**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

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**ADMINISTRATIVE PROCEEDING**
**File No. 3-15015**

**In the Matter of**

**MICHAEL BRESNER; RALPH CALABRO; JASON KONNER; and DIMITRIOS KOUTSOUBOS,**

**Respondents.**

**RESPONDENT MICHAEL BRESNER'S POST-HEARING BRIEF**

SUTHERLAND ASBILL & BRENNAN LLP

Peter J. Anderson
Jaliya S. Faulkner
Sutherland Asbill & Brennan LLP
999 Peachtree Street, NE
Suite 2300
Atlanta, Georgia 30309-3996
(404) 853-8000
(404) 853-8806 (fax)

*Counsel for Respondent Michael Bresner*

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## I. INTRODUCTION

Respondent, Michael Bresner, by and through counsel, hereby submits this Post-hearing Brief in the above-captioned matter to explain and support what the evidence established: Mr. Bresner reasonably supervised Dimitrios Koutsoubos's and Jason Konner's activity with respect to the accounts of James Carlson, Pamela and Bruce Mills, and Teddy Bryant appearing on Level 4 of the Active Account Review System ("AARS") during 2008 and 2009. At the hearing, the Division of Enforcement ("Division") was unable to meet its burden of proving that Mr. Koutsoubos and Mr. Konner churned their customers' accounts. Moreover, even assuming arguendo that the customers' accounts were churned, the Division did not prove that Mr. Bresner failed to supervise reasonably Messrs. Koutsoubos and Konner.

The evidence presented at the hearing demonstrated that J.P. Turner LLC ("J.P. Turner") had an effective system in place for preventing and detecting churning, which consisted of more than AARS. The Series 24 principals responsible for the day-to-day supervision of the representatives preapproved every trade placed by Messrs. Koutsoubos and Konner on behalf of the three customers and evaluated the suitability of those trades in light of the customers' investment objectives. Each of the customers repeatedly signed documents affirming their investment objectives as trading profits, short term trading, or speculation. When Mr. Bresner received reports that the customers' accounts appeared on Level 4 of AARS, he (1) solicited recommendations from his direct reports, the Area Vice Presidents ("AVPs"), who were responsible for supervising the branch managers, (2) reviewed and analyzed the customers' activity and suitability information, and (3) imposed commission restrictions on the accounts.

The "red flags" identified by the Division in the Order Instituting Proceedings ("OIP") proved to be the Division's lack of understanding of how AARS operated and who was responsible for what. For example, the Division cited two red flags related to suitability questionnaires customers were asked to complete that were the responsibility of the Compliance Department, not Mr. Bresner. Because Mr. Bresner never had any responsibility with respect to those documents, neither the information contained in them, nor a customer's failure to complete the form could put Mr. Bresner on notice of anything. Further, evidence at the hearing demonstrated that the information submitted on the forms was consistent with the trading activity in the customers' accounts and that John Williams, one of the Series 24 principals, spoke with two of the three customers to verify the information.

The Division is attempting to lay all of the supervisory responsibility at Mr. Bresner's feet, notwithstanding that there were a number of other individuals who had responsibility for supervision. A branch principal was responsible for the day-to-day supervision of the representatives' activities. An AVP supervised the activity of the branch principals, and Mr. Bresner supervised the AVPs. The Compliance Department also had certain supervisory responsibilities, including the distribution and review of suitability questionnaires.

The crux of the Division's case is not that Mr. Bresner failed to reasonably supervise Messrs. Koutsoubos and Konner, but that Mr. Bresner did not supervise them in the manner the Division would have. The standard, however, is not whether Mr. Bresner's supervision was exemplary, but whether it was reasonable under the particular circumstances. The Division did not prove that Mr. Bresner's supervision was unreasonable under the circumstances, and therefore, the charges against Mr. Bresner should be dismissed.

## II. STATEMENT OF FACTS

### *A. The Division's Allegations against Mr. Bresner.*

The Division instituted this action against Mr. Bresner, Mr. Koutsoubos, Mr. Konner, and Ralph Calabro on September 10, 2012. The Division alleges that Mr. Bresner failed to reasonably supervise the activities of (a) Mr. Koutsoubos with respect to Teddy Bryant's account during 2008, and with respect to Pamela and Bruce Mills's account from December 2008 through July 2009, and (b) Mr. Konner with respect to James Carlson's account during 2009 with a view toward preventing and detecting their alleged violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The Division alleges that Mr. Koutsoubos and Mr. Konner churned these clients' accounts.

In the OIP, the Division alleged that Mr. Bresner failed to take appropriate action in response to

> the following red flags: (1) these Level 4 accounts had ROI greater than 25 percent and an annualized turnover rate greater than six, which presumptively indicated excessive trading, (2) two of these accounts repeatedly appeared at Level 4, even after commission restrictions were placed on the accounts, (3) Konner and Koutsoubos each engaged in trading activity that far exceeded the "frequency of trades" identified in the suitability questionnaire signed by two of their defrauded customers, and (4) one of Koutsoubos's defrauded customers had no suitability questionnaire on file, even though the customer's account repeatedly appeared on Level 4.

(OIP ¶ 24.) Mr. Bresner is not charged with failing to supervise Mr. Calabro or Mr. Konner with respect to the account of Gordon Miller.

