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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

PRE-HEARING BRIEF SUBMITTED ON BEHALF OF RESPONDENT JASON KONNER

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Respondent Jason Konner ("Konner"), by his attorneys, Hutner Klarish LLP, hereby submits his Pre-Hearing Brief.[1]

PRELIMINARY STATEMENT

Following an extensive investigation of Atlanta-based brokerage firm J.P. Turner & Co. conducted by the Atlanta office of the Securities and Exchange Commission's Division of Enforcement (the "Division"), in which more than 500,000 documents were produced, many witnesses deposed, and dozens of subpoenas issued, the Division informed respondent Jason Konner in May 2011 that it planned to recommend disciplinary action against him on the grounds that he had churned the accounts of two retail clients, James Carlson and Gordon Miller. Konner's counsel, experienced attorneys who were retained on behalf of Mr. Konner by his then-current employer J.P. Turner, submitted a detailed Wells Submission in July 2011. Following that, the Division's long-running investigation continued for another 14 months, after which the Commission launched the present action against Mr. Konner and three others in September 2012.

Jason Konner did not churn the accounts of Gordon Miller or James Carlson, and the Division will not be able to satisfy its burden of proof with respect to any of the elements of its churning claim, excessive trading, broker control and scienter, with respect to either account. What the evidence *will* demonstrate is that that the active trading in the Carlson and Miller accounts was exactly what the clients wanted for the small part of their net worth placed with J.P. Turner. Both clients were interested in speculation and aggressive trading, and both were well able to bear the risk of loss of their account principal. Further, each trade was preceded by a discussion between Konner and his client as to the merits of the proposed trade and its cost (including commission costs), and every one of the trades was authorized – a fact not in

[1] This submission does not address in any way the charges brought against the three other respondents in this multi-party administrative proceeding, Michael Bresner, Ralph Calabro or Dimitrios Koutsoubos.

contention here. That both clients understood the market risks associated with these accounts was confirmed by the Compliance officer based in the branch office where Mr. Konner worked, and by the firm's Compliance Department in Atlanta. Ample evidence to establish these facts will be presented at the hearing.

POSITION OF RESPONDENT KONNER:

UNDER THE APPLICABLE LEGAL STANDARDS, THE EVIDENCE WILL NOT SUPPORT A CHARGE THAT KONNER CHURNED THE MILLER OR CARLSON ACCOUNTS

The Division's contention that Mr. Konner churned the Miller and Carlson accounts is wrong, and the evidence will prove that Mr. Konner (a) did not engage in excessive trading, as it relates to either account in question, (b) did not have actual or *de facto* control of either account, and (c) did not act with scienter, that is, his actions were not motivated exclusively by his own self-interest. The basis for findings consistent with these assertions will be established through several different strands of evidence and testimony.

To properly address the specifics of the what, when and why of the trading activity in the Carlson and Miller accounts, we submit that the Court must first be presented with facts that place the activity in question in the appropriate context. Such evidence will establish the following:

Jason Konner is 39 years old and resides in Brooklyn, New York. He is married and has two young daughters. After graduating high school, he attended college for a brief time and worked in his family's interior design business until he decided to enter the securities industry in 1994. For the next six years, he worked at a number of small firms as he got his footing in the business. In 2000, he joined Merit Capital Group, which later became Source Capital Group, and he remained there until 2006, when he joined J.P. Turner. He remained at that firm until his employment there was terminated in December 2011 while laboring under the cloud of an ongoing SEC investigation. Later that month he joined DPEC Capital, Inc., a broker-dealer based in New York City that exclusively offers private placements of non-public securities.

The decision to join a firm specializing in offering private placements to accredited investors (i.e., sophisticated investors who meet the SEC requirements of high net worth and/or high annual earnings) was a logical progression for Mr. Konner. As he will explain at hearing, for several years, he focused on developing brokerage relationships with high net worth individuals interested in deploying a small portion of their liquid assets in short term, speculative trading. In other words, he was building a business geared toward clients who have the financial wherewithal and the personal desire and inclination to use a portion of their money to invest aggressively. He readily understood that this business was not geared to those for whom the money placed with him would constitute an appreciable part of their life savings, nest egg or assets required for current or future needs or contingencies for themselves or their families.

Konner has never been subject of a regulatory proceeding prior to this case. And in bringing charges against Konner based on the activity in the Carlson and Miller accounts, the Division fails to take into account the type of investing that Messrs. Carlson and Miller acknowledged they wanted to do. It is no coincidence, as will be established at hearing, that neither Mr. Carlson nor Mr. Miller ever complained about Mr. Konner, about the trading in their accounts, about the commissions they paid, or about any other matter. Only the Staff has alleged there was inappropriate conduct, the actual investors never did, even after they were contacted repeatedly by members of the Staff during the course of the J.P. Turner investigation.[2]

[2] To the extent the Staff seeks to raise at the hearing any issues regarding disclosures on Mr. Konner's CRD, we will be glad to address that at hearing.

