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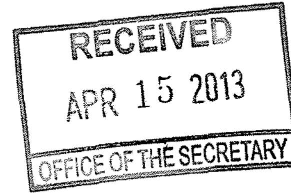
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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



POST-HEARING BRIEF SUBMITTED
ON BEHALF OF RESPONDENT JASON KONNER

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The hearing in this case was held in Washington , D.C. before the Honorable Cameron Elliot over 17 days between Jan. 28 –Feb. 20, 2013. Respondent Jason Konner ("Konner"), by his attorneys, Hutner Klarish LLP, hereby submits his Post-Hearing Brief.[1]

PRELIMINARY STATEMENT

The evidence adduced at trial overwhelmingly established that Jason Konner did not churn the account of either Gordon Miller or James Carlson. The evidence established exactly what respondent Konner had anticipated in his pre-hearing brief, and demolished the Division's case against him: Konner did not have control over his clients or their accounts; Konner lacked the requisite mental intent or scienter to be found liable for churning; and, while the trading levels during the so called "churn" period were high, in the context of the client's goals and the investment objectives for the accounts, they did not rise to the level of improper excessive trading. As demonstrated below, the testimony from all of the witnesses including Messrs. Miller and Carlson, together with the documentary evidence preclude a finding that Konner engaged in churning.

The Division did not satisfy its burden of proof with respect to any of the elements of its churning charge against Konner. The active trading in the Carlson and Miller accounts was exactly what the clients wanted for the small part of their net worth placed with J.P. Turner. Both clients were interested in speculation and aggressive short-term trading, both were well able to bear the risk of loss of their account principal, and both understood the market risk associated with their accounts. Indeed, in its aggressive pursuit of J.P. Turner and several of its current and former employees, the Division regrettably failed to apply the most basic of analytical tenets: common sense. They all but ignored what should have been obvious from the multiple

[1] All references herein to the hearing testimony will be identified as "Tr. __." All exhibits referenced herein were admitted into evidence during the course of the hearing, and copies were filed under separate cover with the Court and the Secretary's Office. They are referred to herein as "Ex. Konner-1," etc.

documents signed and acknowledged by Miller and Carlson that were produced during the Division's extended investigation. Those documents spoke volumes, yet the Division worked hard to undermine their integrity. But in the end, both clients acknowledged the obvious: when they signed their names on business documents they meant something by it, and all that they signed – and all of their testimony fully and fairly understood -- was consistent with only one conclusion. They wanted a broker to make them some money, they were willing to accept the risk and pay the freight for an aggressive trading account, they repeatedly acknowledged as much, and the Division's unvarnished effort to contort the facts, actions, words and deeds of Konner, Miller and Carlson into something the opposite of what they were, in true Orwellian fashion, does not withstand scrutiny.

The testimony and documentary evidence of this case is it relates to Jason Konner focuses on the three people primarily involved in the challenged activity, and the activity that brought them together:

Jason Konner and the nature of his brokerage business: The starting point in the analysis should not be, as the Division would have it, the analysis of raw data of account activity, but instead, the following: what kind of brokerage business did Konner do, what kind of clients was he looking for, and did Carlson and Miller fall within the category of clients that Konner was looking to do business with? The answers to these questions undermine the entire theory of the Division's case.

Konner focused his business on individuals who could afford to engage in speculative investing with a portion of their assets, who could afford to invest aggressively with the hope of making significant profits. Konner did not seek to do business with investors who did not fit this profile, that is, persons for whom their investment assets were an important part of their nest egg,

or who needed, *needed,* to generate income from their investments, or people for whom capital preservation was a must.

From their words and actions, it is evident that Gordon Miller and James Carlson were precisely the kind of investors who could afford to and had the inclination to invest with Jason Konner: they had the financial wherewithal, the ability to take on the risk, and the appetite for outsized gains. And once this is recognized, not only is the theory of the Division's case eviscerated, it necessitates the evaluation of the evidence relating to the charge of churning in a fundamentally different light.

Gordon Miller: There are multiple strands of evidence that undermine the charge that Miller's account was churned:

(1) Prior to speaking with Division lawyers during the run-up to the hearing, Miller on several occasions in writing indicated that his investment objectives were Speculation and Short-term Trading.

(2) Miller's actions in 2009 and 2010 were consistent with those two investment objectives, and he had the financial wherewithal, in terms of net worth and income, to invest in this fashion, his age notwithstanding.

(3) Numerous investments made outside of J.P. Turner and having nothing to do with Jason Konner, which occurred before, during and after the so-called "churn" period, reflect Miller's willingness to invest speculatively, something he well understood, and did knowingly.

(4) Miller was aware throughout that there was a significant amount of activity, evidenced not only by his admissions about that, but also by the fact that he sent money from his regular personal checking account each time money was needed to pay for the purchase of stock. He received and reviewed his confirmations and his statements, regularly spoke with Konner, and never complained about anything, other than his ultimate account performance. Tr. 0458-59.

This evidence, and a great deal more, is discussed in detail below.

James Carlson: Several strands of evidence also undermine the charge that Carlson's account was churned:

(1) Over a period of many years, before he had been led by Division lawyers to believe that he might recover money if the Commission wins this case, Mr. Carlson signed many documents reflecting investment objectives of Speculation and Short-term Trading. And despite his best efforts to dissociate from the representations he repeatedly made to J.P. Turner about his investment objectives, he ultimately acknowledged and stood behind his written representations, admitting that he appeared to any observer like someone who wanted to invest in an aggressive manner.

(2) Carlson acknowledged that when his business was good, it generated cash that he wanted to invest "to make money." His oft-stated objective was clear: make me some money. Don't care how, just do it. That is why he invested in speculative investments, and why he rejected conservative investment recommendations.

(3) Carlson's nest egg – his retirement funds – was held safely in a number of 401k accounts; he never sent any of those assets to J.P. Turner and held them sacrosanct. However, when he had excess cash to invest, he did not put it with any of the conservative brokers that he knew, and from whom he expected little more than a plodding return. Instead, he invested with J.P. Turner, hoping that they could make him substantial profits. His actions comport 100% with the representations that he made about his investment objectives.

This evidence, and a great deal more, is discussed in detail below.

SUMMARY OF THE EVIDENCE

THE TOTALITY OF THE EVIDENCE SOUNDLY REPUDIATED THE CHARGE OF CHURNING AGAINST JASON KONNER.

I. KONNER'S BUSINESS FOCUSED ON AN AGGRESSIVE TRADING APPROACH, AND HE ONLY SOUGHT TO DEVELOP RELATIONSHIPS WITH INVESTORS SUCH AS GORDON MILLER AND JAMES CARLSON WHO WANTED THAT KIND OF INVESTING.

Jason Konner has been a working broker for almost twenty years. He supports his wife, his two young daughters, and numerous members of an extended family. Tr. 4408, 4412. During the hearing, he made two points quite clearly. First, there is a particular type of business that he likes to do: aggressive, fast-paced short-term trading. Second, recognizing that this type of investment activity is not suitable for all investors, he will do business only with certain investors.

Specifically, Konner has focused on developing brokerage relationships with high net worth individuals interested in deploying a small portion of their liquid assets in short-term, speculative trading. In other words, his business is geared toward clients who have the financial wherewithal and the personal desire and inclination to use a portion of their money to invest aggressively. He knows that his approach is not geared to those for whom the money placed with him would constitute an appreciable part of their life savings, their nest egg, or assets that might be required for current or future needs or contingencies for themselves or their families. See Tr. 4419, 4438-39, 4355-57, 4425-26. Konner repeatedly indicated that his standard practice was to tell clients about the risks associated with the type of investing he specialized in and to make sure they understood what he told them. He emphatically acknowledged that he did not want as a client the proverbial "little old lady" who depended upon her investments and the income drawn therefrom to pay for basic living expenses. Tr. 4414. As Konner said, he was looking for:

> "investors that want to invest a small portion of their liquid monies in order to speculate the market, not using the nest egg, as you guys would put it. I was looking for people that wanted to trade the market the way I like trading the market, trying to find the next big thing."

