UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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ADMINISTRATIVE PROCEEDING
File No. 3-15015

In the Matter of

MICHAEL BRESNER;
RALPH CALABRO;
JASON KONNER; and
DIMITRIOS KOUTSOUBOS

Respondents.

DIVISION OF ENFORCEMENT'S PREHEARING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE(S)

STATUTES, REGULATIONS AND RULES

I. INTRODUCTION

The Division of Enforcement ("the Division") hereby submits its prehearing brief. In this action, the Division seeks cease and desist orders and industry bars against Ralph Calabro ("Calabro" or "Respondent"), Jason Konner ("Konner" or "Respondent") and Dimitrious Koutsoubos ("Koutsoubos" or "Respondent")[1] for violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") for, while acting as registered representatives at JP Turner & Company, LLC ("JP Turner"), engaging in the churning of their customers' accounts. The Division also seeks disgorgement along with prejudgment interest against the churning Respondents. The disgorgement sought by the Commission is based upon the churning Respondents' retained portions of their sales commissions which they received as payment for the trades during the churn period for each respective churn victim's account. The Division further seeks against each of the churning Respondents a civil penalty pursuant to Section 21B of the Exchange Act and Section 9 of the Investment Company Act.

In this action, the Division also seeks against Michael Bresner ("Bresner" or "Respondent") a supervisory bar pursuant to Section 15(b)(6) of the Exchange Act, which incorporates by reference Section 15(b)(4)(E) of the Exchange Act and pursuant to Section 203(f) of the Investment Advisers' Act ("Advisers Act"), for failing reasonably to supervise Konner and Koutsoubos, who each willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Division also seeks against Bresner disgorgement, if any, and a civil penalty pursuant to Section 203 of the Advisers Act.

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[1] Calabro, Konner and Koutsoubos will be jointly referred to herein as "the churning Respondents."

This matter involves the fraudulent "churning" of customer accounts by registered representatives of J.P. Turner & Company, LLC ("JP Turner"), a registered broker-dealer based in Atlanta, Georgia, and failure reasonably to supervise these registered representatives by JP Turner and associated individuals. At various times between January 2008 and December 2009, three registered representatives at the firm – Calabro[2], Konner[3] and Koutsoubos[4] – churned the accounts of seven customers[5]. Consequently, these customers collectively lost approximately $2.7 million and paid approximately $845,000 in commissions, fees, and margin interest to JP Turner, which paid a portion of the commissions and fees to the three registered representatives.

Bresner, the firm's Head of Supervision, Executive Vice President and a senior member of management, also failed reasonably to supervise Konner and Koutsoubos, who generated sufficiently high commissions for some of their churned customers such that the firm's procedures required that Bresner personally review the underlying trading. For such accounts, Konner and Koutsoubos each engaged in trading activity that far exceeded the "frequency of

[2] Calabro, age 37, resides in Matawan, NJ. He served as a registered representative of the Parlin, New Jersey branch office of JP Turner from March 2004 until January 2011. He is currently a registered representative at NSC. In 2000, while employed by Preston Langley, Calabro was named as a co-defendant in a FINRA complaint by a customer alleging unsuitability. This complaint was resolved by monetary settlement. During his tenure at JP Turner, three FINRA arbitration complaints were filed against Calabro's branch office. Two complaints filed in June 2007 and January 2009, respectively, both cited excessive trading, unsuitability and unauthorized trading against a registered representative who was supervised by Calabro. The third complaint filed in December 2007 was made directly against Calabro for churning a customer account. Each of these arbitrations was resolved by monetary settlements.

[3] Konner, age 37, resides in Brooklyn, NY. Konner was a registered representative at JP Turner from September 2006 to December 2011. He is currently a registered representative at DPEC Capital, Inc, a position he has held since January 2012. At JP Turner, Konner was placed on special supervision for one year after a new customer failed to deposit funds for initial trades. Before joining JP Turner, he worked as a registered representative for Merit Capital Group, which later became Source Capital Group. At Source Capital, Konner was the subject of one customer complaint for unauthorized trading. He and another registered representative settled the matter for $6,000.

[4] Koutsoubos, age 35, resides in Brooklyn, NY. He was a registered representative at JP Turner from July 2000 until August 2009. He is currently a registered representative at Caldwell International Securities.

[5] This count of the victims does not include the spouses of the customers who were joint account holders at JP Turner during the churn period.

trades" identified in the customers' account documents associated with active trading. Additionally, the file for one of Koutsoubos's customers lacked the required account documents associated with active trading. Despite these and other red flags, Bresner[6] took no meaningful action to investigate or prevent the churning.

II. FACTS

A. Churning of Customer Accounts at JP Turner

During the relevant period, Calabro,[7] Konner and Koutsoubos collectively churned the accounts of seven customers and personally received in the aggregate approximately $627,833 in commissions and fees, while the accounts suffered an aggregate loss of approximately $2.7 million.[8] The chart below summarizes the churning activity by customer:

[6] Bresner, age 67, resides in Atlanta, Georgia. He has been employed as Executive Vice President and Head of Supervision of JP Turner since 2005. He has also been an associated person with JP Turner Capital since 2007. Bresner was the subject of two FINRA sanctions during his tenure as President of National Securities Corporation ("NSC"), a position he held from March 1998 to February 2005. In August 2004, Bresner settled charges brought by FINRA against him for failure to respond to red flags that pointed to misconduct of registered representatives at NSC and failure to ensure that the firm had an adequate supervisory system and written procedures designed to prevent and detect deceptive market timing activities and possible late trading. The settlement terms included a 30-day suspension of his supervisory license and a $25,000 fine. In October 1990, FINRA censured and fined Bresner $1,000 for failing to maintain the minimum required net capital at his then employer Beuret & Company.

