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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **-against-** **ZACHARY S. BERKEY and DANIEL T. FISCHER,** **Defendants.**	**17 CV ____ (__)** **Jury Trial Demanded**

COMPLAINT

Plaintiff Securities and Exchange Commission, for its Complaint against defendants Zachary S. Berkey ("Berkey") and Daniel T. Fischer ("Fischer") (together, the "Defendants"), alleges as follows:

SUMMARY

1. Berkey, from 2013 to 2014, and Fischer, from 2012 to 2015, while acting as registered representatives at Four Points Capital Partners LLC ("Four Points"), a New York City broker-dealer that had a branch office in Melville, NY, violated the antifraud provisions of the federal securities laws. First, Berkey and Fischer had a duty to have a reasonable basis for

recommendations that they made to their customers. In violation of this duty, Fischer recommended to four customers, and Berkey recommended to six customers, a high cost, in-and-out trading strategy without any reasonable basis to believe that these recommendations were suitable for anyone. The recommended trading strategy resulted in losses for the customers and ill-gotten gains for Berkey and Fischer. Berkey and Fischer knew or recklessly disregarded that their recommendations, for which they had no reasonable basis, were not suitable for anyone.

2. Second, Berkey's and Fischer's recommended trading strategy was unsuitable for certain of their customers in light of those customers' financial needs, investment objectives and circumstances. Third, Berkey and Fischer made material misrepresentations and omissions to customers. Fourth, Berkey and Fischer churned customer accounts. Finally, Fischer engaged in unauthorized trading.

3. As a result of these violations, Berkey and Fischer received approximately $106,000 and $175,000, respectively, in commissions. The ten customers experienced losses totaling $573,867.

VIOLATIONS

4. By virtue of the conduct alleged herein, the Defendants, directly or indirectly, singly or in concert, violated and are otherwise liable for violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)], Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

5. Unless the Defendants are permanently restrained and enjoined, they will again engage in the acts, practices, transactions, and courses of business set forth in this complaint and in acts, practices, transactions, and courses of business of similar type and object.

JURISDICTION AND VENUE

6. The Commission brings this action pursuant to authority conferred by Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)] and Section 21(d)(1) of the Exchange Act [15 U.S.C. § 78u(d)(1)], seeking a final judgment: (1) restraining and permanently enjoining each of the Defendants from engaging in the acts, practices and courses of business alleged against them herein; (b) ordering each of the Defendants to disgorge all ill-gotten gains and to pay prejudgment interest on those amounts; and (c) imposing civil money penalties on each of the Defendants pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331, Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)], and Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa]. The Defendants, either directly or indirectly, have made use of the means or instrumentalities of interstate commerce, of the mails, of the facilities of national securities exchanges, and/or the means or instruments of transportation or communication in interstate commerce in connection with the acts, practices, and courses of business alleged herein.

8. Venue lies in the Southern District of New York pursuant to 28 U.S.C. §1391(b)(2), Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)], and Section 27 of the Exchange Act [15 U.S.C. § 78aa]. Certain of the acts, practices, transactions, and courses of business alleged in this complaint occurred within the Southern District of New York, including the execution of trades on exchanges based in the Southern District of New York, and were effected, directly or indirectly, by making use of means or instrumentalities of transportation or

communication in interstate commerce, or the mails, or the facilities of a national securities exchange.

DEFENDANTS

9. **Berkey**, age 42, a resident of Centereach, NY, was a registered representative at Four Points from April 2013 through January 2015. Berkey has worked at five different firms during his eighteen years in the securities industry, and held Series 7, 24, and 63 licenses. In September 2016, Berkey consented to an Order by the Commissioner of Securities and Insurance, Office of the Montana State Auditor ("Montana CSI"), in which his securities license was revoked in Montana, thereby settling excessive trading and excessive commissions allegations.

10. **Fischer**, age 43, a resident of Greenwich, CT, was a registered representative at Four Points from November 2012 through July 2017. Fischer has worked at ten different firms during his twenty years in the securities industry, and holds Series 7, 24, 55, and 63 licenses. In July 2016, Fischer consented to the issuance of a Letter of Acceptance, Waiver and Consent ("AWC"), in which FINRA found that Fischer "exercised discretion in five customer accounts without written authorization." In the AWC, Fischer consented to paying a $5,000 fine and to a 20-day suspension from associating with any FINRA member firm.

