

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 51588 / April 21, 2005

ADMINISTRATIVE PROCEEDING
File No. 3-11907

In the Matter of

FISERV SECURITIES, INC. and
DENNIS J. DONNELLY,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) against Fiserv Securities, Inc. and Dennis J. Donnelly (collectively, “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offers”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, Respondents consent to the entry of this Order Instituting Administrative Proceedings, Making Findings, and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Order”), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

Respondents

1. Fiserv Securities, Inc. ("FSI"), headquartered in Philadelphia, Pennsylvania, registered with the Commission as a broker-dealer in October 1983. FSI provides securities clearing services for approximately 140 introducing brokers. In addition, between August 2002 and October 2003, FSI provided direct brokerage services to two hedge funds.

2. Dennis J. Donnelly ("Donnelly"), age 55, was, during the relevant period, an Executive Vice President and Chief Operating Officer of FSI. Donnelly has the following NASD licenses: General Securities Representative (Series 7), General Securities Principal (Series 24), and Financial and Operations Principal (Series 27).

Overview

3. Between August 2002 and October 2003, two employees at FSI's New York City office, Thomas J. Gerbasio and Raymond L. Braun, Jr., engaged in an illegal market timing scheme on behalf of two FSI hedge fund customers.² Additionally, between December 2000 and October 2002, another employee, who was a senior vice president in the Mutual Fund Department of FSI's Philadelphia office, engaged in a late trading and market timing scheme in his personal trading accounts.³ Charles J. Addeo, a vice-president in FSI's Philadelphia office, participated in both market timing schemes. These employees defrauded hundreds of mutual funds and their shareholders by engaging in deceptive practices designed to circumvent the funds' restrictions on market timing. In response to hundreds of notifications from mutual funds, including "kick-out letters" rejecting market timing trades, Gerbasio and Braun, assisted by Addeo, employed a variety of deceptive acts and practices including misrepresenting the nature

¹ The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

² Market timing includes: (i) frequent buying and selling of shares of the same mutual fund or (ii) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not illegal per se, can harm other mutual fund shareholders because it can dilute the value of their shares, if the market timer is exploiting pricing inefficiencies, or disrupt the management of the mutual fund's investment portfolio and can cause the targeted mutual fund to incur costs borne by other shareholders to accommodate frequent buying and selling of shares by the market timer.

³ Late Trading refers to the practice of placing orders to buy, redeem, or exchange mutual fund shares after 4:00 p.m. ET, the time as of which mutual funds typically calculate their net asset value ("NAV"), but receiving the price based on the prior NAV already determined as of 4:00 p.m. Late trading enables the trader to profit from market events that occur after 4:00 p.m. but that are not reflected in that day's price.

of the trades to the funds, opening dozens of accounts on behalf of their customers to conceal their identity from the funds, entering trades in amounts that would avoid the funds' detection triggers, trading in funds that were less likely to detect the unwanted market timing, and advising their customers on strategies to conceal their market timing from funds that objected to this trading. In addition, the senior vice president, who also received kick-out letters as a result of trading in his own accounts, employed similar deceptive practices, and also engaged in illegal late trading. Through these activities, Gerbasio, Braun, Addeo and the senior vice president violated the antifraud provisions of the federal securities laws.⁴

4. FSI failed reasonably to supervise Gerbasio, Braun, the senior vice president and Addeo, with a view to preventing their violations of the federal securities laws. FSI failed to adopt adequate policies and procedures to monitor market timing or late trading so as to detect and prevent the fraudulent conduct described herein. In addition, FSI failed to implement appropriate policies and procedures to ensure that abusive trading was discontinued in the face of the funds' instructions to curb it.

5. Donnelly, their supervisor, failed reasonably to supervise Gerbasio and Braun with a view to preventing their violations of the federal securities laws. Donnelly failed to review the trading activities engaged in by Gerbasio and Braun on behalf of their customers. Further, he was aware of correspondence received from the mutual funds seeking to restrict market timing trading and failed to follow up and investigate this red flag.