[7] Calabro served as both the branch manager and owner of the office. Significantly, Calabro ranked as the firm's top revenue generator in 2008 and 2009. His accounts generated more than $3 million in commissions and fees during that period, far eclipsing the second-place finisher, who generated approximately $1.5 million for the same period. Finally, Calabro's revenue constituted approximately 3.5 percent of the firm's total revenue during 2009.

[8] Commissions charged to customers of JP Turner typically ranged between one and four percent of each trade, depending on the size of the trade. The commission split between the firm and each registered representative varied. For example, Calabro retained 90 percent if his monthly gross commissions exceeded $25,000. Otherwise, he retained 85 percent. Konner retained 65 percent of his commissions. Koutsoubos retained 65 percent of his gross monthly commissions if it exceeded $100,000. Otherwise, Koutsoubos retained 60 percent.

Registered Representative	[redacted]	[redacted]	Time Period	Turnover (Annual Basis)	Cost to Equity Ratio	Total Losses	Commissions and Fees Paid by Customer[9]	Commissions and Fees Retained by Registered Representative
Calabro	[redacted]	[redacted]	02/09-11/09	13	29.3%	$805,337	$118,917	$93,778
Calabro	[redacted]	[redacted]	12/08-11/09	8	22.9%	$1,026,506	$297,515	$247,945
Calabro	[redacted]	[redacted]	12/08-11/09	10	31.8%	$123,784	$98,185	$80,218
Calabro	[redacted]	[redacted]	12/08-11/09	9	29.3%	$407,491	$116,419	$96,091
Konner	[redacted]	[redacted]	01/09-12/09	17	34.4%	$54,119	$90,684	$46,805
Konner	[redacted]	[redacted]	06/09-11/09	18	28.2%	$80,504	$35,706	$20,833
Koutsoubos	[redacted]	[redacted]	01/08-12/08	56	73.3%	$189,801	$53,080	$25,829
Koutsoubos	[redacted]	[redacted]	12/08-07/09	28	41.2%	$3,902	$33,019	$16,333

The defrauded customers generally had similar investment experiences with JP Turner.[12] Notably, each customer: (1) had conservative investment objectives and low or moderate risk tolerance; (2) signed blank or pre-filled account documents that identified inaccurate investment objectives, risk tolerance, and investment experience levels; and (3) was generally unsophisticated in securities trading. In fact, three of the defrauded customers had never opened a brokerage account prior to their JP Turner accounts. The remaining customers had previously held conservatively managed brokerage accounts that were not actively traded.

At the time they opened their JP Turner accounts, three customers were retired or semi-retired and four customers were small business owners who devoted much of their time and energy to running their businesses. All of the customers relied upon the expertise of their registered representatives to manage their accounts in accordance with their intended investment objectives, which they generally conveyed to their registered representative when they opened

9 Refers to the total commissions, fees and margin interest paid to JP Turner, a portion of which was retained by the registered representative.

10 The Wilhofts (husband and wife) held two joint accounts.

11 This is a joint account held by a husband and wife.

12 Detailed customer profiles are attached as Appendix A.

their accounts.

While their accounts were non-discretionary, all of the defrauded customers relied almost exclusively on their JP Turner registered representative to make investment decisions. With one exception, none of the customers ever initiated any trading activity. The customers rarely, if ever, rejected any trading recommendations made by their registered representatives, and were generally unable to evaluate such recommendations independently due to lack of time, resources, and expertise.

The customers signed account-opening and related documents showing investment objectives of speculation, short-term trading, and trading profits as well as aggressive risk tolerances. However, with one exception, the customers are expected to testify that, at the request of their registered representatives, they either signed blank or pre-filled forms. The customers are expected to further testify that they believed the forms to be "procedural" in nature, and as such often did not read the documents closely before signing them. To the extent the customers read the documents, they did not understand the implications of the investment objectives and risk tolerance selections and trusted that their registered representatives would manage the account in a manner consistent with their true investment objectives and financial situation.

As reflected in the table below, all but three of the customers[13] signed forms associated with active trading indicating a "frequency of trades" that Calabro, Konner, and Koutsoubos

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[13] Despite appearing on the AARS at a level requiring he receive a suitability supplement and suitability questionnaire, customer [redacted] did not receive these forms until he closed his account. Prior to the time period that Calabro churned his account, however, [redacted] signed an option suitability in November 2008 that listed the "frequency of trades" in his account as "50-60 per year." From March 2009 through November 2009, the period his account was churned, approximately 222 transactions took place in his account.

Customer [redacted] account appeared on the AARS at a level requiring a suitability supplement and suitability questionnaire after the period that Konner churned his account. Customer [redacted] did not have a suitability supplement or suitability questionnaire on file during the period his account was churned by Koutsoubos even though it appeared at the highest levels on the AARS.

subsequently exceeded.

Registered Representative	Customer by Last Name	Date of Form	Type of Form	Frequency of Trades Listed	Frequency of Trades During Relevant Time Period
Calabro	[redacted]	March 2009	Suitability Questionnaire	3-6 Per Month	13 in April 2009 38 in May 2009 45 in June 2009
Calabro	[redacted]	March 2009	Suitability Questionnaire	10 Per Month	26 in June 2009 19 in July 2009
Calabro	[redacted]	March 2009	Suitability Questionnaire	10 Per Month	27 in June 2009 17 in July 2009
Konner	[redacted]	March 2009	Suitability Questionnaire	4 Per Week	34 in April 2009 32 in June 2009 30 in Sep. 2009
Koutsoubos	[redacted]	March 2009	Suitability Questionnaire	4 Per Week	54 in April 2009 45 in May 2009 26 in June 2009

No JP Turner supervisor or compliance officer undertook reasonable steps to address the active trading that persisted in the accounts of the seven customers. For example, no JP Turner supervisor or compliance officer contacted any of the seven customers to discuss the high volume of trading. The only calls the customers received were from their respective registered representatives, who generally touted profits to be made in the accounts. Although the customers typically received trade confirmations and monthly statements, they also noted that due to the high volume and number of transactions that were taking place in their accounts, they found it difficult and confusing to keep up with the account activity. None of the defrauded customers had an understanding of the total transaction costs, including margin interest and commissions that they were incurring by trading through JP Turner.

