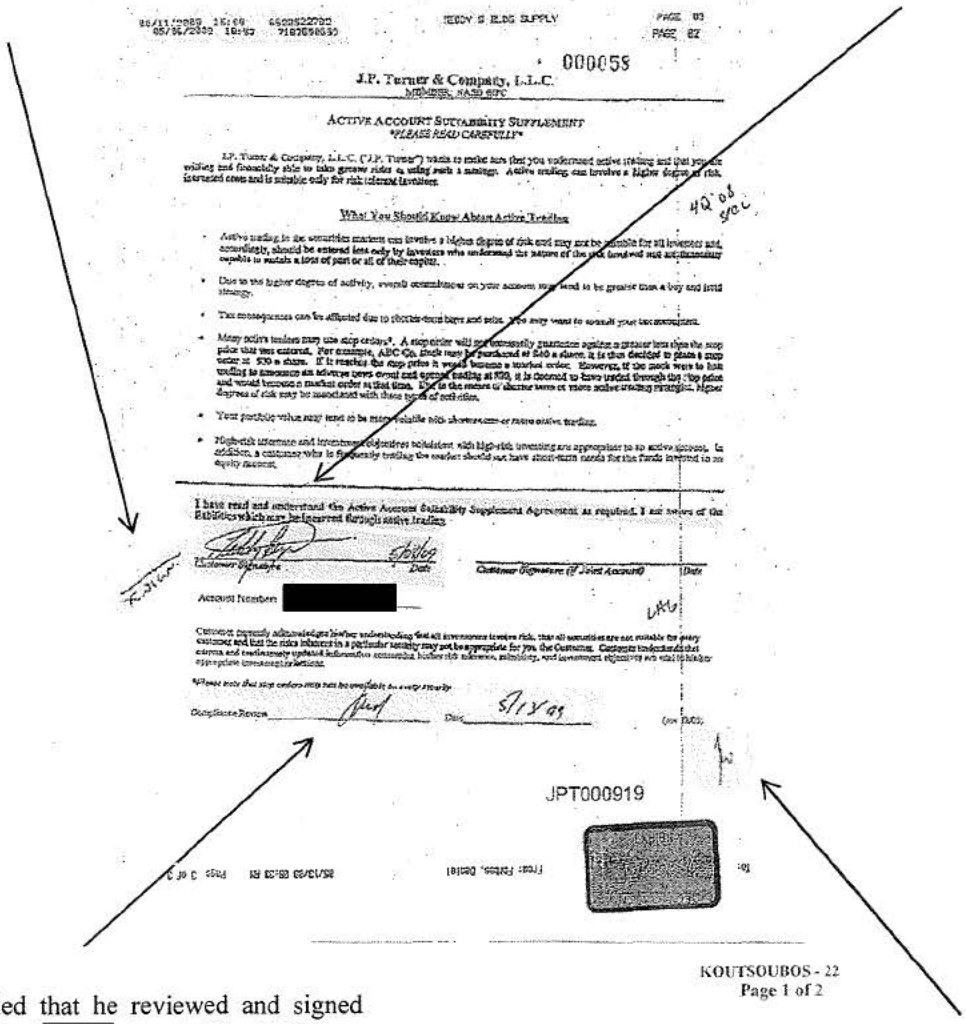
Williams testified that his signature reflected his review of [redacted] signed and initialed Account Update Form as it came off the J.P. Turner Brooklyn Branch fax machine on 3/15/07. [Tr. 3625, 3762-63]

The Active Sup and AASQ for Bryant's account (DKX. 22, pages 1 and 2, respectively, shown in reduced size below) were personally reviewed by Williams upon receipt by fax from [redacted]. It was Williams who required that [redacted] place his initials to highlight to [redacted] the information filled out by the J.P. Turner branch pursuant to a telephone conversation with [redacted], and had [redacted] **verify to him, and not to Koutsoubos,** the accuracy of the information. [Tr. 3758]

Active Account Suitability Supplement ("Active Sup")

Williams testified that he marked the "X-Sign" to instruct [redacted] where to sign the document he was faxing to him. [Tr. 3626]

[redacted]'s signature acknowledged that he read and understood the risks associated with active trading. [Tr. 871]



000058

J.P. Turner & Company, L.L.C.

