

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 729 / October 17, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15015

In the Matter of	:	
	:	ORDER DENYING RESPONDENT
MICHAEL BRESNER,	:	MICHAEL BRESNER'S MOTION
RALPH CALABRO,	:	TO DISMISS
JASON KONNER, and	:	
DIMITRIOS KOUTSOUBOS	:	

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on September 10, 2012, pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act), Section 203(f) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940.

Pending before me is Respondent Michael Bresner's (Bresner) September 28, 2012, Motion to Dismiss (Motion). On October 5, 2012, the Division of Enforcement (Division) filed its Memorandum of Law in Opposition to the Motion (Opposition), including a Declaration of Matthew F. McNamara (McNamara Declaration). Bresner did not file a Reply.

Section 929U of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), codified in Section 4E of the Exchange Act, provides that "[n]ot later than 180 days after the date on which Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action." 15 U.S.C. § 78d-5(a)(1). However, Section 929U of Dodd-Frank also permits, in certain complex actions, the Director of the Division of Enforcement (Division Director), or his designee, to authorize successive 180-day extensions to the deadline.¹ See 15 U.S.C. § 78d-5(a)(2).

Bresner asserts that the Division failed to institute this action within the 180-day time limit set forth in Dodd-Frank, and that this matter is not sufficiently complex to warrant extensions under Dodd-Frank, and requests that the OIP be dismissed in its entirety. See 15 U.S.C. § 78d-5; Motion, pp. 2-4, 5. Specifically, Bresner asserts that the 180-day period expired because the written Wells notice was provided to him on May 31, 2011, 468 days before the Commission issued this OIP. Motion, pp. 3.

¹ The first additional 180-day extension requires the Division Director to provide notice to the Chairman of the Commission, and any successive extensions require Commission approval. See 15 U.S.C. § 78d-5(a)(2).

The Division contends that Section 929U of Dodd-Frank does not constitute a statute of limitations, or otherwise bar Commission action, and that the issue is moot because the Division provided notice to the Chairman of the Commission and requested and received Commission approval granting extensions of the 180-day deadline until November 14, 2012. Opposition, pp. 2-4. The Division also argues that the Division Director has discretion to determine whether a proceeding is sufficiently complex to warrant an extension under Section 929U of Dodd-Frank, and this case was determined to be sufficiently complex to warrant the extensions. Id. at 6.

The McNamara Declaration establishes that the requisite complexity determinations were made by the Division Director, that the Division Director complied with the notification and approval requirements set forth in Section 929U of Dodd-Frank, and that the deadline was extended until November 14, 2012. McNamara Declaration, pp. 2-3. There is nothing in the language of Section 929U indicating that any person other than the Division Director or his designee is authorized to make a complexity determination, or that I have the authority to review such a determination. 15 U.S.C. § 78d-5(a)(2). That second or subsequent deadline extensions must be approved by the Commission itself – an approval I obviously cannot second-guess – strongly suggests that I lack such authority. Id. Alternatively, assuming that I have such authority, proceedings in which I must issue an initial decision within 300 days of service of the OIP are, in my experience, the most complex of the various cases referred to the Office of Administrative Law Judges. It is therefore reasonable to apply the following rebuttable presumption: proceedings in which I must issue an initial decision within 300 days of service of the OIP are complex within the meaning of Section 929U. This is such a case, and Bresner has not rebutted the presumption. I do not reach the other issues raised in the Division’s Opposition.

Based on the forgoing, I conclude that the Division Director properly authorized the extensions of the deadline to bring this proceeding until November 14, 2012. Therefore, the proceeding was instituted within the period authorized by Dodd-Frank and Bresner’s Motion must be denied.

Ruling

Respondent Michael Bresner’s Motion to Dismiss is DENIED.

Cameron Elliot
Administrative Law Judge