James Carlson, the owner of successful farm in Iowa, is a man used to making business decisions and exercising independent judgment. He had experience in the securities markets before he opened his account with J.P. Turner and was at all times fully informed about the activity in his accounts, including the costs of trading.

The evidence will support the notion, certainly with respect to the period at issue here (2009), that Mr. Carlson had the means to invest aggressively with the money he placed at J.P. Turner. When he first opened his account in July 2007, Mr. Carlson was 55 years old and his three children were adults. He told Konner that he had other assets at Wells Fargo and A.G. Edwards and that he owned annuities, information which was important to Mr. Konner as he understood that those other assets were meant to meet Carlson's long-term needs. Mr. Carlson told Mr. Konner when he opened the account, as was recorded on the account application, that his annual income was $100,000, his net worth was $700,000, and his investment assets were $200,000. He noted that his primary investment objectives were trading profits, speculation and capital appreciation, and his risk tolerance was aggressive. (See Konner 31, 32, 33, 34, 35, 36, 37.)

By 2008, Mr. Carlson decided he wanted a more active trading strategy and decided to use margin, a way of leveraging the assets on account. On the margin agreement that Mr. Carlson signed in May 2008, he recorded his annual income as $200,000, his estimated net worth as $2.5 million, and his investment assets as $750,000.

Increased activity in this time period caused the account to appear on J.P. Turner's AARS report, and thus account activity was reviewed by the Compliance Department in Atlanta and by on-site Compliance officer John Williams in Brooklyn. In response to such inquiries, Mr. Carlson confirmed the information he had previously provided to J.P. Turner. As time progressed, Carlson diversified into other types of securities, including investing in two private placements sponsored by J.P. Turner. These investments were reviewed by J.P. Turner's Compliance Department and found suitable for this investor. In making these investments, Carlson certified that he was an "accredited investor" within the meaning of the securities laws and had the ability to examine and understand the merits of the investments. (See Konner 75, 76, 77.)

Other evidence will demonstrate that Mr. Carlson reaffirmed his significant financial wherewithal in 2009, showing a net worth of $2.5 million, liquid assets of $200,000, retirement account worth $300,000, stocks, mutual funds and other assets worth $350,000, and more. He disclosed to J.P. Turner that he had 20 years of investment experience, five years of margin experience, and traded frequently. The evidence will bear out that broker and client spoke regularly, and the client was well informed with respect to the activity in his account, and gave every indication – in terms of financial wherewithal and investment objectives – that his account was one designed for aggressive short term trading.

Gordon Miller. Understanding that Mr. Miller was elderly, Mr. Konner spoke to him a number of times before opening the account. Information provided by Mr. Miller confirmed that, despite his age, he was the type of investor with whom Mr. Konner sought to work. From their conversations, he learned that Miller still received income from his farm, that his net worth was over $4 million, and that he had years of investment experience – all information that was discussed more than once.

As they got to know each other better, Miller would say that the money in his J.P. Turner account was his "play money," and that if he lost it, "it won't hurt me." Miller was interested in having a margin account, but Konner would not to open one for him, believing that even if he could afford losses in a cash account, a margin account would expose him to too much risk. For similar reasons, Konner discouraged Miller from trading penny stocks when Miller broached the subject. For his part, Miller told Konner that he was not interested in private placements, and the two frequently conferred about developments regarding his holdings in particular and the market in general.

When Mr. Miller opened his account in May 2009, he signed account documents stating that his annual income was $150,000, his net worth was $4,000,000, and his investment assets were $100,000. He noted that his primary investment objectives were speculation, trading profits and capital appreciation, and his risk tolerance was aggressive. That he reviewed his application carefully before signing it will be demonstrated by the fact that he corrected the date of issuance noted for his driver's license. Later in 2009, Mr. Miller informed Konner that based on the recent sale price of a neighbor's farm, his own farm was worth $1,400,000. Konner discussed with Miller taking a less aggressive approach to the market. Konner's contemporaneous notes, to be offered at the hearing, state: "[I] told him I wanted [him] to buy dividend stocks. He told me he is already a millionaire [and] I don't need to buy dividend stocks [because] I want to speculate." In other conversations, Miller told Konner that he did not want to invest in mutual funds. (See Konner 1, 2, 3, 4, 6.)

The evidence will show that, far from taking advantage of Miller, Konner set reasonable limits and acted in his client's interest. The account may have been aggressive, but it was not inappropriate for a man with his resources and with the objectives to invest this part of his net worth in such a fashion. To Mr. Konner's knowledge, based upon Miller's statements, this was money he could afford to lose. He did not use margin and did not trade any exotic securities. And when the Compliance Department checked to confirm that Miller understood the activity in his account, he indicated that he did.

