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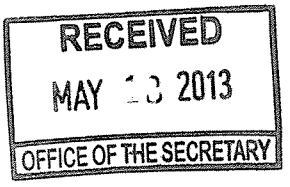
**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

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

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| **In the Matter of**<br><br>**MICHAEL BRESNER; RALPH CALABRO; JASON KONNER; and DIMITRIOS KOUTSOUBOS,**<br>**Respondents.** | **RESPONDENT MICHAEL BRESNER'S REPLY TO THE DIVISION'S POST-HEARING BRIEF** |

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## I. INTRODUCTION

Respondent Michael Bresner, by and through counsel, hereby submits this Reply to the Division's Post-Hearing Brief in the above-captioned matter to respond to the Division's mischaracterization of the evidence presented at the hearing and resulting unreasonable request for a supervisory bar and $150,000 in civil penalties. The Division continues to complain that Mr. Bresner's actions were not sufficiently severe, but whether Mr. Bresner took the actions the Division would have taken is not the standard. The operative question is whether Mr. Bresner's supervision was reasonable under the circumstances at the time. For the reasons set forth in detail in Mr. Bresner's initial Post-Hearing Brief, the answer is yes.

Even assuming the Administrative Law Judge ("ALJ") concludes that Mr. Bresner failed reasonably to supervise Mr. Konner and Mr. Koutsoubos, the remedies requested by the Division are unwarranted and not in the public interest. Mr. Bresner is no longer serving in a supervisory role at J.P. Turner & Company LLC ("J.P. Turner"), has no intention of serving as a supervisor, and, at the age of 69, is approaching the end of his career; therefore, a supervisory bar is unnecessary. A finding that Mr. Bresner failed reasonably to supervise Mr. Konner and Mr. Koutsoubos will not only prevent Mr. Bresner from acting as a supervisor but also will subject him to statutory disqualification under FINRA's Bylaws, which will detrimentally impact Mr. Bresner's ability to earn a living by effectively rendering him unemployable in the industry. Mr. Bresner is not a wealthy man and, other than his salary, earned no compensation as a result of the conduct of Mr. Konner or Mr. Koutsoubos. A $150,000 civil penalty is grossly disproportionate to the conduct at issue, and Mr. Bresner cannot afford to pay such a fine.

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.

Nevertheless, if the ALJ concludes that Mr. Bresner's supervision was unreasonable, the Division's request for a supervisory bar should be denied. The consequences of these proceedings and such a finding are more than adequate to punish Mr. Bresner and deter any future violation. The Division's request for civil penalties is both unreasonable and unnecessary, and the Administrative Law Judge should only order an appropriate remedy based on the underlying facts, including Mr. Bresner's financial position.

## II. ARGUMENT

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

The evidence presented at the hearing demonstrated that while serving as Executive Vice President at J.P. Turner, Mr. Bresner was a committed supervisor who, in response to concerns about the high ROIs of certain customers' accounts, imposed severely punitive commission restrictions to eliminate any broker incentive to recommend trades for the purpose of generating commissions. Under the supervisory system implemented by J.P. Turner, Mr. Bresner reasonably believed the imposition of these commission restrictions to be the most effective tool available to him to address the potential issue and provide clients with fair and reasonable commissions going forward. Contrary to the Division's assertion, Mr. Bresner did not approve the mechanics of AARS. (Div. Brief at 43.) 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.) Once his concerns were heard and rejected by more senior members of the firm's management, Mr. Bresner operated within the system the firm's management created and, within that system, Mr. Bresner took what he believed were the most effective actions to prevent churning.

