

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	
THOMAS J. GERBASIO and	:	05-1833 (BWK)
RAYMOND L. BRAUN, JR.,	:	
	:	
Defendants.	:	

COMPLAINT

Plaintiff Securities and Exchange Commission (the “Commission”) alleges for its Complaint the following:

SUMMARY

1. From at least August 2002 until October 2003, defendants Thomas J. Gerbasio and Raymond L. Braun, Jr., former employees of Fiserv Securities, Inc. (“Fiserv”), participated in a scheme to defraud hundreds of mutual funds and their shareholders by engaging in deceptive practices in connection with market timing by two hedge fund customers.
2. Specifically, in response to hundreds of notifications from mutual funds monitoring and restricting excessive trading, including “kick-out letters” rejecting market timing trades, defendants Gerbasio and Braun employed a variety of deceptions and evasions on behalf of the hedge fund customers, including misrepresenting the nature of their trades to the funds, opening dozens of accounts under different names to conceal the

customers' identities 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 the customers on strategies to conceal their market timing from funds that objected to and/or prohibited this trading.

3. Using these fraudulent tactics, Defendants placed thousands of market timing trades for the hedge fund customers that would have otherwise been rejected by the fund companies for reasons including harm to shareholders in the relevant fund. Between August 2002 and October 2003, the two hedge fund customers placed 37,965 market timing trades. As a result, defendants Gerbasio and Braun received at least \$454,797 and \$125,318, respectively, in ill-gotten gains.

4. Through the activities described in this Complaint, defendants Gerbasio and Braun violated, and unless restrained and enjoined will continue to violate, Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)], and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder.

JURISDICTION AND VENUE

5. The Commission brings this action pursuant to Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)], to enjoin such acts, practices, and courses of business, obtain disgorgement and civil penalties, and for other appropriate relief.

6. This Court has jurisdiction over this action pursuant to Section 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 78u(e) and 78aa].

7. Venue is proper because certain of the acts or practices constituting the alleged violations occurred in the Eastern District of Pennsylvania.

8. In connection with the conduct alleged in this complaint, Defendants directly or indirectly made use of means or instrumentalities of interstate commerce, or of the mails, or of facilities of a national securities exchange.

DEFENDANTS

9. Thomas J. Gerbasio, age 34, is a resident of Ocean City, New Jersey. From August 2002 until April 2004, he was in charge of Fiserv's New York office, the Fiserv office that placed tens of thousands of market timing trades for certain hedge fund customers (the "New York Market Timing Office"). Gerbasio also was the Vice President of the Mutual Fund Department for Fiserv in Philadelphia.

10. Raymond L. Braun, Jr., age 31, is a resident of New York, New York. From August 2002 until April 2004, he was the Mutual Funds Operations Supervisor of Fiserv's New York Market Timing Office. Braun reported directly to Gerbasio.

FACTS

Background

11. Fiserv is a broker-dealer registered with the Commission. Its headquarters are located in Philadelphia, Pennsylvania. During the relevant time period, Fiserv provided clearing services for more than 100 introducing brokers in addition to the services described below.

12. In August 2002, Fiserv acquired 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 Gerbasio and Braun, which involved, primarily, Investec's provision of brokerage services to two hedge funds (the "Hedge Fund customers"). These customers traded directly through accounts at Investec, rather than through an introducing

broker. As such, the Hedge Fund customers were unlike any of Fiserv's existing customers, which were registered broker-dealers.

13. Following the acquisition of Investec, Fiserv retained the Investec office in New York where, in addition to its normal clearing business, Fiserv also provided direct brokerage services to the Hedge Fund customers.

14. Fiserv delegated responsibility for the Hedge Fund customers' accounts to the New York Market Timing Office, and retained Gerbasio to run the operation and Braun as the Mutual Funds Operations Supervisor. In this role, Braun supervised the mutual fund trading clerks and reported to Gerbasio.

15. Gerbasio and Braun had daily contact with the Hedge Fund customers, and were primarily responsible for maintaining these relationships. From August 2002 through at least late fall 2002, their job duties almost exclusively consisted of advising, maintaining and servicing the Hedge Fund customers. In or around late 2002, Fiserv assigned to Gerbasio the additional responsibility of running the Fiserv Mutual Fund Department in Philadelphia.

16. Neither Gerbasio nor Braun was licensed to sell securities or provide investment advice. Notwithstanding, they both recommended trades and strategies to the Hedge Fund customers and placed all trades, or directed others at Fiserv to place trades, on behalf of the Hedge Fund customers.

Market Timing

17. The Hedge Fund customers' trading activity through Fiserv, and more particularly, through Gerbasio and Braun and their subordinates, consisted exclusively of market timing transactions. 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.

18. Mutual funds often maintain policies and procedures to detect and prevent market timing. Mutual funds try to prevent market timing by, for instance, prohibiting additional trades in their funds' shares after a customer has placed a certain number of trades. Mutual funds use various tools to enforce these limits, including tracking customer transactions by customer account numbers, and monitoring transactions above a certain monetary threshold.

19. Between August 2002 and October 2003, at the direction of, and with the full knowledge, approval and assistance of Defendants, the Hedge Fund customers executed 37,965 market timing transactions in hundreds of mutual funds through their Fiserv accounts.

Defendants' Fraudulent Scheme to Conceal Market Timing Transactions from Mutual Funds Seeking to Stop Such Trading

20. At times relevant to this complaint, defendants Gerbasio and Braun were aware that many mutual fund companies deemed market timing to be improper and unacceptable, and that market timing could adversely affect shareholders in mutual funds.