### B. *J.P. Turner's Supervisory System Relied Primarily on Direct Supervisors to Prevent and Detect Churning.*

J.P. Turner had a supervisory system to prevent and detect churning that relied principally upon the registered representatives' direct supervisors. Pursuant to J.P. Turner's Written Supervisory Procedures ("WSPs"), day-to-day supervision, including the review of trading activity, was the responsibility of the Branch Manager or Designated Principal. (*See, e.g.*, Bresner Ex. 9, at 68–69.) John Williams, a principal in the branch where Mr. Koutsoubos and Mr. Konner worked, testified that, in accordance with the firm's WSPs, he was responsible for reviewing transactions on a daily basis for excessive trading and churning, among other things. (Hr'g Tr. 3630:9–3631:5; 3802:2–9; Bresner Ex. 9, at 68–69.) Mr. Williams further testified that he, or another principal, approved every trade executed by Mr. Koutsoubos and Mr. Konner prior to execution, explaining that he reviewed the account information in the firm's Streetscape system to determine whether the trade was suitable based on the client's financial information and investment objectives. (Hr'g Tr. 3654:9–3655:3.)

The firm implemented AARS in late 2007 to facilitate the monitoring of active accounts (Hr'g Tr. 2654:1-7; 2528:15-19) in response to Mr. Bresner's recommendation in 2006 that the firm's system for monitoring active trading be improved (Hr'g Tr. 2994:22–2995:12.). AARS improved upon the firm's prior trade monitoring system, Online Compliance, by changing the primary metric used to track the accounts from turnover to a cost-maintenance factor, called return on investment ("ROI"). Mr. Bresner explained that the prior system was not very effective for reviewing current activity or addressing future activity because by the time the most active accounts were identified, most of the accounts had already been closed by the customers. (Hr'g Tr. 2992:20–2993:17.)

AARS was not a system to detect churning (Hr'g Tr. 2682:1–5), but a tool to assist supervisors in monitoring trading activity (Hr'g Tr. 2654:1-7). As the Branch Manager's Guide explained, "[a]n account that is 'active' does not necessarily denote churning. It is your responsibility to review account activity individually when reviewing for churning including the customer's objectives and the customer's control of the account." (Bresner Ex. 12, at 98.) Thus, the primary responsibility for preventing and detecting churning remained with the direct supervisors. As Mr. Williams explained, "Basically, I'm at the front lines or the ground level of that office, so I'm – it's either the responsibility of me or the branch manager to report any issues, such as [excessive trading or churning] to compliance to prevent – to either correct the issue or prevent it from happening." (Hr'g Tr. 3802:18–23.)

ROI was calculated as a ratio between the total fees and commissions charged for the previous twelve-month period divided by the account's market value. (DOE Ex. 91.) Michael Isaac, the firm's Chief Compliance Officer during the relevant period, testified that the purpose of tracking ROI was to identify accounts that were performing poorly such that there was a risk the customer might leave the firm or initiate litigation. (Hr'g Tr. 2520:2–10.) Based on criteria determined by the firm's senior management, the accounts were separated into four levels that required review and action by a supervisor on a quarterly basis. (*E.g.*, Bresner Ex. 9, at 267–68.)

Accounts with an ROI between ten and fifteen and a turnover of less than six were identified as Level 1 and were reviewed by the registered representative's supervisor. (DOE Ex. 138.) Accounts with an ROI between ten and fifteen and a turnover greater than six or an ROI between fifteen and twenty were identified as Level 2 and were reviewed by the registered representative's supervisor. (*Id.*) Level 2 accounts were also sent an Active Customer Supplement and Questionnaire ("AASQ") by the Compliance Department, which determined whether customers were approved to trade actively. (*Id.*) If the customer failed to return the questionnaire, the Compliance Department restricted trading in the account. (Hr'g Tr. 2694:2–12.) Accounts with ROIs between twenty and twenty-five were identified as Level 3 and were reviewed by one of the AVPs. (*E.g.*, Bresner Ex. 9, at 268.) Finally, accounts with an ROI greater than twenty-five were identified as Level 4 and were managed at the discretion of the Executive Vice President. (*Id.*)

### C. *Mr. Bresner Was a Qualified Supervisor Who Took His Responsibilities Seriously.*

Mr. Bresner has more than forty-five years of experience in the securities industry (Hr'g Tr. 2751:23–25) and is currently Senior Vice President for Due Diligence at J.P. Turner (Hr'g 2739:3–4). Mr. Bresner joined J.P. Turner in 2005 as Executive Vice President. (Hr'g Tr. 2752:5–10.) He remained in that role and also served on the firm's New Product Committee, Hiring Committee, and Steering Committee until March 2012. (Hr'g Tr. 2754:20–2755:21.)

As Executive Vice President, Mr. Bresner's primary responsibility was to supervise the AVPs, who in turn supervised the branch managers, who supervised the registered representatives. (Hr'g Tr. 2760:24–2761:2.) Mr. Bresner held formal meetings at least once a week with the AVPs where they regularly discussed the AVPs' supervision of branches and the AARS system. (Hr'g Tr. 3006:18–3007:11.) From time to time, the AVPs also provided Mr. Bresner with logs or checklists to confirm that they were executing their duties with respect to supervising Branch Managers. (*See, e.g.*, Bresner Exs. 51–67.)

Mr. Bresner's responsibilities as Executive Vice President included taking action with respect to any account that appeared on Level 4 of the AARS system. (Hr'g Tr. 2775:24–2776:3.) Mr. Bresner delegated the review of Level 4 accounts to the AVPs, who presented him with recommendations for action that he either adopted or increased as appropriate. (Hr'g Tr.