Tr. 4352. He acknowledged that not all investors were right for him, and that before he started with a client, he needed to make a match between what they wanted and what he offered. Tr. 4354. And finally, he noted that he was not looking to manage anyone's complete portfolio, just that portion for which they were comfortable taking on additional risk and making speculative investments. Tr. 4356-57. He testified that he was looking for people with the mind set to speculate, and he always assessed a prospective client's suitability for aggressive trading. Tr. 325, 372-73.

Because he understands the limits of what he wants to do and with whom he is going to do it, Konner has successfully navigated for twenty years through the shoals of high risk stock

market investing in volatile and dangerous markets: no client has ever accused him in an arbitration, civil lawsuit or even customer complaint of misconduct in the handling of their account. Tr. 4355.[2] Certainly, neither Mr. Carlson nor Mr. Miller ever complained about Mr. Konner, about the trading in their accounts, about the commissions they paid, or about any other matter.

As described below, Gordon Miller and James Carlson were ready, willing and able to invest with Jason Konner, to allocate a portion of their assets to aggressive stock trading.

II. THE EVIDENCE CONVINCINGLY ESTABLISHED THAT THE MILLER ACCOUNT WAS NOT CHURNED.

The Division's case that Gordon Miller's account was churned was premised on the following: (1) Gordon Miller was 85 when he opened his account at J.P. Turner; (2) Gordon Miller is a retired farmer from Iowa; (3) the contention that Mr. Miller did not understand the investment objectives set forth on J.P. Turner account documents that he signed and returned to J.P. Turner; and (4) the net worth figures set forth on those account forms were overstated. However, as the evidence so clearly established, the first two of these points are irrelevant to the churning analysis *in this case*, and the second two are either wrong or miss the import of Mr. Miller's actual multi-million dollar wealth.

1. Mr. Miller's net worth and annual income establish his suitability to invest aggressively, and his age and former occupation do not establish otherwise.

In what amounts to a transparent urban bias, the Division repeatedly made reference to

[2] The Division tried to dispute this at the hearing by noting that Konner was mentioned in two customer complaints. However, as he explained each time he was asked, his conduct was never in question, and he was identified in those matters not based on anything he had said or done, but because he was listed a co-broker on another broker's account, and that "joint rep" relationship was nothing more than a vehicle for commission-sharing and covering in the absence from the office of the other broker. See Tr. 0310-12, 4454-56, 4462-63. The Division did not dispute Konner's characterization of those two matters, and made no effort to establish that his conduct was in any way involved. In fact, we submit that reference to those matters was made solely in an effort to impugn his reputation.

the fact that Mr. Miller was a farmer from Iowa, the implication being that he could not possibly understand what city slickers like Jason Konner and J.P. Turner were doing with his money. That chauvinism is belied by the facts.

There is of course no dispute that Gordon Miller is a senior citizen who worked on a farm most of his life. However, even the Division did not (explicitly at least) argue that seniors who work on farms are prohibited from making aggressive investments, and a review of the facts reveals that this senior does not conform at all to the pre-conceived notion of a retired farmer from Iowa.

Start with his physical capabilities: *without assistance*, Miller drove 90 miles from his home in rural western Iowa, to Sioux City, South Dakota, where he boarded a flight that took him to Chicago, where he made a connecting flight to Washington, D.C., and then to the Commission's offices. Tr. 1984-85. Gordon Miller is not a helpless, defenseless old man, by any stretch of the imagination.

Nor does the insinuation that he is an elderly retiree dependent on income from his investments for his basic living expenses pan out. In fact, Mr. Miller acknowledged having multiple income streams: he received between $75,000 to $200,000 per year from the Iowa farm that he owned. Tr. 1980-83. He received monthly checks from an interest in an ethanol plant that he had invested in, monies that were sufficient to cover his living expenses. Tr. 2097. His wife owned the home that they lived in, so his living expenses were relatively low, and his child is a grown woman, a lawyer. Mr. Miller also receives monthly social security benefits. Tr. 1983.

He inherited approximately 426 acres of prime Iowa farm land, and added 160 acres to his holdings decades ago. Tr. 1968-72, 1976-77. He testified that the land which he owns free and clear is worth between $4,300-5,000 per acre, or between $2,519,800 and 2,930,000, though

he told Jason Konner in 2009 that the farm across the road sold for $8,300 per acre. Tr. at 1976, see Ex. Konner-6. And there's more. As Mr. Miller testified, he has significant assets above and beyond his multi-million dollar land holdings.

Proof that Gordon Miller had cash available to invest with Jason Konner is that, as he readily acknowledged, each time he received a Temporary Confirmation from J.P. Turner indicating how much was needed to pay for the stock he just bought,[3] he pulled out his checkbook and wrote a check. And he did that at least eleven separate times, drawing checks from his personal checking account for considerable amounts, typically more than $20-30,000 and some for as much as $50-56,000. See Tr. 2046-47, Ex. Konner-10. By making these payments from his checking account, it becomes clear that Mr. Miller not only had readily available resources to pay for this stock, but also, as he admitted, he was very aware of the activity in his account. Tr. 2050-52.[4]

Gordon Miller is not the person the Division tried to present him as. His financial needs are adequately covered, multiple times over, by the income he received from at least these three separate sources. Contrary to the insinuation that old people cannot invest aggressively because they need income from investments to live on, this senior's age is irrelevant to the churning analysis, and other pertinent factors plainly point to the appropriateness of the activity in question.[5]

[3] Konner explained that the Temporary Confirmations were used to expedite the process of remitting payment in a T+3 world. That a formal confirmation showing full commission information was also always sent to the client from the clearing house was undisputed. Tr. 0460-01.

[4] Konner took comfort from the fact that the new money coming into the account came from a checking account, indicating to him that it was not money needed for other important purposes such as retirement. Tr. 4439.

[5] The emphasis that the Division placed on the age issue was evident from the get-go: the second question Miller was asked by Division counsel was "What's your date of birth?" Tr. 1923.

Having spoken many times with Mr. Miller, Konner knew a great deal about him, and knew that he was the type of client who he could work with, one for whom an actively traded account was an opportunity, not a personal risk. He knew Miller had substantial wealth in real estate (Tr. 4402-03), he understood that he received a nice income and did not, like many senior citizens, need income from his portfolio. Still, he made sure the client understood the risks of active trading (Tr. 4359, 4423-24). His unimpeachable contemporaneous notes (Ex. Konner-6) corroborate all that. See Tr. 4401-02.

2. Mr. Miller's investment experience belies the notion that he did not intend to establish a relationship designed to trade aggressively in the hopes of making significant profits.

Gordon Miller has an investment history that the Division would prefer either to ignore or to distinguish away. But the fact is that Mr. Miller has been around the investment block a few times, and he was not ashamed to admit it.

First, he admitted that he had invested years earlier in a speculative commodities account, now worth approximately 500% of his original investment, even after withdrawing 150% of his initial investment. Tr. 2001-04. And does he know what it means to make a speculative investment? He does indeed:

> "I don't think there is anything much more speculative than speculating on the grain market in the Chicago Mercantile Exchange and it has turned out to my advantage."

He specifically admitted that he had been making speculative investments – "futures, hedging, options, whatever" for more than 12 years. Tr. 2003.