RELATED ENTITY

11. **Four Points**, a Texas limited liability company with its principal place of business in New York, NY, has been registered with the Commission as a broker-dealer since January 1998. In September 2016, Four Points and the Montana CSI entered into a Consent Agreement and Final Order in which the Montana CSI alleged, among other things, that Four Points failed to have adequate written supervisory policies and procedures in effect "to monitor

Berkey for alleged excessive trading." Four Points agreed to pay a $5,000 fine and restitution of $61,348.13, and to withdraw its Montana registration.

FACTS

Berkey and Fischer Made
Recommendations With No Reasonable Basis

12. Berkey and Fischer were required to have a reasonable basis to believe that their recommendations were suitable for at least some customers. This meant that they needed to do due diligence and have an understanding of the recommendations' risks and rewards, and potential consequences. Given that Berkey and Fischer recommended an in-and-out trading strategy, they had a duty to determine whether their recommendations, which imposed high costs on the customer, were suitable and in their customers' interests.

13. Berkey and Fischer were aware of this duty. For example, in December 2013, in connection with Four Points' Annual Compliance Meeting, Four Points provided to Berkey and Fischer a FINRA Regulatory Notice, which stated that registered representatives must "have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for [a] customer . . . ." The materials note that registered representatives must "perform reasonable diligence to understand the nature of the recommended security or investment strategy involving a security, as well as its potential risks and rewards, and [] determine whether the recommendation is suitable for at least some investors based on that understanding."

14. As Berkey and Fischer knew or were reckless in not knowing, the investment strategy that they recommended was almost certain to lose money and, despite their duty, they had no reasonable basis for the recommendations they made. In particular, Berkey and Fischer

had no basis to believe that the in-and-out trading strategy they recommended, combined with the per-trade costs imposed on customers, would be suitable for anyone.

15. Berkey and Fischer unilaterally determined, on a trade-by-trade basis, the amount to charge the customer in commissions. Customers were also charged a per-trade "Fixed Transaction Commission" fee of $75. Berkey and Fischer received the majority of the commissions as compensation.

16. All of the accounts managed by Berkey and Fischer were non-discretionary; as a result, they were required to seek and obtain customer authorization prior to each transaction.

17. Berkey and Fischer recommended all aspects of the trading, including the selection of issuers and the timing of purchases and sales, and the customers followed their recommendations. Since the customers incurred costs with every transaction, making a profit depended upon the price of the security increasing during the brief period the security was held in the customer accounts. The increase in price had to exceed the combined costs for even a minimal profit to be realized. The impact of the costs that arose from the excessive trading, however, all but doomed any possibility of even a minimal profit.

18. Berkey and Fischer knew, or were reckless in not knowing, that the in-and-out trading strategy was not in the best interests of their customers because the transaction costs exceeded any potential gains. In addition, Berkey and Fischer failed to disclose to customers that the costs of their trading strategy would almost certainly make even a minimal profit unlikely.

19. Attachment A lists the customer losses and other data regarding Berkey's seven accounts (for six customers) and Fischer's four accounts. On average, Berkey held each position for 30.6 days, and Fischer held each position 14.3 days.

20. Berkey's six customers paid a total of $288,792 in commissions and other costs, and Fischer's four customers paid a total of $386,844 in commissions and other costs. For seven of the eleven accounts, the total costs the customers paid exceeded the average equity in their accounts.

21. The annualized turnover and cost-to-equity ratios for the eleven customer accounts were high. Turnover and cost-to-equity ratios are used to evaluate activity in brokerage accounts. Turnover is the number of times per year a customer's securities are replaced by new securities. The cost-to-equity ratio, also referred to as the break-even ratio, measures the amount an account has to appreciate annually just to cover commissions and other expenses. A turnover of 6, or a cost-to-equity ratio in excess of 20%, is considered to be indicative of excessive trading.

22. The average annualized cost-to-equity ratio was 58.19% for the Berkey accounts and 70.26% for the Fischer accounts. In other words, due to the costs imposed on the customers, the accounts handled by Berkey and Fischer had to increase in value an average of, respectively, 58.19% and 70.26%, on a yearly basis, before the customer would see a single dollar of profit.

23. Frequently, stocks were sold at a loss; nevertheless, Berkey and Fischer often charged commissions on losing trades as well as profitable trades. Since Berkey and Fischer set the commission, Berkey and Fischer had every incentive to keep buying and selling.