ACTIVE ACCOUNT SUITABILITY SUPPLEMENT
PLEASE READ CAREFULLY

What You Should Know About Active Trading

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

Account Number [redacted]

JPT000919

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Williams testified that he reviewed and signed the Active Sup that [redacted] signed. [Tr. 3626]

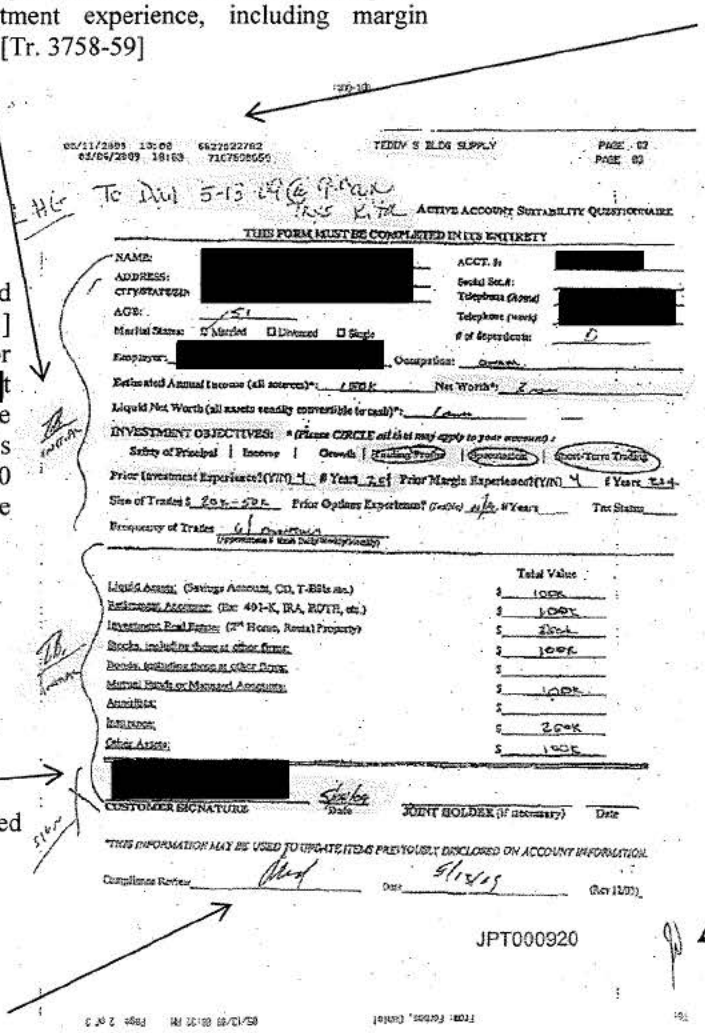
Williams testified that he initialed the Active Sup to reflect his review of the incoming fax from [redacted] [Tr. 3625-26]

Active Account Supplement Questionnaire ("AASQ")

[redacted]t admitted that he placed his initials here. [Tr. 871] Williams testified that he placed this space for [redacted]'s initials so that [redacted] would focus on and verify whether the information in this section, including the $3M net worth, $1M liquid net worth, the investment objectives of trading profits, speculation, and short-term trading, the 20+ years of prior investment experience, including margin experience, were all accurate. [Tr. 3758-59]

The fax line reflects that the AASQ was faxed to [redacted]s company on 5/6/09 and returned, signed and initialed by [redacted] to the J.P. Turner Brooklyn Branch fax machine on 5/11/09

[redacted] admitted that he placed his initials here. [Tr. 871] Williams placed this space for [redacted]t's initials so that [redacted]t would focus on and verify the specific information about his assets, including his $100,000 retirement account, were accurate. [Tr. 3758-59]



[redacted] admitted that he signed and dated the AASQ. [Tr. 871]

