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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15015

In the Matter of	
MICHAEL BRESNER, RALPH CALABRO, JASON KONNER, and DMITRIOS KOUTSOUBOS	

RESPONDENT RALPH CALABRO'S REPLY
BRIEF IN FURTHER SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Ralph Calabro respectfully submits this Reply Brief in Further Support of Petition for Review of the Initial Decision dated November 8, 2013 (the "Initial Decision") of Administrative Law Judge Cameron Elliot (the "ALJ"), and in response to the Division of Enforcement's Brief in Response to Calabro's Opening Brief in Support of His Petition for Review (the "Response"). For the reasons set forth below, and in Calabro's Opening Brief, the Initial Decision should be reversed or, alternatively, be modified to vacate any monetary obligation.

INTRODUCTION

The crux of the Division's lengthy Response is that "credibility determinations" based upon a "he said-she said" comparison of Calabro's testimony to the hindsight testimony of his former customer, [redacted] insulates the Initial Order from direct scrutiny. The alleged "credibility determinations" referenced in the Initial Decision, however, were mostly beside the point. This case instead featured contemporaneous documents [redacted] *prepared and signed independent of Calabro* that expressed his true investment objectives, his true financial ability to incur risk, and his true control of his account. This case also featured *uncontested evidence*—requiring no "credibility determinations"—demonstrating [redacted]' ability, as a decades-long economist, to understand the nature and volume of trading in his account sufficient to make decisions and to maintain control. And this case featured pure mathematics—not subjective viewpoints requiring "credibility determinations"—upon which the calculations the Division relied to show trading volume in [redacted]' account were admitted to be skewed against Calabro by the very expert the Division presented in its case in chief.

Stated simply, this case defies the "credibility determinations" label repeatedly echoed by the Division as a substitute for incontestable evidence; indeed, permitting life-crippling liability and penalties to stand requires more than talismanic labels. When the independent documentary

and uncontested evidence is assigned even a minimal level of weight, and the appropriate legal standard is applied, the truth becomes clear: [redacted] never relinquished control of his account, the trading in the account was consistent with [redacted]' investment objectives, and the volume of trading was not excessive. And perhaps most importantly, Calabro sought to maximize [redacted]' return based upon the uncontested market forces at the time, not to maximize his commissions. For these reasons, and as demonstrated below and in Calabro's Opening Brief, the Initial Decision should be reversed and vacated.

THE APPLICABLE STANDARD OF REVIEW

The Division's reliance upon "credibility determinations" as a basis to explain away the ALJ's disregard of contemporaneous documents and objective facts is misguided. For while "[t]he Commission *conventionally* extends substantial deference to the credibility determination of the ALJ as the initial fact finder" (Response at 4) (emphasis added), the actual standard of review is more exhaustive; it is *de novo*. *Matter of John Flannery*, SEC Rel. No. 9307 (Mar. 30, 2012); *see* 17 C.F.R. § 201.411(a) ("The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record."). Thus, the Commission should review an application of law for legal error, and review determinations of fact from scratch by independently weighing the record evidence. *See Schellenbach v. SEC*, 989 F.2d 907, 909 (7th Cir. 1993); *see also U. S. v. Raddatz*, 447 U.S. 667, 690 (1980) ("The phrase '*de novo* determination' has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy.").

It is for this very reason that while the Commission lends weight to an ALJ's credibility determinations given his or her first-hand evaluation of testimonial demeanor, it does not accept an ALJ's factual findings "'blindly.'" *Kenneth R. Ward*, 56 S.E.C. 236, 260 (2003) *aff'd*, 75 F. App'x. 320 (5th Cir. 2003); *see Matter of Theodore W. Urban Securities*, Rel. No. 63456 (2010) ("although the Commission grants 'considerable weight and deference' to credibility determinations of the law judges, those determinations are not sacrosanct"). The Commission should instead "disregard" credibility determinations "where the record contains 'substantial evidence' for [rejecting them]." *Matter of Herbert Moskowitz,* S.E.C. Docket 456, 2002 WL 434524 (2002). Indeed, "there are circumstances"—such as when contemporaneous documentary evidence disproves hindsight testimony—where, in the exercise of its "review function," the Commission "must disregard explicit determinations of credibility." *Kenneth R. Ward*, 56 S.E.C. at 260 (finding testimonial and documentary evidence contradicted witness testimony). In this case, uncontested facts, documentary evidence and mathematical objectivity require the Commission to exercise its review function, weigh anew the core facts, and then discount the so-called "credibility determinations" upon which the Division urges affirmance.