2996:10–2997:10; *see also* DOE Ex. 138 "EVP reviews AVP decision on accounts and makes necessary changes that are documented in system.".) Mr. Bresner expected that the AVPs would take appropriate action including discussing the accounts with the direct supervisor and broker. (Hr'g Tr. 2996:10–2997:10.) Mr. Bresner's and the AVPs' role in reviewing active accounts did not, however, relieve the direct supervisors of their responsibilities. The Division's expert, John Pinto, agreed that Mr. Bresner did not become the sole supervisor of the representatives whose accounts appeared on Level 4 until the accounts were removed from Level 4 (Hr'g Tr. 3345:18–23), or the sole and direct supervisor of Mr. Koutsoubos and Mr. Konner (Hr'g Tr. 3352:3–10). Mr. Isaac, who as CCO was responsible for developing policies and procedures for supervising active trading (Hr'g Tr. 2519:1–5), testified that Mr. Bresner could delegate the review of Level 4 accounts to the AVPs. (Hr'g Tr. 2573:12–2574:1; 2578:20–24.) He explained that his understanding during the development and implementation of AARS was not that Mr. Bresner would take over supervision of Level 4 accounts, but that Mr. Bresner would assess what had been done and take appropriate action, and that he believed Mr. Bresner fulfilled that role. (Hr'g Tr. 2579:3–2580:8.) Mr. Isaac further stated that Mr. Bresner was not the supervisor of every registered representative whose account reached Level 4. (Hr'g Tr. 2597:14–24.) With respect to Mr. Bresner's commitment to supervision and compliance, Mr. Isaac testified: "His commitment was – he took it serious. He was very committed. He had a very difficult job. And his commitment was that he gave it maximum effort from my perspective." (Hr'g Tr. 2630:18–2631:4.)

## III. ANALYSIS

### *A. Legal Standards.*

To prove a failure to supervise claim against Mr. Bresner, the Division was required to establish (i) an underlying securities law violation; (ii) association of the registered representative; (iii) supervisory jurisdiction over that representative; and (iv) failure to reasonably supervise the representative. *In re SG Americas Sec., LLC*, Exchange Act Release No. 59401, 2009 SEC LEXIS 366, at *35 (Feb. 13, 2009). To establish the underlying violations that the representatives churned their customers' accounts, the Division was required to prove that (1) trading in the account was excessive in light of the customers' investment objectives, (2) the representatives exercised control over the accounts, and (3) the representatives acted with intent to defraud or with willful and reckless disregard for the interests of their clients. *Moran v. Kidder Peabody & Co.*, 609 F. Supp. 661, 666 (S.D.N.Y. 1985).

Sections 15(b)(4)(E) and 15(b)(6) of the Securities Exchange Act, 15 U.S.C. § 78o(b)(4)(E) and 15 U.S.C. § 78o(b)(6), authorize the Commission to sanction a person associated with a broker-dealer if it determines that such person "failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision." No person can be found to have failed to reasonably supervise another person if:

> (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and
> (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

15 U.S.C. § 78o(b)(4)(E). Negligence is the applicable standard in determining whether supervision was reasonable under the circumstances. *In re Huff,* Exchange Act Release No. 29017, 50 S.E.C. 524, 529, 1991 SEC LEXIS 551, at *12 (Mar. 28, 1991). A failure to supervise occurs when red flags are evident and are ignored, undetected, or fail to cause reasonable concern. *In re Consol. Inv. Servs.*, 1994 SEC LEXIS 4045, at *26-27 (Dec. 12, 1994). But the mere fact that a principal could have taken stronger action is not sufficient to find supervisory liability. *In re Trujillo*, Exchange Act Release No. 26635, 49 S.E.C. 1106, 1109–10, 1989 SEC LEXIS 480, at *10–11 (Mar. 30, 1989) ("We agree with the Division and the law judge that Trujillo's supervisory record was less than exemplary. . . . However, the statute only requires reasonable supervision under the attendant circumstances, and, applying that standard, we cannot conclude that Trujillo's overall performance with respect to the activities of Matl amounted to a failure to supervise within the meaning of the statutory language."); *see also In re Quest Capital Strategies, Inc.*, 1999 SEC LEXIS 727, at *56 (Apr. 12, 1999). Further, the principal's actions must be analyzed in light of what he or she knew at the time. *In re Quest Capital Strategies, Inc., id.* at *55–56. The issue is not whether Mr. Bresner "'was a model supervisor, but whether his supervision was reasonable under all the attendant circumstances.'" *Id.* at *56 (quoting *Huff,* 50 S.E.C. 524, 528–29 & n.7, 1991 SEC LEXIS 551, at *11–12 & n.7); *In re Bellows*, 67 S.E.C. Docket 1426, 1998 WL 409445, *9 (July 23, 1998) ("I conclude that the supervision of Moses was not perfect, and a factual analysis indicates that a more thorough investigation might have revealed Moses' misconduct. 'However, the statute only requires reasonable supervision under the attendant circumstances.'" (quoting *Huff,* 50 S.E.C. 524, 528, 1991 SEC LEXIS 551, at *11).)