While that speculative account was centered around a commodity he knew from farming, he demonstrated a willingness to invest speculatively in other commodities and in securities:

- In 2010, he invested $40,000 in 3,500 ounces of silver, an investment that had nothing to do with J.P. Turner or with Jason Konner, and which he admitted was an aggressive, speculative investment. Tr. 2082-85, 2128.

- In a different J.P. Turner account based out of Tinton Falls, New Jersey, an account which to this day remains open, he invested in Denison Mines, a uranium prospecting company. Tr. 2077-78. Mr. Miller explained the reason he made this speculative investment, believing that the world-wide demand for uranium would go up as the supply from Russia's deactivated nuclear weapons ran down. Tr. 2079.[6]

- He invested $40,000 in a private company named BTP Construction, acknowledging that he understood that such an investment was speculative, and was nothing like putting money in the bank, or buying a CD or anything safe like that. It also had nothing to do with Jason Konner, Tr. 2070-75, 2128; see Ex. Konner-24.

- Mr. Miller knowingly made another speculative investment for $100,000 in a company named Big and Little Management. Tr. 2086-87.

Mr. Miller knew what he was doing with these investments: "The goal [with speculating] is to make money." Tr. 2004. And of course Mr. Miller acknowledged having at least one other stock brokerage account, at a firm named Green River, which was a more conservative account holding perhaps $70,000 in stocks. Tr. 2081-82.

Nor was Gordon Miller a senior citizen sitting all alone in the Iowa countryside, as the Division insinuates. Not only was his grown daughter an attorney, Mr. Miller testified that for his income taxes every year he engaged first an attorney that he had known for many years, and later an accounting firm. Information about his investments was provided to his tax advisors, and none of them ever suggested to him that the investment activity in the J.P. Turner account was inappropriate in any way. Tr. 1977-78, 2063-65, 2069. If those close personal advisors never questioned the activity, it is safe to presume that they understood that Miller had the money, the wherewithal and so forth to place a small percentage of his wealth in a speculative trading account, his age notwithstanding.

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[6] Other stocks that he bought but could not remember were also purchased in that J.P. Turner account. Tr. 2080. Indeed, as he admitted, he had no problem with J.P. Turner and had never lodged any kind of complaint against it, even acknowledging that he would not continue to do business with a company he thought was engaged in inappropriate or improper activity. Tr. 2081. The obvious implication is that he does not believe he was taken advantage of by anyone associated with J.P. Turner.

For all of the investments that he made – at J.P. Turner and elsewhere – Gordon Miller knew what he was doing and why. He was a *farmer*? Irrelevant.

3. <u>Mr. Miller's expressed willingness to take aggressive investment risk, evidenced by what he said and did in 2009 when he had an account at J.P. Turner, was palpable.</u>

The fact that Gordon Miller had repeated contact with Division lawyers over a multi-year period, and was prepared by them to the point that he hung up the telephone with any other lawyer who tried to speak with him (see Tr. 1990-92), speaks volumes about the mish-mash of testimony from Mr. Miller regarding his investment objectives. The testimony elicited by the Division on direct examination, in which Mr. Miller stated that he might have written different investment objectives had the form not been filled in for him, and something about a form that he refused to sign (not confirmed with any actual document), pales in significance to what Mr. Miller actually did in 2009 – before those government lawyers visited him in South Dakota.

As he freely admitted on cross-examination, back in 2009 he signed or received multiple account forms, which reflect that his investment objectives were "Speculation" and "Trading Profits." See Ex. Konner-1 - Konner-4. The first new account form, Ex. Konner-1, was initially completed by someone at J.P. Turner. But not only did Mr. Miller sign the form, he initialed the spot where he was asked to confirm that Speculation and Trading Profits were his primary investment objectives. He couldn't make changes to that? He knew he could, as he did elsewhere when he corrected driver license information. He also admitted there was no need to change those investment objectives. Tr. at 2009. Respectfully, the testimony that he did not understand those objectives flies in the face of common sense, logic and the witness's own admissions, specifically his testimony about the very reason he was willing to open this account:

> "At the time [I opened the account], I thought the market had hit bottom and if you chose the right stocks, the only direction that it could go is up. ...There were so many investors that had bailed out of the market and things had kind of leveled off and

> that's what – I had watched the land prices in years past and that's what happened there so I thought that's what was going to happen in the stock market."

Tr. 2010-11. He was following the markets on the news and "just thought the market was going to go up …."

Similarly, the two letters that J.P. Turner sent him (Ex. Konner-2, Konner-3) confirmed that those were his investment objectives, and Mr. Miller acknowledged that he got them, read them, and left them unchanged. Tr. 2013-16.

Given his belief that stock market prices had leveled off and were ready to turn upwards, he was receptive to the call from Jason Konner, and explains why he indicated on the form that he signed that he was willing to invest aggressively and speculatively. Tr. 2011-12. He had had prior experience with short-term trading, Tr. 2017-18, and that is what he wanted in 2009 with stocks. And, at the same time, Mr. Miller acknowledged that he had also lost money speculating, Tr. 2018, so plainly he was aware of that risk.

Especially telling is Mr. Miller's response to the Active Account Suitability Supplement and Questionnaire, Ex. Konner-4. He admitted getting and reading the document in December 2009, and acknowledged that with full awareness of account activity, he had no objection and was not dissatisfied with how the account was being handled during and after the so-called "churn" period. He knew he had done a significant amount of trading, and was not looking to change anything. Further, he frankly admitted that when he got this form, a disclosure form that clearly and in plain English explains to the client the risks of short-term trading ("Active trading in the securities markets can involve a higher degree of risk….Due to the higher degree of activity, overall commissions on your account may tend to be greater than a buy and hold strategy."), he admitted that he expressly acknowledged with his initials that Speculation and Trading Profits were two of three investment objectives, and that his Risk Tolerance was

"Aggressive." Tr. 2018-24. Indeed, as his testimony wound down, Mr. Miller acknowledged that while he didn't want to "go out on a limb," he nonetheless understood that many of his investments were in the speculative category, which provided an opportunity to make money and to lose money. Tr. 2130. He frankly admitted he was willing to take risks by speculating, and that he initialed the box to acknowledge his aggressive risk tolerance. Tr. 2004-05.

Konner confirmed that his client was clear about wanting the account set up to trade aggressively, and that the limited portion of his wealth deployed at J.P. Turner was money available to him to invest speculatively. Tr. 0437, 0447, 4359. Konner recognized that Miller's ability to write checks was consistent with what he said about his financial condition. Tr. 4362. And Konner testified repeatedly that he explained what an aggressive tolerance to risk meant, and confirmed that it was something this client could bear. Tr. 0438.

4. Mr. Miller's wealth was substantial, and only a small fraction of it was invested at J.P. Turner.

Gordon Miller is a multi-millionaire. Given his age and his life style, he has many times over what his current and future needs might ever possibly be. So when a man like this with a net worth upward of $3-4 million dollars wants to invest a small percentage of that money with J.P. Turner in speculative stocks, it is unjustified to argue that he needs to be protected from himself. However, the Division ignores this reality in bringing this charge against Mr. Konner.

In attempting to diminish the actual importance to both the client and the broker of Mr. Miller's high net worth in 2009, the Division in examining Mr. Miller tried hard to make a big deal about the exact definition of "Estimated Net Worth (exclusive of home and farm)" on the J.P. Turner new account form, noting that much of Mr. Miller's wealth was farm land in Iowa. That point, however, is a red herring.