ARGUMENT

I. THE ALJ ERRONOUSLY FOUND THAT CALABRO EXERCISED *DE FACTO* CONTROL

As explained in Calabro's Opening Brief, the Initial Decision should be reversed and vacated because the ALJ applied an incorrect legal standard in finding *de facto* control. The core question underlying *de facto* control 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." *Follansbee v. Davis, Skaggs & Co.*, 681 F.2d 673, 677 (9th Cir. 1982) (emphasis added); *see Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1069-70 (2d Cir. 1977) ("If a

customer is fully able to evaluate his broker's advice and agrees with the broker's suggestions, the customer retains control of the account."). The ALJ's Initial Decision concerning *de facto* control was fraught with legal error, as it discounted the "sufficient intelligence and understanding" standard as being "beside the point." (Initial Decision at 108.)

Indeed, the ALJ's error turned out to be result-dictating. For when the "sufficient intelligence and understanding" standard is correctly applied, as it should have been here, the "substantial" uncontested evidence defeats the purported "credibility determinations" the Division now claims render the Initial Opinion sacrosanct. *Herbert Moskowitz,* S.E.C. Docket 456, 2002 WL 434524. [redacted] had "sufficient intelligence" to enable him to evaluate Calabro's investment recommendations as the *uncontested facts* proved; he earned an MBA before going on to teach quantitative analysis for 30 years—as a *Professor of Economics*. (Tr. 1398:10-1400:8.) [redacted] also had sufficient "understanding" as both the *uncontested facts* and *contemporaneous documents* proved; [redacted] testified to the "basic concept" underlying short sales that he "could sell the stock now and buy it back at a reduced price" (Tr. 1426:13-19; 1428:20-1429:1), and he prepared a handwritten profit and loss analysis in real time which evaluated the types of investments in his account, the tax impact of net investment gains, the dividends received, the commissions paid, and the unrealized gains and losses for each short investment. (Calabro Exs. 47, 48.) Having obtained an advanced degree in business, having been an economist in the ensuing 30 years, and having closely monitored and understood the trading in his account as proven through a complex analysis of realized and unrealized profits, losses and expenses—all uncontested facts—[redacted] fell well-within the pure definition of an investor who retained control of his account. *See Follansbee*, 681 F.2d at 677 (customer retained control where he had a degree in economics, a course in accounting, and read and understood

corporate financial reports); *Morris v. Commodity Futures Trading Com'n*, 980 F.2d 1289, 1296 (9th Cir. 1992) (customer's "professional education" in medicine and his "investment and business experience" were core facts in disproving *de facto* control); *Xaphes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 632 F. Supp. 471, 483 (D. Maine 1986) (law school graduate).

The Division contends that a "key factor" in determining control is whether the customer "lacks the ability to manage the account and routinely follows the recommendations of the registered representative. . . ." (Response at 18; *see id.* at 20 [Williams "placed great confidence in Calabro" and Calabro "initiated virtually every trade"].) To the contrary, "[t]he fact that a customer follows the advice of his broker does not in itself establish control." *Matter of IFG Network Securities, Inc., et al.*, 84 S.E.C. Docket 2942, Admin. Proc. File No. 3-11179 (February 10, 2005), *rev'd in part on other grounds* 88 S.E.C. Docket 1195, 2006 WL 1976001 (July 11, 2006); *see Hebda v. Harbinger Group, Inc.*, 2014 WL 234469, at *4 (E.D. Mich. Jan. 22, 2014) ("'Where a customer has the independent capacity to accept or reject his broker's recommendations, he cannot accuse his broker of having control over his account even if he habitually follows his broker's recommendations.'") (quoting *Moran v. Kidder Peabody & Co.*, 609 F. Supp. 661, 666 (S.D.N.Y. 1985)). Rather, the actual "key factor," as explained above, is the customer's ability—an ability [redacted] indisputably had—to evaluate and understand the relevant investment recommendations because "[i]f the customer, based on the information available to him and his ability to interpret it, can independently evaluate his broker's recommendations, the customer, not the broker, has control of the trading." *IFG Network Securities, Inc., et al.*, 84 S.E.C. Docket 2942. [redacted]' ability to interpret, understand and evaluate Calabro's trading recommendations—as indisputably proven by [redacted]' intelligence and his own handwritten analysis of the trading in his account based upon his account