Most of the trading in the defrauded customers' accounts involved primarily NASDAQ and NYSE-listed stocks (including some options and margin trading) across a variety of industries, generally priced above $5 per share. In their sworn investigative testimony, none of the registered representatives could articulate any reasonable trading strategy that justified the frequency of trades in each of the customer's accounts.

B. JP Turner's Supervisory Structure

For JP Turner's offices of supervisory jurisdiction ("OSJ"), the registered representatives were directly supervised by branch managers, who in turn reported to, and were supervised by one of four area vice presidents ("AVPs").[14] For smaller, non-OSJ offices, registered representatives were supervised directly by an AVP, who in turn was supervised by Bresner, the Head of Supervision. For his part, Bresner reported to Dean Vernoia ("Vernoia"), JP Turner's Chief Operating Officer, who in turn reported to William Mello ("Mello"), the firm's President, as well as Tim McAfee ("McAfee"), the firm's CEO.

C. Development and Design of the Active Account Review System

Beginning in late 2006, Mello and other senior managers at JP Turner participated in meetings to design and implement a system to monitor active trading at the firm. The firm had previously utilized a monitoring system based on annualized turnover rates, but determined to switch to a system that tracked return-on-investment ("ROI"), *i.e.* the level of fees and commissions as a percentage of account equity. The meetings were generally attended by personnel heads from the compliance, supervisory and information technology departments as well as executive members of the firm including Vernoia and Mello. Through these meetings, the management team developed what came to be known as the Active Account Review System ("AARS"), which became operational in November 2007. The mechanics of the system, discussed below, were understood and collectively approved by various senior level individuals, which included Bresner.

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[14] Both Konner and Koutsoubos worked at the same OSJ branch and a branch manager served as a first line supervisor for them. If an account reached a certain level on the firm's active account monitoring system, as further discussed in the text below, Konner and Koutsoubos would additionally be supervised by an assigned AVP or by Bresner. In Calabro's case, although he worked at an OSJ branch, only an AVP and Bresner directly supervised Calabro because Calabro also functioned as the branch manager of the office. (*i.e.*, branch managers were not to supervise their own trading).

As implemented, on a quarterly basis the AARS identified accounts with specific commission levels, and required that certain supervisory actions be taken at each level. Specifically, for each customer account, the system calculated as ROI the total commissions and fees as a percentage of the average equity in the account over the trailing twelve-month period. The AARS flagged actively traded accounts that fell into four levels, requiring different supervisory actions at each level. At Levels 1 and 2, first-line supervisors, and at Levels 3 and 4, more senior supervisors, were directed to review the account or take other action.

Level 1 Accounts:

For each account tagged at Level 1 (ROI between 10 and 15 percent), the system sent an e-mail to first-line supervisors[15] requiring that they conduct an unspecified "review" of the system. The firm did not provide guidance on how to conduct this review. Supervisors were only required to access the AARS and click a box on a summary account screen that identified the ROI level, thereby memorializing the "review."

Level 2 Accounts:

At Level 2 (ROI between 15 and 20 percent, or ROI of 10 to 15 percent and turnover rate exceeding six), the system sent an e-mail to first-line supervisors requiring that they conduct the same undefined review of the account, with the additional requirement that they take one of four actions: (1) compute a profit and loss analysis, (2) discuss the account with the registered representative, (3) call the customer, or (4) restrict the amount of commissions a registered represented could charge to a customer.

Additionally, for all accounts initially tagged at Level 2 or at a higher level, the

[15] First line supervisors included: (1) OSJ branch managers supervising the office's registered representatives, (2) AVPs supervising registered representatives associated with non-OSJ branch offices, and (3) AVPs supervising the trading of OSJ branch managers.

compliance department sent the customer a form cover letter with an attached Active Account Suitability Supplement ("suitability supplement") and Active Account Suitability Questionnaire ("suitability questionnaire"). The letter requested that customers complete, sign, and return the suitability questionnaire identifying their investment objectives and risk tolerance, as well as the "frequency of trades" associated with the account.

Customers were also required to sign the suitability supplement certifying that they had read an attached boilerplate summary of risks associated with active trading. If the customer failed to return these forms, compliance personnel contacted the registered representative for the pertinent customer account, who in turn contacted the customer directly to facilitate the return of the forms, and in some instances filled in customer information (e.g., investment objectives and risk tolerance) before resending to the customer. In fact, all but two of the defrauded customers received the suitability questionnaire with investment objectives and risk tolerance information already completed. After receiving the signed documents from the customer, the registered representative would then forward these forms to compliance personnel. The cover letter, suitability supplement and suitability questionnaire were sent only once per 12-month period, even if the AARS repeatedly flagged an account as actively traded in that period.[16]

Level 3 Accounts:

At Level 3 (ROI between 20 and 25 percent), AVPs, notified via e-mail, were required to perform the same undefined "review" of the account and to conduct at a minimum a profit and loss analysis. The firm did not provide guidance on how to conduct this review or what steps to take to respond to a suspicious profit and loss analysis for the account. In addition, at this level, the firm's Written Supervisory Procedures stated that "[p]rincipals with a pattern of accounts that

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16 After the initial forms were returned, a second set would be sent after one year, assuming the customer's account was then still at Level 2 or higher on the AARS.

reach Level III may be subject to disciplinary action by the Firm." The term "pattern" was not defined.

