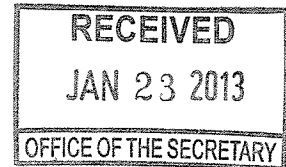


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UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

HARD COPY

ADMINISTRATIVE PROCEEDING  
File No. 3-15015



In the Matter of

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

Respondents.

RESPONDENT BRESNER'S  
PREHEARING BRIEF

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Respondent, Michael Bresner, by and through counsel, hereby submits this Prehearing Brief in the above-captioned matter.

## **I. INTRODUCTION**

The Division of Enforcement's case against Mr. Bresner fails because Mr. Bresner was not Dimitrios Koutsoubos's or Jason Konner's supervisor. Even assuming Mr. Bresner had some supervisory responsibility for Mr. Koutsoubos and Mr. Konner, he exercised his obligations appropriately. The crux of the Division's case is not that Mr. Bresner failed to reasonably supervise Mr. Koutsoubos and Mr. Konner, but that he did not take the action the Division suggests. Indeed, the Division is critical of Mr. Bresner's adoption of the recommendations of J.P. Turner & Company's ("J.P. Turner") staff to whom he delegated supervisory responsibility. Although the chain of command was unanimous in its recommendations, the Division has chosen the person farthest from direct supervision to sanction. The impact of this flawed reasoning will incentivize managers to remove themselves from the chain of supervision lest their judgment be subsequently second guessed by the Division.

## **II. FACTUAL BACKGROUND**

### *A. Mr. Bresner is an Experienced Securities Professional.*

Mr. Bresner has more than forty years of experience in the securities industry and is currently Senior Vice President for Due Diligence and New Products at J.P. Turner. For the first fifteen years of his securities career, Mr. Bresner worked as an analyst or supervisor of analysts. Since 1982, Mr. Bresner has held various management positions, including president and financial officer, for a number of firms. Mr. Bresner joined J.P. Turner in 2005. Until 2012, he was the Executive Vice President, and it was his responsibility to supervise the Area Vice

Presidents (“AVP”). Mr. Bresner also served on the firm’s New Product Committee, Ethics Committee, and Steering Committee.

B. *J.P. Turner’s Supervisory Systems.*

Pursuant to J.P. Turner’s Written Supervisory Procedures, day-to-day supervision, including the review of trading activity, was primarily the responsibility of the Branch Manager or Designated Principal. Branch Managers reported to the AVPs, the AVPs reported to Mr. Bresner, and Mr. Bresner reported to Dean Vernoia, the Chief Operating Officer. Some non-OSJ branch offices were directly supervised by an AVP, and producing managers were generally supervised by an AVP.

The firm initiated AARS in late 2007 using return on investment benchmark criteria to facilitate the monitoring of active accounts following Mr. Bresner’s recommendation that that the firm’s system for monitoring active trading should be improved. 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”). The 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.<sup>1</sup> 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.

Accounts with an ROI between ten and fifteen and a turnover of less than six were identified as Level 1 and reviewed by the registered representative’s supervisor. 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 reviewed by the registered representative’s supervisor.

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<sup>1</sup> The Division incorrectly alleges that the ROI is based on the average equity in the account. (OIP ¶ 15.)

Level 2 accounts were also sent an Active Customer Supplement and Questionnaire by the Compliance Department, which determined whether customers were approved to trade actively. Those customers who did not qualify for active trading were restricted by the Compliance Department. In addition, if the customer failed to return the questionnaire, the Compliance Department restricted all trading in the account with the exception of liquidations. Accounts with ROIs between twenty and twenty-five were identified as Level 3 and were reviewed by one of the AVPs. Finally, accounts with an ROI greater than twenty-five were identified as Level 4 and managed at the discretion of the Executive Vice President. To that end, 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. Mr. Bresner's and the AVPs' role in reviewing active accounts did not, however, relieve the direct supervisors of their responsibilities. According to the Written Supervisory System & Procedures (July 2, 2008):

The Branch Manager or Designated Principal reviews transactions for the following (as applicable in light of the transaction):

1. excessive trading by a customer or a representative;
2. transactions inconsistent with the client's stated investment objectives;
3. transactions not within the customer's financial resources;
4. undue concentration;
5. sale of controlled or restricted securities (Rule 144);
6. solicited vs. unsolicited transactions;
7. violations of the Firm's policies regarding breakpoints and mutual fund exchanges;

8. employee and related account transactions with regard to possible conflicts of interest;
9. general suitability;
10. possible guarantees against losses;
11. churning; and
12. any other questionable activity.

C. *Mr. Bresner's Role in J.P. Turner's Supervisory System.*

As Executive Vice President, Mr. Bresner's primary responsibility was to supervise the AVPs. Mr. Bresner held formal meetings at least once a week with the AVPs in addition to ad hoc meetings and spoke with individual AVPs on a daily basis. 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.