First, Mr. Miller lived in his wife's home. They married in their 60's and moved to her home. So the net worth figure on the form plainly did not include a home. Second, by 2009 when Mr. Miller had been retired for many years, his land had become for him a fantastic real estate investment: it was worth a great deal, its value continued to grow as numerous worldwide trends combined to increase the value of America's farming heartland, and it generated significant income each and every year. The Division never inquired about why the "exclusive of home and farm" terminology was on the form or why it was important, but that exclusion plainly has no relevance here, where the farm was not the asset needed by the client to sustain his way of life. This asset was throwing off significant free cash flow, and was not relied upon to support a farmer, his spouse, children or anyone else. And yet, the Division honed in on that to undermine what Mr. Miller and Mr. Konner well understood: the client was wealthy and wanted to use a small portion of that wealth to invest in what the client believed was a stock market poised for significant gains.

5. Mr. Miller was aware of and understood the trading in his J.P. Turner account.

Mr. Miller acknowledged receipt of the transaction confirmations mailed to him in 2009 and 2010, and he admitted he read them and was aware that he had to pay a commission for every trade. Tr. 2025, 2028, 2033, 2044-46; see Ex. Konner-8 and Konner-9. Mr. Miller's admissions about these documents is enough to take down the Division's case that he was an unwitting dupe of a churning scheme; further testifying that the amount of the commission made no difference to him and that he never told Konner to stop trading or even to slow trading. He was willing to continue, having only one goal: to make some money. Tr. 1848, 2046.

Miller also acknowledged receiving his monthly account statements (Ex. Konner-11 - Konner-23), as well as the annual tax form (Ex. Konner-7) which summarized all of his trading

activity for 2009 (thus embracing the entire "churn" period). With full awareness of the monthly activity, with full awareness of the totality of the year's activity in 2009, Mr. Miller could perhaps not more clearly express his willingness to invest as he had been doing than by continuing to fund new stock purchases for the account with significant investment dollars as he did well into 2010. Tr. 2060-62, 2066. When asked clearly and directly whether he was aware "that there was a pattern of short-term trades in your account at J.P. Turner," Mr. Miller honestly admitted he was. Tr. 2069.

6. Mr. Miller had the ability to say no to certain investment recommendations and to make independent investment decisions or develop investment ideas.

The record contains evidence not only of numerous instances where Mr. Miller made speculative investment decisions that did not involve Jason Konner or J.P. Turner, and thus were not in any way, shape or form under Mr. Konner's control, but also that he had rejected recommendations from Konner to make investments that were not speculative in nature. Consistent with Mr. Konner's contemporaneous notes that the client had no interest in dividend stocks (because he is "already a millionaire;" see Ex. Konner-6 and Tr. 4401), Mr. Miller admitted that he turned down certain investment recommendations made by Konner. For example, when Konner presented American Realty Capital Trust, a high-yielding (7%) publicly traded REIT (real estate investment trust), Miller rejected the recommendation. Tr. 2087-89. Konner also testified that he had recommended mutual funds and other types of investments to "anchor" the account, but each time he proposed something like that, he was "shot down." Tr. 0444. Mr. Miller wouldn't deny that Konner had recommended such other investments including mutual funds – he just couldn't remember (Tr. 2092-93).

And when Mr. Miller was asked if he initiated discussion about certain penny stock investments, Mr. Miller again wouldn't deny that he had done so (Tr. 2091-92), but Mr. Konner

was clear that he did, and that he (Konner) tried to convince his client not to invest in penny stocks.

That Gordon Miller had the independence of mind to choose his investment course, and was not subject to the control of another, is powerfully evidenced by a comment he made to Mr. Konner in 2009, a comment recorded long before Konner had reason to think anyone, let alone the Securities and Exchange Commission, would be making inquiries about this client. Those notes reflect Miller's negative response to the recommendation of a conservative investment: "[I] told him I wanted [him] to buy dividend stocks. He told me he is already a millionaire [and] I don't need to buy dividend stocks [because] I want to speculate." See Ex. Konner-6, Tr. 0443. Perhaps as well as any other, that piece of evidence tells us exactly where Mr. Miller's mindset was in 2009 when Mr. Konner was working to make him some money with aggressive trading. Miller was rich, he was secure, he thought the market was poised to go up, so he didn't need or want a 3,4, or 5% dividend. He knowingly and deliberately wanted to take a shot at some big profits.

III. THE EVIDENCE CONVINCINGLY ESTABLISHED THAT THE CARLSON ACCOUNT WAS NOT CHURNED.

When he first opened his J.P. Turner account in July 2007, James Carlson was 55 years old, married and his three children were adults. He graduated from a top college in Iowa and had been a farmer for 30 years. He managed the business, making all of the necessary decisions, including the timing for when to sell his farm's products to the market. He dealt with government agencies and with banks, and personally prepared his and his business's tax returns. Tr. 1654, 1760-64.

Jim Carlson had also been investing in the stock market and had dealings with stock brokers since the 1980's. He had numerous investment accounts, including a number of

retirement accounts with hundreds of thousands of dollars in assets that he considers inviolate, to be handled conservatively as they are needed for his retirement. He had invested in stocks and in mutual funds and had accounts that were conservatively handled. Tr. 1658-61, 1671, 1697, 1747-51, 1753-55.

Jim Carlson never sent any of his retirement account money to J.P. Turner. Tr. 1757. And while he had numerous accounts into which he could have deposited and invested the money generated from some good years in his farming business, he consciously made the decision to send some of that money to J.P. Turner. The reason he did so, as he stated repeatedly throughout the hearing, was because "he wanted to make money." Tr. 1754. No one ever held a gun to his head, no one ever pressured him to do anything, no one suggested that he transfer his retirement funds to J.P. Turner or that he take any risk at all with those assets. Tr. 1748. Instead, knowing full well that he could deposit his farming profits into one of his conservatively managed accounts, Tr. 1752-53, he nonetheless chose to send them to J.P. Turner, because he believed that the aggressive investing and short-term trading program offered by Jason Konner was for him the best way "to make some money." Tr. 1754. His other brokers were too conservative, and he wanted someone else who offered what he was not getting from them. Tr. 1754-56.

In its effort to prove that the Carlson account was churned, the Division focused principally on the following: (1) that he was a farmer from Iowa; (2) that he did not understand the investment objectives set forth on the papers that he signed and returned to J.P. Turner; and (3) that the net worth stated on various account forms was overstated, so he lacked the financial wherewithal to invest as he did with Konner. However, as the full record demonstrates, the first of these factors is irrelevant, the second has been debunked, and the third fails to consider the

picture that Mr. Carlson painted of himself and which Jason Konner and J.P. Turner did rely upon, and had every right to rely upon.

1. Mr. Carlson was a farmer, but that hardly proves he did not have aggressive investment objectives for some of his non-retirement funds.

The fact that James Carlson is a farmer is irrelevant, except to the extent that he was a very successful farmer whose business generated a substantial amount of free cash flow. What is important is that he rejected – for some of his money -- a conservative approach to investing. His goal, his investment objective, was simple and he stated it in simple terms: "I told him I wanted to make money." Tr. 1672; see Tr. 1673, 1674, 1685. But of course that was not one of the options on the account documents, and he knew that. Again and again, he signed his name to account documents, be they new account forms, or Active Account Supplements and Questionnaires, in which he acknowledged that his investment objectives were Speculation and Trading Profits. Never did "Preservation of Capital" or "Income" come ahead of Speculation and Trading Profits, and nowhere in the record is there evidence that either of those two conservative investment objectives were ones that James Carlson sought to further in his J.P. Turner account. He wanted his capital to grow, he wanted to make money. See Ex. Konner-31, Konner-32, Konner-34, Konner-35, Konner-36, and Konner-37. The contemporaneous record establishes that every time during a multi-year period that Mr. Carlson needed to restate what his investment objectives were, he affirmed in writing that they were Speculation and Trading Profits, and he understood that by signing and/or initialing those documents he was affirming the accuracy of the information on the documents, Tr. 1774, 1781, 1805-06, 1809-13, 1819-30.

