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INTRODUCTION

Dimitrios Koutsoubos is 36 years old and has been employed in the securities industry for nearly his entire adult life. Throughout his 14 year career, Mr. Koutsoubos has maintained a pristine disciplinary record and has never before been named as the subject of any SEC or SRO disciplinary proceeding nor named as a defendant in any arbitration proceeding. Indeed, when Mr. Koutsoubos left the employ of J.P. Turner after a decade, in August 2009 [T 476; Koutsoubos Ex.2]¹, there was not a single customer complaint lodged against Mr. Koutsoubos nor had Mr. Koutsoubos been subject to any internal discipline or special supervision at J.P. Turner. [T. 505; Koutsoubos Ex. 1]

Mr. Koutsoubos' hard-fought unblemished reputation in the securities industry has been sullied by the Division's factually unwarranted and legally unsupported charges in this case that during separate cherry-picked periods within the cataclysmic market debacle of 2008 and early 2009, he defrauded two of his over 500 clients by engaging in excessive buying and selling of securities in these customers' account without regard to their investment interests but instead for the purpose of generating commissions. Yet, the Division's "case" consists of nothing more than flawed turnover calculations in a vacuum without any consideration of either the speculative and short term trading profit investment objectives and aggressive risk tolerances repeatedly reported by these two customers, [REDACTED], or the uniquely volatile market conditions during the worst stock market disaster since the Great Depression.

Every document signed by [REDACTED] pertinent to their investment objectives and risk tolerance – and there were numerous such documents - reflects the aggressive, risk tolerant and speculative nature of the accounts. Not a single document signed by [REDACTED]

¹ References in this brief to the hearing transcript are designated by transcript page number as [T.], to Koutsoubos exhibits as [Koutsoubos Ex.] and to Division of Enforcement exhibits as [Division Ex.].

provides even the slightest inference to the contrary. Moreover, and which sets this case apart all others is that each of these customers **expressly acknowledged in writing that they understood the accounts to be active trading accounts, that they were willing and financially able to take greater risks using such a strategy, that they understood that active trading involves a high degree of risk and increased costs and that such active trading is suitable only for risk tolerant investors.** [Koutsoubos Ex. 9, 11, 22] Both well-settled legal authority and the Division's own expert witness agree: brokerage customers may not disavow, in hindsight, their written representations in account agreements and investment-related documents by claiming they failed to read them before signing.

It is undisputed that Koutsoubos did not have formal discretionary trading authority over the two customer accounts. The Division did not even attempt to prove that ██████████ lacked the capacity to exercise the final right to say 'yes' or 'no' to the trading in their accounts and thereby relinquished *de facto* control of their trading accounts to Koutsoubos. Neither ██████████ nor ██████████ are mental incompetents or financial naifs; rather both ██████████ and ██████████ quite obviously had the capacity to exercise their right to say 'no.' Each was a successful business owner with substantial experience in various financial products and business settings, including managing real estate properties for rent or purchase. ██████████, a multi-millionaire owner of two businesses employing 32 people, was an experienced investor who had other brokerage accounts including at a firm specializing in highly speculative securities. ██████████ closely monitored his J.P. Turner account, spoke with Koutsoubos often regarding the account and various investment ideas, rejected certain securities recommendations made by Koutsoubos and from time to time proffered his own investment ideas. ██████████, affluent business entrepreneurs who owned and managed rental real estate, successfully ran three franchise

businesses in two states. On several occasions rejected Koutsoubos' recommendations in favor of their own and placed a number of very large unsolicited trades in the account totaling over \$200,000. In fact, ██████ conclusively demonstrated their control over their account by defunding it in 2007 only to later decide to replenish the account later that same year. Neither ██████ nor ██████ was a personal friend or relative of Koutsoubos which would have caused them to repose particular trust and confidence in him. Rather these relationships were entirely at arm's-length and neither ██████ nor ██████ even met Koutsoubos in person until after he had left J.P. Turner in August 2009. The existence of similar facts have led numerous courts to conclude that the customer, not the broker, retained control over his account.

Lastly, but equally importantly, the Division failed to prove that Koutsoubos intended to defraud ██████ or ██████ by recommending unwarranted trades solely for his own pecuniary gain. It is undisputed that for nearly the entirety of the relevant period, there was a \$100 maximum commission restriction placed on transactions in the ██████ and ██████ accounts - precisely because they were active trading accounts - whereby the motive and opportunity for Koutsoubos to line his pockets with unwarranted commission dollars was extinguished. There was simply no pecuniary reason for Koutsoubos to defraud ██████ or ██████ or even to recklessly disregard their interests. Koutsoubos demonstrated, and both ██████ and ██████ conceded, that he was in frequent contact with these customers and discussed with them various investment ideas and strategies. Koutsoubos explained the investment strategies and theories he followed, the copious financial and market research analyzed and the extent to which he worked in good faith to present investment recommendations that were well thought out and suitable for the customer. There was no evidence in the record to suggest that Koutsoubos made recommendations without an investment strategy, devoid of research or otherwise in anything but a good faith belief that it

was consistent with the customer's investment objectives. Moreover, the evidence is undisputed that [REDACTED] and [REDACTED] received every monthly account statement detailing their investment performance and every confirmation detailing the exact amount of commissions charged for each transaction, and [REDACTED] and [REDACTED] conceded that neither J.P. Turner nor Koutsoubos ever tried to conceal any such information from them.

Given the complete lack of evidence of any actual deception and the fact that Koutsoubos had nothing financial to gain by intentionally or recklessly disregarding these customers' interests, the Division failed to demonstrate that Koutsoubos "churned" the [REDACTED] and [REDACTED] accounts in violation of the antifraud provisions of the federal securities laws.

STATEMENT OF FACTS

During the relevant period, Koutsoubos was located mainly in J.P. Turner's Brooklyn, NY branch at J.P. Turner, and to a lesser extent in the Fort Lauderdale branch. [T. 4471] James Sideris was the Series 24 branch manager of the Brooklyn NY office throughout the relevant period. [T. 3663] During the relevant period, Sideris held daily morning meetings with the brokers in the office during which he would go over current financial news and successful investment strategies based upon market conditions. [T. 4472-73] In addition to ideas generated by Sideris and his review of various market research generated by J.P. Turner, Koutsoubos subscribed – at his own cost - to various research reports and internet sites that provided him with news, analysis and ideas for successful investment recommendations, including Investors Business Daily ("IBD"), Morningstar and Daily Graphs.² [T. 4473-79] Only after conducting a

² Koutsoubos described that IBD, published by William J. O'Neill, was one of the most helpful pieces of research he used to generate investment ideas for potential recommendations. O'Neill is the developer of the Can Slim investment approach to growth stocks which Koutsoubos adopted as a methodology for evaluating stocks whose prices were poised to move significantly in a positive direction. [T.4475-77].

significant amount of research work did Koutsoubos consider whether any investment ideas could be recommended to his clients. [T. 4480]

Before presenting any investment idea to a client, Koutsoubos determined whether the investment was suitable for the client, based upon a review of his or her financial condition and investment objectives. [T. 4480] In 2008, the stock markets suffered cataclysmic declines and to deal with the precipitous increase in volatility, Koutsoubos developed a strategy of extra caution to deal with the downside risk, implementing various hedging and stop loss strategies for his clients. [T. 4481-82] Koutsoubos took extra time to discuss with his clients not only the pros and cons of making the investment itself, but at the same time the price at which they were prepared to sell the investment should the market price decline. [T. 4482] By entering stop loss orders, Koutsoubos sought to assist the client in managing his risk of loss their risk tolerance.³ [T. 4483]

At all times relevant, Koutsoubos' sole compensation at J.P. Turner was his gross commission payout, which ranged from 50% to 60% of the commission that J.P. Turner charged the customer with respect to accounts he prospected and brought to the firm and 35% for accounts assigned to him by Sideris. [T. 4535-36] Koutsoubos was financially responsible for a variety of charges and credits against his gross commission payout, including but not limited to: errors and omissions insurance, write offs if there was insufficient funds in an account, ticket charges, contribution to the payroll for the non-registered employees of the branch, training, test

³ In many instances during the relevant period, a single recommendation of a stop loss order resulted in two transactions; the initial purchase and the automatic sale if the price fell to the stop price. [T. 4483] The Division's expert, Louis Dempsey, did not take this fact into account in his calculations of the number of transaction effected in the [REDACTED] or [REDACTED] accounts during the period at issue. [Division Ex. 155] In addition, many of the buy orders entered on behalf of [REDACTED] and [REDACTED] resulted in multiple executions at slightly varying prices, based solely upon how the orders to sell were stacked up in the electronic trading system. [T. 4515-16] Despite the multiple execution prints, Koutsoubos received his commission payout solely from the single \$100 commission charged by J.P. Turner. [Koutsoubos Ex. 14 and 26] Mr. Dempsey's report similarly inflated the trading activity in the accounts by ignoring this fact as well. [Division Ex. 155]

preparation and other expenses of broker trainees in the branch, lead sheets, office materials, overnight delivery charges, wire transfer fees and desk fees. [T. 4530-36; Division Ex. 146]