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. Mr. Bresner reasonably delegated the review of these accounts to the AVPs and then acted on the AVPs' recommendations by either adopting them or increasing the sanction where appropriate. Mr. Bresner did not, however, have the requisite authority to take the actions the Division contends he should have taken. Indeed, pursuant to the firm's procedures, it is the responsibility of Branch Managers and AVPs, in conjunction with the Chief Compliance Officer ("CCO"), to recommend registered representatives for special supervision or other disciplinary actions or restrictions. Following the recommendations of the AVPs, Mr. Bresner acted within the scope of his supervisory authority to appropriately sanction representatives whose accounts appeared on Level 4.

### III. ARGUMENT

To prove a failure to supervise claim against Mr. Bresner, the Division must establish (i) an underlying securities law violation; (ii) association of the registered representative; (iii) supervisory jurisdiction over that representative; and (iv) failure reasonably to 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 must establish 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). Accordingly, if the ALJ determines that Mr. Konner and Mr. Koutsoubos committed no violation, the charges against Mr. Bresner must be dismissed. Assuming arguendo that Mr. Konner and Mr. Koutsoubos committed the alleged primary violations, the ALJ should nevertheless dismiss the charges against Mr. Bresner because the Division cannot establish two elements of its case: (a) that Mr. Bresner was the representatives' supervisor, or (b) that his supervision was unreasonable.

#### A. *Mr. Bresner Was Not Mr. Konner's or Mr. Koutsoubos's Supervisor.*

Mr. Bresner was not Mr. Konner's or Mr. Koutsoubos's supervisor. "[D]etermining if a particular person is a 'supervisor' depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability or authority to affect the conduct of the employee whose behavior is at issue." *In re Gutfreund*, Exchange Act Release No. 34-31554, 51 S.E.C. 93, 113, 1992 SEC LEXIS 2939, at \*47 (Dec. 3, 1992). In *In re Huff*, Exchange Act Release No. 29017, 50 S.E.C. 524, 535, 1991 SEC LEXIS 551, at \*26-27 (Mar.



28, 1991), the Commission considered whether a senior registered options principal in a broker-dealer's compliance department failed to supervise a registered representative. The Commission explained:

An analysis of Huff's authority and responsibility at PaineWebber indicates that Greenman was not subject to Huff's supervision. Because Huff was not in the line of authority at PaineWebber to hire, fire, reward or punish Greenman, Huff should be held to be a statutory supervisor of Greenman only if, in light of all relevant facts and circumstances, he knew or should have known that he had the authority and responsibility within the administrative structure of PaineWebber to exercise such control over Greenman's activities that he could have prevented Greenman's violations.

J.P. Turner's Written Supervisory Procedures do not identify Mr. Bresner as Mr. Koutsoubos's or Mr. Konner's supervisor. The procedures state "Customers with an activity ratio for Level IV will have their accounts managed at the discretion of the EVP." Thus, Mr. Bresner was responsible for managing the *accounts*, not supervising the registered representatives. Further, any requirement that Mr. Bresner, as Executive Vice President, review and take action with respect to Level 4 accounts does not make him the representatives' supervisor. It simply cannot be true that Mr. Bresner became the supervisor of every registered representative who appeared on Level 4. For example, in the third quarter of 2007, the first time the AARS report was available, there were 398 accounts on Level 4 represented by approximately one hundred different registered representatives. To suggest that Mr. Bresner became the supervisor of more than one hundred representatives is unreasonable and unsupported by J.P. Turner's policies. Rather, the Branch Managers remained the direct supervisors of the representatives, while Mr. Bresner, as Executive Vice President, had overarching supervisory responsibilities for many registered representatives. *See In re Bellows*, 67 S.E.C. Docket 1426, 1998 WL 409445, at \*7-8 (July 23, 1998) (finding that individual who

served as compliance officer, vice president, and senior registered options principal was not supervisor of registered representative, and even if she were, she reasonably supervised the representative). As discussed in detail below, Mr. Bresner reasonably delegated his supervisory responsibilities to his direct reports, the AVPs. *See id.*

Mr. Bresner did not have the authority or responsibility to exercise control over Mr. Konner's and Mr. Koutsoubos's activities to prevent the alleged misconduct. Mr. Bresner was not the Branch Manager responsible for reviewing the daily trading activities of Mr. Konner and Mr. Koutsoubos, or for monitoring those activities for churning. He had no authority to discipline them, including placing them on heightened supervision. The Written Supervisory System & Procedures provide that "[i]t is the responsibility of the BM or AVP, in conjunction with the CCO to identify RRs for potential special supervision." Contrary to the Division's suggestions, Mr. Bresner could have not restricted the number of trades that were permitted to occur in the non-discretionary accounts. None of the clients had complained of unauthorized trading by Mr. Konner or Mr. Koutsoubos. In short, Mr. Bresner had no control over the individual acts of the registered representatives and was not their direct supervisor.