Conduct of Gerbasio, Braun, the Senior Vice President and Addeo

Gerbasio and Braun

6. In August 2002, FSI expanded its client base by acquiring the clearing operations of Investec Ernst & Co. ("Investec"), a broker-dealer located in New York. Part of this acquisition consisted of a market timing business run by then-Investec employees Gerbasio and Braun. This market timing business involved, primarily, Investec's provision of brokerage services to two hedge funds (together, the "Direct Customers"). These Direct Customers traded directly through accounts at Investec, rather than through an introducing broker. As such, the Direct Customers were unlike any of FSI's existing customers, which were registered broker-dealers.

7. Following the acquisition of Investec, FSI retained the Investec office in New York where, in addition to its normal clearing business, FSI also serviced the Direct Customer accounts. FSI designated the market timing business for these hedge funds as the New York Market Timing Office, and retained Gerbasio and Braun to run this operation. At that time, FSI named Gerbasio Vice President and head of the Market Timing Office, and Braun became its front line manager. In that role, Braun supervised the mutual fund trading clerks and reported to Gerbasio and Donnelly. Neither Gerbasio nor Braun was licensed to sell securities or provide

⁴ Simultaneously with the institution of this Order, the Commission has filed a civil injunctive action against Gerbasio and Braun in United States district court. The Commission has also instituted a settled administrative proceeding against Addeo.

investment advice. For the entire time that Gerbasio was employed by FSI, he reported to Donnelly.

8. The Direct Customers' trading activity through FSI consisted exclusively of market timing transactions. Between August 2002 and October 2003, the Direct Customers executed 37,965 market timing transactions through their FSI accounts, which were serviced, handled, and advised by Gerbasio and Braun.

9. Over time, FSI received hundreds of letters and e-mails from mutual funds questioning or objecting to the Direct Customers' trading practices. Some of these notices informed FSI that trades were rejected due to market timing in violation of the fund's prospectus, while other communications informed FSI that the fund had perceived a pattern that could be regarded as market timing or inquired as to the intentions of the customer. Some notices requested that FSI prevent an identified customer or broker from entering further market timing trades. In order to retain the Direct Customers' market timing business, Gerbasio and Braun engaged in a series of acts and practices designed to conceal the Direct Customers' market timing activity from the mutual funds that had objected to the trading. These efforts included: misrepresenting their customer's intentions to engage in market timing in response to inquiries by the funds; trading through 62 separate accounts to conceal customer identities; entering trades in amounts unlikely to be detected and/or perceived as market timing; recommending that market timing customers invest in those funds that were slow to identify market timing; and advising their customers on strategies they could use to conceal their market timing from funds that objected to this trading.

10. The Direct Customers paid FSI fees, ranging from 1.75 to 2.50 percent of assets in their accounts annually. Between 2000 and 2004, FSI's market timing business, including both the Direct Customers as well as customers of introducing brokers who engaged in market timing, generated \$4,598,000 in gross revenue. The two hedge funds comprising the Direct Customer accounts produced more than half of this revenue in only 14 months of trading.

Senior Vice President

11. Between April 2000 and October 2002, when FSI terminated his employment, the senior vice president in charge of FSI's Mutual Fund Department in Philadelphia engaged in deceptive mutual fund trading for his own benefit through his personal accounts at FSI, earning profits of \$922,000. FSI's Mutual Fund Department provided clearing services for mutual fund trading by introducing brokers.

12. During the time that he worked for FSI, the senior vice president engaged in over 1,000 market timing transactions through his FSI accounts. To conceal his market timing from the mutual funds, the senior vice president employed some of the same deceptive practices used by Gerbasio and Braun, including dividing his trades between accounts to conceal his identity; breaking up large transactions into a series of smaller trades to avoid detection; and repeatedly ignoring fund requests to cease trading.

13. In addition to, and as part of his deceptive trading practices, the senior vice president engaged in late trading in his personal accounts. During 2001 and 2002, the senior vice

president entered nearly 70 percent of his market timing trades after 4:00 p.m. ET. Each of these trades improperly received the current day's NAV, despite being entered after the close of the market. In order to do so, the senior vice president circumvented FSI's system which only allowed trading after 4:00 p.m. in limited circumstances involving errors and other technical problems.

Addeo

14. Between approximately 1995 and 2004, Addeo served as vice president of mutual funds in FSI's Philadelphia office where he was responsible for the day-to-day operations of the Mutual Fund Department. Addeo intentionally participated in the fraudulent trading practices of Gerbasio, Braun, and the senior vice president, and also enabled the market timing to continue despite having created the appearance of restricting such trading.

