UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9376 / December 18, 2012

SECURITIES EXCHANGE ACT OF 1934
Release No. 68464 / December 18, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3518 / December 18, 2012

INVESTMENT COMPANY ACT OF 1940
Release No. 30307 / December 18, 2012

Admin. Proc. File No. 3-15015

In the Matter of MICHAEL BRESNER, RALPH CALABRO, JASON KONNER, and DIMITRIOS KOUTSOUBOS, Respondents; MICHAEL BRESNER, Movant	ORDER DENYING MOTION OF MICHAEL BRESNER TO SEVER PROCEEDINGS

On September 10, 2012, we issued an Order Instituting Proceedings that charged Ralph Calabro, Jason Konner, and Dimitrios Koutsoubos (registered representatives formerly associated with broker-dealer JP Turner & Co., LLC) with churning customer accounts in violation of the antifraud provisions of the securities laws.[1] The OIP also alleged that Michael Bresner, Executive Vice President and Head of Supervision at JP Turner, was a supervisor of two of the three representatives and that he failed to exercise that supervision reasonably within the meaning of Exchange Act § 15(b) and Advisers Act § 203(f).[2]

[1] *Michael Bresner*, Securities Exchange Act Release No. 67810, 2012 WL 3903387 (Sept. 10, 2012). Specifically, the OIP alleges that registered representatives Calabro, Konner, and Koutsoubos violated Securities Act § 17(a), Exchange Act § 10(b), and Rule 10b-5 promulgated thereunder. 15 U.S.C. §§ 77q(a), 78j(b), 17 C.F.R. § 240.10b-5.

[2] 15 U.S.C. §§ 78o(b), 80b-3(f).

In a motion filed October 25, 2012, Bresner moved to sever the causes of action against him from those against the other named respondents. In support of his motion, Bresner states that the Division of Enforcement expects the hearing in this matter to last two to three weeks, and he projects that "the expense associated with such a proceeding will run into the hundreds of thousands of dollars"—an expense he represents he cannot afford.[3] Bresner argues that the Division will need to focus the majority of its time at trial establishing the underlying violations of his co-respondents (that is, the alleged churning of customer accounts), while the charges regarding Bresner's supervisory failure could be addressed, in Bresner's estimate, in just two or three days. Severing the proceedings would be more efficient, Bresner posits, for three reasons: first, if the Division cannot establish that Konner and Koutsoubos churned their customers' accounts, its case against Bresner necessarily fails and need not be further prosecuted; second, if the Division does prove that Konner and Koutsoubos churned their customers' accounts, it can use that evidence in Bresner's subsequent hearing; and third, the conduct of Calabro, whom Bresner is not alleged to have supervised, is wholly irrelevant to the charges against Bresner and need not be a part of any hearing related to Bresner's conduct.

Bresner represents that his co-respondents support his motion. The Division, however, opposes it. The Division asserts that judicial economy would not be served by severing this proceeding because there is substantial overlap in the conduct to be examined at trial. It anticipates that the testimony of Konner and Koutsoubos, while necessary to establish the allegations of churning, will also be relevant to the failure-to-supervise charges against Bresner, just as Bresner's testimony will be relevant to the allegations of churning and to his own failure to supervise. The Division also argues that the use of evidence from one hearing (on the churning allegations) in a subsequent hearing (on the failure to supervise allegations) would likely result in protracted disagreement over the admissibility of such evidence, eroding any gains in efficiency that Bresner suggests would result from severance.

Our Rule of Practice 201(b) states that a proceeding may be severed with respect to some or all parties upon a showing of good cause.[4] As we have stated, "considerations of adjudicatory economy carry great weight in the analysis of [a] motion [to sever]."[5] In the case before us, the allegations to be addressed at trial are substantially interrelated. First, the allegations overlap factually: all the respondents were associated with the same firm at the same time and are alleged to have engaged in misconduct related to the fraudulent churning of certain of the firm's customers' accounts. Second, the allegations overlap legally: as in all failure-to-supervise cases, the underlying violation must be proven as the first step in substantiating a charge of supervisory failure against Bresner, and, in turn, the Division alleges that Bresner's failure to supervise Konner and Koutsoubos facilitated their churning of accounts.

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[3] Bresner's Mot. for Severance at 2.

[4] 17 C.F.R. § 201.201(b); *see also David A. Finnerty*, Exchange Act Release No. 52207, 2005 WL 1963821, at *1 (Aug. 4, 2005).

[5] *John A. Carley*, Exchange Act Release No. 50695, 2004 WL 2624639, at *1 (Nov. 18, 2004).

The Division stated it expects that, while the testimony of Konner and Koutsoubos will be necessary to establish that they churned accounts, their testimony will also be necessary in a trial to establish that Bresner failed to supervise them; similarly, the testimony of Bresner is expected to be relevant to the charges against him as well as the charges against the representatives he is alleged to have supervised. As an example, the Division asserts that it intends to question all the respondents about any communications between or among Calabro, Konner, Koutsoubos, and Bresner. These communications could inform conclusions about whether Bresner supervised Konner and Koutsoubos and what steps he took as part of that supervision. Although the two types of allegations in this proceeding are legally discrete, the evidence relevant to those charges may not be neatly separable and will likely come from many of the same witnesses. Bifurcating this proceeding would require the Division to call several witnesses to testify at both proceedings, a duplication of effort and expense that would be inefficient.[6]

In fact, the Division commonly pursues combined proceedings against alleged violators of the securities laws together with their supervisor(s).[7] Bresner has not shown good cause why we should set aside the Division's prosecutorial discretion and require it to try two cases where years of experience in prosecuting failure-to-supervise cases have demonstrated that one will better serve.[8]

We are not persuaded that Bresner could eliminate this inefficiency by agreeing to be bound by the law judge's findings as to whether Konner or Koutsoubos churned their customers' accounts. First, as noted, several witnesses are likely to be asked to testify not only about whether accounts were churned, but also about facts that are relevant to conclusions regarding whether Bresner was a supervisor of Konner and Koutsoubos and whether he failed reasonably to supervise them. Second, if Bresner's co-respondents are found by the law judge to have violated the securities laws, those respondents could appeal that decision, which could further delay the proceeding against Bresner. Such a delay could compromise the proceeding against Bresner if, for example, witnesses become unavailable or have increasing difficulty remembering events with the passage of time.

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[6] *Finnerty*, 2007 WL 327445, at *2 (denying severance and noting that "there are common legal, factual, and evidentiary issues in these proceedings . . . that indicate[] that a single proceeding will be more efficient than separate trials from the standpoint of judicial economy and financial resources").

[7] *See, e.g, Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874 (Feb. 27, 2012); *Thomas C. Bridge*, Exchange Act Release No. 60736, 2009 WL 3100582 (Sept. 29, 2009), *aff'd sub nom., Jeffrey K. Robles*, 411 F. App'x 337 (2010) (unpublished); *Newbridge Securities Corp.*, Admin. Proc. File No. 13099, 2008 WL 2876595 (July 25, 2008).

[8] *See Dolphin and Bradbury, Inc.*, Exchange Act Release No. 54143, 2006 WL 1976000, at *12 (July 13, 2006), ("[A]gency decisions about the best use of staff time are a matter for prosecutorial judgment."), *aff'd*, 512 F.3d 634 (D.C. Cir. 2008).

Accordingly, it is ordered that Bresner's motion to sever the proceedings against him from the proceedings against the other named respondents in this matter is denied.

By the Commission.

Elizabeth M. Murphy
Secretary