In his ten year career at J.P. Turner, Koutsoubos served as registered representative for approximately 500 retail client accounts [T. 603]. With respect to the two customer accounts that the Division has alleged Koutsoubos defrauded, [REDACTED] and [REDACTED], for nearly the entire period at issue the maximum commission charged to either customer on any transaction of any size was limited to \$100. [Koutsoubos Ex. 14, 26] J.P. Turner's Executive Vice President, Michael Bresner, conducted an analysis of the effectiveness of the commission restriction procedures he implemented for actively traded accounts (such as [REDACTED] and [REDACTED]) and concluded that at \$100 maximum commission per trade, the broker was "at best breakeven."⁴ [T. 3058] Nevertheless, the very limited amount that Koutsoubos could be compensated with respect to a transaction in the [REDACTED]' account and even smaller amount Koutsoubos would be compensated on a transaction in [REDACTED]'s account made no difference in the effort that Koutsoubos expended in preparing to make a recommendation. [T. 4480-81]

In 2006, Sideris hired John Williams to serve as onsite branch compliance officer in the Brooklyn branch to share his supervisory responsibilities in the Brooklyn branch [T. 3603]. Williams served in this capacity through December 2010. [T. 3603] Williams, an MBA in finance [T. 3725] had been a ten year veteran compliance officer who had previously been a compliance officer at three other broker-dealers, and served as Chief Compliance Officer at two of those firms. [T. 3664-3665] At J.P. Turner, Williams was compensated strictly by salary and

⁴ As Bresner reported, based upon a \$100 commission maximum with 60% payout less the ticket charges and desk fee, a broker writing 100 tickets in a month would receive on average \$15 per ticket. Because he would then still have to pay the insurance, secretarial, telephone, federal express and other miscellaneous fees, "the economic incentive to do trades was taken away." [T. 3058-59] As discussed herein, Koutsoubos' commission payout regarding the [REDACTED] and [REDACTED] accounts was far less than the "breakeven" point.

he did not receive any commissions or overrides on any transactions occurring in the Brooklyn branch. [T. 3603, 3727] Williams augmented the supervision of the registered representatives in the Brooklyn branch to ensure that the Brooklyn branch was compliant within the firm's written supervisory procedures as well as FINRA rules and regulations.⁵ [T. 3663] Indeed, every customer order in the Brooklyn branch, whether solicited or unsolicited, was required to be submitted to Williams or Sideris for review before any order could be submitted to J.P. Turner's trading department. [T. 3604, 3649-3650, 3729-30] In addition to review of every order ticket, Williams each day conducted end of day trade blotter reviews to, among other things, make certain there had been no unauthorized trades effected in the Brooklyn branch, that the transaction was suitable for the customer in light of his financial ability and investment objectives. [T. 3604, 3730-31] Williams made it a general practice to call customers if he saw any trading that was out of the ordinary or inconsistent with the investment objectives on file at the firm [T. 3733-34] and did not typically provide the broker with advanced notice that his customers would be called by Williams. [T. 3734] Williams recalled instances in which he disapproved a customer transaction because it was not suitable for the customer in light of his investment objectives. [T. 3656]

At all times that Koutsoubos was located in the Brooklyn branch, he sat in close proximity to Williams, who was able to observe Koutsoubos' telephone communications with his clients. [T. 3607-09, 3741] Williams found Koutsoubos to be a hardworking and diligent broker who spoke knowledgeably with his clients, regularly discuss investment strategies with

⁵ In addition to his supervisory responsibilities in the Brooklyn branch, Williams also conducted audits at least each quarter of the Ft. Lauderdale branch, where Koutsoubos also worked. [T. 3642-43] Williams observed that Steve Doukas, the Series 24 branch manager of the Ft. Lauderdale branch, conducted the same types of order ticket, new account and correspondence reviews as did Williams and Sideris with respect to Koutsoubos' customer accounts when Koutsoubos was in Ft. Lauderdale. [T. 3742] Koutsoubos confirmed that Doukas also reviewed every customer order ticket before Doukas himself entered it into J.P. Turner's trade entry system for execution, conducted an end-of-day review to match customer orders to trade executions and from time-to-time called clients directly to, among other things, confirm the validity of orders [T. 4486-89].

his clients and was never abusive or disrespectful to his customers. [T. 3609, 3742-44] Williams never had any concerns about excessive trading or churning in any of Koutsoubos' customers accounts because based upon his review, the trading activity fit these customers' investment objectives and financial profiles. [T. 3613, 3631, 3744-45] If any customer had complained about any broker in the Brooklyn branch, Williams would have been made aware. [T. 3665] No customer ever expressed any complaint about Koutsoubos, either in writing, in telephone calls with Williams or otherwise.⁶ [T 3754]

Every facsimile or other written communication to or from a J.P. Turner customer was reviewed and approved by either Sideris or Williams [T. 3604], who documented their review and approval by placing their initials on the document. [T. 3625] As a prophylactic procedure, no registered representative of the Brooklyn branch was permitted access to the branch fax machine to remove even the possibility that any broker could tamper with any customer communication before supervisory review by Williams or Sideris.⁷ [T 3617-18] Similarly, all mail was opened by Sideris or Williams and no broker had the ability to preempt that review. [T. 3736]

Williams considered reviews of active accounts to be a very important aspect of his compliance review. [T. 3695] When Williams reviewed customer new account applications, he endeavored to determine the suitability of the type and frequency of trading in light of the customer's disclosed financial condition and investment objectives [T. 3679, 3728] and in that regard, called customers to verify the accuracy of information set forth. [T. 3733-34] Williams was responsible for the coordination and review of Active Account Suitability Supplements

⁶ Williams testified that if Doukas had received any complaint about Koutsoubos in the Ft. Lauderdale office, Williams would have been notified. This also never occurred. [T. 3754]

⁷ As branch manager of the J.P. Turner Fort Lauderdale office, Doukas instituted the same policy and procedure in that office to prevent any broker from access to the fax machine and required all incoming and outgoing faxed to be reviewed by a Series 24 supervisor. [T. 3740-41, 3799, 4493]

("active sups") and the accompanying Active Account Suitability Questionnaires ("active sup questionnaires") sent to the Brooklyn branch clients who had high levels of trading activity. [T. 3635] Williams reviewed each active sup before it was sent to the client as well as upon received from the client. [T. 3617-18] The active sup expressly advised active account holders in bold letters to **"*PLEASE READ CAREFULLY*"** and set out, among other important risks:

- **Active trading can involve a higher degree of risk, increased costs and is suitable only for risk tolerant investors.**
- **Active trading in the securities markets can involve a higher degree of risk and may not be suitable for all investors and accordingly, should be entered into only by investors who understanding the nature of the risk involved and are financially capable to sustain a loss of part or all of their capital.**
- **Due to the higher degree of activity, overall commissions on your account may tend to be greater than a buy and hold strategy.**
- **High-risk tolerance and investment objectives consistent with high-risk investing are appropriate to an active account. In addition, a customer who is frequently trading the market should not have short-term needs for the funds invested in an equity account.**

[Koutsoubos Ex. 9, 11, 22] The active sup questionnaire required active account holders to reconfirm his or her income and wealth, investment objective, risk tolerance and other information which was important for J.P. Turner's assessment as to whether the customer was suitable for active trading. [Koutsoubos Ex. 9, 11, 22] As an accommodation to customers and in an effort to reduce the potential that the customer would not fully complete the active sup questionnaire, J.P. Turner branch personnel would sometimes fill in the information on the questionnaire before submitting the document to Williams for review. [T. 3638] In these instances, Williams made it the branch practice to highlight that information to the client on the questionnaire and ask the customer to place his initials specifically on those portions to make certain that the customer focused on that information and verified that it accurately reflected

what the customer had told the J.P. Turner broker. [T. 3626] Upon receiving an active sup back from the customer, Williams reviewed the document to make certain it was filled out completely, that the financial information added up correctly, that the investment objectives and risk tolerance information comported with the information on file at the firm and that the document was properly signed by the customer (and initialed where needed). [T. 3618, 3676] If any information was left off the questionnaire, the information did not add up or was inconsistent with the information on file at the firm, or it was not signed or initialed, Williams spoke directly with the customer.⁸ [T. 3618] In Williams' compliance calls with customers, Williams did not limit the conversations solely to the missing information on the questionnaire, but used the opportunity to more broadly discuss with the customer his investment objectives and other information to make certain that the customer understood and agreed with the level of trading in his J.P. Turner account and understood the risks disclosed in the active sup. [T. 3619] Indeed, even though the customer had signed the active sup and thereby expressly acknowledged having read and understood the risks associated with active trading, Williams would go over certain of the risk factors set forth on the active sup and asked the customer to verbally acknowledge to him that he or she had in fact read the risk factors. [T. 3753] Williams would fill in any missing information on the questionnaire based upon what the customer advised him and would sign or initial next to that information to document that he spoke to the customer who provided him that information. [T.3618] After Williams reviewed and approved the active sup, he caused the signed forms to be sent directly to J.P. Turner's compliance department in Atlanta. [T. 3618]

██████████ who was █████ years old when he opened his J.P Turner account [T. 887], is a multi-millionaire [T. 863,889] with significant prior securities experience [T. 919] that lives in

⁸ Williams sat near Koutsoubos for many years and had ample opportunity to observe how he conducted his securities business. Williams testified that he never saw Koutsoubos ever telling a customer to sign any document even though it was incorrect. [T. 3801]

a home he built on the golf club at which he was a member. [T. 905] █████ owned and operated two thriving businesses in two different towns, employing approximately 32 people. [T. 890-891] In 2007, █████ built his current home⁹ on one of the 14 lots he owns on the golf course at Kirkwood National Golf Club [T. 914], of which he has been member. [T. 906] During the period at issue, █████ also owned two other houses, a 44-acre tract of land and another property in Holly Springs, Mississippi [T. 908].