15. In response to the funds' communications, Addeo created a list of fund families that objected to market timing (known as the "Restricted Funds List"). Addeo, or others acting on his instruction, circulated the Restricted Funds List to introducing brokers to notify those firms that their clients should not engage in frequent trading in the mutual fund families listed on the Restricted Funds List. At the end of 2002, Addeo replaced the Restricted Funds List with a more detailed list (the "Restricted Funds Log"), which sought to restrict specific accounts from trading in particular mutual funds within a fund family. In practice, the Mutual Fund Department compared the introducing brokers' trades with the Restricted Funds Log and cancelled any prohibited market timing trades.

16. Furthermore, Addeo failed to apply the lists both to the senior vice president's trades and the Direct Customer trades. He intentionally failed to apply the Restricted Funds List to the senior vice president's trades, thereby permitting him to trade in funds that objected to his trading. In addition, on Gerbasio's instructions, Addeo did not apply the Restricted Funds Log to the Direct Customer trades, thereby exempting those trades from any restrictions.

FSI Failed Reasonably to Supervise Gerbasio, Braun, the Senior Vice President and Addeo, and Donnelly Failed Reasonably to Supervise Gerbasio and Braun

17. FSI failed reasonably to supervise Gerbasio, Braun, the senior vice president and Addeo, with a view to preventing their violations of the federal securities laws. In particular, FSI failed to adopt, implement or follow adequate supervisory and compliance policies, procedures or systems that could have detected or prevented its employees' market timing and late trading schemes. FSI had insufficient systems in place to prevent its employees from using fraudulent and deceptive practices to circumvent mutual fund objections to the market timing conducted by both the Direct Customers and the senior vice president. In addition, FSI had insufficient procedures and systems in place regarding adequate responses to red flags and warnings of improper conduct, namely the hundreds of communications from mutual funds objecting to or questioning market timing. Finally, FSI had no procedures to detect and prevent late trading by its employees, and to ensure that the FSI system, which prohibited trading after 4:00 p.m. except only in limited circumstances involving errors and other technical problems, worked as intended.

18. Donnelly also failed reasonably to supervise Gerbasio and Braun with a view to preventing their violations of the federal securities laws. During the relevant period, Donnelly was responsible for the management and supervision of FSI's market timing business. He was the senior officer with supervisory responsibility over Gerbasio and Braun. Neither of these individuals was licensed to sell securities or provide investment advice. Donnelly failed to take appropriate affirmative steps to supervise them. For example, he failed to monitor the Direct Customer market timing business conducted by Gerbasio and Braun.

19. In addition, Donnelly knew that some mutual fund companies had sent letters to FSI seeking to restrict market timing trades, including the Direct Customers' trades. Donnelly failed to adequately respond to these red flags. He did not investigate why, how frequently, or from whom FSI received such correspondence, or how, if at all, FSI was responding.

Violations

20. As a result of the conduct described above, Gerbasio, Braun, the senior vice president, and Addeo willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities.

Failure to Supervise

21. Section 15(b)(4)(E) of the Exchange Act provides for the imposition of a sanction against a broker or dealer who "has failed reasonably to supervise, with a view to preventing violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision." Section 15(b)(6)(A)(i) parallels Section 15(b)(4)(E) and provides for the imposition of sanctions against persons associated with a broker or dealer.

22. As a result of the conduct described above, Respondents FSI and Donnelly failed reasonably to supervise Gerbasio and Braun, and FSI failed reasonably to supervise Addeo and the senior vice president, with a view to preventing their violations of the federal securities laws.

FSI's Remedial Efforts

23. Since the staff's investigation, FSI has taken the following voluntary remedial actions:

- A. Ceased and prohibited all market timing activity by and through FSI;
- B. Hired a law firm, Foley & Lardner LLP, to review and revise its written supervisory procedures to aid in the detection and prevention of illegal market timing. The revised procedures require written verification certifying the completion of supervisory reviews on a regular basis;
- C. Adopted and implemented new supervisory and operational procedures designed to detect and prevent illegal mutual fund market timing and late trading; and

D. Completed a comprehensive review of its clearing and operations functions by an outside consultant.

24. In determining to accept the Offers, the Commission considered the remedial acts promptly undertaken by FSI, including those set forth in Paragraph 23, above, and cooperation afforded the Commission staff by Respondents.