Level 4 Accounts:

At Level 4 (ROI greater than 25 percent), Bresner, notified via e-mail, was required to perform a review of the account and take "appropriate" action. The appropriate action typically consisted of Bresner soliciting recommendations from AVPs regarding the treatment of an account, or independently determining the appropriate action to take on an account with respect to the registered representative handling that account. One AVP testified that she served in a consultant role to Bresner, and another testified similarly that after making his recommendations to Bresner "he could accept them, or not accept them, or he can do his own, if he wanted to."

D. AARS Limitations and Deficiencies

The AARS and related procedures did not effectively prevent or detect churning by the three registered representatives. Despite the accounts of the defrauded customers repeatedly appearing on the AARS during the relevant period, JP Turner never, for example: (1) put any of the three registered representatives on any kind of "heightened supervision" for suspected churning or excessive trading; (2) fined the three registered representatives (or any other registered representatives) for suspected churning or excessive trading; (3) imposed any meaningful trading restrictions on any of the defrauded customers' accounts based on suspected churning or excessive trading by the three registered representatives; or (4) terminated any of the three registered representatives for suspected churning or excessive trading. In fact, apart from the minimal "review" requirements, the most restrictive action taken on actively traded accounts involved commission restrictions, which Bresner and AVPs routinely imposed on Level 3 and Level 4 accounts. For such accounts, Bresner and the AVPs typically imposed maximum commission levels ranging from 1 to 2 percent of the trade (as opposed to the normal maximum of 4 percent) or commission dollar limits of $50 to $100 per trade. The restrictions lasted until the end of the quarter. As evidenced by the continued churning in this matter, the commission restrictions did not effectively prevent churning, and arguably provided an incentive for the three registered representatives to increase the trading activity to make up for reduced commissions. The following describes the many deficiencies and limitations of the AARS and related review procedures the firm had in place during the relevant period which were not reasonably designed to prevent and detect the churning by Calabro, Konner, and Koutsoubos.

1. No Meaningful Guidance Provided in Connection with Active Accounts

The AARS imposed few requirements on supervisors in connection with their review of the three registered representatives with respect to their actively traded accounts of the defrauded customers. As summarized by one AVP, "[T]here is a clicking of the box stating that you actually reviewed the account. And there is a notation field for you to place your notes." Other than a general directive that an account appearing on the AARS was to be reviewed by an appropriate supervisor and a few options that a supervisor could consider in his or her review, JP Turner's policies and procedures did not for example: (i) specify the manner in which an internal review of an account flagged by the AARS was to occur; (ii) provide guidelines for analyzing the accounts identified on the AARS to determine whether churning or excessive trading was occurring; or (iii) require follow-up of suspicious trading activity with the customer, particularly when the AARS repeatedly flagged as actively traded a customer's account. As Bresner testified, the "[AARS] system itself is not going to get to a point and say oops, churning. The result of a review by a supervisor would then have to come to that conclusion."

2. The Suitability Supplement and Questionnaire Omitted Meaningful Information Concerning Trading in Customer Accounts

JP Turner did not provide adequate information to defrauded customers to meaningfully inform them of active trading in their accounts and the associated costs of that trading. For example, the suitability supplement and suitability questionnaire (with a form cover letter) given to customers regarding their actively traded accounts omitted information that could have been important for obtaining meaningful customer approval of the active trading in the accounts of the defrauded customers. The forms excluded any specific details from the firm concerning the actual trading levels or associated commissions, margin interest and fees paid by the customer. The suitability supplement and accompanying cover letter instead relied on generic boilerplate discussion of "some of the risks associated with active trading." Specifically, the suitability supplement explained in relevant part that "active trading" (not defined) could "involve a higher degree of risk," and "should be entered into only by investors who understand the nature of the risk involved[.]" The suitability supplement further explained that "overall commissions on your account may tend to be greater than a buy and hold strategy," and that "[y]our portfolio may tend to be more volatile with shorter-term or more active trading."

3. The Suitability Supplement and Questionnaire Were Provided to Customers on an Untimely Basis

JP Turner did not provide notice to the defrauded customers of active trading in their accounts on a timely basis. For example, the suitability supplement and suitability questionnaire were sent only once per 12-month period. Specifically, because the AARS generated active account alerts on a quarterly basis, holders of accounts identified at Level 2 or higher would receive these documents many weeks after the active trading began. In fact, for at least one of the defrauded investors [redacted], although his account appeared at Level 4 of the AARS for all four quarters of 2008, he did not receive active account suitability forms until May 2009.

Another defrauded customer ([redacted] appeared on Level 3 of the AARS for the 3rd quarter of 2009 and Level 4 of the AARS for the 4th quarter of 2009, but did not receive active account forms until after he closed his account in 2010.

Additionally, the defrauded customers received the activity letter, albeit deficient, only after reaching a level considered to be presumptive of excessive trading. At Level 2, all accounts had an ROI of 15 to 20 percent, or an ROI of 10 to 15 percent and an annualized turnover rate exceeding six. As discussed below, an annualized turnover rate exceeding six is presumptive of excessive trading in an account. In some instances, a customer's account appeared on the AARS for the first time at Level 3 or 4, which carried ROI trigger levels also presumptive of excessive trading.

Finally, the firm's policies, procedures and systems failed to require supervisors to take any additional heightened supervisory action with respect to the three registered representatives in connection with the defrauded customer accounts for which the AARS repeatedly generated active account alerts.