The counter-argument, that Carlson did not know what he was doing when he signed these various forms over a multi-year period, is baseless, and the conflicted witness's testimony that would support the argument is not credible. He first testified he never read the forms, but

then admitted he was a liar when he signed a false representation which said he had read them. Tr. 1793-1800. Which is it? His testimony that these were the only documents he never read, coming after being told by the Division's lawyers that a win for them might translate into a financial win for him (Tr. 1768-70)[7], is just not credible. Indeed, he admitted that no one forced him to do anything, and that it would not have been hard to revise the form or insert correct information. Tr. 1802. At the end, Mr. Carlson simply lacked the constitution to deny the obvious:

> Q: Mr. Carlson, does your signature mean anything to you?
>
> A: Yes.
>
> Q: Is it something people can rely upon? Or is it just worth the paper it's written on?
>
> A: I wouldn't know how to answer that question.
>
> Q: Well, when you sign your name on a document, do you intend to mislead or misrepresent or misstate anything?
>
> A: I would assume not.
>
> Q: And when you're dealing with people in business and they get a document with your signature, do you want them to believe that what you signed is truthful – whatever it is your signing represents a truthful and accurate statement?
>
> A: Yes.
>
> Q: And wouldn't you, in fact, be disappointed if people didn't think you were a man whose signature meant something?
>
> A: Yes.
>
> Q: And that's because, when Jim Carlson signs something, he means it, and you expect people to take that at face value?
>
> A: Yes.

[7] Carlson met with SEC counsel Shawn Murnahan in Cedar Rapids, Iowa a month before the hearing began for three hours, in a sort of "dress rehearsal" of his testimony. Tr. 1764-66. SEC counsel spoke with Carlson on a number of other occasions, about his testimony, but he steadfastly refused to speak with Konner's counsel. Tr. 1767-71.

Tr. 1829-30. He knew that these forms all mattered; he simply could not and would not at the end of the day deny that they did.[8]

James Carlson acknowledged in writing – and ultimately at the hearing despite his efforts to walk away from the obvious -- that his account objectives were the most aggressive on the spectrum. He also well understood that those objectives entailed risk, and that it was obvious that they did. Tr. 1778-79. He also admitted that he was familiar with the concept of speculating, and that he was telling J.P. Turner that he was willing to speculate. Tr. 1787-88.

2. Mr. Carlson's affirmed, reaffirmed and re-reaffirmed declarations of his personal financial information are consistent with his willingness to invest aggressively.

At the hearing, the Division went to great lengths to try to show that the financial information that appeared on Mr. Carlson's account forms – information that he repeatedly reaffirmed in writing -- was wrong. However, the Division's position ignores the obvious, as driven home by Mr. Konner's testimony.

When Carlson first opened his account, he reported that his annual income was $100,000, his net worth was $700,000, and his investment assets were $200,000. See Ex. Konner-31. When he decided to embark in 2008 and 2009 upon a more active trading strategy and to use margin, he was more forthcoming, noting on a number of documents (Account Update Form, Margin Account Application, Active Account Suitability Questionnaire) an annual income of about $200,000, an estimated net worth of approximately $2-2.5 million, and investment assets of $750,000. See Ex. Konner-32, 33, 34

Mr. Konner again and again was asked if he knew that the information on client documents was true or not, and each time he answered "I only knew what they told me" and that

[8] Nor can the Division argue with this. After all, their own expert with a long history of working for the NASD and FINRA, John Pinto, admitted that broker-dealers may routinely rely on written representations from their clients. Tr. 3573-74.

he trusted his clients to be truthful with him. See Tr. 0432-35, 4331-32, 4358 (ability to get information is based on what clients tell him). And on those forms, Mr. Carlson repeatedly acknowledged numbers that indicated he had a significant level of wealth, and that he was acknowledging the accuracy of that information. Tr. 1781. True, the numbers varied over the course of several years, in part because they were changing, in part because there was some confusion as to which category some assets went into (liquid assets vs. stocks vs. other assets),[9] but the big picture was that James Carlson each time confirmed that he had a net worth in the seven figures and a six-figure income. And he acknowledged under oath an awareness that people would rely on the figures that he had represented. Tr. 1829-30.[10]

3. Mr. Carlson's conduct was consistent with his investment objectives and his stated financial condition.

All of James Carlson's conduct – that is, what occurred before he heard from SEC lawyers about a possible financial recovery (Tr. 1769-70) – is consistent with his oft-declared investment objectives and more importantly with the actions of a client willing to invest aggressively in order to generate significant investment profits:

a) He repeatedly furnished "new" money to pay for additional stock purchases, all drawn from his personal checking account, many for tens of thousands of dollars. See Ex. Konner-78. When asked about these further investments, Carlson repeatedly said

[9] The evolving information on Carlson's forms was also reflective of a truism known to brokers: clients don't always want to reveal the full extent of their net worth at the beginning of a relationship, when they are just starting to get to know their broker. Tr. 0403, 0464-65. More details, especially about the client's wealth, are often made available as time goes by. Tr. 0404, 0465.

[10] Trying to hew the line that he thought might result in a financial windfall from a Commission victory against Konner, Carlson admitted that he did not have a good reason for signing an inaccurate form. Tr. 1714. The best he could muster was that Konner told him that whatever he put down didn't matter. However, after hearing that, Konner set the record straight. He did tell Carlson, when he was filling out account forms, that it did not matter, but not in the sense that he should represent something false, but that he should just feel free to put down whatever was accurate; there was no reason not to. Tr. 4340-45. Plainly, the suggestion that Konner told Carlson to make something up makes no sense – who would want to do business with someone who deliberately seeks to skirt the rules. See Tr. 4334-35. Further, Konner swore under oath that he never in his career asked anyone to provide inaccurate information on account forms, including Messrs. Carlson and Miller, and that doing so would be a sure way to end a relationship. Tr. 4334-35, 4432. The testimony from Mr. Carlson does nothing but undermine his credibility.

he knew what he was doing with his money, it was what he wanted to be doing with his money, and that aside from results, he had no regrets. Tr. 1868.

b) Carlson invested $150,000 in the Quantum PIPE offering (Ex. Konner-76 and 77), only to regret that he hadn't invested more. In making those speculative investments, Carlson affirmed that he was an accredited investor, yet another representation of being a high income/high net worth investor. Tr. 1882. When this account generated a return in excess of 100% in just a few months, he told Konner that this was the kind of outsized gain he was looking for. Tr. 4381. Indeed, as Carlson admitted, the reason he opened this account and did not invest more money in his accounts in Iowa was because he was hoping to have an opportunity to "hit some things big." Tr. 1918-19.

c) Carlson rejected Konner's recommendations to establish an anchor in his account in light of the volatile markets they were dealing with in 2008-09. Each conservative recommendation, such as the American Capital real estate investment trust, certain mutual funds, and other conservative investments, was rejected by the client, evidencing an independent mind and the absence of broker control. Tr. 4379-82.

d) Carlson from time to time suggested stocks to invest in, but Konner said take them to a discount broker – Carlson should not have to pay the full commission if the idea was his own. Tr. 0400-01. Carlson admitted that he did from time to time independently develop ideas for possible investments. Tr. 1749-50.

e) Carlson admitted he was not unhappy with Konner's handling of the account, and in fact remained his client for more than two years after the so-called churn period ended, and then continued to remain a J.P. Turner client after Konner left the company. Tr. 1758. Carlson frankly admitted that after all those years, after all that activity, after all the commissions, he was only unhappy that his account was not profitable.