The Division continues to suggest that Mr. Bresner should have placed representatives on heightened supervision, contacted customers, spoken with the registered representatives, limited trading, or closed customers' accounts (Div. Brief at 48–49), notwithstanding evidence that these actions were either already occurring or unnecessary. The firm's Chief Compliance Officer, Michael Isaac, was the only individual with authority to place individuals on heightened supervision. (Hr'g Tr. 2612:1-4.) Mr. Bresner could only *recommend* that representatives be placed on heightened supervision. Mr. Bresner never suspected that Mr. Konner and Mr. Koutsoubos were churning their customers' accounts. None of their direct supervisors ever reported that they suspected either Mr. Konner or Mr. Koutsoubos churned their customers' accounts. Had Mr. Bresner suspected that churning was occurring, he would have recommended termination, not heightened supervision. (Hr'g Tr. 2790:9-25.) Further, 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.) Thus, heightened supervision was unnecessary under the circumstances.

Mr. Bresner permissibly relied on the Area Vice Presidents ("AVPs") and the registered representatives' direct supervisors to take the supervisory actions they deemed necessary, including contacting customers, if appropriate, and discussing the accounts with registered representatives. (*See* Hr'g Tr. 2924:23–2925:4; 3051:6–20.) Mr. Williams, one of Mr. Konner and Mr. Koutsoubos's direct supervisors, confirmed that Mr. Bresner's reliance on him was justified. (Hr'g Tr.3604:10–23; 3654:9–3655:3; Konner Ex. 34; Koutsoubos Exs. 9& 11).

Finally, Mr. Bresner did not place trading restrictions on the accounts or close them because he viewed those solutions as unworkable and punitive to the clients. (Hr'g Tr. 2842:9–18). These actions would have limited the actions the customer could take, such as choosing to

purchase L'Oreal stock, as one of the customers did. Mr. Bresner understood that the issue was not the number of trades, but the amount of commissions being charged, and that this number was the only variable in the calculation of ROI over which he had control. (Hr'g Tr. 2942:1–5; 2857:15–2858:3.) Mr. Bresner reasonably believed that imposing severe commission restrictions was the most effective method of preventing the activity, because it removed the incentive for the brokers to trade for the purpose of generating commissions.

No evidence was offered by the Division that Mr. Bresner failed to do what he was required to do. The Division's disingenuous assertion that Mr. Bresner ignored red flags is contradicted by the severe commission restrictions Mr. Bresner imposed on the accounts at issue. Accordingly, the evidence presented at the hearing failed to prove that Mr. Bresner failed reasonably to supervise Mr. Konner and Mr. Koutsoubos.

*B. A Supervisory Bar Is Unwarranted.*

The Division has requested that the ALJ bar Mr. Bresner from acting as a supervisor. The Commission has authority to place limitations on, suspend, or bar a person associated with a broker-dealer if it determines that he or she "has 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." 15 U.S.C. § 78o. In determining what sanctions to impose, the Commission considers the following factors:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

*Steadman v. S.E.C.*, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Circ. 1978).

> The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation [,]. . . the extent to which the sanction will have a deterrent effect [, and] . . . the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally.

*In re Prime Capital Services, Inc.*, 97 S.E.C. Docket 2408, 98 S.E.C. Docket 2820, 2010 WL 2546835, *48 (June 25, 2010) (citations omitted). In the instant case, these factors do not support a bar against Mr. Bresner.

Even viewing the Division's evidence in its most favorably light, Mr. Bresner's conduct cannot be fairly characterized as egregious. Mr. Bresner acted. He took steps that he believed were reasonable to prevent the registered representatives from making trades in their own interests rather than their clients. Even if the supervision was not perfect, that does not render it unreasonable, much less egregious. *See 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).)

The conduct at issue was not recurrent. Although Mr. Bresner routinely received lists of Level 4 accounts containing more than 250 accounts, he is charged with failing to supervise two brokers with respect to three accounts during a very limited period of time. In fact, although the alleged churned period for the Mills account is December 2008 through July 2009, the Mills account only appeared on Level 4 in the second and third quarters of 2009. (DOE Ex. 100.)

This can hardly be characterized as recurrent and, given the numbers, would suggest that Mr. Bresner's supervisory activities were effective.