Undertakings

25. Ongoing Cooperation by FSI. FSI undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in this Order. In connection with such cooperation, FSI has undertaken:

A. To produce, without service of a notice or subpoena, any and all documents and other information reasonably requested by the Commission's staff;

B. To use its best efforts to cause its employees to be interviewed by the Commission's staff at such times as the staff reasonably may direct;

C. To use its best efforts to cause its employees to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be requested by the Commission's staff; and

D. That in connection with any testimony of FSI to be conducted at deposition, hearing or trial pursuant to a notice or subpoena, FSI:

i. Agrees that any such notice or subpoena for FSI's appearance and testimony may be served by regular mail on its counsel, Samuel J. Winer, Esq., Foley & Lardner LLP, 3000 K. Street, N.W., Suite 500, Washington, D.C. 20007; and

ii. Agrees that any such notice or subpoena for FSI's appearance and testimony in an action pending in a United States District Court may be served, and may require testimony, beyond the territorial limits imposed by the Federal Rules of Civil Procedure.

26. Ongoing Cooperation by Donnelly. Donnelly undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in this Order. In connection with such cooperation, Donnelly has undertaken:

A. To produce, without service of a notice or subpoena, any and all documents and other information reasonably requested by the Commission's staff;

B. To be interviewed by the Commission's staff at such times as the staff reasonably may request and to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be requested by the Commission's staff; and

C. That in connection with any testimony of Donnelly to be conducted at deposition, hearing or trial pursuant to a notice or subpoena, Donnelly:

i. Agrees that any such notice or subpoena for his appearance and testimony may be served by regular mail on his counsel, Jerry A. Isenberg, Esq., LeClair Ryan, 1701 Pennsylvania Avenue, N.W., Suite 1045, Washington, D.C. 20006; and

ii. Agrees that any such notice or subpoena for his appearance and testimony in an action pending in a United States District Court may be served, and may require testimony, beyond the territorial limits imposed by the Federal Rules of Civil Procedure.

27. FSI undertakes to continue and maintain the remedial efforts described in Paragraph 23 above, and comply with all new policies, procedures, systems and recommendations of Foley & Lardner LLP and the Independent Compliance Consultant, as set forth below, as necessary to provide reasonable assurance that FSI can detect and prevent the types of violations and supervisory failures described above.

28. Independent Compliance Consultant. FSI shall retain, within one year of the date of entry of this Order, an Independent Compliance Consultant (“Consultant”) not unacceptable to the staff of the Commission. The Consultant’s compensation and expenses shall be borne exclusively by FSI. The Consultant shall conduct a comprehensive review of FSI’s supervisory, compliance, and other policies and procedures designed to detect and prevent violations of the federal securities laws related to mutual fund late trading and market timing. FSI shall cooperate fully with the Consultant in this review, including making such information and documents available, as the Consultant may reasonably request, and by requiring FSI’s employees and agents to supply such information and documents as the Consultant may reasonably request. This review will begin one year after the date of the entry of this Order.

29. At the conclusion of the review, but no later than 14 months from the date of entry of this Order, the Consultant will produce to FSI a preliminary report regarding his conclusions concerning such policies and procedures. The Consultant shall have the option to seek an extension of time by making a written request to the Commission staff. The preliminary report shall include a description of the review performed, the conclusions reached, and any recommendations of the Consultant for changes in such policies and procedures which would be necessary to ensure that those policies and procedures were reasonably designed to detect and prevent violations of the federal securities laws related to mutual fund late trading and market timing.

30. Within 30 days of receipt of the preliminary report, FSI shall in writing respond to the preliminary report. In such response FSI shall advise the Consultant of the recommendations from the preliminary report that it has determined to accept and the recommendations that it considers to be unduly burdensome. In addition, FSI may request an explanation or suggest an alternative policy designed to achieve the same objective.

31. Within 45 days of receipt of the preliminary report, the Consultant and FSI shall engage in such communications as are necessary to seek to resolve, in good faith, any disputes with respect to the Consultant’s recommendations. In the event the Consultant and FSI are

unable to agree on an alternative proposal acceptable to the Commission's staff, FSI shall abide by the recommendation of the Consultant.