*B. The Division Failed to Prove that Mr. Koutsoubos and Mr. Konner Churned the Customers' Accounts.*

As a threshold matter, the Division failed to prove an underlying violation of churning. The evidence presented at the hearing showed that the trading activity in the accounts was consistent with customers' investment objections on file with the firm. (*See, e.g.*, Konner Exs. 32 & 34; Koutsoubos Exs. 11, 21–22.) While the customers disavowed these objectives during the hearing, they did not disavow their signatures, nor did they testify that they ever informed J.P. Turner through a complaint or otherwise that these were not in fact their investment objectives or that they were unhappy with the trading activity in their accounts. Further, Mr. Williams, who sat close enough to the representatives to hear their conversations with clients (Hr'g Tr. 3607:12–3608:3; 3608:24–3609:12), who reviewed their trading activity daily (Hr'g Tr. 3603:25–3604:14), who preapproved their trades, and who spoke directly to their customers (Hr'g Tr. 3608:4–12; 3609:13–3610:15), and was therefore in the best position to evaluate whether churning had occurred, testified that he never had any concerns about excessive trading or churning in these customers' accounts because the activity was consistent with the clients' investment objectives (Hr'g Tr. 3631:2–5). Mr. Williams also testified that none of these customers ever complained about Mr. Koutsoubos or Mr. Konner (Hr'g Tr. 3665:15–24; 3754:2–24), which, as Mr. Bresner's expert Hank Sanchez testified, suggests they understood the activity (Hr'g Tr. 3920:9–15). The Division failed to establish that the trading was excessive in light of the customers' investment objectives, and, consequently, did not prove that the accounts were churned.

*C. Mr. Bresner Reasonably Supervised the Level 4 Accounts.*

Mr. Bresner reasonably discharged his responsibilities as Executive Vice President with respect to the accounts appearing at Level 4. "[D]ifferent supervisors may have different responsibilities depending on how each firm devises its compliance program. What may be reasonable discharge of supervisory duties in one case can be unreasonable in another. A factual analysis is required in each case." *Huff*, 50 S.E.C. 524, at *528, 191 SEC Lexis 551, at*11. J.P. Turner's WSPs provided the following guidance related to the review of active accounts:

> The Firm will, on at least a quarterly basis, review accounts that are identified as "active." Items to be reviewed include, depending on the type of account and type of trading activity:
>
> - Review of new account documentation to determine necessary documents are on file and identify the customer's investment objectives and financial profile
>
> - Review of trading activity in the account including types and size of trades and frequency of trades
>
> - Contact with the RR and designated supervisor to determine additional information regarding the customer and trading activity
>
> Additional reviews that may be conducted include:
>
> - Profit and loss or change of equity calculation
> - Turnover calculation
> - Contact with the customer (written or oral)
>
> Reviews of active accounts may include these items or other items at the discretion of the EVP. The EVP will establish criteria and procedures for conducting the active account review.

(Bresner Ex. 9, at 267). The WSPs further provided that "Customers with an activity ratio for Level IV will have their accounts managed at the discretion of the EVP." (*Id.* at 268.)

The procedures offered guidance regarding the review of the accounts but left the details of the review to the discretion of the EVP and other supervisors. Although they were not documented, Mr. Bresner adopted procedures for the review of accounts at Level 4. Because of the sheer volume of accounts that appeared at Level 4, frequently between 250 and 300 per quarter (Hr'g Tr. 2838:25–2840:10), Mr. Bresner delegated review of the Level 4 accounts to the

AVPs. (Hr'g Tr. 2996:10–2997:10; *see also* DOE Ex. 138 "EVP reviews AVP decision on accounts and makes necessary changes that are documented in system.".) Mr. Bresner instructed them "to get with the local 24, in this case John Williams, to do whatever was necessary to come to a conclusion as to what they recommended the action be, if any action, taken, and then come back to [Mr. Bresner with] those results." (Hr'g Tr. 2896:25–2897:4.)

The Commission has previously recognized the authority of a supervisor to delegate his or her responsibilities. *Bellows*, 67 SEC Docket 1426, 1998 WL 409445, at *8 ("Indeed, the Commission has long recognized that individuals like Bellows who may have overarching supervisory responsibilities for thousands of employees must be able to delegate supervisory responsibility to subordinate qualified individuals, such as Reap, Cummings, and Cepak."). In addition, Mr. Isaac, who was responsible for developing the firm's WSPs, testified that Mr. Bresner could delegate the review of Level 4 accounts to the AVPs. (Hr'g Tr. 2573:12–2574:1; 2578:20–24.) The Division's expert, Mr. Pinto, agreed: "What I'm saying is that he had sole and direct responsibility for level 4 accounts pursuant to J.P. Turner's written supervisory procedures. By sole and direct, it doesn't mean he needs to do everything himself and be the only one involved in that process." (3351:10–15.) Mr. Pinto elaborated, "He can have others do tasks that would be subject to his review and assessment and his analysis as to whether what they did was adequate, whether he was satisfied that they went far enough, whether he thought they did what they said they were going to do. The bottom line is when he makes the decision to do something at level 4, he has to have the basis upon which to make those decisions." (Hr'g Tr. 3353:6–13.)

Mr. Bresner expected that the AVPs would take whatever steps they deemed necessary including, but not limited to, reviewing the customers' investment objectives and trading activity and discussing the accounts with the representatives, their direct supervisors, and the customers, if appropriate. (*See* Hr'g Tr. 3051:6–20.) Mr. Pinto acknowledged that the supervisors "act on their discretion. Sometimes they decide not to contact customers or not to do calculations. That may be okay. It's just you have to consider it. It's part of your arsenal." (Hr'g Tr. 3362:15–18.) The AVPs conducted their reviews, reported back to Mr. Bresner regarding their conversations with the direct supervisors, and provided their recommendations to Mr. Bresner, who then reviewed those recommendations and decided whether to implement them or to impose a more severe restriction. (Hr'g Tr. 2997:12–2998:6; 2924:23–2925:4; Bresner Exs. 22 & 68.)

