

J.P. Turner in August 2009, over 5 months prior to the conclusion of his alleged wrongdoing. Mr. Koutsoubos had nothing whatsoever to do with either of these J.P. Turner accounts after August 2009 and thus cannot be liable for any trading activity that occurred in these accounts thereafter.

A claim of “churning” requires Enforcement to prove that (1) the trading in the account was excessive in light of the investor’s trading objectives, (2) the broker in question exercised control over the trading in the account and (3) that the broker acted with the intent to defraud or willful and reckless disregard for the investors’ interests. Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361, 1368 (7th Cir. 1983). 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 Nelson v. Weatherly Sec. Corp., 2006 WL 708219, at *3 (S.D.N.Y. March 21, 2006). Enforcement will be unable to meet any of the three required elements, much less all of them. The evidence will show that these investors were each intelligent and affluent business owners, the trading in their respective accounts was consistent with their expressed investment objectives and financial capabilities and they were plainly and repeatedly advised of the costs and risks of loss at all relevant times – which they repeatedly verified to J.P. Turner compliance personnel that they understood.

One of the two accounts that the OIP incorrectly alleges that Mr. Koutsoubos churned was a joint account held by Bruce and Pamela Mills, a married couple of 61 and 58 years of age, respectively. We will present evidence to show that the Mills’ were affluent business people who owned and operated a number of business ventures, including real estate and a wholesale beauty supply company. We will also show that the Mills’ frequented a number of gambling

casinos, reporting 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.

We will demonstrate that the Mills' were actively engaged in making decisions in their joint account. Indeed, the evidence will show that in 2007, just before the alleged "churn period," the Mills' wired essentially all of the funds from their J.P. Turner joint account to their bank account - an action obviously not recommended by Mr. Koutsoubos. We will also show that on some occasions, the Mills' brought their own ideas to the table and made speculative unsolicited securities purchases.

We will also show that in September 2007, just before the alleged "churn period," J.P. Turner's compliance department sent the Mills' an Active Account Suitability Supplement to make sure that they understood active trading and were willing and financially able to take greater risks in using such a strategy. The Active Account Suitability Supplement advised the Mills' 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.**

The Mills' each signed and dated the Active Account Suitability Supplement on September 7, 2007 indicating that they had both read and understood the Active Account Suitability Agreement and were both aware of the liabilities which may be incurred through active trading and returned the signed Supplement to the firm where it was reviewed and approved by J.P. Turner's compliance/supervisory staff. We will also show that at this same time – right before the alleged “churn period” - J.P. Turner's compliance department also sent to the Mills' an Active Account Suitability Questionnaire which they signed and dated on September 20, 2007 and returned to the firm where it too was reviewed by J.P. Turner's compliance/supervisory staff. In fact, the evidence will establish that John Williams, the J.P. Turner compliance officer in the Brooklyn branch office, spoke with Bruce Mills about his completed Active Account Suitability Supplement and that Mr. Mills verified the accuracy of the stated financial information and investment objectives. Mr. Koutsoubos received a copy of the Questionnaire in which the Mills' made clear that their investment objectives were trading profits, speculation and capital appreciation and that their risk tolerance was aggressive. We will further show that thereafter, in March 2009 – right in the middle of the alleged “churn period” - J.P. Turner's compliance department sent the Mills' another Active Account Suitability Supplement which they each signed and dated March 20, 2009, indicating that they had read and understood the Supplement, and returned it to Turner. The completed and signed questionnaire was reviewed by J.P. Turner's compliance/supervisory staff. In fact, the evidence will establish that John Williams, the J.P. Turner compliance officer in the Brooklyn branch, again spoke with the Mills' about their Active Account Suitability Supplement and that Mills again verified the accuracy of the stated financial information and investment objectives of speculation and short-term trading. The evidence will further show that Mr. Koutsoubos thereafter received a copy of

the completed and signed Questionnaire in which, consistent with their September 2007 Active Account Suitability Questionnaire, the Mills' reiterated that their investment objectives were trading profits, speculation and capital appreciation and that their risk tolerance was aggressive.