24. Attachment B illustrates the impact of the costs paid by the customers on the overall performance of these eleven accounts. Customer losses were significantly increased by the costs, and accounts that experienced a profit before costs generally ended up as unprofitable after costs.

Berkey and Fischer Made Customer-Specific
Recommendations That Were Unsuitable

25. Berkey and Fischer were required to make customer-specific suitability determinations. In other words, they had a duty to determine that their recommendations were suitable for their customers in light of their customers' financial needs, investment objectives, risk tolerance, and circumstances.

26. Berkey, as to Customers 1, 3, and 5, and Fischer, as to Customers 8 and 10, recommended a trading strategy that was not suitable for these customers, and was incompatible with each of these customers' financial needs, investment objectives, risk tolerance and circumstances. Each of these customers had conservative to moderate investment objectives and risk tolerances.

27. Berkey and Fischer had only limited discussions with these customers regarding the customer's financial condition and needs. The account opening documents sent to the customers, moreover, were uniformly pre-populated to show "Speculation" and/or "Aggressive" as the investment profile.

28. Berkey and Fischer knew or were reckless in not knowing that their recommendation of a high cost, in-and-out trading strategy was unsuitable for Customers 1, 3, 5, 8, and 10.

Berkey and Fischer Made Material Misrepresentations and
Omissions to Their Customers

29. Berkey and Fischer concealed material information from their customers and made material misrepresentations.

30. The recommendations made by Berkey and Fischer to their customers to engage in a high cost, in-and-out trading strategy were misrepresentations. In making the

recommendations, Berkey and Fischer implicitly represented to each customer that they had a reasonable basis for that recommendation. Without a reasonable basis, the recommendation was a misrepresentation, and their failure to disclose their lack of a reasonable basis was a material omission.

31. In their initial phone calls with customers, Berkey and Fischer generally touted their ability to make money for customers. Berkey and Fischer did not tell customers that the transaction costs associated with their recommended strategy—in the form of commissions, Fixed Transaction Commissions, and margin interest—would almost certainly exceed any potential gains in the accounts.

32. When Berkey and Fischer spoke to customers, they discussed particular issuers or market conditions, and told customers that their recommended trades would be profitable for the customers. They misleadingly concealed from their customers, however, the most important factor that doomed any realistic possibility of making a profit: the negative impact of the frequency of the buys and sells, combined with the high per-trade costs, including the high commissions that Berkey and Fischer unilaterally imposed.

Berkey and Fischer Churned Customer Accounts

33. Berkey churned the accounts of Customers 1, 3, and 5, and Fischer churned the accounts of Customers 8 and 10, by engaging in excessive trading in disregard of their customers' trading objectives and risk tolerance for the purpose of generating commissions.

34. The trading in these accounts was excessive in light of the investment objectives and experiences, ages, and financial needs of Customers 1, 3, 5, 8, and 10.

35. Berkey exercised *de facto* control over the accounts of Customers 1, 3, and 5, and Fischer exercised *de facto* control over the accounts of Customers 8 and 10. Customers 1, 3, 5,

8, and 10 were unsophisticated and had insufficient financial acumen to be able to independently evaluate the broker's recommendations. Berkey and Fischer made all the investment decisions, including the timing of purchases and sales, and the selection of securities.

36. The churned customers of Berkey (1, 3, and 5) and Fischer (8 and 10) relied on Berkey and Fischer for investment recommendations, and Berkey and Fischer were responsible for the volume and frequency of the trading. Due to their lack of investment knowledge and expertise, the customers did not generally question or independently evaluate the broker's recommendations.

37. These customers, despite what was reflected on their pre-filled account documents, had low or moderate risk tolerance, and the trading in the accounts was excessive in light of these customers' investment objectives.

38. The turnover and cost-to-equity ratio numbers are extremely high and are indicative of excessive trading as seen in this chart:

Customer	Representative	Cost-to-Equity Ratio	Annualized Turnover
1	Berkey	94.10%	28.83
3	Berkey	30.25%	13.74
5	Berkey	77.19%	26.05
8	Fischer	80.26%	51.82
10	Fischer	53.92%	46.70

Fischer Engaged in Unauthorized Trading

39. Fischer never met his customers face to face and communications were almost entirely by telephone. Accordingly, a phone call between the customer and Fischer needed to occur before any trade, and phone records provide an indicator of whether a trade was authorized or not.