Prior to opening his J.P. Turner account, █████ had significant securities trading experience, having held brokerage accounts at J.C. Bradford, Wachovia and Stifel Nicolaus. [T.849]. Until at least February 2007, █████ also held a brokerage account at Sky Capital [T. 915, Koutsoubos Ex. 23], a brokerage firm noted for aggressive trading of penny stocks. █████ continues to maintain his J.P. Turner account as well as a securities brokerage account at Lipscomb & Pitts, ING. [T. 847-848]

When █████ opened his cash and margin accounts at J.P. Turner in February 2005, Jay Bergin - and not Koutsoubos - was the registered representative on █████'s account.¹⁰ [T. 924-925] When Bergin left J.P. Turner, Sideris assigned the handling of █████'s account to Koutsoubos. [T. 4535] As an inherited account, Sideris designated it an "S Rep" account whereby Koutsoubos would receive a payout of 35% of the gross commission credits, less ticket and other charges. [T. 4535-4536; Division Ex. 146] Koutsoubos had never previously met █████ and they were not related in any way. Indeed, █████ acknowledged that their relationship was purely an arms-length business relationship. [T. 956]

⁹ According to the Trulia website, the average list price for homes in Holly Springs, MI similar to █████'s is \$712,000. [Koutsoubos Ex. 32]

¹⁰ Bryant opened his J.P Turner account in February 2005 and continues to maintain that account to this day. The Division's expert witness, John Pinto, noted that such a long relationship with this client is indicative of a client who was satisfied with his account. [T. 3532]

When Koutsoubos became the registered representative on the account and before speaking with his new client, he reviewed J.P. Turner's records, including the new account documents and ██████'s transaction history. Among the documents Koutsoubos reviewed were ██████'s New Account Application [Koutsoubos Ex.16], Margin Agreement [Koutsoubos Ex. 18] and Margin Account Agreement Suitability Supplement [Koutsoubos Ex.17], each of which were signed by ██████ in February 2005. [T. 922, 928, 931] The Account Agreement reflected, among other things, that ██████'s annual income was \$100,000, his net worth was \$3,000,000, his primary investment objective was growth and that he had 10 years of prior investment experience. [Koutsoubos Ex. 16] ██████ acknowledged that the income, net worth and liquid net worth information on the New Account Application that he signed was correct. [T. 858, 925] At the bottom, in bold print and ½ inch directly above ██████'s signature, it states "To brokerage services: In consideration of your accepting this account, I hereby acknowledge that I understand and agree to the terms set forth in the customer agreement." [Koutsoubos Ex. 16; T. 923] ██████ emphasized that his signature is his word and that he stood behind his signature. [T. 977, 994]

The Margin Account Agreement Suitability Supplement was sent to ██████ in February 2005 to "make sure that you understand margin trading, and that you are willing and financially able to take greater risks in using such strategy. Margin trading involves a higher degree of risk than trading on a cash basis and is suitable only for risk tolerant investors." [Koutsoubos Ex. 17] The Suitability Supplement contained a heading in bold entitled "What you Should Know About Margin Trading" and set forth 16 important risk factors, including but not limited to that "You can lose more funds that you deposit in the margin account" and "It may happen that declining stock value will cause you to lose your portfolio to margin calls and you may still owe a debit

balance to FISERV Securities.’ ██████ acknowledged that he signed directly below the statement “I have read and signed your Margin Suitability Supplement Agreement as required; and I understand it.” [T. 931]

██████ was an attentive securities brokerage customer and closely monitored the activity in his account. For example, and well before Koutsoubos was assigned to his account, ██████ had made it a regular practice to print the quantity and stock symbol of the trade he wanted to effect on the memo line of the checks he wrote to pay for the trades in his J.P. Turner account. [T. 942, 946; Koutsoubos Ex. 18 and 19] Moreover, ██████ not only kept and maintained all of the trade confirmation he received from J.P. Turner [Koutsoubos Ex. 26], all of the monthly account statements sent to him [Koutsoubos Ex. 24] and each of the year-end tax reporting statements sent to him [Koutsoubos Ex. 27] for many years after the period in question, he also kept and maintained certain research and other market information that Koutsoubos had sent to him for his review and discussion over the years. [T. 971; Koutsoubos Ex. 34]

In July 2006, after Koutsoubos had been assigned as the registered representative of ██████’s account, J.P. Turner changed clearing firms from Fiserv to NFS. To accommodate ██████’s election to continue to maintain a margin account, J.P. Turner sent to ██████ a Supplemental Application for NFS Margin Privileges. [Koutsoubos Ex. 20] ██████ signed the Supplemental Application dated July 28, 2006 [T. 949] and faxed his signed agreement that same day to J.P. Turner where it was reviewed by Doukas and then forwarded by Doukas to J.P. Turner’s compliance department. [Koutsoubos Ex. 20]

In mid-March 2007, approximately 8 months before the alleged period, ██████ signed an Account Update form which reflected, among other things, that ██████’s annual income was \$150,000, his estimated net worth was \$3,000,000, his investable assets were \$1,000,000, his

investment objectives were trading profits, speculation and capital appreciation and that his risk tolerance was aggressive. [Koutsoubos Ex. 21] █████ not only signed the Account Update form dated March 15, 2007 [T. 960], he placed his initials in the box to verify his selection of aggressive risk tolerance and speculative investment objectives [T. 960, 961], and faxed the signed and initialed form that same day to J.P. Turner [T. 963] where it was reviewed by Williams who compared the financial information on the form to the information on file at the firm and, finding no discrepancies, signed the document as branch manager. [T. 3625, 3763].

█████ acknowledged that he spoke frequently with Mr. Koutsoubos throughout the period that Koutsoubos was his broker, sometimes several times per week. [T 964-965] On the infrequent occasions when █████ did not hear from Koutsoubos, such as when Koutsoubos was out of the office for a few weeks following elbow surgery, █████ called in repeatedly so that he could continue to make sure he knew what was going on in his account at all times. [T. 965-966] On various occasions, █████ asked Koutsoubos to send him updates on his trading positions. Often, █████ proposed investment ideas, particularly in companies in the lumber, materials, home building and metals sectors. [T. 569] On numerous occasions, Koutsoubos sent █████ research reports, news items and related articles of potential investment interest for further discussion. For example, in July 2007, Koutsoubos and █████ had been discussing the potential merger of the Intercontinental and NYNEX exchanges as well as the merits of investment in Smith Moore Software, Inc. In this regard, on July 31, 2007, Koutsoubos faxed to █████ pages from the Dow Jones Newswire about a potential IC/NYNEX merger as well as a research report authored by the investment banking firm Piper Jaffrey regarding Smith Micro Software. [T. 970-971; Koutsoubos Ex. 34]. This research was amongst the documents █████ kept and maintained for many years and produced in response to subpoena in December 2012. [T. 971]

In May 2009, J.P. Turner's compliance department sent ██████ an active sup to make sure that he understood active trading and that he was willing and financially able to take greater risks in using such a strategy. [Koutsoubos Ex. 22] ██████ signed and dated the active sup on May 13, 2009 [T. 871] indicating that he read and understood the agreement and was aware of the liabilities which may be incurred through active trading. At the same time, J.P. Turner also sent to ██████ an active sup questionnaire. [Koutsoubos Ex. 22] Exactly consistent with the March 2007 Account Update form that ██████ signed and acknowledged was accurate, the active sub questionnaire reflected, among other things, that ██████'s annual income was \$150,000, his estimated net worth was \$3,000,000, his liquid net worth (all assets readily convertible to cash) was \$1,000,000 and that his investment objectives were trading profits, speculation and capital appreciation. [Koutsoubos Ex. 22] ██████ not only signed the active sup questionnaire dated May 8, 2009, he placed his initials in two other places on the form: (1) to verify his name, address, age, employment and financial information (such as estimated annual income, net worth, liquid net worth, investment objectives) prior investment experience, prior margin experience, and the size a frequency of trades and (2) to verify the specific composition of his liquid net worth.¹¹ [T. 871] After ██████ signed and initialed the document, he faxed his signed active sup questionnaire with his signed active sup to J.P. Turner's Brooklyn office where these two documents were reviewed by Williams. [T. 3625-26] At hearing, ██████ again acknowledged that all of the financial information on active sup questionnaire including his