The other customer account that the OIP alleges Mr. Koutsoubos churned belonged to Teddy Bryant, who was a 47 year old building supply business owner with prior securities investment experience. When Mr. Bryant opened his cash and margin accounts in February 2005, Mr. Koutsoubos was not the registered representative on the accounts. When Mr. Koutsoubos became the registered representative on the account and reviewed J.P. Turner's records, he saw that Bryant's account application reflected, among other things, that his annual income was over \$100,000 and his net worth of \$3 million. J.P. Turner's records also included a two page suitability supplement to the Margin Account Agreement which advised Mr. Bryant of the risks of margin trading, including among other things, that "margin trading involves a higher degree of risk than trading on a cash basis and is suitable only for risk tolerant investors." The evidence will show that Mr. Bryant signed the margin suitability supplement to indicate that he read and understood the document. In March 2007, after Mr. Koutsoubos had been assigned as the registered representative of Mr. Bryant's account, J.P. Turner sent to Mr. Bryant an account update form which Mr. Bryant signed and returned to the firm, where it was reviewed and approved by J.P. Turner's compliance/supervisory staff. Mr. Koutsoubos was provided a copy of Mr. Bryant's completed account update form which reflected that Mr. Bryant's annual income was \$150,000, his estimated net worth was \$3 million, his investment objectives were trading profits, speculation and capital appreciation and that his risk tolerance was aggressive.

In May 2009, J.P. Turner's compliance department sent Mr. Bryant an Active Account Suitability Supplement 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. It bears reiterating that the Active Account Suitability Supplement expressly advised Mr. Bryant in large bold letters, among other important risks, that active trading can involve a higher degree of risk, increased costs and is suitable only for risk tolerant investors, that 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, that due to the higher degree of activity, overall commissions on his account may tend to be greater than a buy and hold strategy and that high-risk tolerance and investment objectives consistent with high-risk investing are appropriate to an active account and that a customer who is frequently trading the market should not have short-term needs for the funds invested in an equity account.

The evidence will establish that Mr. Bryant signed the Active Account Suitability Supplement on May 8, 2009 indicating that he “read and understood the Active Account Suitability Agreement . . . [and was] aware of the liabilities which may be incurred through active trading” and returned his signed Supplement to the firm where it was reviewed and approved by Turner’s compliance/supervisory staff. At the same time, J.P. Turner’s compliance department also sent Mr. Bryant an Active Account Suitability Questionnaire which Mr. Bryant signed and dated May 8, 2009 and returned to the firm where it was reviewed and approved by Turner’s compliance/supervisory staff. Mr. Koutsoubos received a copy of Mr. Bryant’s Active Account Suitability Questionnaire in which Mr. Bryant again reaffirmed that his investment objectives were trading profits, speculation and capital appreciation and that his risk tolerance was aggressive.

We will show that trading activity in both the Mills' and Teddy Bryant's accounts during the relevant periods was entirely consistent with the nature and objectives of these account as repeatedly verified by these clients. The evidence will show that the value of the Mills' account increased substantially from December 2008 through July 2009, the period Enforcement contends the Mills' account was excessively traded. While it is undeniable that the value of the Bryant account declined significantly in calendar year 2008, the period enforcement has selected as the Bryant excessive trading period, what it will be obvious is that this decline in the Bryant account in 2008 coincided with the cataclysmic stock market crash that year and cannot be blamed on improper conduct by Mr. Koutsoubos. In fact, as the enormous downward pressures on the stock market increased in 2008, Mr. Koutsoubos recommended short EFTs as a short-term hedge. Ultimately, these efforts by Mr. Koutsoubos to help Mr. Bryant weather the horrific market decline was insufficient to avoid substantial losses. Nonetheless, the evidence will show that Mr. Koutsoubos sought to recommend strategies to benefit the Mills' and Mr. Bryant – which Enforcement's myopic reliance on "turnover ratios" and other mathematical measures of trading frequency completely ignores.

The evidence will further show that these investors received and largely maintained written confirmations of every transaction effected in their respective accounts which disclosed the commissions charged, monthly statements which detailed their overall account performance and year-end tax reporting statements summaries with respect to their accounts . The evidence will also show that Mr. Koutsoubos was in close contact with each of these clients, speaking with them frequently about their respective investment strategies. The evidence will show that at least annually, the firm's compliance/supervisory personnel spoke directly with these investors (away from Mr. Koutsoubos), were advised that the trading activity was consistent with their

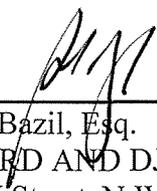
investment objectives and then notified Mr. Koutsoubos that the investors had so advised. Perhaps most telling, the evidence will show that at no time while Mr. Koutsoubos was the registered representative of these accounts did either customer ever complain to him or anyone else at J.P. Turner that any transaction in their account was inconsistent with their investment objectives.

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 the OIP should be dismissed as to him.

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Respectfully submitted,



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