documents—is the actual "key factor" that separates him from the customers in the cases to which the Division points which found the customer's control to have been relinquished. (Response at 18.) *See, e.g., Cruse v. Equitable Securities*, 678 F. Supp. 1023, 1031 (S.D.N.Y. 1987) (control where customer had "no comprehension" of the investments "let alone the risks or particular trading strategies involved he did not understand the account documentation he was receiving"); *Matter of Al Rizek*, 570 S.E.C. Docket 705, 1999 WL 600427 (August 11, 1999) (customers "unable to make any sort of independent evaluation of that strategy"); *Matter of Joseph J. Barbato*, 63 S.E.C. Docket 509, 1996 WL 664616 (November 12, 1996) (control where customer "unable to make an independent evaluation" of broker's recommendations, but no control where customer "had the financial background to track his investments, calculate profits and losses, and investigate more thoroughly the investments he was making").

The Division next points to [redacted]' testimony to argue that he was "unsophisticated" and had "limited prior experience investing in securities." (Response at 19-20.) Under the law, however, it was not necessary for [redacted] to have been be a sophisticated investor with extensive experience to maintain control; he maintained control because he understood the nature, volume and risks of the his investments as demonstrated by the "substantial" documentary evidence [redacted] authored in real time. *Herbert Moskowitz,* S.E.C. Docket 456, 2002 WL 434524. In any event, the documentary evidence [redacted] prepared and signed proved his experience—or at minimum, [redacted]' representations concerning his experience. To be sure, [redacted] signed many forms including a New Account Form and an Active Account Suitability Questionnaire ("AASQ") which represented his investment experience as decades long and which [redacted] claimed were signed in blank. (Tr. 1441:7-15; 1478:9-15; 1517:19-1518:2-5; DOE Ex. 45.) But the signed New Account Form and AASQ were not the only

evidence of [redacted]' experience; [redacted] produced *from documents in his possession* an Options Suitability Questionnaire he signed on September 24, 2008 in which he confirmed his decades-long investment experience. (Calabro Ex. 45.)[1] [redacted] also represented the same when he signed a new account form to open a separate account with a separate brokerage firm, Newbridge Securities, during the same time as his J.P. Turner account, in which he confirmed his "Investment Experience" for "Bonds" and "Stocks" was "(yrs. 30+)," for Mutual Funds "(yrs. 30)," and that his "Investment Knowledge" was "Excellent." (Calabro Ex. 54.) Stated simply, the incontestable documentary evidence demonstrating [redacted]' depiction of his own experience is "substantial" and is directly contrary to the "credibility determinations" upon which the Division relies. *Herbert Moskowitz,* S.E.C. Docket 456, 2002 WL 434524.

The Division's next argument that [redacted] was never advised of the "risks of active trading" is also contrary to the documentary and uncontested evidence. (Response at 21.) As explained above, [redacted] closely monitored his account, and the handwritten account analysis he prepared which included both realized and unrealized profits and losses demonstrated the volatility of the trades that had occurred in his account. [redacted] also knew by December 1, 2008 that his account was volatile and was up $700,000—a 100% gain in one year—to which he

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[1] [redacted]' testimony concerning his having signed blank documents was substantially undermined by the events surrounding the Options Suitability Questionnaire. As it turned out, and contrary to [redacted]s' "blank form" mantra, a *pre-filled and signed* Questionnaire was in [redacted] possession all along. [redacted] produced documents to the SEC Staff and on Thursday, December 9, 2010, provided testimony. He returned home and over the weekend and "ran across" the Questionnaire signed two years before on September 24, 2008. (DOE Ex. 48.) The document was not a copy of a blank form; it was a copy of the signed and fully-populated Questionnaire attached to a letter J.P. Turner sent requesting that he "review" for "accuracy" and "notify" it of any change. (*Id.*) [redacted] mailed the document to the SEC Staff the next Monday, December 13, 2010. Contrary to his testimony *two years later* in which he declared the Questionnaire had "absolutely not" been filled out (Tr. 1497:23-25), [redacted] represented in his handwritten cover letter to the Staff that it had been "*'pre' filled out* and then mailed for my signature." (DOE Ex. 43) (emphasis added).