¹¹ According to Williams, the J.P. Turner branch bracketed and sought ██████'s initials in two separate places on the active sup questionnaire to highlight to ██████ the information filled out by the J.P. Turner branch pursuant to telephone conversation with ██████ and have ██████ verify the accuracy of the information. [T. 3758] Williams had hoped that this procedure would provide protection against a customer later claiming that he had "just signed the document" that was pre-filled out and had not read it. [T. 3758]

annual income, estimated net worth and liquid net worth information was accurate.¹² Moreover, ██████ testified clearly that he was on board with the idea of trading actively in his account if it might help try to regain the losses he incurred during the 2008 market debacle. [T. 1028]

The monthly level of trading activity during the cataclysmic year 2008 varied greatly as market conditions varied widely and belies the allegation that Koutsoubos disregarded ██████'s interests in order to excessively trade the account to generate outsized commissions. As reflected in ██████'s account statements, during January 2008 to April 2008, during which the portfolio value of the account declined precipitously from \$177,559 to \$80,179.45, there was a relatively moderate trading activity. [Koutsoubos Ex. 24] As Koutsoubos explained and ██████'s account statements clearly reflect, much of these losses stemmed from sharp declines in the value of only a few large securities positions. [T. 4507-08; Koutsoubos Ex. 24] Pursuant to Koutsoubos' recommendation that ██████ diversify his portfolio to better manage the downside risk of an increasingly volatile market, the level of trading activity increased in May 2008, which coincided with a large gain in portfolio value from \$80,179 to \$123,854. [Koutsoubos Ex. 24] The level of trading again was again quite moderate in June and July 2008; however following the collapse of Lehman Brothers in September 2008, the equity markets went into freefall. [T. 4509-10] Much of the remainder of 2008 was a desperate, and ultimately unsuccessful, attempt to "catch a falling knife" by implementing various short-term hedge positions, stop losses and other strategies to manage precipitous losses in portfolio value. [T. 4510-13]

██████ acknowledged that the account statements he received and maintained set out each purchase and sale transaction effected in his account that month, every deposit and withdrawal of

¹² The active sub questionnaire signed by ██████ also reflected a frequency of trades as of May 2009 of approximately 6 per month. The Division's expert, John Pinto, testified that the level of trading frequency set forth on the active sub questionnaire was not inconsistent with the level of trading that occurred in the 7 months preceding and 2 months succeeding ██████'s signing of the form in May 2009. [T. 3590]

funds and securities in his account that month and a calculation of the total portfolio value of the account and how that value changed from the prior month. [T. 986-987; Koutsoubos Ex. 26]

██████████ conceded that from the account statements he received, he could have totaled the number of securities transactions effected in his account during the period January 2008 to December 2008. [T. 989] ██████████ further acknowledged that he received confirmations by mail within 3 days of trade execution. [T. 971, 974; Koutsoubos Ex. 26] Indeed, as meticulous an investor as ██████████ was, he organized every confirmation in three-ring binders. [T. 971] The confirmations set out all of the pertinent information regarding the transaction, including the name of the security, the symbol, whether it was a purchase or sale, the quantity and the price per share, as well as the principal amount of the trade, the commission and the postage and service fee. [Koutsoubos Ex. 26] ██████████ conceded that from the confirmations he received he could have easily added the commissions disclosed to see exactly how much commissions he paid during any given period. [T. 984] ██████████ acknowledged that the year-end tax information statements he received for his J.P. Turner accounts contained detailed information showing, among other things, his proceeds from transactions effected, the dividends and other distributions received and the margin interest paid on each margin transaction effected during that year. [T. 986; Koutsoubos Ex. 27] Notwithstanding this wealth of information, ██████████ never raised the slightest complaint about Koutsoubos or about the handling of his account and certainly never told anyone at J.P. Turner that any transaction effected in his account was not authorized by him.¹³ [T. 974-975]

¹³ ██████████ admitted that one of the reasons why he agreed to testify in the SEC hearing - despite having made no complaint about Koutsoubos at any time that he was the broker on the account (until August 2009) or the three and a half years thereafter - was because he had now come to understand that he could receive some money if there were a finding of wrongdoing against Koutsoubos. [T. 1000]

██████████ who were a married couple ██████████ when they opened their J. P. Turner joint account in 2006 [T. 2133, Koutsoubos Ex. 4], were affluent business entrepreneurs who owned and operated a number of business ventures, including three franchises of an international beauty supply company, and owned and managed commercial real estate properties.¹⁴

After working for over 20 years as a legal secretary in a large law firm [T. 2396], ██████████ became an entrepreneur in 1982 [T. 2341] and by the time she and ██████████ opened their J. P. Turner account, she owned three ██████████ beauty supply franchise stores. [T. 2171] The New Orleans franchise occupied an 11,000 square foot commercial building that the ██████████ owned and to which their 26 car parking lot was adjacent. Prior to joining with his wife in her thriving beauty supply business, ██████████ enjoyed a long and successful 28 year career as an insurance agent. [T. 2134-35] Since 1988, ██████████ have also owned and managed an even larger commercial real estate property in Metairie, Louisiana which, besides being the location of ██████████ independent insurance agency as well as a bar and grill they owned and which their son operated [T. 2204], they leased to several rent paying business tenants. ██████████ also owned the house next door to theirs, which they purchased for their grown daughter. [T. 2194-95]

██████████ frequented a number of gambling casinos, including Grand Casino, Treasure Chest, Beau Rivage Casino, Harrah's Casino and Desert Place. [Koutsoubos Ex. 3] Indeed, ██████████

¹⁴ ██████████ traveled together to Washington DC to testify in this case. ██████████ admitted that they decided together as to the "general framework" of what they would testify about. [T. 2163]. In fact, on the lunch break on February 6, 2013, while ██████████ sworn testimony was still taking place and immediately after being admonished not to discuss his testimony with anyone, ██████████, the very next Division witness, for lunch. [T. 2193] Despite ██████████ admission that he and ██████████ sought to coordinate their testimonies, there were a few glaring inconsistencies. ██████████ testified that he rarely if ever opened the mail and that ██████████ handled all of the paperwork [T. 2206, 2242, 2254, 2255-56, 2259-60] ██████████ contradicted, stating that ██████████ probably opened the mail 35% of the time. [T. 2392] ██████████ also testified that he did not require his commercial tenants to sign leases but that he conducted his business with his renters by handshake alone [T. 2187]; ██████████ contradicted, stated that they made their tenants sign standard form lease agreements which set forth the terms and conditions of the rental. [T. 2403-2404]

██████ reported significant gambling income and losses on their joint federal tax returns in the years which preceded the opening of their J.P. Turner joint account in 2006. ██████ joint federal income tax return for 2003 reflected that ██████ deducted \$23,150 in gambling losses while declaring \$35,429 in gambling income for 2003 and ██████ joint federal income tax return for 2004 reflected that ██████ deducted \$27,215 in gambling losses while declaring \$39,250 in gambling income for 2003.¹⁵ [Koutsoubos Ex. 3]

Koutsoubos was neither a personal friend nor relative of ██████ and their relationship was at all times an arm's length business relationship. [T. 2233-2234] In fact, ██████ did not meet Koutsoubos in person until after he had left J.P. Turner and ceased acting as the broker for their J.P. Turner account. [T. 2418-19] When ██████ opened their joint account at J. P. Turner, they each signed a Customer Agreement dated October 6, 2006 [T. 2140, 2234; Koutsoubos Ex. 4] to which was attached their New Account Application. ██████ not only testified that she and her husband signed the document, but noted four separate instances in which she made handwritten notations in correcting the information before causing it to be faxed back to J.P. Turner [T. 2347-48; 2420-21]. Despite her obviously careful review and correction to the new account application, ██████ did not make any changes to the following information on the form: annual income of \$100,000, estimated net worth of \$1 million, investible assets of \$120,000, investment objective of (1) speculation and (2) trading profits¹⁶; risk tolerance of aggressive and good general investment knowledge. [Koutsoubos Ex. 4]

¹⁵ ██████ testified that their gambling winnings typically exceeded their gambling losses. Improbably, ██████ claimed that he was able to consistently net gambling winnings solely by playing slot machines [T. 2232] which he conceded were pure games of "pure gamble" and involved no skill at all. [T. 2222]

¹⁶ In the box entitled "Investment Objectives," the New Account Application [Division Ex. 34] provided:

Pursuant to various securities regulations, your Broker/Dealer is required to ask you to list your investment objectives for your account. The attached Customer Agreement contains descriptions and examples of typical investments for each investment objective presented below. Please rank your investment objectives for this

██████████ recalled discussing the opening of a margin account with Koutsoubos during which Koutsoubos explained trading on margin to them. [T. 2422-23] In this regard, J.P. Turner sent to the ██████████ a Supplemental Application for NFS Margin Privileges. [Koutsoubos Ex. 5] ██████████ signed the Supplemental Application dated January 12, 2007 [T. 2421-2422] and faxed their signed agreement that same day to J.P. Turner where it was reviewed by Doukas and then forwarded by Doukas to J.P. Turner's compliance department. [Koutsoubos Ex. 5] The Supplemental Application for NFS Margin Account Privileges that ██████████ each signed also provided that their annual income was \$100,000 and net worth was over \$1 million. [Koutsoubos Ex. 5]

██████████ were actively engaged in making decisions in their joint account and at all times maintained control over the account.¹⁷ For example, in 2007, just before the alleged "churn period," the ██████████ made withdrawals from their J.P. Turner by wire transfers to their Whitney Bank account on April 13, 2007 of \$112,500 and on May 7, 2007 of \$36,000, leaving

account in order of importance (higher = 1) Please review these descriptions prior to completing this section to ensure that the investment objective selection you make is appropriate, understanding that the more aggressive objectives incorporate the less aggressive objectives. If at any time you would like to revise your investment objective, please contact your Investment Professional.