I. <u>THE LEGAL STANDARD FOR THE CHURNING CHARGE AGAINST KONNER.</u>

The legal standard applicable to the case against Mr. Konner is clear: "Churning occurs when a securities broker buys and sells securities for a client's account, without regard to the client's investment interests, for the purpose of generating commissions." *See, e.g., In re Sandra Logay*, SEC Initial Decision No. 159 (Jan. 28, 2000). Accordingly, the Staff will bear the burden of proving three things by a preponderance of the evidence: (1) Konner had either actual or *de facto* control over the Carlson and Miller accounts; (2) that the trading in the two accounts was excessive in light of the investor's trading objectives; and (3) that Konner acted with scienter. *See, e.g., Costello v. Oppenheimer & Co.*, Inc., 711 F.2d 1361, 1368 (7th Cir. 1983).

The law is clear that churning cannot be based solely on the number of trades per month or the turnover rate of an account. For example, speculative accounts that are used for day trading or short-term gains will often exhibit a high level of activity in a given time period. In these cases, a large volume of trading is consistent with the objectives and goals of the account. Churning does not occur if the account owner knowingly and intelligently consents to a high volume, or if the broker lacked the intent to defraud or recklessly disregard the account owner's wishes. *See, e.g., Nelson v. Weatherly Sec. Corp.*, 2006 WL 708219, at *3 (S.D.N.Y. Mar. 21, 2006).

II. <u>EXCESSIVE TRADING CANNOT BE EVALUATED IN A VACUUM.</u>

Proper analysis of whether an account was excessively traded requires consideration of multiple factors; no simple quantitative analysis is applicable to all clients and all accounts.

As one court has stated, "No turnover rate is universally recognized as determinative of churning." *In re J.W. Barclay & Co., Inc.,* SEC Initial Decision No. 239 (Oct. 23, 2003), at 19. An inquiry into whether an account was excessively traded should focus on "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 the customer." *Costello, supra,* 711 F.2d at 1368. The first step in this analysis is to evaluate the client's investment goals, as they provide the standard for measuring the account activity. Investors who wish to invest aggressively will often require a much higher frequency of trading in order to satisfy their investment objectives. *E.g., Mitchell v. Ainbinder*, 214 Fed. App'x. 565, 568 (6th Cir. 2007). In addition, numerical evidence regarding the activity of the account and commissions paid to the broker may also be considered. *Id.* "Of course, if a customer wants to speculate, the portfolio turnover rate could be unlimited." *J.W. Barclay*, *supra.*

The evidence will show that Konner geared his business to clients looking to obtain profits through short term trading, investors who are willing and able to bear the risk of loss. Such varied circumstances – purpose of account, investor objectives and more – bear heavily on whether frequent trading and high turnover are or are not appropriate, and with this context in mind, we will demonstrate that Messrs. Carlson and Miller intended to use their accounts for speculative and aggressive trading in the hope of generating high returns, funded with money they could afford to place at risk, and with costs and risks of loss understood.

Finally, we will demonstrate that the quantitative analysis which forms the underpinning of the entire case against Konner fails to take into account the extreme and unusual market conditions prevailing during much of the relevant time period - 2009. For at least the first part of that year (when only the Carlson account was in existence), the financial and stock markets were buffeted by extreme volatility, and all investors faced the added risk associated with a calamitous U.S. economy and rampant fear. Some investors made money during this period, many did not, but virtually all U.S. investors knew there was a significant amount of risk involved. Nor was the second half of 2009 smooth sailing, and during that period many of the best analysts and traders failed to gauge the market correctly. To obliquely ignore the reality of the time in assessing whether the trading in the Carlson and Miller accounts was excessive is inappropriate.

In sum, any analysis concerning account activity must always be viewed in the context of how the trades correspond to the ultimate goals of the investor. The evidence to be adduced at hearing will demonstrate that the initial component for a churning charge cannot be sustained.

III. THE EVIDENCE WILL DEMONSTRATE THAT KONNER DID NOT EXERCISE CONTROL OVER THE MILLER OR CARLSON ACCOUNTS.

Jason Konner never had actual or *de facto* control over the Carlson and Miller accounts. We do not believe the Division will attempt to portray Mr. Konner as having actual control, since the accounts were non-discretionary, which meant the broker did not have discretion to place trades without getting authorization from the client. Since unauthorized trading was not charged or even suggested, the Division will presumably not proffer evidence relating to actual control. As such, a churning claim would require proof that Konner had *de facto* control over the two accounts.