Mr. Bresner also relied on the registered representatives' direct supervisors to communicate with the registered representatives and the customers. (*See* Hr'g Tr. 2924:23–2925:4.) Mr. Williams testified that when an account appeared at Level 3 or 4, he did not have an obligation to review the account, but he discussed the accounts with the brokers to learn if there were any special circumstances that explained why the ROI was so high, and discussed the accounts with the AVPs. (Hr'g Tr. 3612:6–24.) Mr. Bresner also conducted his own analysis of many accounts. (*See, e.g.*, Bresner Exs. 22 & 68.) Mr. Bresner explained that because the AARS report did not include a profit and loss analysis, he often performed those calculations, and then discussed the recommendations with the AVPs. (Hr'g Tr. 3450:21–3451:24.)

Ultimately, following the recommendations of his AVPs and based on his own review and analysis, Mr. Bresner determined that the most effective manner to address the Level 4 accounts was to impose severe commission restrictions. (*See* Bresner Exs. 23–25.) That Mr. Bresner did not always document every step of his supervisory action does not violate any rule and does not mean his supervision was unreasonable. As Mr. Sanchez explained, although documenting supervisory action is a best practice, it is not required under the firm's procedures. (Hr'g Tr. 3916:5–17.)

*D. Heightened Supervision Was Inappropriate and Unnecessary and Restrictions on Trading Were Unworkable.*

Seeking to substitute its judgment for Mr. Bresner's and the AVPs', the Division criticizes Mr. Bresner for failing to impose other restrictions, but the Division's criticism is merely hindsight speculation of additional action Mr. Bresner could have taken. *See In re Dean Witter Reynolds Inc.*, 2001 SEC LEXIS 99, at *142 (Jan. 22, 2001) ("The Division alleges a number of deficiencies in Dean Witter's supervisory procedures, and for proof relies upon Padgett's testimony and expert report. As is more fully discussed below, these alleged deficiencies are made with the hindsight of Oberholzer's misconduct and do not support a conclusion that Dean Witter's procedures as applied in this case were unreasonable.") (footnote omitted). The only evidence the Division offered to support its contention that Mr. Bresner's supervision was unreasonable is the opinion of Mr. Pinto who has never been a supervisor in the industry. The bottom line of Mr. Pinto's criticism is that the action Mr. Bresner took was not sufficiently severe. That, however, does not render the action taken unreasonable, and that is the test. The central question is whether what Mr. Bresner did was unreasonable under the circumstances in which he operated, and the answer is no.

The Division's proposed additional actions were unnecessary or unworkable. Mr. Pinto opined that "Bresner failed to place Koutsoubos or Konner on heightened supervision or to take any other disciplinary action against either representative . . . ." (DOE Ex. 156, at 6.) But Mr. Isaac, not Mr. Bresner determined whether a representative would be placed on heightened supervision. (Hr'g Tr. 2612:1-4.) Further, pursuant to the firm's WSPs, it was the responsibility of Branch Managers, AVPs, and the CCO to identify representatives in need of heightened supervision. (DOE Ex. 79 at 25.)

Further, Mr. Bresner testified that if he or another supervisor concluded that churning had occurred, the appropriate remedy would have been termination, not heightened supervision. (Hr'g Tr. 2790:9-13.) He explained, "I think if there is suspected churning, it would behoove the firm to make a determination of whether or not there actually was churning. And if churning was found, I think termination would be more appropriate." (Hr'g Tr. 2790:19–25.) But no supervisor ever reached the conclusion that churning occurred. To the contrary, Mr. Williams testified that he never had concerns about the trading activity in these accounts, and that if he had concerns, he would have reported them to compliance. (Hr'g Tr. 3631:2–12.) Mr. Bresner likewise testified that if he had believed that Mr. Koutsoubos and Mr. Konner were in fact churning customers' accounts, he would have recommended termination. (Hr'g Tr. 3040:9–14.) Finally, Mr. Bresner believed that heightened supervision would likely require preapproval of trades or contacting customers, which he understood was already occurring. (Hr'g Tr. 3075:6–14.) Mr. Williams's testimony and the evidence presented at trial confirmed that Mr. Bresner's understanding was correct. (Hr'g Tr.3604:10–23; 3654:9–3655:3; Konner Ex. 34; Koutsoubos Exs. 9& 11). In short, Mr. Bresner did not recommend heightened supervision because, in his judgment at the time based on the information he had available, it was not a necessary or appropriate measure to prevent to or detect churning. That the Division might have reached a different conclusion does not make Mr. Bresner's decision unreasonable, especially where, as here, the trades were already being pre-approved by the direct supervisors who were responsible for reviewing daily trading activity for churning and who were in the best position to detect churning.

Mr. Pinto also opined that "Bresner never restricted trading or took other supervisory action to address the underlying issue of excessive trading activity in the Mills, Bryant and Carlson Level 4 accounts in 2008 or 2009. . . ." (DOE Ex. 156, at 6.) Mr. Bresner viewed restricting trading as punitive to the client and an unworkable solution. (Hr'g Tr. 2842:9–18.). Mr. Bresner explained that the economic driver of churning is excessive commissions, not the number of trades, which he restricted to address this concern. (Hr'g Tr. 2942:1–5.) Mr. Bresner observed with respect to the Millses' account, "[I]f you look at the commissions charged in this account going back to the third quarter of '07, you will see they fell from 45,600 over the next couple of quarters dramatically. The fact is that these commission restrictions were far more effective than limiting the number of trades. Far more effective." (Hr'g Tr. 2966:20–2.) Mr. Bresner elaborated,