An investment objective of trading profits indicates that you seek to take advantage of short-term trading opportunities, which may involve establishing and liquidating positions quickly. Some examples of typical investments might include short-term purchases and sales of volatile or low priced common stocks, put or call options, spreads, straddles and/or combinations on equities or indexes. This is a high risk strategy.

An Investment Objective of Speculation indicates you seek a significant increase in the principal value of your investments and are willing to accept a correspondingly greater degree of risk by investing in securities that have historically demonstrated a high degree of risk of loss of principal value to pursue this objective. Some examples of typical investments might include lower quality, long-term fixed income products, initial public offerings, volatile or low priced common stocks, the purchase or sale of put and call options, spreads, straddles and/or combinations on equities or indexes, and the use of short-term or day trading strategies.

¹⁷ Further evidencing ██████████'s close maintenance and control over their J.P. Turner account, in 2007 ██████████ went on a 12 day cruise to Rome. ██████████ were concerned that if they were at sea, they needed to make certain that someone could be available to make decisions with respect to their J.P. Turner account. [T. 2423] In this regard, ██████████ and their grown daughter ██████████ each executed (and had notarized) a Limited Trading Authorization form so that ██████████ could make investment decisions in their absence. [T. 2423-24; Koutsoubos Ex. 6]

less than \$1000 in their J.P. Turner joint account. [Koutsoubos Ex. 7 and 8] ██████ admitted that this withdrawal of essentially all of the funds from the J.P. Turner account was not recommended by Koutsoubos but that it was her husband's idea¹⁸ to withdraw these funds from their J.P. Turner account in order to purchase a commercial real estate property in Alabama. [T. 2413-2415] ██████ testified that the decision later in 2007 to refund their J.P. Turner account was also their decision – not Koutsoubos' idea. [T. 2266]

On some occasions, ██████ brought their own ideas to the table and made large and sometimes speculative unsolicited securities purchases.¹⁹ For example, on October 26, 2007, ██████ entered an unsolicited order to buy 500 shares of L'Oreal at \$132.50 per share for a net amount of \$66,359. [Koutsoubos Ex. 7] ██████ testified that one of the manufacturers that her beauty supply business was involved with was L'Oreal and that through some meetings with other franchisees, she developed an interest in investing in L'Oreal shares. [T. 2356] In connection with this unsolicited investment in L'Oreal, ██████ read before signing and then executed an Unsolicited Acknowledgement letter affirming that the purchase was initiated and entered into solely at her volition with full understanding of the risks involved.²⁰ [T. 2430;

¹⁸ Initially, ██████ denied defunding the account. [T. 2261]. After being shown the evidence of their withdrawal, even ██████ conceded that it could not have been Mr. Koutsoubos' idea to insist that he take all the money out of the account and that this action reflected his and his wife's control over the account. [T. 2264-2265]

¹⁹ As Koutsoubos recalled, "██████ declined a lot of my recommendations. He replaced a lot of my recommendations with a lot of his recommendations, actually." [T. 593] During 2008 alone, ██████ gave unsolicited orders to purchase and sell shares of Apple Corporation on 8 occasions. [T. 2470-71, 4622-24; Koutsoubos Ex.15]

²⁰ Specifically, ██████ testified she read:

I am aware of the highly speculative nature of the aforementioned transaction being made and confirm that I hereby agree to indemnify and hold J.P. Turner harmless from any cause of action, which may arise as a result of any and all losses that may occur due to the purchaser of the above reference security.

THIS TRANSACTION WAS NOT RECOMMENDED BY MY J.P. TURNER SECURITIES REPRESENTATIVE. [Boldface, underlining and capital letters included] [T. 2431; Koutsoubos Ex. 10]

Koutsoubos Ex. 10] For his part, █████ entered numerous unsolicited orders to buy and sell Apple Corporation stock in significant quantities. In fact, in 2007 alone, █████ entered unsolicited orders to invest over \$125,000 in Apple Corporation shares alone. [T. 2257-2258; Koutsoubos Ex. 14]

In September 2007, just before the alleged “churn period,” J.P. Turner’s compliance department sent █████ an active sup to make sure that they understood active trading and were willing and financially able to take greater risks in using such a strategy. [Koutsoubos Ex. 9] █████ each signed and dated the active sup on September 7, 2007 indicating that they had both read and understood the active sup and were both aware of the liabilities which may be incurred through active trading [T. 2150, 2272, 2433] and faxed the signed active sup to the firm [T. 2272, 2436] where it was reviewed and approved by Williams. [T. 3627, 3745-46] █████ acknowledged that she likely read this document prior to signing it [T. 2433] and conceded that she should have taken note of all of the risks of active trading disclosed in the document. [T. 2435-36] Directly above her and her husband’s signature, the document states “I have read and understood the active account suitability supplement agreement as required. I’m aware of the liabilities which may be incurred through active trading. [Koutsoubos Ex. 9] █████ testified that she may have read that provision before signing the document, may have asked Koutsoubos about the risk disclosure and that Koutsoubos may have explained it to her. [T. 2436]

At this same time, J.P. Turner also sent to █████ an active sup questionnaire which they signed and dated on September 20, 2007 and faxed to the firm [T. 2150, 2272, 2360] where it too was reviewed by Williams. [T. 3627-28, 3745-46] █████ testified that he handwrote that their estimated annual income was \$100,000 and net worth was 2,000,000 on the September 7, 2007 active sup questionnaire. [T. 2150-2151, 2274-2275] █████ testified that she

handwrote on the form nearly all of the other information, including: that they were self-employed, that they had prior investment experience, \$90,000 for size of trades, 28% tax status, frequency of trades of 6 trades per month, \$75,000 in liquid assets, \$150,000 in retirement account value, \$1,300,000 in investment real estate value, \$200,000 in the value of their stocks and \$500,000 in insurance. [T. 2360-2361]. Moreover, ██████████ acknowledged that it was she - not Koutsoubos or anyone else at J.P. Turner - who circled trading profits, speculation and short-term trading as their investment objectives. [T. 2362]

The only piece of information that ██████████ left off the active sup questionnaire that they signed and faxed to the Brooklyn branch on September 20, 2007 was their estimated liquid net worth. [T. 3746; Koutsoubos Ex. 9] Upon receipt of the signed active sup and questionnaire off the Brooklyn branch fax machine, Williams spoke with ██████████ about the signed active sup at which time ██████████ advised Williams that his estimated net worth was \$2 million. [T. 3746; Koutsoubos Ex.9] Consistent with his general practice, Williams filled in this missing information on the active sup questionnaire and notated that he had done so pursuant to his conversation with the client. [T. 3627, 3747-48; Koutsoubos Ex.9] In this call, ██████████ verified to Williams the accuracy of the stated financial information and investment objectives that he and his wife had provided as well as reaffirmed that they had read and understood the risks of active trading set forth in the active sup. [T. 3627, 3749]

In March 2009 – right in the middle of the alleged “churn period” - J.P. Turner’s compliance department sent ██████████ another active sup which they each signed and dated March 20, 2009. [T. 2439] ██████████ acknowledged that in signing this document, she was expressly affirming to J.P. Turner that she had read and understood the active sup and was aware of the liabilities which may be incurred through active trading. [T. 2440-41] At the same time,

J.P. Turner also sent to ██████ an active sup questionnaire which they also signed and dated March 20, 2009 and faxed to the firm. [T. 2369] ██████ testified that in addition to her (and her husband's) signature, she handwrote all of the following information on the form: her name, address, age, social security number, telephone numbers, that they had 20+ years of prior investment experience and 10+ years of prior experience with margin, \$25,000 for the size of trades, 37% tax status, frequency of trades of 4 trades per week²¹, \$50,000 in liquid assets, \$80,000 in retirement account value, \$550,000 in investment real estate value, \$50,000 in the value of their stocks and \$270,000 in insurance. [T. 2369-70] Moreover, ██████ acknowledged that it was she – not Koutsoubos or anyone else at J.P. Turner – who circled trading profits, speculation and short-term trading as their investment objectives. [T. 2370]