E. Other Relevant Systems and Procedures

Apart from the AARS system, branch managers (including those who supervised the three registered representatives) were required to perform a daily "trade blotter" review of all trading activity for registered representatives under their supervision. However, the software application utilized in connection with this review did not identify account turnover or ROI, or otherwise highlight potentially excessive trading. [17] Additionally, branch managers were

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[17] In connection with the daily trade blotter review, supervisors utilized a software application called Protegent, which generated certain "alerts" according to parameters specified by compliance personnel at JP Turner. Critically, none of the alerts related to active trading. In addition to Protegent, supervisors utilized another software application called Streetscape, which allowed them, on an ad-hoc basis, to perform detailed analysis on historical trading activity in accounts under their supervision. Supervisors typically used Streetscape to perform the profit-and-loss analysis for accounts flagged by the AARS system at Levels 2 and higher.

required to provide their AVPs with a monthly branch report certifying that they had reviewed a self-selected sampling of accounts to detect potential "irregularities and abuses." However, JP Turner's Written Supervisory Procedures provided no meaningful guidance for conducting the monthly branch review. Instead, the procedures merely identified a non-exclusive laundry list of 21 potential "abuses," which included "excessive activity." Finally, compliance personnel periodically conducted audits of branch offices, including the offices in which the three registered representatives worked during the time period of the churning. However, JP Turner's associate director of compliance testified these audits were primarily designed to insure that branches complied with record-keeping requirements, and that excessive trading "wasn't one of the focuses" of the audits. Similar to the AARS and related procedures, these other systems and procedures in place during the relevant period were not reasonably designed to prevent and detect the churning by Calabro, Konner and Koutsoubos.

F. Bresner Failed to Take Meaningful Action In Connection with the Accounts of Konner's and Koutsoubos's Defrauded Customers, Despite Red Flags Indicative of Possible Churning

Konner and Koutsoubos both worked as registered representatives in the Brooklyn, NY branch. Once Konner and Koutsoubos had an account reaching Level 4, the firm's written supervisory procedures required that Bresner personally review the underlying trading activity and take any appropriate actions. The following chart sets forth certain account information for customers of Konner or Koutsoubos (Carlson, Bryant, and Mills) whose accounts all appeared at Level 4 on the AARS during the period that their accounts were churned:

Registered Representative	Customer	Churned Time Period	# of times on Level 4	ROI Ratios (%) on Firm's AARS	Turnover Rates on Firm's AARS	Date of Suitability Questionnaire ("SQ")	Frequency of Trades Listed on SQ	Actual Trades During Churned Period
Konner	[redacted]	1/09 -12/09	1st Q 2009 2nd Q 2009 3rd Q 2009	1st Q 2009: 46.24 2nd Q 2009: 27.31 3rd Q 2009: 29.79	1st Q 2009: 19.97 2nd Q 2009: 15.56 3rd Q 2009: 16.61	3/2009	4 per wk	34 in Apr. 2009 32 in Jun. 2009 30 in Sept. 2009
Koutsoubos	[redacted]	1/08 -12/08	1st Q 2008 2nd Q 2008 3rd Q 2008 4th Q 2008	1st Q 2008: 41.02 2nd Q 2008: 36.21 3rd Q 2008: 35.84 4th Q 2008: 31.38	1st Q 2008: 15.07 2nd Q 2008: 20.05 3rd Q 2008: 22.43 4th Q 2008: 25.47	*Missing from Firm Files for Bryant*	*Missing from Firm Files for Bryant*	191 in 12 months
Koutsoubos	[redacted]	12/08 -7/09	2nd Q 2009	2nd Q 2009: 33.69	2nd Q 2009: 17.69	3/2009	4 per wk	54 in Apr. 2009 45 in May 2009 26 in Jun. 2009

During the relevant period, the accounts belonging to customers [redacted] presented Bresner with multiple red flags that Konner and Koutsoubos may have been churning these accounts. Significantly, a cursory review of the AARS by Bresner would have revealed that the ROI and turnover levels for each of the quarters they appeared at Level 4 exhibited levels much higher than 20 and six, respectively, levels that already reflected presumptive excessive trading of an account. The AARS also revealed that accounts belonging to [redacted] continued to appear on the system at Level 4 even after Bresner imposed associated commission restrictions.[18]

Additionally, Bresner was aware, or should have been aware, that Konner and Koutsoubos each engaged in trading activity that far exceeded the "frequency of trades" identified in the suitability questionnaire for the accounts belonging to customers [redacted] As the table above shows, during the period his account was churned, customer [redacted] signed a suitability questionnaire which identified the frequency of trades as "4 per week."[19] His

[18] Bresner typically limited commissions on Konner's and Koutsoubos's accounts appearing at Level 4 of the AARS to either one percent of each trade or a flat commission ranging between $50 and $100 per trade.

[19] The suitability questionnaire is ambiguous as to whether "frequency of trades" refers to past trading or desired future trading levels. However, the "frequency of trades" for customers Carlson and Mills was not exceeded prior to the date of the suitability questionnaires. In any event, the fact that Konner and Koutsoubos vastly exceeded the "frequency of trades" should have raised red flags for Bresner.

account statements, however, indicate that in the months that followed, the actual trading that took place vastly exceeded what was provided in the suitability questionnaire. Similarly, the actual trading that occurred in the [redacted] account vastly exceeded the frequency of trades identified in the suitability questionnaire that they signed during the period Koutsoubos churned their account.