> The problem with limiting the number of trades, for example, is that you're now liming the account itself to what they might want to do. So, for example, let's say I said, okay, you can only do 20 trades a month or a year or whatever the number is, now you get to that point. I don't know how we would enforce it technically, but assuming we got to that point and now the client calls up and says, I want to buy Apple, can't do it. So to me it was unworkable as a solution.
>
> Admittedly if you got a bad guy and he was doing 50 trades a month and you cut his commissions from $1,000 a trade to $100 a trade, admittedly he might take, say, I'm going to do more trades but the fact is, in order to make the same money, he could do any number of trades and still not make anything because he wasn't making any money at the $100 level.
>
> And let's say, for example, that he was losing money on a trade, as an example, where it was a $60 maximum or a $50 maximum, where he was actually losing money on a trade, he could do a million trades and still not make money. He would lose money. So to me it was the most effective way, given the boundaries of what I could to, it was the most effective way of stopping the activity. And over time, it did stop the activity.

(Hr'g Tr. 3061:3–3062:5.) Mr. Sanchez agreed that trade restrictions would have been inappropriate because "that would have an immediate direct detrimental effect on the client and I think that would raise more complaints than what was done in this case." (Hr'g Tr. 3919:12–19.) When asked, "In a nondiscretionary account where the customers have indicated their objectives to be short-term trading or trading profits, is it your position that Mr. Bresner should have imposed some limits on the number of trades that were taking place in any quarter for these clients?", Mr. Pinto, responded, "No." (Hr'g Tr. 3551:15–21.) Mr. Pinto elaborated that Mr. Bresner should have done a more in depth review which may have led him to put in a restriction such as requiring preapproval of all trades. (Hr'g Tr. 3552:1–13.) But Mr. Williams testified that all trades by Mr. Koutsoubos and Mr. Konner were preapproved by him or another principal. (Hr'g Tr. 3604:10–23; 3654:9–3655:3.) Thus, Mr. Bresner reasonably concluded that imposing commission restrictions was a substantially more effective and more practical method of preventing churning than restricting the number of trades the customers were permitted to make.

*E. The Imposition of Commission Restrictions Was Effective.*

The commission restrictions imposed by Mr. Bresner were effective. When Mr. Carlson's account first appeared on Level 4 following the second quarter of 2008, he had paid an average commission per transaction of approximately $1,104, calculated based on the commissions charged for seventy-six trades in a ninety-day period. (*See* DOE Ex. 98.) Following the recommendation of the AVP, Mr. Bresner imposed a commission restriction of $100 per trade on July 28, 2008. (*Id.*) The result of that restriction, and similar restrictions imposed in the following quarters, was that Mr. Carlson paid an average commission of approximately $108 per trade over the subsequent four quarters. (*See* DOE Ex. 98.) Significantly, the Division alleges that Mr. Carlson's account was churned from January 2009 to

December 2009, but Mr. Carlson's account did not appear at Level 4 during the fourth quarter of 2009; therefore, Mr. Bresner had no responsibility for supervising Mr. Konner's activity with respect to the account during the final quarter of the alleged churned period.

Mr. Bryant's account appeared at Level 4 the first quarter the AARS report was available. (DOE Ex. 99.) In that quarter, he was charged $21,824 on twenty-two trades, almost $1,000 per trade, and, based on the recommendation of the AVP, Mr. Bresner imposed a 1% commission restriction. (*Id.*) The following quarter, a $100 commission was imposed. (*Id.*) Over the next four quarters, Mr. Bryant paid, on average $179 per trade. (*Id.*) Thus, the commission restrictions reduced the average commission charged by more than 80%.

Like Mr. Bryant's, the Millses' account first appeared on Level 4 in the third quarter of 2007 when AARS was first implemented. (DOE Ex. 100.) In that quarter, they paid $45,668 on thirty-two trades, more than $1,400 per trade. (*Id.*) Following that quarter, following the AVP's recommendation, Mr. Bresner imposed a $100 commission restriction. Although the alleged churned period for the Millses' account is December 2008 through July 2009, the Millses' account only appeared on Level 4 in the second and third quarters of 2009 (DOE Ex. 100). As a result, Mr. Bresner cannot be held responsible for failing to supervise the account during that portion of the alleged churned period that the account appeared at Level 3. When the account appeared at Level 4 in the second quarter of 2009, the Millses were charged $11,740 on 122 trades, less than $100 per trade, but Mr. Bresner nevertheless imposed a $50 commission restriction. (*Id.*)

In sum, Mr. Bresner's imposition of commission restrictions on all of these accounts greatly reduced or perhaps even eliminated any incentive the brokers might have had to trade in their own interests rather than in their clients' interests. While the Division hypothesized that reducing the commissions may have incentivized the representatives to engage in more trading, the evidence presented at trial demonstrated that the commissions charged declined significantly as a result of these commission restrictions. Indeed, Mr. Carlson would have had to engage in *ten times* the number of trades in order for the representative to generate the same amount in commissions. Moreover, Mr. Bresner explained that as a result of commission restrictions, the brokers actually lost money on the trades. (Hr'g Tr. 2858:20–22.) On a $100 commission, a broker might be entitled to $60 based on his particular payout, but the broker is also required to pay expenses such as ticket charges, errors and omissions insurance, and administrative costs, which Mr. Bresner estimated cost approximately $60. (Hr'g Tr. 3058:8–3059:5.) Mr. Bresner reasoned that "by putting a max of $100 or less we took away that economic incentive. . . [T]he economic incentive to continue to do trades was taken away." (Hr'g Tr. 3059:6–13.) Mr. Bresner further explained that he believed the imposition of commission restrictions was effective because the amount of commissions charged was the only factor used to determine ROI over which he had any control. (Hr'g Tr. 2857:15–2858:3 ("You have fees, margin fees and the miscellaneous fee in the numerator, both of which I have zero control over. The denominator is the average market value of the account over which I have no control. So the only thing I really do have control over is the commissions.").) Mr. Bresner's imposition of commission restrictions was a reasonable and effective method of preventing churning in the accounts because it removed the incentive for the brokers to trade for the purpose of generating commissions.