added another $90,000 in profits during December 2008, another $250,000 in January 2009, and another $350,000 in February 2009. (Calabro Ex. 53) (Tr. 1547:19-1548:1; 1603:10-1604:5; 1605:9-22.) And on March 9, 2009, [redacted] confirmed his understanding of the risks of active trading when he signed an AASQ Supplement entitled "**What You Should Know About Active Trading**" which spelled out the risks of active trading. (DOE Ex. 10.) Once again, the documentary evidence is "substantial" and is directly contrary to the "credibility determinations" upon which the Division relies. *Herbert Moskowitz,* S.E.C. Docket 456, 2002 WL 434524.

And finally, the Division argues that Calabro engaged in unauthorized trading which, it contends, is evidence of control. But as explained in Calabro's Opening Brief, the specific evidence the Division offered was of a single trade—among the more than 260 trades at issue—involving J.P. Morgan options of which [redacted] was in fact aware, because he testified to having raised the trade and its profitability with Calabro in real time. (Tr. 1450-51, 1459.) The complete events underlying the J.P. Morgan trade, however, demonstrate [redacted]' control, as he testified he raised and challenged the trade with Calabro and despite characterizing the trade as unauthorized, [redacted] made it clear that he "trusted [Calabro] up until the very end." (Tr. 1503.) *See Xaphes*, 632 F. Supp. at 471 (a "well-educated, sophisticated investor" who "monitored his account constantly and in great detail, checking confirmation slips as they were sent to him, checking the monthly statements, and making notes about the account for himself and his accountants" had "sufficient financial acumen to determine his own best interests").[2]

[2] The Division misstates Calabro's argument in this regard as limited to [redacted]' receipt of trade confirmations. (Response at 21.) [redacted]' control is not determined by mere dint of having received trade confirmations; his control is proven by acting in response to the trade confirmations, raising a concern with Calabro, and then after being satisfied, ratifying the trade. *See also Richardson Greenshields Securities Inc. v. Lau*, 819 F. Supp. 1246, 1259 (S.D.N.Y. 1993) ("Ratification occurs when the customer acquiesces in the unauthorized trading.").

For these reasons, and as explained in Calabro's Opening Brief, [redacted] maintained control of his account and therefore ALJ's finding that Calabro engaged in churning should be reversed.

II. THE ALJ ERRED IN FINDING THE ACTIVITY IN WILLIAMS' ACCOUNT EXCESSIVE

The contemporaneous documentary and uncontested evidence also proved that the activity in [redacted] account was not excessive. Indeed, it bears repeating that the "essence of a churning claim" is "the aggregation of transactions, allegedly excessive in number, judged in relation to the plaintiff's investment objectives and the market conditions at that time." *Baselski v. Paine Webber Jackson & Curtis Inc.*, 514 F. Supp. 535, 541 (N.D. Ill. 1981). At the heart of the ALJ's ruling was his determination that [redacted]' risk tolerance was conservative or moderate rather than aggressive, and his investment objectives were preservation of capital and capital appreciation rather than speculation. (Initial Decision at 22.) The Division locks on to the ALJ's decision in this regard based on "the fact that the ALJ found [redacted] more credible than he found Calabro on the critical subjects of risk tolerances and investment objectives." (Response at 22.) Once again, however, the "substantial" documentary and testimonial evidence proved the contrary. *Herbert Moskowitz,* S.E.C. Docket 456, 2002 WL 434524.

[redacted] testified that he became interested in the short strategy Calabro offered in late 2007 when he determined "the economy was going to fall" and the market was "going to go, down." (Tr. 1426:13-19; 1428:20-1429:1; 1535:12-19; 1614:9-13.) By February 2008, [redacted] had conducted his handwritten profit and loss analysis, which he then delivered to Calabro along with a cover note reiterating his investment objective. In the note, [redacted] referred to his attached "quick analysis" of his account and that "Hopefully, the 'short' gods will turn in our favor in the not too distant future"—meaning that he hoped the market would

decline—which it then did and caused a sharp and volatile increase in the value of his account. (Calabro Exs. 47, 48.) Speculating that the market would fall and engaging in a short-term investment strategy to take advantage of the decline was [redacted]' actual investment objective, as his own handwritten documents make clear.