██████ signed questionnaire was also reviewed by Williams who noted that this time, the estimated annual income, net worth and liquid net worth information was left blank and again called ██████ to obtain the missing information. [T. 3750] ██████ advised Williams that his estimated annual income was \$100,000, his net worth was \$2 million and that his liquid net worth was over \$1 million. [T 3751-52; Koutsoubos Ex. 11] Consistent with his general practice, Williams filled in this missing information on the active sup questionnaire and notated that he had done so pursuant to his conversation with the client on March 23, 2009. [T. 3651-52; Koutsoubos Ex. 11] In this call, ██████ verified to Williams the accuracy of the stated financial information and investment objectives that he and his wife had provided as well as reaffirmed that they had read and understood the risks of active trading set forth in the active sup. [T. 3652-53] ██████ again verified the accuracy of the stated financial information and investment objectives of speculation and short-term trading. [T. 3752]

²¹ The Division's expert John Pinto, testified that the actual level of trading frequency that occurred in the alleged churn period was about 5 trades per week which, in his opinion, was not materially inconsistent with 4 trade per week trading frequency set forth in the active sup questionnaire. [T. 3590]

An analysis of the monthly levels of trading activity during alleged “churn period” of December 2008 to July 2009 belies the allegation that Koutsoubos disregarded [REDACTED]’ interests in order to excessively trade the account to generate outsized commissions.²² As reflected in [REDACTED]’ account statements, from December 2008 through February 2009, at a time when the 2008 free fall had crushed the market and the future prospects were extremely uncertain, Koutsoubos recommended caution and there were exceedingly few transactions executed in [REDACTED]’ account. [T. 4497-98; Koutsoubos Ex. 7] During this period, the portfolio value of the account declined substantially from \$87,176 to \$62,855. [Koutsoubos Ex. 7] During this period, it was [REDACTED] who wanted to trade more actively because he was optimistic that the stock market would turn around. [T. 4501] Thereafter, as the market appeared to stabilize and there was some growth in certain industry sectors, including in defense and in emerging markets, Koutsoubos recommended that [REDACTED] employ certain industry specific short-term exchange traded funds which would provide diversification within that sector while providing a hedge against a down market. [T. 4501-4503; Koutsoubos Ex. 7] As the level of trading increased beginning in March 2009 through July 2009, so did the [REDACTED]’ portfolio value, rising from \$62,855 to \$95,529. [Koutsoubos Ex. 7] In fact, the value of the [REDACTED]’ account during the alleged period increased from \$87,176 on December 1, 2008 to \$93,090 on July 31, 2009.²³

²² In any case, the maximum commission charged by J.P. Turner for each of the subject transactions was \$100 and the gross commission payout was between 50% and 60%. Since the [REDACTED]’ account was a joint account, the commission payout was split equally between Koutsoubos and Jason Konner [T. 534], and from Koutsoubos’ portion of the gross payout, he paid various charges and credits. At a maximum commission of \$50 (akin to a \$100 maximum commission on a joint rep account such as the [REDACTED] account), the “broker was getting crushed.” [T. 3058]

²³ The Division’s expert miscalculated that [REDACTED]’ account suffered a loss during the period because he incorrectly treated a dividend as a customer deposit even though it was a distribution from a securities [REDACTED] had already purchased. Dempsey was forced to concede that the dividend was not new funds coming into the account, but rather a gain to [REDACTED]. [T 3231-32] This fundamental mistake rendered Dempsey’s turnover calculation as to [REDACTED] inaccurate, since as Dempsey conceded, as account value goes down, turnover rates go up. [T 3202]

██████████ acknowledged that the account statements she and her husband received and maintained set out each purchase and sale transaction effected in the account that month, every deposit and withdrawal of funds and securities in his account that month and a calculation of the total portfolio value of the account and how that value changed from the prior month. [T. 2441-42; Koutsoubos Ex. 7] ██████████ conceded that from the account statements she and her husband received, they could have totaled the number of securities transactions effected in his account during the period December 2008 to July 2009. [T. 2444] ██████████ further conceded that from the confirmations they received, they could have easily added the commissions disclosed to see exactly how much commissions he paid during any given period. [T. 2446-47; Koutsoubos Ex. 14] ██████████ also acknowledged that the year-end tax information statements she and her husband received for their JP Turner accounts contained detailed information showing, among other things, proceeds from transactions effected, the dividends and other distributions received and the margin interest paid on each margin transaction effected during that year. [T. 2447; Koutsoubos Ex. 15]

Notwithstanding this wealth of information, neither ██████████ nor ██████████ raised the slightest concern about Koutsoubos or about the handling of their account at any time that he served as their broker at J.P. Turner.²⁴ To underscore the extent to which ██████████ were fully in accord with the trading activities in their J.P. Turner account and were interested in speculative high-risk investment, they sought to continue to invest in private placements of securities with Koutsoubos even after he left the brokerage industry for the private equity world in August 2009. [T. 4542-43] Indeed, after inviting Koutsoubos to one of their favorite casinos in New Orleans

²⁴ ██████████' pecuniary interest in the outcome of the trial may explain why they complied with the Court's subpoena requiring them to testify on behalf of the Division and entirely ignored the Court's subpoena requiring the production of certain relevant documents to Koutsoubos' attorneys. [T. 2166-67; Koutsoubos Ex.30]

to discuss their potential investment in a private placement of Bidthatproject.com shares, [REDACTED] [REDACTED] traveled at their own expense [T. 2323] to Bidthatproject.com's headquarters in south Florida to meet with the company's management, including the company's President, Chief Operating Officer, Controller and other officers. [T. 4543] Only after listening to a detailed recitation of the high degree of risk involved in the investment and having reviewing all of the risk disclosures²⁵ and other important features of the investment disclosed in the confidential private placement memorandum, [REDACTED] determined that they were, once again, comfortable with a high degree of risk in connection with their securities investment objectives and made a private placement investment of \$30,000 from funds in her self-directed IRA account.²⁶ [T. 4848-50; Koutsoubos Ex. 35 and 36]

ARGUMENT

The Division alleged that Koutsoubos violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and SEC Rule 10b-5, the antifraud provisions of the federal securities laws. To support its allegation, the Division was required to prove that Koutsoubos engaged in a device, scheme or artifice to defraud in the purchase or sale of securities. U.S. v. Naftalin, 441 U.S. 768 (1979). The mere fact of a large number of trades in a customer's account that

²⁵ In this regard, the confidential private placement memorandum for Bidthatproject.com disclosed, among many other risks of an investment, that the company had a very limited operating history, generated no revenues and was highly illiquid. Indeed, the PPM highlighted in all capital letters at the top of the third page that "THE INVESTMENT WHICH IS DESCRIBED IN THIS MEMORANDUM INVOLVES A HIGH DEGREE OF RISK AND THE PURCHASE OF THE SECURITIES SHOULD BE CONSIDERED ONLY BY PERSONS WHO, NUMBER ONE, CAN AFFORD TO SUSTAIN A LOSS OF THEIR ENTIRE INVESTMENT; NUMBER TWO, HAVE NO NEED FOR LIQUIDITY IN THIS INVESTMENT; AND THREE, HAVE ADEQUATE MEANS TO PROVIDE FOR THEIR CURRENT AND FUTURE NEEDS, INCLUDING CONTINGENCIES." [Koutsoubos Ex. 36]

²⁶ On direct examination, [REDACTED] testified falsely that they did not receive any risk disclosures in connection with their Bidthatproject.com investment. [T.2159-60, 2387] Immediately following their testimony on February 7, 2013, Koutsoubos contacted management of Bidthatproject.com and secured a copy of [REDACTED] signed subscription agreement for Bidthatproject.com [T. 4544; Koutsoubos Ex. 35] in which [REDACTED] acknowledged receipt of the confidential private placement memorandum for the company dated July 9, 2013, as well as a copy of the July 9, 2013 PPM itself. [Koutsoubos Ex. 36] The Division did not seek to recall either [REDACTED] in rebuttal to attempt to explain their false testimony before the Court.

ultimately results in “losses while [the broker] was receiving substantial commissions,” does not constitute the fraud of “churning.” Hotmar v. Lowell H. Listrom & Co., Inc., 808 F.2d 1384, 1386 (10th Cir. 1987) Rather, the fraud of “churning” arises only when a broker-dealer, who exercises control over his customer’s trading account, engages in excessive buying and selling of securities for the customer’s account without regard to the customer’s investment interests and for the purpose of generating commissions. Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361, 1368-69 (7th Cir. 1983); Thompson v. Smith Barney, Harris Upham & Co, 709 F.2d 1413, 1416 (11th Cir. 1983). Churning is not found if the account holder 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. Nelson v. Weatherly Sec., Inc., 2006 WL 708219, at *3 (S.D.N.Y., Mar. 21, 2006).

The Division bore the burden of proving each of three well-recognized elements to establish its fraud claim against Koutsoubos regarding the [REDACTED] and [REDACTED] accounts: that (1) the trading in these accounts was excessive in light of [REDACTED] and [REDACTED]’ stated trading objectives, (2) Koutsoubos – and not [REDACTED] or [REDACTED] - exercised control over the trading in their customer accounts and (3) that Koutsoubos acted with the intent to defraud. See Costello, infra. While the Division was required to meet all three of these elements and prove that Koutsoubos did not intend to benefit his clients consistent with their stated objectives, but exercised control over their accounts and excessively traded the accounts solely to line his pockets with outsized commissions, as describe below, it met none of the required elements. Accordingly, the charges against Koutsoubos should be dismissed.