4. <u>Mr. Carlson's conduct evidenced a clear awareness that his account was actively traded, and that there was a high cost associated with that activity.</u>

As early as March 2009, roughly the half-way point in his dealings with J.P. Turner and Jason Konner, James Carlson – in his own handwriting – acknowledged that his account traded approximately four times per week. Ex. Konner-34. That fact alone was sufficient for one of the Division's expert witnesses, John Pinto, to concede that the client was well aware of the significant level of activity in his account. Tr. 3576-78. The record is replete with Carlson's acknowledgement of such activity and the cost to him associated with that. Plainly, he knew what was going on, and accepted it.

For example, he never complained about Jason Konner, or about the activity, despite having a clear understanding of the commissions he was paying. Tr. 1867. Carlson admitted that he had no problem with the mail (Tr. 1772), received all of the transaction confirmations for his account (Ex. Konner-80-83), and that he could readily see what the commission was or calculate it based on the markup or markdown that appeared on the confirmations. Tr. 1832-48. He admitted he was aware that there was a commission on every trade (Tr. 1846).

Carlson also was plainly aware of the turnover of his account assets by early 2009, when he got his Form 1099 from J.P. Turner for tax year 2008 (see Ex. Konner-38). He was aware of the turnover from the amount of securities bought in his account - $5,856,000 – and knowing that he was paying a commission each time, he saw no need to either transfer out of J.P. Turner or tell his broker to slow down. Here again, his concern was only net performance – where you finish and not how you get there. Tr. 1855-63. Indeed, even after seeing the level of activity in 2008, Carlson continued to fund new purchases in the account. Tr. 1858. And his ability to write checks as he made additional investments confirmed what he had told Konner about the size of his net worth. Tr. 4364.

Finally, the Division tried to make much of the fact that J.P. Turner and Jason Konner did not provide the clients with a running or cumulative total of commissions that were charged. However, aside from the fact that they were not required to provide such information, the clients both received one or more Active Account Suitability Supplements which disclosed that their actively traded accounted did generate a significant amount of commissions. Tr. 4440. Konner testified that he discussed commissions with Miller and Carlson many times, and neither ever suggested that he did not understand what he was being charged. Tr. 4375-78.[11] Carlson admitted

[11] Thinking they found something important that Konner failed to do, Division counsel asked Konner whether he discussed turnover ratios and ROI with his clients. Konner admitted he didn't, in part because he had no familiarity

that he was aware that there was a great deal of trading and that he paid a commission for every trade. Tr. 1807-08.

IV. FORMER COMPLIANCE OFFICER JOHN WILLIAMS CORROBORATED THE EVIDENCE THAT UNDERMINES THE CHURNING CHARGE AGAINST KONNER.

Former J.P. Turner compliance officer John Williams was called to testify by respondent Bresner, to address various issues relating to the supervisory charge against Bresner. However, one thing that certainly did emerge from Williams's testimony was the complete corroboration of the evidence which demonstrates that Konner did not control, and therefore did not churn, the Miller and Carlson accounts.

Respondent Konner respectfully submits that Williams's testimony provides to the Court a profoundly honest, forthright and independent voice, one with "no skin in the game" having departed J.P. Turner more than two years ago, at the end of 2010. Tr. 3707-08. In the course of a few hours, Williams said a great deal of importance about (1) Jason Konner and his brokerage business, (2) relevant practices and procedures at J.P. Turner, and (3) Carlson, Miller, and their J.P. Turner accounts. The key points of his testimony are as follows:

1. Williams on Jason Konner: John Williams, hired to serve as compliance officer of the J.P. Turner branch where Konner worked and to supervise the branch, Tr. 3662-63, worked in very close proximity to Jason Konner, close enough to hear him deal with his clients on the telephone on virtually a daily basis. Tr. 3666. Williams never observed Konner being overbearing or exerting undue pressure on any client, and would have reported it up the chain of command if he did. Tr. 3669-70. He also confirmed that there were no customer complaints against Konner, and that he would recall if there were. Tr. 3665

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with those technical numbers but more to the point: he knew and his clients knew that there was a lot of activity and a lot of commissions were charged, whether or not they discussed turnover ratios. Tr. 4461-62.

2. Williams on J.P. Turner practices and procedures: Williams expressly acknowledged the importance of the receipt and review of account documents signed, initialed and/or corrected by clients. Tr. 3671. He typically conducted a substantive review of them, often confirming information directly with the client, to establish that the information on the form was accurate. Tr. 3675-76. He routinely relied on the information confirmed by the client, and knew that others at J.P. Turner did as well, and he never thought that a client was trying to mislead him with mis-information. Tr. 3676.

Williams testified that accurate information was especially important for one segment of the branch's clientele, the clients who had active trading accounts. Given the risks involved, there was a clear need to ensure that the client was suitable for active trading, and that the broker's clients fit within the parameters for this type of business. Tr. 3679, 3695. The information on the client forms – once confirmed by the client with his signature or initials, or perhaps by Williams by phone -- was extremely important. Tr. 3679-80.

Williams was also able to provide some important guidance regarding commission disclosures to clients, acknowledging that J.P. Turner supplied all required commission information to its clients on the confirmations generated by its clearing house, National Financial, a division of Fidelity Investments. Tr. 3709.

3. Williams on Gordon Miller: At the time he opened his account in 2009, Gordon Miller was contacted either by Mr. Williams or co-branch manager James Sideris, and both evidenced review of his new account form (Ex. Konner-1) with their initials. Tr. 3673, 3711-15. The fact that Mr. Miller made a change to the form suggested to Williams that the client carefully reviewed the form, and had the ability to make any necessary corrections. He also noted that by 2009 it had become the practice of the office to specifically draw the client's

attention to important account information (objectives, risk tolerance, financials) and that the mechanism for doing that was to have them initial each appropriate block of information. Tr. at 3714-15. And this was important vis-à-vis Miller's account, because everything that he initialed signified that this was a client ready, willing and able to participate in an actively traded, speculative account, age notwithstanding. Tr. 3715.

Williams also testified about the importance to him, as a compliance officer, of the Active Account Suitability Supplement and Questionnaire signed by Mr. Miller, Ex. Konner-4. Williams's review of that document was confirmed by his initials, Tr. 3716-17, and its importance is attributable to the fact that it informs the client that the firm believes him to be an active trader and that such an account has additional risks associated with it, and also because it enables the firm to reconfirm the accuracy of the information on file which enabled the account to proceed as an actively traded account in the first place. Tr. 3718-20.

Included in the information that Mr. Miller reconfirmed on the 2009 form (Ex. Konner-4) were that two of his investment objectives were Speculation and Trading Profits. Mr. Williams testified that it was important to him as a compliance officer that the client understand the meaning of these investment objectives so that he form was properly completed. He confirmed that such meanings were in fact provided to Mr. Miller in Ex. Konner-3. Tr. 3720-23.

4. Williams on James Carlson: Williams had a hand in reviewing many of the documents signed and initialed by James Carlson, notably Ex. Konner-31, 32, 34.

The first of these, from 2007, was reviewed and signed by Williams after it came back signed from the client, and the information affirmed by the client about investment objectives, risk tolerance, and financials is both meaningful and relied upon. Tr. 3699-3700.

Williams also received and signed off on Ex. Konner-32, Carlson's 2008 update form in which the client initialed (among other things) a net worth of $2,500,000, Aggressive Risk Tolerance and that his top two investment objectives were Speculation and Trading Profits. Tr. 3699-3700. It was in this context that Williams testified that when account documents were pre-filled out, as an accommodation and service to the client and to ensure the form is accurate and fully completed (Tr. 3796-97), his expectation was that if the information was grossly inaccurate, the client would not sign it and not return it. Mr. Williams was not aware of any such issue with respect to Mr. Carlson or Mr. Miller, Tr. 3700-01. He had absolutely no reason to think that Jason Konner ever put a client up to submitting or acknowledging false information on a J.P. Turner document. Tr. 3796-98.