Along with many other documents he signed in connection with his account, the Options Suitability Questionnaire which he maintained within his possession all along and produced to the Division staff from his personal documents also confirmed his interests in "speculation" and "growth." (Calabro Ex. 45.) [redacted] further confirmed his investment objectives in AASQ Supplement he signed on March 9, 2009, in which he affirmed that he had read the disclosure, including its introduction that "[a]ctive trading can involve a higher degree of risk, increased costs and is suitable only for risk tolerant investors," and its detail that (1) active trading "should be entered into only by investors who understand the nature of the risk involved and are financially capable to sustain a loss of part or all of their capital," (2) "[d]ue to the higher degree of activity, overall commissions on your account may tend to be greater than a buy and hold strategy," (3) "[y]our portfolio value may tend to be more volatile with shorter-term trading," and (4) "[h]igh-risk tolerance and investment objectives consistent with high-risk investing are appropriate to an active account." (*Id.*) In signing the Supplement, [redacted] acknowledged that "I have read and understand the Active Account Suitability Supplement Agreement as required." (*Id.*) These representations that [redacted] signed were all documented in real time and should have been accepted as true; no "credibility determinations" comparing [redacted]s' testimony to Calabro's testimony was otherwise necessary. *See First Union Discount Brokerage Services, Inc. v. Milos*, 997 F.2d 835, 846 n.21 (11th Cir. 1993) (investors "may derive neither comfort nor legal protection from their willingness to sign [margin and option] contracts without reading

them"); *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) ("absent a showing of fraud or mental incompetence, a person who signs a contract cannot avoid her obligations under it by showing that she did not read what she signed").

The Division next refers to the separate Newbridge Securities new account form [redacted] signed at the time he was engaging in short term trading in his J.P. Turner account. (Response at 23.) Consistent with his investment objectives, [redacted] specified in the new account form—which defined "Speculation" as seeking "[m]aximum total return involving a higher degree of risk through investment in a broad spectrum of securities"—an "Investment Objective" of "Speculation" and a "Risk Tolerance" of "Aggressive." (Calabro Ex. 54.) [redacted] was thereafter reminded every month that "Speculation" was his objective on the first page of each Newbridge Securities monthly statement, and he did not venture to change his investment objectives in the account until the Division staff contacted him concerning the present case. (Calabro Exs. 56, 216) (Tr. 1550:2-7.)[3] If anything, the Newbridge new account form further confirms [redacted]' speculative investment objectives in yet another real time document he signed.

Because [redacted]' investment objective was consistent with shorter-term, more speculative trading, the ALJ analyzed the trading volume in [redacted]' account based upon an incorrect predicate. The ALJ then perpetuated the error by making another purported "credibility determination" upon which the mathematical computations offered by the Division's expert would be accepted. (Response at 23.) As demonstrated in Calabro's Opening Brief, the expert opinion should have been discounted as unreliable in the first instance, but even were the basic

[3] [redacted] responded to an inquiry from Newbridge requesting he review his account information and notify it of any changes. When asked the reason he alerted Newbridge that he was not interested in speculation, but left untouched his annual income of "Over 200,001," [redacted] stated that "it wouldn't have made any difference. " (Tr. 1558:6-10.)

mathematical formulas appropriate, the turnover ratio should have been calculated as between 5.4% and 6.6% and the cost/equity ratio calculated at 18.7% given [redacted]' actual investment objectives, the short nature of the account and its rapid decline. Far from a "sleight of hand" (Response at 29), this was the simple mathematics conducted by the expert demonstrating that both ratios were within the trading guideposts associated with determining whether trading was excessive—no credibility determination was necessary.

In short, for the reasons set forth above and in Calabro's Opening Brief, the Initial Decision should be reversed because the trading in [redacted]' account was not excessive.