A. The Division Failed to Prove that the Trading Activity in the [REDACTED] and [REDACTED] Accounts was Excessive and Contravened these Customers' Repeatedly Stated Trading Objectives of Trading Profits, Speculation and Short-term Trading

Whether the number of trades in an account is excessive must be judged by reference to the customer's investment objectives. Baselski v. Paine Webber, Jackson & Curtis, Inc., 514 F. Supp. 535, 541 (N.D. Ill, 1981)(“The essence of a churning claim is not a particular transaction, it is the aggregation of transactions, allegedly excessive in number judged in relation to the plaintiff's objectives and the market conditions at that time.”) The level of trading in an investor's account who has set forth investment objectives of speculation and trading is expected to be a more frequent investor than an investor with a more conservative objective, such as preserving capital or seeking fixed income. See Costello, infra.; see also Mitchell v. Ainbinder, 214 Fed. Appx. 565, 568 (6th Cir, 2007)(noting that investors who wish to invest aggressively will often require a much higher frequency of trading in order to satisfy their investment objectives). Accordingly, any analysis of determining whether an account was excessively traded “is, of course, delineation of the customer's investment goals, for those objectives significantly illuminate the context in which the trading took place and, indeed, form standards against which the allegations of excessiveness may be measured.” Costello, infra at 1369; see Hotmar, infra at 1386.

The documentary evidence in this case is unambiguous: both [REDACTED] and [REDACTED] repeatedly documented their express desires to aggressively trade their accounts by, among other things, deliberately selecting trading profits, speculation and short-term trading as their investment objectives on several occasions [Koutsoubos Ex. 4, 9, 11, 21, 22]. In February 2005, [REDACTED] indicated on his New Account Application that his investment objective was “growth,” [Koutsoubos Ex. 16] in March 2007, [REDACTED] indicated on his account update form that his

investment objectives were “trading profits, speculation and capital appreciation” and his risk tolerance was “aggressive” [Koutsoubos Ex. 21] and in May 2009, ██████ advised on his active sup questionnaire that his investment objectives remained “trading profits, speculation and capital appreciation” and his risk tolerance was still “aggressive.” [Koutsoubos Ex. 22] In October 2006, ██████ both indicated on their New Account Application that their investment objectives were “trading profits, speculation and capital appreciation” and risk tolerance was “aggressive” [Koutsoubos Ex. 4] and they repeated this description of their investment objectives and risk tolerance on not one but two active sup questionnaires: in September 2007 [Koutsoubos Ex. 9] and in March 2009 [Koutsoubos Ex. 11] – the latter in the very middle of the alleged “churn” period. Nor were these the only documents signed by ██████ and ██████ that reflected their aggressive, risk-taking investment intentions. Indeed, ██████ opened a margin account at J.P. Turner in February 2005 - before Koutsoubos had anything to do with ██████’s J.P. Turner account – having acknowledged that he understood margin trading, that he was willing and financially able to take greater risks using such strategy, that margin trading involves a higher risk than trading on a cash basis and is suitable only for risk tolerant investors.” [Koutsoubos Ex. 17] ██████ also maintained a margin account at J.P. Turner which they had opened in January 2007, nearly 2 years before the alleged “churn” period. [Koutsoubos Ex. 5] There is not a single document in evidence in this case indicates that either ██████ or ██████ were conservative investors, had a low risk tolerance, or had investment objectives of fixed income or preservation of capital. Even more to the point, ██████ and ██████ expressly advised J.P. Turner and Koutsoubos in writing that they understood active trading, were willing and financially able to take greater risks using such a strategy, understood that active trading involves a higher degree of risk and increased costs and is suitable only for

risk tolerant investors and that they had an aggressive risk tolerance and wanted to engage in active trading in their accounts. [Koutsoubos Ex. 9,11, 22]

Because the documentary evidence is so entirely one-sided, the Division's only remaining argument is that ██████ and ██████ were clandestine conservative investors uninterested and unable to bear the risks associated with active trading²⁷ and that their repeated written statements to the contrary should be ignored because they were either too busy to read or too ignorant to understand what they were writing. This argument is unavailing as a matter of law. It is well-settled that "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."

Coleman v. Prudential Bache Sec. Inc., 802 F.2d 1350, 1352 911th Cir. 1986) The Division made no showing that either ██████ or the ██████ were mentally incompetent or that Koutsoubos or J.P. Turner concealed from them the trading activity in their accounts. To the contrary, the evidence reflects that ██████ and ██████ were each vibrant, intelligent, wealthy, and successful entrepreneurs who had a variety of business interests. During the relevant period, ██████ owned and operated two thriving businesses employing 32 people and his success allowed him to build a substantial home on his golf course. During the relevant period, ██████ – having recently retired from his successful insurance career – not only joined his wife's substantial beauty supply business in which she owned and managed three stores in two states, but continued to own and manage commercial real estate properties. ██████ and ██████ each acknowledged that they received all of the account statements, customer confirmations and year-end tax summaries from J.P. Turner on a timely basis which disclosed all of the transactional activities in their accounts

²⁷ The Divisions' claims that ██████ were conservative investors unwilling to bear a high degree of risk of losses is further belied by their casino gambling activities during the period. Indeed, ██████ joint federal tax returns for 2003 and 2004 reflected large gambling losses and gains at multiple casinos. [Koutsoubos Ex. 3] gambling casinos

and all of the commissions charged. The law properly precludes brokerage customers from disavowing, in hindsight, their written representations in account agreements and investment-related documents by claiming they failed to read them before signing. Id.; see also Bull v. Chandler, 1992 WL 103686 (N.D. Cal, Mar. 12, 1992)(Court entered summary judgment against plaintiff asserting securities fraud who claimed he read neither the offering materials nor the documents he signed and relied exclusively on his broker's misrepresentations because such reliance was unjustified); see also First Union Discount Brokerage Services, inc. v. Milos, 997 F.2d 835 (11th Cir. 1993)(Court rejected investor's attempt to avoid summary judgment by claiming he had not read the margin and options agreements he signed because investors "may derive neither comfort nor legal protection from their willingness to sign contracts without reading them."); see also Benoay v. E.F. Hutton & Co, Inc., 699 F. Supp 1523, 1529 (S.D. Fla. 1988)(holding that a brokerage customer "who signs an instrument is presumed to know its contents . . . He cannot avoid his obligations thereunder by alleging that he did not read the contract, or that the terms were not explained to him, or that he did not understand the provisions.") Indeed, the Division's own expert, John Pinto, a long-time securities regulator and NASD official, observed that "broker-dealer are entitled to rely upon the written representations of the customers. . . ." ²⁸ [T 3531; Division Ex. 156]

Try as it might, the Division cannot simply assert that turnover ratios and break-even rates appropriate for conservative investors are presumptive of "churning" by ignoring the repeated written representations of [REDACTED] and [REDACTED] that they intended to use their accounts for speculative and aggressive trading in the hopes of generating high returns and that they

²⁸ Mr. Pinto's sole qualification to this opinion is that broker-dealers should look at situations where there is contradictory information, such as where the frequency of trading indicated in an account-related form is materially inconsistent with the actual level of trading activity. [T 3531] However, Mr. Pinto observed that the frequency of trading reflected by [REDACTED] and [REDACTED] in their respective account sup questionnaires was not materially inconsistent with the actual level of trading activities in their respective accounts. [T 3590, 3594-95]

understood the costs and risks of loss. Indeed, even their “churning” expert, Louis Dempsey conceded that if a customer signed a document stating he understood the risks associated with active trading, that is an indicator of the customer’s intentions as to the appropriateness of a high level of trading [T. 3172-73] and that this indicator is even more relevant where the customer acknowledged such understanding on multiple occasions. [T. 3174] The law is clear that such quantitative benchmarks do not demonstrate churning where, as here, the investment objectives of the customers and the structure of their accounts were intended to trade actively. Costello, infra at 1369; see also Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1070 (2d Cir. 1977)(a greater volume of activity will normally be expected in an account where speculation is the objective); see also Landry v. Hemphill, Noyes & Co., Inc. 473 F.2d 365 (1st Cir. 1973). Indeed, it is well established that “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, and that “if a customer wants to speculate, the portfolio turnover rate could be unlimited.” Id. Even Mr. Dempsey agreed that there is no established benchmark for somebody who has a higher risk tolerance or who has a very aggressive risk tolerance. [T. 3199] In any case, the Division’s quantitative analysis of turnover and break-even ratios have little if any probative value in this case because they entirely ignore the extreme and unusual market volatility which prevailing during much of the alleged “churn” period which, along with its miscalculation of account values discussed herein, dramatically skewed the Division’s turnover calculations. [Division Ex. 155]

B. The Division Failed to Prove that [REDACTED] or [REDACTED] Lacked the “Capacity to Exercise the Final Right to Say ‘Yes’ or ‘No’ Thereby Relinquishing *De Facto* Control of Their Trading Accounts to Koutsoubos

Express control of an account by a broker exists where a customer has a discretionary account established pursuant to written agreement in which the customer has given the broker discretion to trade the account without consulting the customer in advance regarding each transaction. In this paradigm, the broker for the discretionary account is a fiduciary vis-à-vis the customer. “Broker Dealer Regulation,” Securities Law Series, David A. Lipton, Editor, (Thompson West 2009). There is no OIP allegation, evidence in the record and presumably no argument in the Division’s brief that Koutsoubos had express control over either the [REDACTED] or [REDACTED]’ accounts.