Williams testified that he initialed the AASQ to reflect his review of the incoming fax from [redacted] [Tr. 3626]

Williams testified that this was his signature, reflecting his review of [redacted]t's signed and initialed AASQ. [Tr. 3760]

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C. The Division's Spurious Attempt To Support The Decision's Failure To Properly Consider John William's Uncontroverted Testimony Should Be Disregarded As Utterly Without Basis

Williams' undisputed testimony, corroborated by the uncontroverted documentary evidence, is entirely fatal to the Decision's false finding that [redacted] was a conservative buy-and-hold investor with limited means and experience. Moreover, it annihilates the Division's new contention that Koutsoubos manipulated the documents that Bryant signed that show contrariwise. In an effort to impugn Williams' credibility (and thus bolster the Division's pitiful rationale for disregarding Williams' testimony because he appeared soft-spoken), the Division contends that as a former J.P. Turner employee, Williams "had every incentive to shade his testimony in favor of his performance of his duties in a hearing before the Commission."[4] [Opp. Br. 15, n. 7] This is utter nonsense. Williams was not named as a respondent in this matter (which pertains to events in 2008) and was in no danger of being sued by the SEC in connection with his supervisory conduct at that time. Williams has not been employed at J.P. Turner since 2010 and had no reason whatsoever to curry favor with J.P. Turner. Williams did not even volunteer to testify in this matter – he was compelled by subpoena by another party and travelled from New York to testify under oath under penalty of perjury for the better part of two days. His testimony was not disputed by any other witness (including [redacted] who was not recalled by the Division for rebuttal testimony), nor was there any documentary evidence to impeach the veracity of his testimony. There is simply no basis upon which the Division may imply that Williams, a long-term compliance officer, was not telling the unvarnished truth. This stands in

[4] The Division's footnote states "Koutsoubos had every incentive...", however, it appears from the context of the rest of the footnote that this is a typographical error and that the Division intended to refer to Williams. In the same footnote, the Division falsely implies that Williams was biased to testify in favor of Koutsoubos by misrepresenting the record to claim that Williams and Koutsoubos were "friends." In fact, Williams demurred when asked if he and Koutsoubos were friends, replying that 5 years earlier, during the period in question, he and Koutsoubos had been "friendly," and that the extent of his socializing outside of work with Koutsoubos was limited to "maybe once or twice outside of work... probably just getting some food or dinner or something." [Tr. 3786]

stark contrast to the testimony of [redacted], utterly ignored by the Decision and avoided by Division's Opposition, who was strongly motived to bend the truth the way he did in the hope that it would put him in a position to recover money. [Tr. 1000]

D. The Division's False Claim That Koutsoubos Earned Nearly Twice The Gross Commission Credits In Connection With Bryant's Trades, While Pretending The Documentary Evidence In Its Own Exhibits Doesn't Exist, Should Be Disregarded

As described in detail in Koutsoubos's Brief in Support [DK Br. 33-37] and which need not be reargued in this Reply, the evidence in this case contradicts, rather than supports, any finding that Koutsoubos' actions were for the purpose of generating commissions by recommending unwarranted trades without regard to [redacted]'s interests. The evidence in this case demonstrated that for nearly the entirety of 2008, there was a maximum commission restriction in place on transactions in the [redacted] account (max of $100/per trade to J.P. Turner through October 2008 and max of $60/per trade to J.P. Turner thereafter). The evidence further demonstrated that for the entirety of Koutsoubos' term as registered representative of [redacted]'s account, Koutsoubos could receive a payout of only 35% of the gross commission credits, less ticket and other charges. [Tr. 4535-36; DX 146] As the chart on page 12 of this Reply demonstrates, this fact alone defeats the finding that Koutsoubos acted with scienter in connection with the trading in [redacted]'s account in 2008. The Division recognizes this fact and attempts to solve its problem by pretending that "without any support apart from his own selective and self-serving testimony, Koutsoubos claims his payout on the [redacted] account was only 35%. Koutsoubos' testimony is totally unreliable. . . ." [Opp. Br. 28] Yet, as the Division

well knows, the 35% payout percentage for the [redacted] account was not a figment of Koutsoubos' imagination – it is documented in the Division's own hearing exhibit.[5]