Mr. Bresner is no longer in the supervisory chain for J.P. Turner's registered representatives, has not been in a supervisory position for more than a year, and has no intention of serving as a supervisor in the future; therefore, there is very little risk of future violations. Further, any sanction resulting from a finding that Mr. Bresner failed to supervise reasonably Mr. Konner and Mr. Koutsoubos would statutorily disqualify Mr. Bresner under FINRA's rules. FINRA's rules set forth the requirements for a person to become or remain associated with a broker-dealer. FINRA Rule 9521(a). In 2009, FINRA adopted additional categories of disqualification, including the grounds listed in Section 3(a)(39) of the Exchange Act, 15 U.S.C. § 78c(a)(39), which incorporates by reference Exchange Act Section 15 (b)(4)(E), 15 U.S.C. § 78o (b)(E). Thus, under FINRA's rules, a person who "has failed reasonably to supervise, with a view to preventing violations of [the Securities Act, the Investment Advisers Act, the Investment Company Act, and the Commodity Exchange Act], rules, and regulations thereunder, another person who committed a violation, if such other person is subject to his supervision" is statutorily disqualified. FINRA Regulatory Notice 09-19. As a result, if the ALJ finds that Mr. Bresner failed reasonably to supervise Mr. Konner and Mr. Koutsoubos, he will be statutorily disqualified. It is unlikely that he will be allowed to continue *working* in the industry, notwithstanding that the Division is seeking only to bar him from serving as a supervisor.

Mr. Bresner is not a recidivist as the Division claims (Division's Brief at 79.) The ALJ should afford no weight to Mr. Brenser's prior suspension in determining an appropriate sanction, because the Division did not introduce the actual settlement documents into evidence. In 2004, when Mr. Bresner served as the President of Nation Securities Corporation, Mr. Bresner

executed a Letter of Acceptance, Waiver, and Consent ("AWC") with then NASD, without admitting or denying the allegations, consenting to a 30-day suspension and fine of $25,000 in connection with an action by FINRA related to the firm's failure to implement an adequate supervisory system to prevent and detect market timing activities. The Division did not offer the AWC into evidence. The Commission will not consider an offer of settlement for purposes of disciplinary history where the settlement states that it may not be used in another proceeding. *In re Trautman*, 2009 WL 6761741, *25 n.85 (Dec. 15, 2009). In *Trautman*, 2009 WL 6761741 at *25 n.85, the Commission declined to consider two settled disciplinary matters because the Division did not introduce the settlement documents into evidence, thus the Commission could not determine whether the settlement documents allowed the settlement to be considered in a separate proceeding. Because the Division failed to introduce the AWC into evidence during the hearing, the ALJ should not consider it in determining the appropriate sanction. Even if the ALJ considers the AWC, the ALJ should afford it little weight because the conduct occurred more than eight years ago. Mr. Bresner has been in the industry for forty-five years and his license has never otherwise been suspended.

In sum, under all of the circumstances presented here, the Division's suggested disbarment is a drastic remedy that is not proportional to the conduct at issue.

*C. A Penalty of $150,000 Is Not in the Public Interest.*

Section 21B of the Exchange Act, 15 U.S.C. § 78u-2, authorizes the Commission to impose a civil penalty for willful violations of the Securities Act or the Exchange if it determines that the penalty is in the public interest.

> In considering under this section whether a penalty is in the public interest, the Commission or the appropriate regulatory agency may consider –

> **(1)** whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;
>
> **(2)** the harm to other persons resulting either directly or indirectly from such act or omission;
>
> **(3)** the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;
>
> **(4)** whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 78*o*(b)(4)(B) of this title;
>
> **(5)** the need to deter such person and other persons from committing such acts or omissions; and
>
> **(6)** such other matters as justice may require.

15 U.S.C. § 78u-2. These factors do not support the imposition of a $150,000 penalty against Mr. Bresner.

There was no evidence presented at trial that Mr. Bresner was enriched justly or otherwise as a result of Mr. Konner's or Mr. Koutsoubos's conduct. During the relevant period, Mr. Bresner was compensated by a salary and received a modest recruiting bonus. He did not receive any compensation as a direct result of the commissions generated via the customers' accounts.