III. CALABRO DID NOT COMMIT FRAUD

The Division next points to two purported "facts" upon which a finding of Calabro's alleged *scienter* was based. *First*, the Division suggests that Calabro provided blank forms or only the signature page to [redacted] with respect to his account. (Response at 26.) The Options Suitability Questionnaire [redacted] produced from his personal documents, however, proves the opposite. The one-page form included *all* the financial, objective and experience information that [redacted] protested was "absolutely not" filled out when signed. (Tr. 1497:23-25.) But he was aware that his story could not be true since he was in possession of a form that was fully populated with the relevant account information all along, and wrote in a handwritten letter to the Division staff that it had been "*'pre' filled out* and then mailed for my signature." (DOE Ex. 43) (emphasis added). [redacted] confirmed he signed the pre-filled Questionnaire, and although he was "aghast," he clarified that he was "not surprised, that [he] signed it." (*Id.*) In short, [redacted]' testimony that he signed blank forms was unreliable because he stated the contrary two years earlier to the SEC Staff, in writing, and with respect to a crucial form containing all the

information of which he, in hindsight, claimed never to have seen and of which he alleged at trial was inaccurate.[4]

The *second* "fact" to which the Division points is a reference to the volume of trading in [redacted]' account as stated in the AASQ he signed. (Response at 27.) The trading volume reflected in the form was for the account history. The Division ignores the purpose of the form as an *historical document* and with an actual "sleight of hand" compares the trading volume with the number of trades *in later months*. Given the simple physics of time, the number of trades set forth in the AASQ [redacted] signed could not have included the level of later trading because the trading had yet to occur. (*Id.*)

In any event, the applicable standard for determining *scienter* was whether Calabro recommended trades "without regard to the customer's investment interests" and "*for the purpose of generating commissions*." *Thompson v. Smith Barney, Harris Upham & Co.*, 709 F.2d 1413, 1416 (11th Cir. 1983). Here, the trading volume associated with [redacted]' account was consistent with the short strategy in which both he and Calabro were engaged. The strategy was fully transparent, not deceptive, and appears not to have raised any concerns with [redacted] when his account was profitable by over $1 million. Instead, the specter of "churning" only reared its head when [redacted]' account thereafter suffered a substantial decline, but the fact that the account declined is not indicative of an intent to make trade recommendations for the

[4] The letter is unique in its layers of mistruth. [redacted] stated he signed the Questionnaire it because "[w]hen someone you trust asks you to sign a document supposedly for 'your' benefit, it is very difficult to tell them you are being hustled." (DOE Ex. 48.) Thus, [redacted] inferred he knew the form he sent to J.P. Turner was false, but he signed it nonetheless as part of a Calabro "hustle" he felt powerless to stop. But even that was false because [redacted] later confirmed that had he "felt Mr. Calabro was doing something wrong in [his] account" or that he "did not want a particular trade or a particular thing to happen in the account," he "felt comfortable" objecting and he "believed based upon [his] relationship" that Calabro "would have followed [his] objection." (Tr. 1632:15-1633:10.)

principal purpose of generating commissions. *Hotmar v. Lowell H. Listrom & Co.*, 808 F.2d 1384 (10th Cir. 1987) (where broker "freely shared all his knowledge and information," the court unable "to perceive any real evidence of deception" by the broker, notwithstanding the customer "suffered substantial losses while [the broker] was receiving substantial commissions").

In short, the Division failed to prove Calabro acted with *scienter*. For this separate reason, the Initial Decision should be overruled.

IV. SHOULD THE COMMISSION RULE THAT CALABRO CHURNED [redacted] ACCOUNT, THE INITIAL DECISION SHOULD NEVERTHELESS BE MODIFIED TO ELIMINATE ANY MONETARY PAYMENT

As demonstrated in Calabro's Opening Brief, should the Commission decide to uphold the Initial Decision, it should nevertheless modify the Initial Decision to reduce or eliminate the monetary components of the decision. Indeed, the Initial Decision ordered Calabro to disgorge $282,000 plus interest relating to the costs and commissions associated with [redacted]' account, which mathematically contributed to [redacted]' losses, but those losses were already compensated through a settlement. *See S.E.C. v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) ("Settlement payment may properly, however, be taken into account by the court in calculating the amount to be disgorged"). Given that he was ruled to have had the "lowest level of scienter" of the respondents in the case (Initial Decision at 122), and has now left the brokerage industry, no further monetary payments or penalties are necessary to ensure enforcement of the law.

CONCLUSION

For all the foregoing reasons, the Initial Decision should be reversed, or in the alternative, modified to overrule disgorgement, interest and any monetary penalty.

Dated: April 18, 2014

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