*F. Mr. Bresner Did Not Ignore Red Flags.*

The OIP identifies four "red flags" that Mr. Bresner purportedly failed to adequately respond to: (1) that the accounts had an ROI greater than twenty-five and were presumptively churned; (2) that two of the accounts repeatedly appeared at Level 4; (3) that the trading activity exceeded the "frequency of trades" identified on the customers' suitability questionnaires; and (4) that one of the customers did not have a suitability questionnaire on file. (OIP ¶ 24.) The evidence presented at the hearing, however, failed to reveal any red flags that were ignored by Mr. Bresner.

It does not necessarily follow from the fact that the accounts had an ROI greater than twenty-five, that they were churned. AARS was not designed to detect churning (Hr'g Tr. 2680:9–2682:5), and it does not follow from the fact that an account reached Level 4 that the account had been churned. (Hr'g Tr. 2630:14–17.) "Determining the subjective elements of churning and unsuitable trading requires a factually intensive investigation, including a review of the specific account and communication with the account executive. It often requires communication with the specific client at issue." *See In re Dean Witter Reynolds Inc.*, 2001 SEC LEXIS 99, at *140 (Jan. 22, 2001). Under J.P. Turner's procedures, the registered representatives' direct supervisor was in the best position to make this determination. *Id.* (" Dean Witter's procedures place the branch manager in the best position to do this.") Mr. Isaac testified that the fact that an account is active even at an ROI of twenty-five or greater does not mean that the accounts were churned. (Hr'g Tr. 2630:14–17.) Mr. Bresner certainly did not ignore the high ROI of these accounts. In fact, Mr. Bresner believed that the ROI triggers in AARS were too high. (Hr'g Tr. 3002:7–16.) Mr. Bresner testified that both during the development of the system and following its implementation he recommended to his superiors that the levels be lower, but his recommendations were not adopted. (Hr'g Tr. 3013:5–15; *see also* 2602:2–8.) In response to the accounts appearing at Level 4, Mr. Bresner established a procedure whereby the AVPs reviewed the account information, spoke with the direct supervisors, who in turn spoke to the representatives, and when appropriate to the customers. Mr. Bresner also did his own evaluation to determine whether he agreed with the AVPs' recommendations.

Each of the customers at issue had informed J.P. Turner that their investment objectives were trading profits, speculation, or short-term trading. J.P. Turner, Mr. Bresner, and the AVPs were entitled to rely on that information. *See* FINRA Regulatory Notice 12-25, at 11 ("[A]bsent 'red flags' indicating that such information is inaccurate or that the customer is unclear about the information, a broker generally may rely on the customer's responses."). Although the customers now claim to be conservative investors, the best evidence of their investment objectives at the time are the numerous documents that they signed to the contrary. (*See, e.g.*, Konner Exs. 31–35; Koutsoubos Exs. 4, 9, 11, 21, & 22.) When asked, "[I]f Mr. Bresner looking at this information [Koutsoubos Ex. 21], it would certainly have been consistent with his understanding that Mr. Carlson was an aggressive investor who wanted to speculate because he had the financial wherewithal to do so, correct?" Mr. Pinto responded,

> At the time, if Mr. Bresner had looked at this at the initial time when this became a level 4, I think he would have concluded that that's what the customer was looking to do, assuming that the customer understood what all these terms meant. That's always an issue about whether the customer understands what these things mean but he would have had the ability – I've said in my report that firms have the right to rely on the written representations of the customer. At that point in time, given the fact that it just got on Level 4, I think both Mr. Williams and Mr. Bresner could have felt comfortable that this is okay.

(Hr'g Tr. 3410:6–24.) Similarly, although the customers may not recall having spoken to Mr. Williams, the best evidence that those conversations did in fact occur are Mr. Williams's contemporaneous notes. (Konner Ex. 34; Koutsoubos Exs. 9 & 11.)

The Division also contends that the fact that two accounts appeared repeatedly on Level 4 of AARS indicates that commission restrictions were not effective. But the Division's analysis ignores the formula used to determine which accounts appear in AARS. The parameters are based on commissions, margin interest, and fees divided by the average market value during the preceding *twelve-month period*; thus, an account that is restricted may still have an ROI high enough to appear on Level 4 after the restriction is initially implemented, despite the fact that the commissions charged have been dramatically reduced. A decline in the market value of or cash withdrawals from the account may also cause the account to remain on Level 4, notwithstanding a decrease in the commissions charged. As Mr. Bresner observed, "Most accounts, because of the nature of the system, if they reached level 4, stayed on level 4 for at least three or four quarters." (Hr'g Tr. 2840:13–15.) In fact, once an account appeared at Level 4, the account might remain at Level 4 even though there is a no trading activity in the following quarter because of the mathematical formula used to calculate ROI. (Hr'g Tr. 2620:9–2621:13.) For example, Mr. Bryant's account remained at Level 4 despite the fact that there were three trades and no commissions in the fourth quarter of 2009. (DOE Ex. 99.) Moreover, as described in detail above, Mr. Bresner took the action he reasonably believed was appropriate to address the activity in the account. Accordingly, the Division did not establish that Mr. Bresner ignored any red flags with respect to the accounts having ROIs greater than twenty-five or appearing at Level 4 more than once.