III. LEGAL DISCUSSION

A. <u>Calabro, Konner, and Koutsoubos Violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder</u>

Section 17(a) of the Securities Act prohibits using the mails or instruments of interstate commerce in the offer or sale of securities to (1) employ any device, scheme, or artifice to defraud; (2) use false statements or omissions of material fact to obtain money or property; or (3) engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser of securities. <u>In re Dale E. Frey</u>, Admin. Proc. File No. 3-10310, 2003 SEC LEXIS 306, at *45 (Feb. 5, 2003) (initial decision). Section 10(b) of the Exchange Act and Rule 10b-5 make it unlawful for any person, directly or indirectly, in connection with the purchase or sale of any security to (1) employ any device, scheme, or artifice to defraud; (2) make any untrue statement or omission of a material fact; or (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. <u>Id.</u>

To state a claim under the antifraud provisions, the Division must show that the defendants acted with scienter. <u>See</u> <u>Rogers v. Sterling Foster & Co.</u>, 222 F. Supp. 2d. 216, 268-9 (E.D.N.Y. 2002); <u>Frey</u>, 2003 SEC LEXIS 306, at *45. Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud." <u>Ernst & Ernst v. Hochfelder</u>, 425 U.S. 185, 193 (1976). Recklessness satisfies the scienter requirement in a civil enforcement action under Section 10(b) and Rule 10b-5. See SEC v. Falbo, Civil Action No. 92 Civ. 6836, 1998 U.S. Dist. LEXIS 16020, at *2 (S.D.N.Y. 1998); SEC v. McNulty, 137 F.3d 732, 737 (2d Cir. 1998) (stands for the proposition that willful ignorance satisfies scienter). Proof of scienter can be inferred from circumstantial evidence. See Herman & MacLean v. Huddleston, 459 U.S. 375, 391 (1983).

Churning violates the antifraud provisions. See Mihara v. Dean Witter & Co., Inc., 619 F.2d 814, 820-21 (9th Cir. 1980); Newburger, Loeb & Co. Inc. v. Gross, 563 F.2d 1057, 1069 (2d Cir. 1977), aff'd in part, rev'd in part, 611 F. 2d. 423 (2d Cir. 1979), cert. denied, 434 U.S. 1035 (1978). Sandra K. Simpson, Exchange Act Release No. 45923 (May 14, 2002) (Commission opinion). Churning occurs "when a broker engages in excessive trading in disregard of the customer's investment objectives for the purpose of generating commission business." Rolf v. Blyth, Eastman, Dillon & Co., 424 F. Supp. 1021, 1039-40 (S.D.N.Y. 1977), aff'd, 570 F.2d 38 (2d Cir. 1978), cert. denied, 439 U.S. 1039 (1978). To establish a claim of churning, the Division must prove that (1) the trading in the account was excessive in light of the investor's trading objectives, (2) the registered representative in question exercised control over the trading in the account, and (3) the registered representative acted with the intent to defraud or with willful and reckless disregard for the investor's interests. See Miley v. Oppenheimer & Co., 637 F.2d 318, 324 (5th Cir. 1981), reh'g denied, 642 F. 2d 1210 (5th Cir. 1981); Moran v. Kidder Peabody & Co., 609 F. Supp. 661, 666 (S.D.N.Y. 1985); Rush v. Oppenheimer & Co., 592 F. Supp. 1108, 1112 (S.D.N.Y. 1984), vacated, 596 F. Supp. 1529 (S.D.N.Y. 1984), rev'd, 779 F. 2d 885 (2d Cir. 1985). "Churning, in and of itself, may be a deceptive and manipulative device under section 10(b), the scienter required by section 10(b) being implicit in the nature of the conduct." Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983).

i. Excessive Trading

To determine whether there is excessive trading, the test is whether the transactions effected by the registered representative were excessive in light of the customer's investment objectives. Miley, 637 F.2d at 324. Although the defrauded customers' account documents identified aggressive investment objectives in various account documents, there is substantial evidence that those documents did not accurately reflect the customers' true, conservative investment objectives.[20]

The turnover ratio in an account measures the number of times during a given period that the securities in an account are replaced by new securities. Although no specific turnover rate is definitive, a rate in excess of six is generally presumed to reflect excessive trading. Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 767 F.2d 1498, 1502 (11th Cir. 1985); Mihara, 619 F.2d at 821; Franks v. Cavanaugh, 711 F. Supp. 1186, 1191 (S.D.N.Y. 1989).

The cost-to-equity ratio determines the percentage of return on the customer's average net equity needed to pay broker-dealer transactional charges and other expenses or, in other words, the amount of return necessary for the account to break even. A registered representative is considered to have excessively traded an account when the trading is so extensive that the account requires a 20% cost-to-equity ratio. See In re Sage Advisory Services, Exchange Act Release No. 44600, 2001 SEC LEXIS 1482, at *15 (July 27, 2001) (settled) (citing In re Al

[20] Even assuming the customers intended to manage their accounts aggressively, there is still a difference between aggressive trading objectives and excessive trading. In upholding an NASD Disciplinary Proceeding involving violations of the NASD (now FINRA) rule prohibiting excessive trading, the Commission has held that although the customer may have authorized a broker to manage her account aggressively, she did not authorize him to deplete her account through commissions and margin charges. See In the Matter of Shearson Lehman Hutton, Inc., Exchange Act Release No. 26766, 1989 SEC LEXIS 778, at *6 (April 28, 1989) (Commission opinion noting that "[t]here is a difference between aggressive investing and excessive trading"). See also Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361, 1369 (7th Cir. 1983)(court stated, "Delineation of an investor's goals is, however, only the first step in showing that a particular course of trading has been excessive. In the usual case, statistical evidence is introduced to establish the level of activity in the account and the amount of profit to the broker."). However, the staff has not identified any direct precedent where a court or the Commission has applied similar analysis under Section 10(b) of the Exchange Act.

Rizek, Exchange Act Release No. 41725, 1999 SEC LEXIS 1585, at *17 (Aug. 11, 1999) (Commission opinion)), aff'd, Rizek v. SEC, 215 F.3d 157 (1st Cir. 2000); In re Sandra Simpson, Exchange Act Release No. 45923, 2002 SEC LEXIS 1278, at * 49 (May 14, 2002) (Commission opinion) (Annualized turnover rates of 2.10 to 8.09 and annualized break-even rates of 11.98% to 54.95% are excessive); In re Laurie Jones Canady, Exchange Act Release No. 41250, 1999 SEC LEXIS 669, at *17 (Apr. 5, 1999) (Commission opinion) (Annualized turnover rates ranging between 3.83 and 7.28 and breakeven levels of 8.96% to 27.48% are excessive).