Mr. Bresner's conduct was not reckless. The Division's allegation that Mr. Bresner "fail[ed] to take even the most basic supervisory steps in fulfilling responsibilities that fell only to him under the AARS" (Division's Brief at 78) is not supported by the record. There can be no dispute that Mr. Bresner took action in response to the accounts appearing at Level 4. Whether characterized as supervisory or disciplinary, Mr. Bresner's action in response to the customers' accounts appearing on Level 4 was to severely restrict the commissions that could be charged.

This action was effective in eliminating the registered representatives' incentive, if any, to recommend or execute trades for the purpose of generating commissions. The Division's wish that Mr. Bresner had taken different actions does not render the actions he took meaningless or unreasonable.

Further, Mr. Bresner was the only person who could record in AARS the action that was taken at Level 4, but he was not the only person who reviewed the Level 4 accounts and recommended appropriate action. Mr. Bresner reasonably 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.".) The CCO who developed J.P. Turner's 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.) 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." (Hr'g Tr. 3351:10–15.)

The evidence presented at trial did not establish that Mr. Bresner "fail[ed] to adequately identify and respond to the red flags" (Division's Brief at 78). AARS was not designed to and did not detect churning (Hr'g Tr. 2681:21–2682:5); thus, it does not follow from the fact that if an account reached Level 4 that the account was 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).

The parameters controlling whether an account appeared at Level 4 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.

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. The letter also asked 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.

A $150,000 penalty is not necessary to deter Mr. Bresner or others. As discussed above, a finding that Mr. Bresner failed reasonably to supervise Mr. Konner or Mr. Koutsoubos will severely hamper Mr. Bresner's ability to earn a living. If the ALJ imposes a limitation on Mr. Bresner's supervisory license, a civil penalty would only add unnecessary marginal additional deterrence. In *In re F.X.C. Investors Corp.*, 2002 WL 31741561, *1 (Dec. 9, 2002), the SEC requested a cease-and desist order, an associational bar, and a civil penalty of $100,000 against

one of the respondents. As a result of the respondents' terminal cancer and concomitant inability to continue working in the industry, the court declined to impose a cease-and-desist order and concluded the respondent should be censured rather than barred. *Id.* at *18–19. The ALJ reasoned,

> The issue to consider is whether these other sanctions, by themselves, provide inadequate deterrence. If so, then the marginal additional deterrence of civil penalty sanctions would be warranted in the public interest. Based on the facts and circumstances before me, I conclude that the need for deterrence has been fully satisfied by the cease-and-desist order, the censure, and the order to engage a compliance consultant.

*Id.* at *21.

Finally, the vast majority of Mr. Bresner's net worth is held in a retirement account. As noted above, Mr. Bresner is 69 years old and nearing the end of his career. The public interest would not be served by forcing Mr. Bresner to liquidate his retirement account to pay such an exorbitant fine. *See F.X.C.*, 2002 WL 31741561, at *21 ("There is simply no valid regulatory purpose to be served by raiding Curzio's individual retirement account, his only liquid asset.") In *F.X.C*, the ALJ concluded that the "$100,000 penalties sought by the Division in this proceeding are grossly disproportionate to the gravity of the proven offenses, and thus constitutionally excessive under the Excessive Fines Clause of the Eighth Amendment" and declined to impose any civil penalty. *Id.* Under the circumstances presented here, the $150,000 penalty requested by the Division is similarly unwarranted.

## IV. CONCLUSION

For the reasons set forth above and in Mr. Bresner's initial Post-Hearing Brief, the charges against him should be dismissed. In the event the Administrative Law Judge concludes

that Mr. Bresner's supervision was unreasonable, the sanctions requested by the Division are unwarranted and should be denied.

Respectfully submitted this 10th day of May, 2013.

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