32. FSI shall require the Consultant to complete the aforementioned review and submit a written Final Report to FSI and to the Commission's staff no later than 17 months from the date of entry of this Order. The Final Report shall recite the efforts the Consultant undertook to review FSI's supervisory functions, compliance mechanisms, and other policies and procedures; set forth the Consultant's conclusions and recommendations and FSI's proposals; and describe how FSI is implementing those recommendations and/or proposals. FSI shall take all necessary and appropriate steps to adopt and implement all recommendations contained in the Consultant's Final Report.

33. FSI may seek confidential treatment of such information and findings set forth in the Consultant's final report to the extent that the report concerns proprietary commercial and financial information of FSI. This report will be subject to the protections from disclosure set forth in the rules of the Commission, including the protections from disclosure set forth in 5 U.S.C. § 552(b)(8) and 17 C.F.R. § 200.80(b)(8), and will not constitute a record, report, statement or data compilation of the Commission under Rule 803(8) of the Federal Rules of Evidence.

34. No later than 20 months after the date of entry of this Order, or at such later time as the staff of the Commission may direct, FSI shall submit to the staff of the Commission an Affidavit stating that it has implemented any and all actions recommended by the Consultant, or explaining the circumstances under which it has not implemented such actions.

35. FSI (i) shall not have the authority to terminate the Consultant without the prior written approval of the Commission staff; (ii) shall compensate the Consultant, and persons engaged to assist the Consultant, for services rendered pursuant to this Order at their reasonable and customary rates; and (iii) shall not be in and shall not have an attorney-client relationship with the Consultant and shall not seek to invoke the attorney-client or any other doctrine or privilege to prevent the Consultant from transmitting any information, reports, or documents to the Commission staff.

36. For the period of engagement and for a period of two years from completion of the engagement, FSI, or any of its present affiliates, directors, officers, employees or agents acting in their capacity, shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with the Consultant. The agreement between FSI and the Consultant shall provide that the Consultant, together with any firm with which the Consultant is affiliated or of which he/she is a member and any person engaged to assist the Consultant in performance of his/her duties, will not, without the prior written consent of the Commission's Philadelphia District Office, enter into any employment, consultant, attorney-client, auditing or other professional relationship with FSI, or any of its present or former affiliates, directors, officers, employees, or agents for the period of the engagement and for a period of two years after the engagement.

37. The foregoing undertakings regarding the Independent Compliance Consultant shall not apply to FSI at such time that FSI were to withdraw its registration as a broker-dealer with the Commission.

38. Respondent Donnelly shall provide to the Commission, within 30 days after the end of the nine month suspension period described below, an affidavit that he has complied fully with the sanctions described in Section IV below.

39. In determining whether to accept the Offers, the Commission has considered the undertakings enumerated above.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions specified in Respondents' Offers.

Accordingly, it is hereby ORDERED that:

A. FSI is hereby censured.

B. The Respondents shall pay disgorgement and civil money penalties as follows:

1. FSI shall, within ten days of the entry of this Order, pay disgorgement plus prejudgment interest in the aggregate amount of \$5,000,000, and a civil penalty in the amount of \$10,000,000, for a total payment of \$15,000,000, to the United States Treasury. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) wired, hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies FSI as a respondent in these proceedings, the file number of these proceedings, a copy of which cover letter, together with a copy of the wire transfer instruction, money order or check shall be sent to Arthur S. Gabinet, Securities and Exchange Commission, Philadelphia District Office, Mellon Independence Center, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

2. Donnelly shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$50,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Donnelly as a respondent in these proceedings, the file number of these proceedings, a copy of the cover letter and money order or check shall be sent to Arthur S. Gabinet, Securities and Exchange Commission, Philadelphia District Office, Mellon Independence Center, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

C. Respondent Donnelly be, and hereby is, suspended from association in a supervisory capacity with any broker or dealer for a period of nine months, effective on the second Monday following the entry of this Order.

D. FSI shall comply with the undertakings specified in Paragraphs 27 to 37, above.

E. Respondent Donnelly shall comply with his undertaking specified in Paragraph 38 above.

By the Commission.

Jonathan G. Katz
Secretary