Williams's involvement with Carlson account documents continued into 2009, evidenced by him initialing Carlson's March 2009 Active Account Suitability Questionnaire, Ex. Konner-34. It was on this document that the figure for Carlson's net worth was changed from $2.5 million to $2.0 million. Although Williams was unable to specifically recall talking to the client about the change, he initialed that change which signified to him that, consistent with his general practice, he had called the client to verify the net worth information. Tr. 3704-05. This testimony confirms that at the beginning of the so-called "churn period," Carlson reaffirmed that he had the financial wherewithal, the investment objectives and the risk tolerance to invest in an actively traded, speculative brokerage account. Indeed, it was Mr. Carlson who acknowledged in his own hand his awareness that his account was traded approximately four times per week, or 200 trades per year.

V. THE OPINIONS OF THE DIVISION'S EXPERT WITNESSES HAVE LITTLE IF ANY BEARING UPON THE CHURNING CHARGE AGAINST KONNER, AND TO THE EXTENT ONE IS AT ALL RELEVANT, IT CONTAINS MATERIAL ERRORS.

The Division retained the services of two expert witnesses for this case, although one was offered solely to address the supervision charge against co-respondent Bresner.[12] The other, Louis Dempsey, was adamant that he was only speaking to the quantitative issues raised by the Division's case – the element of excessive trading – and did not in any way, shape or form speak to the qualitative issues of a churning charge, broker control and scienter. Tr. 3160-61.[13]

But even in the limited area for which he was proffered, Mr. Dempsey's testimony proved to be of little value for two reasons: (1) for purposes of assessing whether there was excessive trading, he failed to take into account the nature or investment objectives of the accounts, and (2) at least with respect to his quantitative analysis of the Carlson account, he made very serious errors which had the effect of grossly distorting the financial results in that account during the so-called "churn" period.[14]

Mr. Dempsey conceded that there are differences in what clients want to do with their brokerage accounts, and that some want to invest conservatively while others want to invest aggressively, or speculatively, through short-term trading. Tr. 3163-64. However, in describing benchmarks for the turnover ratio and cost equity factor which are often used to assess whether

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[12] That witness, John Pinto, confirmed on cross-examination that he was not offering any opinion about whether Konner churned the account of Miller or Carlson; he was only offering an opinion about the adequacy of the supervision. Tr. 3559-61, 3581. (Indeed, the supervision charge against Bresner didn't even involve oversight relating to the Miller account, and most of the period that Pinto addressed was outside the so-called "churn" period of the Carlson account.)

[13] The limited nature of what Mr. Dempsey was qualified to testify about was hardly surprising; he has in fact never qualified as an expert witness in a litigated proceeding to testify about the qualitative aspects of churning. Tr. 3116-22. Further, most of the work he does as a regulatory consultant focuses on other aspects of the brokerage business. Tr. 3126-34.

[14] While Dempsey's "expert" report did include comments about the broker soliciting most of the trades in the Miller and Carlson accounts, he explained that those comments did not mean that the broker had control for

an account has been churned, he was unable to say whether there were any established benchmarks useful for analyzing the level of activity for a risk-tolerant investor whose account was set up for short-term trading, as opposed to a conservative investor. Tr. 3201-03. In light of that concession, and given the fact that the Miller and Carlson accounts were with the clients' knowledge created to be aggressive, short-term trading accounts, any reliance upon turnover ratios and other indicia of so-called excessive trading used in evaluating a conservative investment account must be discarded, for there is no evidence that they have any meaning in the investment context at issue *in this case*.

The cross-examination of Dempsey also brought out a major error in his calculations concerning the Carlson account. Dempsey admitted that his starting point was the SEC-staff generated analysis, and that the work he was paid to do largely consisted of verifying the staff's conclusions. However, the error made by the staff, and not detected by Dempsey, concerned the treatment in September 2009 of the deposit into Carlson's account of the Quantum stock that Carlson had bought in a PIPE transaction. Instead of recognizing that the $325,000 recorded value of the stock consisted of a $150,000 investment and a $175,000 profit (a gain about which Carlson was "ecstatic," see Tr. 4390), Dempsey sanctified the SEC-staff error by recording it all as an investment. By making that mistake – calling a profit an investment of client money – Dempsey's so-called expert report wrongly claims that during the period in question the Carlson account had a net loss of $54,199, when in fact, if the transaction were properly reflected in the report, there would have been a gain during the period in excess of $100,000. Tr. 3176-84.

Dempsey's testimony should be accorded little if any weight in the churning assessment to be made by the Court.

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purposes of determining whether the account was churned, but merely to say that the broker was directing the trading. He reiterated that he was not expressing a view about the control issue. Tr. 3168-3170.

LEGAL ANALYSIS AND ARGUMENT

I. A FINDING AGAINST KONNER IS NOT WARRANTED BECAUSE THE DIVISION HAS FAILED TO DEMONSTRATE THAT KONNER'S CONDUCT CONSTITUTED CHURNING.

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

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

A. Excessive Trading Cannot Be Evaluated In a Vacuum, and as Analyzed by the Division is Irrelevant.

Proper analysis of whether an account was excessively traded requires consideration of multiple factors; no simple quantitative analysis is applicable to all clients and all accounts: "No turnover rate is universally recognized as determinative of churning." *In re J.W. Barclay & Co.,*

Inc., SEC Initial Decision No. 239 (Oct. 23, 2003), at 19. An inquiry into whether an account was excessively traded should focus on "whether the volume of transactions, considered in light of the nature and objectives of the account, was so excessive as to indicate a purpose on the part of the broker to derive a profit for himself at the expense of the customer." *Costello, supra,* 711 F.2d at 1368. The first step in this analysis is to evaluate the client's investment goals, as they provide the standard for measuring the account activity.

Investors who wish to invest aggressively will often require a much higher frequency of trading in order to satisfy their investment objectives. *E.g., Mitchell v. Ainbinder*, 214 Fed. App'x. 565, 568 (6th Cir. 2007). "Of course, if a customer wants to speculate, the portfolio turnover rate could be unlimited." *J. W. Barclay*, *supra*. And "if the goals of an investor are aggressive or speculative, as opposed to conservative, it is easier to conclude that a given course of trading has not been excessive." *Costello*, *supra,* 711 F.2d at 1368, *citing Marshak v. Blyth Eastman Dillon & Co., Inc.*, 413 F. Supp. 377, 379-80 (N.D. Okla. 1975) (no liability where plaintiff's stated objective was "quick short-term profits" ... "We wanted profits").

As demonstrated above, the evidence plainly shows that Konner geared his business to clients looking to obtain profits through short-term trading, investors who are willing and able to bear the risk of loss. Such varied circumstances – purpose of account, investor objectives and more – bear heavily on whether frequent trading and high turnover are or are not appropriate. It should be indisputable by this time that Messrs. Carlson and Miller intended to use their accounts for speculative and aggressive trading in the hope of generating high returns, funded with money they could afford to place at risk, and with costs and risks of loss understood. *See, e.g., Follansebee v. Davis, Skaggs & Co.*, 681 F.2d 673, 674-75 (9th Cir. 1982) (the proper comparison was between the actual trading activity and the investment objective listed on the

new account form, even when written by the broker; broker justifiably relied on a false statement by the plaintiff regarding his finances and suitability for an investment).

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

Based on the forgoing, we submit that the Division has failed to satisfy its burden of demonstrating excessive trading, given the objectives and goals of the clients, and the volatile time period in which the activity occurred. For that reason, the charge against Konner should be dismissed.