The touchstone of implied or *de facto* control of an account by a broker 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.” Follansbee v. David, Skaggs & Co., 681 F.2d 673, 677 (9th Cir. 1982) In analyzing whether the broker controlled the plaintiff-customer’s account, the Ninth Circuit reasoned that merely because a “non-professional investor” usually follows the advice of his broker, it does not mean that the investor

is not in control of his account. No one is likely to form a continuing relationship with a broker unless he trusts the broker and has faith in his financial judgment. Usually the broker will have much greater access to financial information than the customer and will have the support of investigative and research facilities. Such a customer will be expected usually to accept the recommendations of the broker or to disassociate himself from that broker and find someone else in whom he has more confidence. Id.

Accordingly, the correct inquiry is not whether the broker initiates the trades, but rather whether the customer has the capacity to exercise the final right to say ‘yes’ or ‘no’, in which case the customer controls the account. Id.

There can be no doubt that both [REDACTED] and [REDACTED] had the capacity to exercise their right to say no. Each was a successfully business owner with substantial experience in various financial products and business settings, including managing real estate properties for rent or purchase. [REDACTED], an experienced investor who had other brokerage accounts including at a firm specializing in highly speculative penny stocks, closely monitored his J.P. Turner account, spoke with Koutsoubos often regarding the account and various investment ideas, rejected certain securities recommendations made by Koutsoubos and from time to time proffered his own investment ideas. [REDACTED] not only rejected recommendations in favor of their own and placed various very large unsolicited trades in the account totaling over \$200,000, they conclusively demonstrated their control over the account by defunding it in 2007 only to later decide to replenish the account later that same year. Neither [REDACTED] nor [REDACTED] were personal friends or relatives of Koutsoubos which would have caused them to repose particular trust and confidence in him. Rather these relationships were entirely at arm's-length and neither [REDACTED] nor [REDACTED] even met Koutsoubos in person until after he had left J.P. Turner in August 2009. The existence of similar facts have led numerous courts to conclude that the customer, not the broker, retained control over his account. See e.g. Hotmar, infra (no control by the broker where evidence showed customer owned several businesses and rental properties, spoke with the broker almost daily and occasionally rejected broker's recommendation); Cummings v. A.G. Edwards & Sons, Inc., 733 F. Supp. 1029 (M.D. La 1990)(no control by broker where customer declined to follow broker's recommendation, reviewed account statements, and was actively involved in decision-making); Norniella v. Kidder Peabody & Co., Inc., 752 F. Supp. 624, 629 (S.D.N.Y. 1990)(no broker control where investors monitored and raised questions about the accounts with broker); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951 (E.D. Mich 1978) aff'd

647 F.2d 165 (6th Cir. 1981) (no broker control where customer and broker spoke frequently about the status of the account or the prudence of a particular transaction); Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 635 F. Supp. 1391 (D. Md. 1986)(no control by broker where customer was experienced investor and had other brokerage accounts); M&B Contracting Corp v. Dale, 601 F. Supp. 1106 (E.D. Mich 1984), aff'd 795 F.2d 531 (6th Cir. 1986)(no control by broker where relationship with customer was arm's length and customer had some education or experience).

The Division's only argument that Koutsoubos had *de facto* control over [REDACTED] and [REDACTED] account is that Koutsoubos made most of the recommendations and that these clients typically followed his securities recommendations.²⁹ This fact is insufficient as a matter of law to establish *de facto* control. The fact that a client follows the advice of his broker does not in itself establish control. See Tiernan v. Blyth, Eastman, Dillon & Co., 719 F.2d 1,2 (1st Cir. 1983); see also In re IFG Network Sec., Inc., SEC Initial Decision No. 273, at 40-41 (Feb. 10, 2005) Indeed, the fact that the broker recommended all or nearly all of the securities purchased does not in and of itself prove that the broker controlled the account; most customers of full-service brokerage firms follow their broker's recommendations to a large extent. Leib v. Merrill, infra. Rather, as makes perfect sense, the "customer retains control of his account if he has sufficient financial acumen to determine his own best interests and he acquiesces in the broker's

²⁹ The Division's expert, Louis Dempsey, stated he did not conclude and had rendered no opinion as to whether Koutsoubos had *de facto* control over either the [REDACTED] or [REDACTED] account. [T 3162] Indeed, Dempsey testified that the phraseology in his report that the broker respondents exercised a degree of "control over the direction of trading" meant only that the brokers made most of the securities recommendations and did not imply or suggest broker control for purposes of a churning. [T. 3168] Dempsey allowed that to determine broker control in the churning context would require an analysis of all relevant factors that pertain to the relationship between the client and the broker, including interviewing the customers and reviewing the document they signed to determine what was in the customer's mind regarding the account. [T 3166-67] In response to an attempt by the Division on redirect examination to have Dempsey offer an opinion as to the sophistication of the customers who testified at hearing, the Court sustained objection and noted that it was not clear that Mr. Dempsey was qualified to provide his impressions of the sophistications of those eight customers. [T 3295-96]

management. Carras v. Burns, 516 F.2d 251, 258 (4th Cir. 1975). The Fourth Circuit's description fits the facts of the [REDACTED] and [REDACTED] accounts to a tee.

C. The Division Failed to Prove that Koutsoubos Intended to Defraud [REDACTED] or [REDACTED] by Recommending Unwarranted Trades Solely for his own Pecuniary Gain

In order to bring a successful fraud claim against Koutsoubos, the Division must establish his scienter, *i.e.* a mental state embracing the intent to deceive, manipulate or defraud. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). In the context of a "churning" fraud claim, this means that the Division must prove that Koutsoubos' actions were for the purpose of generating commissions by recommending unwarranted trades without regard to the interests of his customers. See Thompson, infra at 1416; Costello, infra at 1368-69; Craighead v. E.F. Hutton & Co., 899 F.2d 485, 489 (6th Cir. 1990). In this case, for nearly the entirety of the relevant period, there was a \$100 maximum commission restriction placed on transactions in the [REDACTED] and [REDACTED] accounts - precisely because they were active trading accounts - whereby the motive and opportunity for Koutsoubos to line his pockets with unwarranted commission dollars was extinguished. There was simply no pecuniary reason for Koutsoubos to defraud [REDACTED] or [REDACTED] or even to recklessly disregard their interests. Further, as Koutsoubos demonstrated and which both [REDACTED] and [REDACTED] conceded, Koutsoubos was in frequent contact with these customers and discussed various investment ideas and strategies. Koutsoubos explained the investment strategies and theories he followed, the copious financial and market research analyzed and the extent to which he worked in good faith to present investment recommendations that were well thought out and suitable for the customer. There was no evidence in the record to suggest that Koutsoubos made recommendations without an investment strategy, devoid of research or otherwise in anything but a good faith belief that it was consistent with the customer's

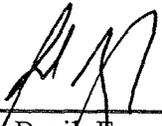
investment objectives. Moreover, the evidence is undisputed that [REDACTED] and [REDACTED] received every monthly account statement detailing their investment performance and every confirmation detailing the exact amount of commissions charged for each transaction, and [REDACTED] and [REDACTED] conceded that neither J.P. Turner nor Koutsoubos ever tried to conceal any such information from them. Given the complete lack of evidence of any actual deception and the fact that Koutsoubos had nothing financially to gain by intentionally or recklessly disregarding these customers' interests, the Division has failed to demonstrate that Koutsoubos "churned" the [REDACTED] and [REDACTED] accounts in violation of the antifraud provisions of the federal securities laws. See Hotmar, infra, in which the 10th Circuit Court of Appeals found that since there was no question the customer was sent the confirmations which described each transaction and the monthly statements which detailed the overall account performance and there was no evidence to suggest the broker withheld any information, it is difficult if not impossible to prove the existence of scienter on the part of the broker, even if the client suffers substantial losses and the broker received substantial commissions. Id.

CONCLUSION

For all the reasons stated above, the claim of “churning” by Mr. Koutsoubos in connection with the trading activities in these accounts is entirely groundless and an Initial Decision should be entered in his favor.

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Respectfully submitted,



Paul J. Bazil, Esq.
PICKARD AND DJINIS LLP
1990 M Street, N.W.; Suite 660
Washington, DC 20036
Pho: 202-223-4418
pjbazil@pickdjin.com
Attorney for Respondent Dimitrios Koutsoubos