[Intentionally Left Blank]

[5] The Division claims that this figure cannot be correct because its churning expert concluded that [redacted] paid $47,000 in commissions during 2008 and Koutsoubos personally made $30,000 as a result. [Opp. Br. 28] The Division further claims that Dempsey's calculation was based upon a trade blotter reflecting Koutsoubos' actual commissions received. [Opp. Br. 10, n. 4] This is flatly false; rather Dempsey admitted the Division told him to assume that the [redacted] account was a 65% commission payout account and he never actually tabulated Koutsoubos's commission pay. [Tr. 3239-3242] Dempsey further testified that the Division did not make its own Exhibit 146 available for him to review in connection with the preparation of his report [DX 155], which served as his direct hearing testimony. When shown the Division's Exhibit 146 for the first time on cross-examination, Dempsey agreed that he recalled testimony during the hearing that the commission rate for the [redacted] account was no more than 35% and stated that he did not have any reason to doubt that figure. [Tr. 3239]

The J.P. Turner Monthly Commission Report for Koutsoubos for calendar year 2008 [DX. 146] was introduced as an exhibit by the Division and admitted into evidence. Each month's commission report generally consists of two pages; the first page (or two) contains the gross commissions for all accounts coded "JA5" in which the gross commission payout percentage is shown to be between 55-65%, and a separate page contains the gross commissions for all accounts coded "S33" in which the gross commission payout percentage is shown to be 35%. Below is a snapshot of page 23 of the Division's Exhibit 146, shown in reduced size, which reflects the report page for "S33" coded accounts for the month ending September 30, 2008.

Monthly Commission Report to Koutsoubos for September 2008 for all accounts coded "S33", including [redacted]'s account. [Tr. 4535-36] The monthly account statements show that [redacted]'s account was coded "S33." [DKX. 24]

Page 23 of the Division of Enforcement's Exhibit 146. The Division deliberately did not show Exhibit 146 to its own expert witness, Louis Dempsey, [Tr. 3237-39] which induced Dempsey to assume a materially overstated commission payout to Koutsoubos in connection with Bryant's trading activity.

10/9/2008 23/ 27

JP Turner Co LLC
Monthly Commission Report
September 30, 2008

Branch: LHG Deerfield Beach, FL 33442
Representative: S33 Koutsoubos, Dimitrios

Description	Type	Gross Commission / Txns Count	Net Commissions / Amount	Percent
Commisssions				
NPS COMMISSION	GC	6,316.01	2,210.60	
JOHN HANCOCK SMALL DISTEFANO	NT	0.78	0.27	
ICON INTERNATIONAL DISTEFANO	NT	2.39	0.84	
KEELEY SMALL CAP DISTEFANO	NT	2.16	0.76	
Total Commisssions		6,321.34	2,212.47	35.0
Charges and Credits				
NFS TRANSACTION - EQUITIES	T9	0.00	-160.00	
DESK FEE	BC	0.00	-69.00	
Total Charges and Credits		0.00	-229.00	
Amount Due To Reps			1,983.47	

35% gross commission payout to Koutsoubos

J.P. Turner's Executive Vice President, Michael Bresner, testified as to his analysis of the effectiveness of the commission restrictions procedures he implemented for actively traded accounts and concluded that, with respect to those accounts for which the registered representative received a 50% to 60% gross commission payout, at $100 maximum commission per trade (i.e., $50 to $60 gross), the broker was "at best breakeven" and at $60 per trade (i.e., $30 to $36 gross) he was losing so much money that he was "getting crushed." [Tr. 3058] The Decision essentially credits Bresner's analysis and notes that because there were far fewer transactions in [redacted] account after October 2008 than in the months preceding that date, this phenomenon can only be ascribed to the fact that the reduction of $100 to $60 per trade made "it quit being profitable to churn [redacted]'s account."[6] [DEC. 37, cited by the Division at Opp. Br. 29] Given the Decision's analysis, the fact that the [redacted] account was coded for a maximum 35% payout percentage demonstrates why it was contrary to Koutsoubos's pecuniary interest to churn [redacted]'s account at any time in 2008, irrespective of whether the maximum commission was $100 or $60. It is simple arithmetic:

	$100 Maximum Gross Commission Charged by J.P. Turner	**$60 Maximum Gross Commission Charged by J.P. Turner**
60% Commission Payout	**$60** ("breakeven")	**$36** ("getting crushed")
35% Commission Payout (e.g. Bryant's account)	**$35** ("getting crushed")	**$21** ("getting crushed")[7]

[6] There is, of course, a far more likely rationale as to why the number of trades in [redacted]'s account declined after September 2008, rather than ascribing it to a change from $100 maximum commission to $60 maximum commission: the complete implosion of the stock markets worldwide following the collapse of Lehman Brothers on September 14, 2008, and the market freefall that accelerated thereafter.

[7] The Division incorrectly assumes that Koutsoubos retained the entirely of the commission payout in arguing that even a smaller commission figure "was more than sufficient to influence his recommendations" [Opp. Br. 29] The Division simply ignores that from the gross commission amount, Koutsoubos was then financially responsible for a variety of charges and credits against his gross commission payout, including but not limited to: errors and omissions insurance, write offs if there was insufficient funds in an account, ticket charges, contribution to the payroll for the non-registered employees of the branch, training, test preparation and other expenses of broker

E. Various "Facts" Put Forth By The Division In Support Of The Legally Erroneous Decision Should Be Disregarded As False

There are numerous other instances in which the "facts" cited in the Division's Opposition were contradicted by record evidence or were based solely upon [redacted]'s self-serving after-the-fact testimony unsupported by documentary evidence or by a corroborating witness. For the sake of brevity, only a few are included below in this Reply brief:

Division: [redacted] invested approximately $250,000 in his J.P. Turner account, "which was approximately 25% of his net worth." [Opp. Br. 7] In other words, the Division states that [redacted]'s net worth was approximately $1 million.

Truth: On four separate documents: [redacted]'s February 2005 New Account Application [DXK. 16], [redacted]'s February 2005 Margin Account Agreement [DXK. 18], [redacted]'s March 2007 Account Update form [DXK. 21] and [redacted]'s May 2009 AASQ [DXK. 22] – all of which [redacted] testified contained accurate net worth information [Tr. 858, 925] – his net worth shown to be either $3 million or $3.5 million.

Division: "[redacted] had no retirement savings as of March 2007." [Opp. Br. 6] Thus, the Division implies Koutsoubos should have known that [redacted] was not suitable to actively trade his account

Truth: [redacted]'s May 2009 AASQ [DXK. 22] – which [redacted] signed, initialed, and testified contained accurate information about his financial information, reflected that his $100,000 retirement account was part of his overall net worth. [redacted] also verified his net worth included $100,000 in mutual funds or managed accounts, $100,000 in cash or cash equivalents and $250,000 in insurance products, among other components of his wealth. [Tr. 858, 925]

Division: Dempsey concluded that "Koutsoubos controlled the trading in the account . . . ." [Opp. Br. 8, 22]

Truth: Dempsey stated he did not conclude and rendered no opinion as to whether Koutsoubos had *de facto* control over the [redacted] account. [Tr. 3162]

Division: [redacted] testified that in March 2007, he received a pre-filled account update form changing his original, more conservative investment

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trainees in the branch, lead sheets, office materials, overnight delivery charges, wire transfer fees and desk fees. [Tr. 4530-36; DX. 146]

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. [Opp. Br. 27]

Truth: [redacted]'s actual testimony was 180 degrees opposite, though equally false. He testified he could not remember if his signed Account Update [DKX. 21] was filled out when he signed it but that there was a "real good possibility" that it was blank. [Tr. 859, 963; DX 143] As discussed in detail in Koutsoubos' Brief in Support (page 24, note 14), the evidence reflects the falsity of [redacted]'s implication that he might have signed a blank form.