The concept of *de facto* control in the context of a churning case is well established. Thus, in *In re J.W. Barclay & Co., Inc.,* SEC Initial Decision No. 239 (Oct. 23, 2003), at 18, the court stated: "The touchstone [of *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 is unsuitable." Further, it has been stated that a client retains control of his account if he has enough financial expertise to determine his own best interests, even if he consents to the broker's management of the account. The fact that a client follows the advice of his broker does not in itself establish control. *See In re IFG Network Sec., Inc.,* SEC Initial Decision No. 273, at 40-41 (Feb. 10, 2005).

The evidence will establish that the two clients did not relinquish control of their accounts: they knew of and approved every trade. They were informed of each trade one, two, three, four or five separate times. They acknowledged in writing on a number of occasions that their objectives were short-term, aggressive trading, and they affirmed as much when contacted by the firm's Compliance personnel. They were never misled and they never complained about the level of activity. They were continuously apprised of the activity in their account, and this is evident from a body of documents that includes numerous transaction confirmations, additional "temporary" transaction confirmations (in certain instances), monthly account statements detailing all activity during the preceding 30 days, and annual summaries listed on tax documents that were provided. Such documents will be offered into evidence at the hearing.

Further, the evidence will demonstrate that the two clients followed stock market developments, in varying degrees, and that they had the wherewithal to decline recommendations made by Mr. Konner. These men have been in engaged in business, as farmers, for decades, and the evidence will show that had sufficient knowledge, ability and understanding to make an independent evaluation of Konner's recommendations.

Indeed, evidence regarding supervision and oversight of Mr. Konner's activity will undermine the allegation that he had *de facto* control of the two clients' accounts. The evidence will show that his branch office manager and local Compliance officer had conversations with many of his clients, including those whose accounts are at issue, and confirmed that the clients understood the risks of the speculative trading and that Konner had discussed those risks with them. These clients also voluntarily signed active account questionnaires and confirmed to management and/or the Compliance department that they acknowledged, understood, approved and ratified the trading in their accounts. Based on all that, none of the supervisory/compliance personnel came away thinking that Konner controlled these clients' accounts, for good reason.

IV. THE EVIDENCE WILL DEMONSTRATE THAT KONNER DID NOT ACT WITH SCIENTER.

Scienter is defined as a mental state embracing the intent to deceive, manipulate, or defraud. *E.g.*, *Rizek v. S.E.C.*, 215 F.3d 157, 162 (1st Cir. 2000). To prove churning, scienter is required, and a broker must have either fraudulent intent or a willful or reckless disregard for the interests of his clients. *Department of Enforcement v. Kelly*, FINRA National Adjudicatory Council, No. E9A2004048801 (Dec. 16, 2008). And while it is true that scienter may be implied through the actions of the broker, there must be sufficient evidence that he possessed the requisite mental state. Churning will not exist in situations where the broker's investment activity results from negligence. *E.g., S.E.C. v. Ficken*, 546 F.3d 45, 47 (1st Cir. 2008).

The case of *Hotmar v. Lowell H. Listrom & Co.*, 80 F.2d 1384, 1386 (10th Cir. 1987), provides an example of how high rates of turnover and the like does not in and of itself demonstrate scienter in the churning context. Hotmar was an aggressive investor who had already experienced significant losses prior to the alleged period of churning. Hotmar stated that he was "prepared to take risks and hopefully recoup his prior losses," and as a result, his portfolio consisted of many speculative investments with a high turnover rate. The court in *Hotmar* noted that -- in a case much like this one -- where there was (a) no question that confirmation slips were sent which described each transaction, (b) where monthly statements which detailed the overall account performance were sent, (c) where there was no evidence that the broker withheld any information, and (d) where there is no evidence to suggest any actual deception surrounding the trades, it will be difficult if not impossible to prove the existence of scienter, even if the client suffers substantial losses and the broker received substantial commissions.

We will ask the Court in this case, in evaluating whether or not Konner acted with fraudulent intent or a willful or reckless disregard for the interests of his clients, to consider what the clients were looking for from this account and for the money invested at J.P. Turner. We submit that the evidence will not establish that Mr. Konner sought to take advantage of the situation for his own gain and with an utter disregard of the interests of his clients.

CONCLUSION

Respondent Jason Konner will establish at hearing that he did not churn the accounts of Gordon Miller or James Carlson. The evidence will show that he geared his business to clients who wanted to trade aggressively and had the means to do so. The evidence will show that the two clients in question fell within that category, and were fully aware of what was happening at all times, and were engaged in the handling of their accounts. Clients and broker maintained a professional relationship throughout, and the clients never complained nor sought redress based upon any perceived breach of duty or misconduct. The evidence will establish that the high level of trading was not inappropriate in the context of these clients' accounts, that the broker never took control of the accounts, and that there was no fraud or reckless misconduct. None of the elements of churning exist.

We look forward to the opportunity to present our defense to the charge brought by the Division against Mr. Konner.

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