The respondents excessively traded in the defrauded customers' accounts. As discussed, the turnover rates and break even analyses for the defrauded customer accounts reveal numerous accounts either with a turnover rate greatly exceeding six or requiring a return of greater than 20% to break even. Specifically, their customers showed the following:

Calabro:	Four customer accounts with turnover rates ranged from 8 to 13, and customers had to realize 22.9% to 31.8% returns to break even.
Konner:	Two customer accounts with turnover rates ranged from 17 to 18, and customers had to realize 28.2% to 34.4% returns to break even.
Koutsoubos:	Two customer accounts with turnover rates ranged from 28 to 56, and customers had to realize 41.4% to 73.3% returns to break even.

ii. Control

A key factor in determining whether control exists is whether the customer lacks the ability to manage the account and routinely follows the recommendations of the registered representative (as opposed to exercising independent judgment). Mihara, 619 F.2d at 821. Registered representatives may "exercise *de facto* control where a customer places his trust and faith in a broker and routinely follows his broker's advice." Cruse v. Equitable Sec. of New York, Inc., 678 F. Supp. 1023, 1030-31 (S.D.N.Y. 1987) (noting that "factors relevant to the element of control include the discretion given the broker-dealer, the age, education, intelligence, and business and investor experience of the client, the relationship between client and broker, and the reliance placed by the customer on his broker, citing to Zaretsky v. E.F. Hutton & Co., Inc., 509 F. Supp. 68, at 74 (SDNY 1981); see also Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361, at 1368 (June 22, 1983)(In determining whether a broker churned a customer's account, "[t]he essential issue of fact is whether the volume of transactions, considered in light of the nature and objectives of the account, was so excessive as to indicate a purpose on the part of the broker to derive a profit for himself at the expense of his customer."); In re Mark Gilbert Platt, Exchange Act Release No. 8275 (Aug. 25, 2003) (in a default judgment, ALJ found registered representative had *de facto* control of the accounts since the unsophisticated customers relied on his recommendations); Simpson, 2002 SEC LEXIS 1278, at *53 (*de facto* control shown by numerous unauthorized transactions and customers' general lack of investment knowledge and sophistication); In the Matter of Al Rizek, Admin. Proc. File No. 3-9041, 1999 SEC LEXIS 1585 at * 19 (Aug. 11, 1999) ("Although Rizek's customers may have been successful businessmen and most of them had some degree of higher education, they were totally lacking in the degree of investor sophistication necessary to understand Rizek's strategy and unable to make any sort of independent evaluation of that strategy."); In the Matter of Joseph J. Barbato, Admin. Proc. File No. 3-8575, 1996 SEC LEXIS 3138, at *50-51 (1996) (Although a customer "had some prior investment experience, authorized the transactions in his account, and kept records of his trades, he lacked vital information about the investments he was making … [and] was unable to make an independent evaluation" of the broker's recommendations.").

The churning respondents exercised *de facto* control over their customers' non-discretionary accounts. All of the defrauded customers lacked investment sophistication and Calabro, Konner and Koutsoubos were aware of this because they knew that, other than their JP

Turner accounts, most of the defrauded customers had never opened a brokerage account or had only done so on limited occasions. Calabro, Konner, and Koutsoubos also knew that for those customers who had other brokerage accounts those accounts were not actively traded and the customers relied similarly on the registered representative managing that account to make most if not all of the investment recommendations.

The defrauded customers are expected to testify that their pre-approval of trade recommendations was based upon their lack of understanding of securities trading, and their belief that their registered representative's activities were beneficial to them, as well as consistent with their true investment objectives. In addition, all of the defrauded customers are expected to testify that they rarely, if ever, initiated transactions in their own accounts. The customers will also note that they were generally unable to evaluate their registered representatives' recommendations independently due to lack of time, resources, and expertise.

iii. Scienter

The specific scienter requirement for churning is met where the registered representative acts to benefit himself by earning commissions, rather than acting for the benefit of his customer. Donald A. Roche, 1997 SEC LEXIS 1283, at *12-13, (citing Mihara., 619 F.2d at 820-21; In re Albert Vincent O'Neal, Exchange Act Release No. 34116, 1994 SEC LEXIS 1639, at *5-6 (May 26, 1994). In the context of churning, the requisite scienter may be "implicit in the nature of the conduct." Franks v. Cavanaugh, 711 F. Supp. 1186, 1191 (S.D.N.Y. 1989 quoting Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983)). Scienter also may be established upon a showing of recklessness. Sharp v. Coopers & Lybrand, 649 F.2d 175, 193 (3rd Cir. 1981). The scienter element may also be inferred from the commissions charged by the registered representatives. See In re David Wong, Exchange Act Release No. 45426 (Feb. 8, 2002); see also In re Donald

A. Roche, 1997 SEC Lexis 1283 (June 17, 1997)(Commission opinion)(concluding that the fact that client accounts sustained large losses while the registered representative generate substantial commission income can show that the registered representative acted in reckless disregard of his customer's interest and account objectives).

As evidenced by the high turnover rates and commission levels, the churning respondents acted with scienter by executing the transactions in the defrauded customers' accounts for their personal monetary benefits. Calabro, Konner and Koutsoubos knew that their customers were unsophisticated securities investors who relied on them to manage their accounts and ensure that their investments were in compliance with their true risk tolerances and investment objectives. For example, customer [redacted] opened his first brokerage account with JP Turner and with Calabro as his registered representative in December 2008. At Calabro's suggestion, [redacted] tapped a line of credit to invest in his JP Turner account. Calabro assured [redacted] that the line of credit would not be utilized for long and guaranteed that he would not lose more than $125,000 in the account. He also told [redacted] hat the profits he could make from his investment with JP Turner was "unlimited."