B. The Evidence Establishes That Konner Did Not Have De Facto Control Over His Clients' Accounts.

Jason Konner never had actual control over the Carlson and Miller accounts, and it was not argued that he did. As such, to prevail, the Division must prove that Konner had *de facto* control.

The concept of *de facto* control in the context of a churning case is well-established. Thus, in *In re J.W. Barclay & Co., Inc.,* SEC Initial Decision No. 239 (Oct. 23, 2003), at 18, the court stated: "The touchstone [of *de facto* control] is whether or not the customer has sufficient

intelligence and understanding to evaluate the broker's recommendations and to reject one when he thinks it is unsuitable." Further, a client retains control of his account if he has enough financial expertise to determine his own best interests, even if he consents to the broker's management of the account. The fact that a client follows the advice of his broker does not in itself establish control. *See In re IFG Network Sec., Inc.,* SEC Initial Decision No. 273, at 40-41 (Feb. 10, 2005). Indeed, a broker has de facto control only "if his customer is unable to evaluate his recommendations and to exercise an independent judgment." *Follansebee v. Davis, Skaggs & Co.*, 681 F.2d at 677. As the Ninth Circuit said in that case:

> "That is not to say, however, that a nonprofessional investor who usually follows the advice of his broker 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.
>
> "The touchstone 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 unsuitable....
>
> "As long as the customer has the capacity to exercise the final right to say 'yes' or 'no,' the customer controls the account." *Id.*

Furthermore, the absence of broker control is evident where the client in some instances declines to follow the broker's suggestions or generates investment ideas independently. Such actions are "completely inconsistent with dependence upon the broker and with the absence of independent evaluations [of the broker's'] recommendations." *Follansebee v. Davis, Skaggs & Co.*, 681 F.2d at 677-78. The evidence here bears out that this is precisely what happened here, as both clients rejected the REIT, mutual fund and other conservative investments, either because

they were looking for larger gains or because they did not need the modest return of a secure investment. Similarly, both initiated investment possibilities with Konner.

The evidence has thus established that Konner never had control of the Carlson or Miller accounts. Both men are of sound mind and body, and familiar with how the markets worked and how their accounts were traded. They admitted being aware of all trades and that they never complained about anything. They both exhibited the strength of mind and self-awareness to reject a number of investment recommendations made by their broker, and to suggest or propose investment ideas. They acknowledged in writing on multiple occasions that the activity in their accounts was consistent with their investment objectives, and they affirmed as much when contacted by the firm's Compliance personnel. They were never misled and they never complained about the level of activity. They were continuously apprised of the activity in their account, and this is evident from the body of documents that includes transaction confirmations, "temporary" confirmations where additional funds are required, monthly account statements detailing all activity during the preceding 30 days, and annual summaries listed on tax documents that were provided.

The totality of the circumstances in this case demonstrate that the Division has failed to prove by a preponderance of the evidence that Konner had de facto control of either the Miller or Carlson accounts, and for that reason, the charge against Konner should be dismissed.

C. <u>The Evidence Demonstrates That Konner Did Not Act With Scienter.</u>

Scienter is defined as a mental state embracing the intent to deceive, manipulate, or defraud. *E.g.*, *Rizek v. S.E.C.,* 215 F.3d 157, 162 (1st Cir. 2000). To prove churning, scienter is required, and a broker must have either fraudulent intent or a willful or reckless disregard for the interests of his clients. *Department of Enforcement v. Kelly*, FINRA National Adjudicatory

Council, No. E9A2004048801 (Dec. 16, 2008). And while it is true that scienter may be implied through the actions of the broker, there must be sufficient evidence that he possessed the requisite mental state. Churning will not exist in situations where the broker's investment activity results from negligence. *E.g., S.E.C. v. Ficken*, 546 F.3d 45, 47 (1st Cir. 2008).

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

In evaluating whether or not Konner acted with fraudulent intent or a willful or reckless disregard for the interests of his clients, it is imperative to take into account what the clients were looking for from their accounts and from the money invested at J.P. Turner. The evidence pertaining to both establishes not that Mr. Konner sought to take advantage of the situation for his own gain or that he acted with an utter disregard of the interests of his clients. Instead, the record demonstrates that the clients liked the idea of investing aggressively and were fully on

board with it. There was nothing that was misleading or deceptive. Rather, there was a program, it entailed high risk trading, the risks were disclosed, the costs were known, and they proceeded voluntarily and deliberately. There was no fraudulent intent.

Many of Konner's actions further rebut the contention that he acted fraudulently or recklessly. For example, Konner never suggested that Miller borrow against the assets in his brokerage account (or indeed, against any of his other assets including his millions in Iowa real estate, see Tr. 1980) in order to gain more buying power for his account; the subject of margin never came up. Tr. 4392.[15] Similarly, when the two clients requested a return of funds, in both instances needed not to pay personal expenses but for seasonal business needs (Miller) or for estimated taxes (Carlson), see Tr. 0447, 1868-69, 2127, the funds were readily remitted back to the clients. Again, no effort to hold onto the money, another well-worn technique to generate more activity and commissions.

The totality of the circumstances in this case demonstrate that the Division has failed to prove by a preponderance of the evidence that Konner acted with scienter, and for that reason, the charge against Konner should be dismissed.

KONNER'S FINANCIAL SITUATION

Konner testified under oath that he has a negative net worth, having bought a home at the top of the market in 2006, and that aside from having negative equity, that house was quite literally under water when Hurricane Sandy swept through New York in the Fall of 2012. Tr. 4409. Those two financial setbacks, along with the burden of supporting not only his wife and two young children but also several members of his extended family, leaves him in a precarious

[15] We acknowledge of course that the much younger James Carlson did use margin, after he expressed an interest in it and after Konner explained the risks. Hardly an unreasonable step from the broker's point of view for a client showing a multi-million dollar net worth. See Ex. Konner-33 and Tr. 1872-75, 4394-95, 4451-52.

financial position; he even admitted to his counsel in open court that he could not afford the cost of his defense. Konner testified that, were the Court to rule against him, he lacked the means to pay a disgorgement of commissions or any significant financial penalty. See Tr. 4408-12.[16]

In accordance with the Court's Post-hearing Order dated February 20, 2013, respondent Konner has filed under separate cover a financial disclosure form (along with a motion to keep that form under seal) that more fully sets forth his personal financial information which would bear upon his ability to pay were the Court to find against him.

CONCLUSION

Though somewhat rough around the edges, and lacking in polish and finesse, Jason Konner demonstrated to the Court that he has an earnest desire to help his clients, that he wants them to be successful, and that doing so is the only way he can be successful and provide for his family.

Respondent Jason Konner did not churn the accounts of Gordon Miller or James Carlson. The evidence demonstrates that he geared his business to clients who wanted to trade aggressively and had the means to do so. The evidence demonstrates that the two clients in question fell within that category, and were fully aware of what was happening at all times, and were engaged in the handling of their accounts. Messrs. Miller and Carlson never complained nor sought redress based upon any perceived breach of duty or misconduct, because Mr. Konner did what they wanted him to do – try to generate significant profits following the decline in the stock market in the wake of the 2008 financial crisis. The evidence demonstrates conclusively that the high level of trading was not inappropriate in the context of these clients' accounts, that

[16] Regarding potential disgorgement, we note that while firms such as J.P. Turner do pay a relatively high pay-out rate to registered representatives, the RR's do pay the lion's shares of expenses associated with running their brokerage business. Tr. 0454-58.

Mr. Konner never took control of the accounts, and that there was no fraud or reckless misconduct. For these reasons, the charge brought by the Division against Jason Konner should be denied in its entirety and this case should be dismissed.

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