Division: Evidence that Koutsoubos traded in the [redacted] account solely to generate commissions rather than for [redacted]'s benefit is "lack of a real trading strategy . . . ." [Opp. Br. 27]

Truth: Koutsoubos testified at considerable length (perhaps more than the Division wanted to listen to) about his application of the Can Slim investment strategy developed by the publisher of Investors Business Daily. [Tr. 4475-77]

F. The Division's Claim That Koutsoubos' Facts Are Based Solely Upon His Self-Serving Testimony Is Disingenuous, If Not Complete Hypocrisy, And Should Be Disregarded

The Division falsely argues, "Koutsoubos claims that [redacted] was a successful business man who had a couple small brokerage accounts before, monitored his J.P. Turner account activity, spoke with Koutsoubos about it, and rejected unspecified recommendations from Koutsoubos while occasionally proposing his own investment ideas," and asks the Commission to "note that Koutsoubos' only support for most of these "facts" are citations to his own testimony..." [Opp. Br. 24] That [redacted] was a success at business is documented by [redacted]'s own testimony that he had two businesses employing 32 people at the time [Tr. 890-891], lived on a golf course at which he was a member [Tr. 914], owned two other houses and a large tract of land [Tr. 908] and had, through his business success, by his mid-forties amassed a net worth of at least $3 million. [Tr. 858] That [redacted] had a couple of prior brokerage accounts before

opening his J.P. Turner account also comes from [redacted]'s testimony: he testified that he previously held accounts at J.C. Bradford, Wachovia and Stifel Niclaus. [Tr. 849] Documentary evidence, not Koutsoubos' testimony, reflected that [redacted] also had prior experience as a brokerage customer of Sky Capital, a firm cited by the SEC for its aggressive trading of penny stocks. [Tr. 915, DKX. 23] That [redacted] closely monitored the activity in his account and spoke often with Koutsoubos about his account is also documented in [redacted]'s own testimony. [Tr. 964-966] Even before Koutsoubos was assigned to his account, [redacted] made it a regular practice to print the quantity and stock symbol of the securities trades he wanted to make on the memo line of the checks he wrote to pay for his trades. [Tr. 942, 946; DKX. 18, 19] [redacted] kept all his J.P. Turner trade confirmations, all his monthly account statements, and each of the year-end tax reporting statements sent to him by J.P. Turner for many years after the period in question [Tr. 971, 986; DKX. 24, 26, 27] [redacted] also testified that he kept and maintained certain research and other market information Koutsoubos sent him for review and discussion [Tr. 971; DKX. 34] and testified that he spoke frequently with Koutsoubos throughout the period Koutsoubos was his broker, sometimes several times per week. [Tr. 964-965] In fact, [redacted] testified that even when Koutsoubos was out of the office (such as when he had elbow surgery) he called into Koutsoubos' office repeatedly to make certain he knew what was going on in his account at all times. [Tr. 965-966]

What makes the Division's false claim that the only support for all of Koutsoubos facts is citations to his own testimony particularly hypocritical is that this is exactly what the Division's Opposition Brief does. [redacted]'s direct and re-direct testimony is found at pages 844 through 881, 1020 to 1026, and 1029 to 1030 of the hearing transcript. [Tr. 844-81, 1020-26, 1029-30] We respectfully request that the Commission note the overwhelming extent to which the "facts" cited

by the Division are supported solely by [redacted]'s self-serving testimony without reference to any other witnesses or documentary evidence in the case.