Additionally, the registered representatives knew, or should have known, that the trading levels in many customers' accounts vastly exceeded the "frequency of trades" indicated by the customers in associated account documents. Nevertheless, the churning respondents took advantage of their defrauded customers' naiveté and loyalty and engaged in a trading that directly conflicted with the actual desires and investment objectives of such customers.

Finally, Calabro, Konner and Koutsoubos's churning earned them each substantial financial gain. In the aggregate, the three earned over $627,833 in commissions and fees, while their customers' associated losses totaled more than $2.7 million.

B. <u>Bresner Failed to Reasonably Supervise Koutsoubos and Konner</u>

Section 15(b)(4)(E) of the Exchange Act provides that the Commission may sanction a broker-dealer for failing reasonably to supervise, with a view to preventing violations of the federal securities laws, another person who commits such a violation. Section 15(b)(6)(A)(i) of the Exchange Act, incorporating by reference Section 15(b)(4)(E), permits the Commission to sanction any individual who fails reasonably to supervise others within the meaning of Section 15(b)(4)(E). Under Section 203(f) of the Advisers Act, which incorporates by reference to Section 203(e)(6), the Commission may also seek sanctions where an associated person has failed reasonably to supervise, with a view to preventing violations of the federal securities laws and rules thereunder, another person subject to the investment adviser's or associated person's supervision who commits such violations.

Section 15(b)(4)(E), however, provides that no person will be deemed to have failed reasonably to supervise if: (1) there were established procedures which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by another person; and (2) the person at issue reasonably discharged the duties and obligations incumbent upon him under the established procedures and had no reason to believe that the procedures were not being complied with. The Commission has also noted that where a firm does not have established procedures, or system for applying those procedures, which together could not have expected to prevent and detect the securities violations, the "affirmative defense provisions of Section 15(b)(4)(E) . . . do not apply." <u>In re John H. Gutfreund</u>, Exchange Act Release No. 31554, 1992 SEC LEXIS 2939, at *41 (Dec. 3, 1992) (21(a) report).

The responsibility for the supervisory function of a registered broker-dealer rests upon the most senior members of management. <u>See</u> <u>In re Donald T. Sheldon</u>, Exchange Act Release

No. 31475, 51 SEC 59, 79 (Nov. 18, 1992) (Commission opinion), aff'd 45 F.3d 1515 (11th Cir. 1995); In re Frederick H. Joseph, Exchange Act Release No. 32340, 1993 WL 167828, at *5 (May 20, 1993) (settled). In addition, red flags and suggestions of irregularities demand inquiry as well as adequate follow up and review. See Gutfreund, SEC LEXIS 2939, at *34. Moreover, "[w]hen indications of impropriety reach the attention of those in authority, they must act decisively to detect and prevent violations of the federal securities laws." In re Edwin Kantor, Exchange Act Release No. 32341, 1993 WL 167840, at *5 (May 20, 1993) (settled). However, the duty to supervise adheres without regard to whether red flags are evident, since a failure of supervision implies a failure to discover violations when diligent application of supervisory procedures would have revealed them. See In re Blinder Robinson & Co., Exchange Act Release No. 19057, 1982 SEC LEXIS 878, at *5 (Sept. 17, 1982) (Commission opinion); see also In re Gary W. Chambers, Exchange Act Release No. 27963, 1990 SEC LEXIS 808, at *8-10 (Apr. 30, 1990) (settled) (broker-dealer lacked supervisory policies and procedures to prevent suitability and churning violations by registered representatives; no supervisor was assigned responsibility for reviewing account activity).

Bresner was directly responsible for supervising Level 4 accounts. As discussed, defrauded customers' accounts managed by Konner or Koutsoubos appeared at Level 4 during the relevant churning periods. This should have raised red flags for Bresner given: (1) accounts at Level 4 had ROI levels greater than 25 percent, which is presumptive of excessive trading, (2) some of these accounts repeatedly appeared at Level 4, even after commission restrictions were placed on the accounts, (3) Konner and Koutsoubos each engaged in trading activity that far exceeded the "frequency of trades" identified in the suitability questionnaire signed by some of their defrauded customers, and (4) one of Koutsoubos's defrauded customers had no suitability questionnaire on file, even though the customer's account repeatedly appeared on Level 4. However, the only supervisory action that Bresner took was to impose associated commission restrictions.

IV. CONCLUSION

As set forth in this prehearing brief, Calabro, Konner and Koutsoubos violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, when they, as registered representatives at JP Turner, churned the brokerage accounts of various individuals. In the interests of protecting the investing public, they should be ordered to cease and desist from further fraudulent activities and be barred from the industry, be ordered to disgorge all commissions they personally retained from the trading in the relevant accounts during the respective churning period of each account, along with prejudgment interest thereon. The churning respondents should also be ordered to pay civil penalties, at least equal to the amount of disgorgement proved against them.

As set forth in this prehearing brief, Bresner failed to supervise Konner and Koutsoubos in the relevant churn period. Section 15(b)(6) of the Exchange Act and Section 9(b) of the Investment Company Act authorize the Commission to sanction any person associated with a broker-dealer for willfully violating any provision of the Securities Act or the Exchange Act, or for failing reasonably to supervise another person subject to their supervision. Similarly, Section 203(f) of the Advisers Act authorizes the Commission to sanction any person associated with an investment adviser if it is in the public interest and the Commission finds that the person has failed reasonably to supervise another person who commits violations of the Securities Act or the Exchange Act. Bresner was an associated person of JP Turner, a registered broker-dealer, and of JP Turner Capital, a registered investment adviser during the period of his misconduct. This court should bar him from serving in a supervisory capacity, order him to pay disgorgement if appropriate, and impose a substantial civil penalty against him.

Respectfully submitted, this 14th day of January, 2013.

Respectfully submitted,

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