40. Phone and trading record analysis reveals that Fischer conducted unauthorized trades in the accounts of Customers 7, 8, 9, and 10.

FIRST CLAIM FOR RELIEF
Violations of Section 17(a) of the Securities Act
(Both Defendants)

41. The Commission realleges and incorporates by reference herein each and every allegation contained in paragraphs 1 through 40, as if fully set forth herein.

42. The Defendants, directly or indirectly, singly or in concert, in the offer or sale of securities and by the use of the means or instruments of transportation or communication in interstate commerce or by use of the mails, have: (a) employed devices, schemes, or artifices to defraud; (b) obtained money or property by means of untrue statements of a material fact or omissions of a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading; and/or (c) engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon purchasers of securities and upon other persons.

43. By reason of the foregoing, the Defendants, directly or indirectly, singly or in concert, have violated, and unless enjoined, will again violate Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

SECOND CLAIM FOR RELIEF
Violation of Section 10(b) of the Exchange Act and Rule 10b-5
(Both Defendants)

44. The Commission realleges and incorporates by reference herein each and every allegation contained in paragraphs 1 through 40, as if fully set forth herein.

45. The Defendants, directly or indirectly, singly or in concert, in connection with the purchase or sale of securities and by the use of the means or instrumentalities of interstate

commerce or of the mails, or of the facilities of a national securities exchange, have: (a) employed devices, schemes, or artifices to defraud; (b) made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading; and/or (c) engaged in acts, transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons.

46. By reason of the foregoing, the Defendants, directly or indirectly, singly or in concert, have violated, and unless enjoined, will again violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court enter a Final Judgment:

I.

Permanently enjoining each of the Defendants from committing, aiding and abetting or otherwise engaging in conduct that would make them liable for the violations of the federal securities laws alleged in this complaint.

II.

Ordering each of the Defendants to disgorge any ill-gotten gains and to pay prejudgment interest on those amounts.

III.

Ordering each of the Defendants to pay civil monetary penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

IV.

Granting such other and further relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury in this action of all issues so triable.

Dated: New York, NY
December 6, 2017

Respectfully submitted,

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Attachment A to Complaint filed December 6, 2017
SEC v. Zachary S. Berkey and Daniel T. Fischer

Customer	Total (Loss) or Gain	Annualized Cost-to-Equity Ratio	Annualized Turnover	Average Equity	Total Purchases	Total Costs to Customer	Weighted Days Held	Account Period	
1	($43,496)	94.10%	28.83	$23,639	$1,193,134	$38,944	24.4	04/01/13	12/31/14
2	($43,697)	42.79%	26.29	$57,758	$1,514,084	$24,649	27.1	07/01/13	06/30/14
3	($146,074)	30.25%	13.74	$116,516	$2,268,313	$49,930	32.1	07/01/13	11/30/14
4	($45,776)	70.88%	22.35	$34,890	$1,364,914	$43,295	31.4	04/01/13	12/31/14
5	($118,468)	77.19%	26.05	$75,562	$3,445,471	$102,116	30.4	04/01/13	12/31/14
6A	$2,969	89.82%	21.03	$9,757	$359,170	$15,342	34.3	04/01/13	12/31/14
6B	($27,037)	26.92%	6.79	$32,316	$365,845	$14,515	51.2	05/01/13	12/31/14
Total	($421,579)			$283,490	$10,510,931	$288,792			
Average		58.19%	21.18				30.6		
7	($53,648)	74.26%	29.87	$49,123	$3,175,387	$78,953	27.4	04/01/13	05/31/15
8	($20,857)	80.26%	51.82	$18,641	$1,767,921	$27,381	12.5	12/01/12	09/30/14
9	($80,860)	78.43%	51.38	$114,173	$10,269,601	$156,762	11.9	04/01/13	12/31/14
10	$3,077	53.92%	46.70	$137,556	$10,717,411	$123,747	13.1	05/01/13	12/31/14
Total	($152,288)			$220,596	$25,930,320	$386,844			
Average		70.26%	47.10				14.3		

Attachment B to Complaint filed December 6, 2017
SEC v. Zachary S. Berkey and Daniel T. Fischer
Gain (Loss) in 11 Accounts Before and After Fees