G. The Division's Entire Argument Is A Deliberate Attempt To Distract From The Manifest Legal Errors In The Decision And Should Be Disregarded As False

This Reply's dissection of the multitude of phony facts deployed in the Division's Opposition Brief should not deflect from the more salient issue: the Decision is a complete misapplication of law, not an appeal-proof credibility contest in which the ALJ is free to credit one witness without articulating any legitimate rationale.[8]

In direct contravention of applicable law, the Decision erroneously found Koutsoubos had *de facto* control over the [redacted] account solely on the grounds that Koutsoubos made most of the recommendations and that [redacted] typically followed his securities recommendations. Applicable law instructs that the correct inquiry is not whether the broker initiates the trades but whether the customer "has sufficient financial acumen to determine his own best interests, even if he acquiesces in the broker's management of the account." In the Matter of J.W. Barclay, 2003 SEC LEXIS 2529 at *71 (Oct. 23, 2003). The overwhelming evidence, from [redacted]'s own testimony and from uncontroverted documentary evidence, showed that [redacted]'s youth, wealth, business sophistication, significant prior investment experience at other brokerage firms, the fact that Koutsoubos provided only accurate information to [redacted], that [redacted] paid active and close attention to his account, and that Bryant did not place undue trust and confidence in Koutsoubos, mandate a finding that Bryant retained control over his account.

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[8] The mere fact that an ALJ has made a "credibility determination" does not, as the Division implies, cast a pall upon the Commission's ability to conduct its required *de novo* review. An ALJ's credibility determination cannot be blindly accepted; it must be judged against the weight of the evidence. As discussed in Koutsoubos' Brief in Support [DK Br. 26-27] but utterly ignored by the Division's Opposition Brief, in circumstances like this the Commission has on several occasions disregarded explicit determinations of credibility where the record contains 'substantial evidence' for rejecting them. In the Matter of Kenneth R. Ward, 56 S.E.C. 236 (Mar. 19, 2003), aff'd 75 Fed. Appx. 320 (5th Cir. 2003); In the Matter of Herbert Moskowitz, 2002 SEC LEXIS 693 (Mar. 21, 2002).

In direct contravention of applicable law, the Decision erroneously found the activity in [redacted]'s account during 2008 constituted "excessive trading" by failing to judge the level of trading by reference to [redacted]'s documented investment objectives – which included an aggressive risk tolerance, and speculative investment objective. All applicable law, and the Division's two experts agree, the customer's investment objectives and risk tolerance is best known from the customer's own written representations, especially where repeated. [Tr. 3531, 3172-73] The overwhelming evidence, repeatedly from [redacted]'s own pen and from independent third-party compliance personnel, was that [redacted] indicated his high risk tolerance before Koutsoubos ever met or spoke with [redacted], reaffirmed his high risk tolerance in 2006 after Koutsoubos was assigned to be his broker, indicated in writing his aggressive investment objectives shortly before the subject period, and reiterated in writing his aggressive investment objective right after the subject period. [redacted] specifically affirmed that he had read and understood the risks of active trading, and the evidence is unimpeachable that the documents [redacted] signed to reflect his intentions were never altered, forged, manipulated or otherwise interfered with by Koutsoubos.

In direct contravention of applicable law, the Decision erroneously found that Koutsoubos acted with scienter with respect to the trading activity in [redacted]'s account in 2008 by failing to properly consider that it was contrary to Koutsoubos' financial interest to recommend excessive trading in intentional disregard of [redacted]'s interests. The evidence, from the Division's own exhibit, contradicts any finding that Koutsoubos' actions were for the purpose of generating commissions by recommending unwarranted trades. The law is crystal clear, a decision finding is unjustified where the substantiality of evidence fails to take into account whatever in the record fairly detracts from its weight." Buchman v. SEC, 553 F.2d 816,

820 (2d Cir. 1997). The Decision may not simply refuse to consider probative evidence which detracts from its finding that Koutsoubos intentionally and deliberately churned [redacted]'s account during 2008.

II. Conclusion

For all of the reasons stated above and in Koutsoubos' Brief in Support, we respectfully request that the Decision be reversed and the sanctions imposed be vacated.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that on this 15th day of April, 2014, the Reply Brief of Dimitrios Koutsoubos in Support of Petition for Review contains 5,308 words (4,073 words in text, and 1,235 words in textboxes and footnotes) as counted by Microsoft Word, complying with the length limitations set forth in Rule 450(c) of the Commission's Rules of Practice.

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