The final two alleged red flags relating to the customers' active account questionnaires ignore the fact that Mr. Bresner played no role in sending, receiving, or reviewing the active account questionnaires. When an account reached Level 2, J.P. Turner's Compliance Department generated a letter notifying the client that the account was active and advising the client of the risks of actively trading, asking the client to acknowledge those risks and to complete a questionnaire to update the client's financial and suitability information. (Hr'g Tr. 2663:16–24; DOE 182, App'x A.) Mr. Bresner was not responsible for sending AASQs to clients, or reviewing them following their return to the firm. That responsibility belonged to Dennis Madej, a senior compliance officer. (Hr'g Tr. 2655:9–17; 2671:19–23.) In the event the information on the AASQ reflected changes from the information on file at J.P. Turner, Mr. Madej would cause the account information to be updated to reflect those changes. (Hr'g Tr. 2672:5–12.) Branch Managers also had the ability to send AASQs at any time. (Hr'g Tr. 2727:17–20.) Mr. Bresner was only aware of the financial and suitability information contained in them to the extent that information was updated in AARS by the Compliance Department. And contrary to Mr. Pinto's suggestion that Mr. Bresner should have nevertheless reviewed the AASQs (Hr'g Tr. 3512:16–22), Mr. Bresner's not reviewing them does not constitute a supervisory failure. *See Bellows*, 67 S.E.C. Docket 1426, 1998 WL 409445, at *8–9 ("Even if H.D. Vest had not required these employees or other specific employees to supervise Moses, that failure would not have created liability in Bellows, but rather in the broker-dealer itself: 'If a broker dealer fails clearly to assign such supervisory authority and responsibility to specific individuals, its supervisory procedures will not be reasonably designed to prevent and detect violations of the securities laws by its employees, and though theoretically no individual in such a circumstance could be charged with a failure to supervise, the firm itself would have committed such a violation.'") (quoting *Huff*, 50 S.E.C. 524, 535 n.14, 1991 SEC LEXIS 551, at *26 n.14 concurring opinion of Comm'rs Lochner and Schapiro). Here, the Compliance Department had responsibility for reviewing the AASQs, not Mr. Bresner.

Further, the trading in the customers' accounts was not inconsistent with the information provided in response to the AASQs. Mr. Carlson's AASQ signed on March 23, 2009, indicated a trading frequency of four trades per week. (Konner Ex. 34.) As Mr. Pinto acknowledged, "200 trades a year is not an inactive account. It's rather active." (Hr'g Tr. 3578:24–25.) Accordingly, had Mr. Bresner reviewed the AASQ, it would not have revealed anything grossly inconsistent with the trading in Mr. Carlson's account. Additionally, Mr. Carlson signed an Account Update Form on April 6, 2008, confirming his primary investment objectives as speculation and trading profits (Konner Ex. 32), the same quarter that his account first appeared at Level 4 (DOE Ex. 98). Thus, as Mr. Pinto acknowledged, Mr. Bresner was entitled to rely on this information in reviewing the activity in the account at that time. (Hr'g Tr. 3410:6–24.)

Similarly, the Millses completed an AASQ on March 24, 2009, indicating four trades weekly as the frequency of trading. (Koutsoubos Ex. 11.) During the alleged churned period, the Millses engaged in 187 trades (DOE Ex. 155 at 27), which is approximately five trades per week. Mr. Pinto acknowledged that the trading was not grossly inconsistent with the level of trading noted on the AASQ. (Hr'g Tr. 3595:3–8.) Once again, had Mr. Bresner reviewed the AASQ, which was not among his responsibilties, it would not have been inconsistent with the trading in the Millses' account.

Finally, although Mr. Bryant did not have an AASQ on file during the alleged churned period, which was the Compliance Department's responsibility, and not Mr. Bresner's, Mr. Bryant's AASQ dated May 31, 2009, indicated six trades per month as the frequency of trades. (Koutsoubos Ex. 22.) For the seven months preceding his signing the document and the two months following, Mr. Bryant engaged in fewer than six trades per month. (Koutsoubos Ex. 24.) Indeed, Mr. Pinto acknowledged that the level of trading set forth in the AASQ by Mr. Bryant was not inconsistent with the trading that occurred during that period. (Hr'g Tr. 3590:12–19.) Mr. Bresner should not be held responsible for not reviewing documents that were not his responsibility to review. Moreover, review of the documents would not have raised any red flags regarding the trading activity in these accounts.

## IV. CONCLUSION

The Division failed to establish that Mr. Koutsoubos and Mr. Konner churned their customers' accounts. Even if the customers' accounts were churned, the Division failed to prove that Mr. Bresner's supervision was unreasonable. Accordingly, all charges against Mr. Bresner should be dismissed.

Respectfully submitted this 11th day of April, 2013.

SUTHERLAND ASBILL & BRENNAN LLP

By: Peter J. Anderson
Jahiya S. Faulkner
Sutherland Asbill & Brennan LLP
999 Peachtree Street, NE
Suite 2300
Atlanta, Georgia 30309-3996
(404) 853-8000
(404) 853-8806 (fax)

*Counsel for Respondent Michael Bresner*