B. *Mr. Bresner Reasonably Supervised the Accounts.*

Mr. Bresner's supervision as Executive Vice President was reasonable. 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. *See Huff*, 50 S.E.C. at 529, 1991 SEC LEXIS 551, at \*12. The Commission has recognized the authority of a supervisor to delegate his or her responsibilities. *Bellows*, 1998 WL 409445, at \*7–8 (“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.”).

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); *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); *see also Bellows*, 67 S.E.C. Docket 1426, 1998 WL 409445, at \*9 (“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 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 Division's allegation that Mr. Bresner failed to appropriately respond to these red flags is incorrect. Mr. Bresner appropriately responded to the red flags of which he had knowledge.

As a threshold matter, Mr. Bresner appropriately delegated review of the accounts on Level 4 to the AVPs. When Mr. Bresner received the list of accounts that reached Level 4 each quarter, he assigned those accounts to the AVPs and directed them to review the accounts and determine what action, if any, was appropriate. 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. The AVPs did indeed engage in such reviews. The AVPs provided their recommendations to Mr. Bresner, who then reviewed those recommendations and decided whether to implement them or to impose a more severe restriction. Having failed to charge any of the Branch Managers or AVPs responsible for supervising Mr. Konner and Mr. Koutsoubos, it appears the Division has determined their supervision was reasonable; it then follows that Mr. Bresner's supervision was also reasonable.

Mr. Bresner took reasonable action in response to each of the accounts appearing on Level 4, namely restricting the commissions that could be charged for trades. Seeking to substitute its judgment for Mr. Bresner's and the AVPs', the Division criticizes Mr. Bresner for failing to impose other restrictions, ignoring the facts that Mr. Bresner did not believe he had the authority to impose any other restrictions, the Written Supervisory Procedures do not state that he did, the Division has not identified any rule that states that reducing profit margin is not an appropriate response to addressing active accounts, and the commission restrictions had the ultimate effect of severely diminishing, if not eliminating, any incentive for the registered representatives to recommend trades for the purpose of generating commissions.

For example, when one of the accounts first appeared on Level 4, the customer 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. The AVPs recommended, and Mr. Bresner imposed, a commission restriction of \$100 per trade on July 28, 2008, after the account appeared at Level 4 in the second quarter of 2008. The result of that restriction, and similar restrictions imposed in the following quarters, was that the customer paid an average commission of approximately \$108 per trade over the subsequent four quarters. While the Division hypothesizes that reducing the commissions may have incentivized the representatives to engage in more trading, as the chart below illustrates, the record will not bear that out.

<b>Quarter</b>	<b>Commissions Last 90 days</b>	<b>Trades Last 90 days</b>
II Quarter 2009	\$10,139.99	84
I Quarter 2009	\$4,300.00	37
IV Quarter 2008	\$11,799.99	114
III Quarter 2008	\$12,299.97	123

II Quarter 2008	\$83,885.04	76
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The customer would have had to have engaged in *ten times* the number of trades in order for the representative to generate the same amount in commissions. In fact, although the customer engaged in more trades in the quarter after the restrictions were first implemented, the commissions charged decreased from approximately \$83,885 to \$12,299. Indeed, the commission restrictions imposed on the three accounts at issue reduced the average of commission charged per transaction by between seventy and ninety percent. Thus, contrary to the Division's argument, the commission restrictions imposed by Mr. Bresner, upon the recommendation of the AVPs, were effective.

The Division also argues 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. Moreover, the test is whether Mr. Bresner's supervision was reasonable, not whether Mr. Bresner did what the Division would have done. The actions Mr. Bresner took in response to the accounts appearing on Level 4 was reasonable.

The final two 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

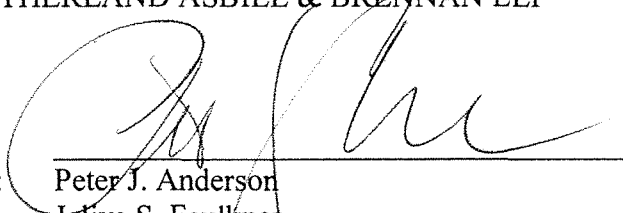
questionnaires. This process was conducted by the Compliance Department. To the best of Mr. Bresner's knowledge, each customer whose account reached Level 2 had returned a completed active account questionnaire in accordance with J.P. Turner's Written Supervisory Procedures, and the Compliance Department had determined that these customers were permitted to trade. It was not among Mr. Bresner's job responsibilities to review active account questionnaires. If J.P. Turner's procedures were deficient in that regard, that failure is J.P. Turner's, not Mr. Bresner's. *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). Mr. Bresner was not the direct supervisor of Mr. Konner and Mr. Koutsoubos, and he reasonably executed his supervisory responsibilities as Executive Vice President. The Division cannot establish otherwise. The charges against Mr. Bresner should be dismissed.

#### **IV. CONCLUSION**

For the reasons detailed above, Mr. Bresner requests that the ALJ dismiss the charges against him.

Respectfully submitted this 22nd day of January, 2013.

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