21. Over time, Fiserv received hundreds of letters and e-mails from mutual funds questioning or objecting to the Hedge Fund customers' trading practices. Some of these

notices informed Fiserv that trades were rejected due to market timing in violation of the fund's prospectus, while others stated that the fund had perceived a pattern of transactions that could be regarded as market timing or inquired as to the intentions of the customer. Some notices requested that Fiserv prevent an identified customer or broker from entering further market timing trades. Several notices indicated that timing was detrimental to mutual funds and/or to shareholders in those funds.

22. Almost daily after Fiserv's acquisition of Investec, Fiserv received such correspondence with respect to the trading of the Hedge Fund customers. Defendants Gerbasio and Braun were aware of this correspondence and of the objections of mutual funds to the trading of the Hedge Fund customers.

23. Moreover, Gerbasio observed in a presentation that he made to Fiserv management that many fund companies were averse to market timing because it reduced the overall return to investors, and because it disrupted the day-to-day management of the fund.

24. Despite their knowledge that many mutual funds did not want timing trades and that such trades harmed mutual fund shareholders, from at least August 2002 through October 2003, Gerbasio and Braun, in order to keep the Hedge Fund customers and their lucrative business, designed and implemented a series of deceptive practices for the purpose of prolonging the customers' ability to market time in funds.

***Defendants Directed Fiserv Employees to
Make Misrepresentations to Mutual Funds***

25. As one of these deceptive practices, defendants Gerbasio and Braun instructed subordinates to mislead mutual funds into thinking that trades made by the Hedge Fund customers were not market timing trades upon inquiries by mutual funds into the nature of the trades. These misrepresentations enabled the Hedge Fund customers to continue trading through Fiserv, unrestricted, in the various mutual funds that made the inquiries, to the detriment of other, long term investors in those mutual funds.

26. For instance, on at least one occasion, in response to an inquiry by a mutual fund seeking to restrict market timing, a trading clerk in the New York Market Timing Office, at Gerbasio's direction, denied that a trade placed on behalf of a Hedge Fund customer was a market timing trade. Gerbasio knew, at the time of giving this instruction, that the trade was, indeed, a market timing trade.

27. In addition, on at least one occasion, Braun instructed a mutual fund trading clerk at the New York Market Timing Office to always tell employees in Fiserv's Philadelphia office, if asked, that trades placed on behalf of the Hedge Fund customers were not market timing trades, when in fact Braun knew, at the time of this instruction, that the trades were placed to time the market. The Philadelphia office would then pass these misrepresentations on to inquiring mutual funds.

28. These misrepresentations were material; they prevented mutual fund companies from identifying the Hedge Fund customers as timers and, thus, from preventing those customers from timing their mutual funds.

Defendants Advised Customers to Enter Trades in Amounts Unlikely to Draw Fund Scrutiny

29. Moreover, in response to repeated trade rejections and kick-out letters from mutual funds stating that their prospectuses banned market timing, defendants Gerbasio and Braun repeatedly recommended to the Hedge Fund customers that they enter trades in amounts that fell just below the funds' "radar" so that the funds would not detect the prohibited market timing trades.

30. Similarly, in response to correspondence from the funds rejecting the Hedge Fund customers' market timing trades, Defendants recommended that they trade in funds that prohibited market timing, but that were perceived as slow to detect it.

31. Once the Hedge Fund customers approved Defendants' trading recommendations, which they invariably did, Defendants input, or directed other Fiserv employees to input, the trades for the customers.

Defendants Advised Customers to Open New Accounts Under Different Names and Numbers to Prolong Their Ability to Time Certain Funds

32. As another deceptive practice, Defendants repeatedly recommended that the Hedge Fund customers open new accounts under different names and account numbers as a way to hide their identities from mutual funds that had previously identified their accounts as unwanted market timing accounts. Defendants then assisted the Hedge Fund customers in opening the new accounts under different names and account numbers and placed trades, or directed others at Fiserv to place trades, for the Hedge Fund customers under their new accounts. This allowed the Hedge Fund customers to continue market timing, undetected, in those mutual funds.

33. For example, in April 2003, Gerbasio recommended that one of the Hedge Fund customers open four new accounts with \$10 million in each account. Subsequently, in June 2003, Braun recommended that the same customer open new accounts for every \$4 to \$5 million invested. The Hedge Fund customer did, in fact, close and re-open accounts under new names and numbers to extend its ability to market time.

34. By October 2003, the Hedge Fund customers had opened 62 separate accounts at Fiserv, all of which were serviced, handled, and advised by defendants Gerbasio and Braun. The reason for opening the new accounts was to prolong the Hedge Fund customers' ability to market time in funds that rejected market timing trades.

35. In assisting the Hedge Fund customers with their market timing activity by changing their account numbers and placing trades under the new numbers, Defendants misrepresented and concealed the identity of their clients. The misrepresented information was material; it prevented the mutual fund companies from protecting fund shareholders and honoring their prospectuses through the restriction of market timing.

Other Strategies to Conceal Market Timing

36. On more than one occasion, defendants Gerbasio and Braun advised the Hedge Fund customers on other strategies that they could use to conceal their market timing from funds that objected to this type of trading. For example, on June 9, 2003, Braun advised one of the Hedge Fund customers on the use of a different strategy in timing, to avoid detection by mutual funds that focused on certain strategies when looking for market timing.

37. As a result of the conduct set forth above, defendant Gerbasio received at least \$454,797 in ill-gotten gains, comprised of commissions, salary and/or bonuses.

38. As a result of the conduct set forth above, defendant Braun received at least \$125,318 in ill-gotten gains, comprised of salary and/or bonuses.

CLAIM FOR RELIEF

**Violations of Section 10(b)
of the Exchange Act and Rule 10b-5 thereunder**

39. The Commission realleges and incorporates by reference each and every allegation in paragraphs 1 through 38, inclusive, as if the same were fully set forth herein.

40. From at least August 2002 through October 2003, as a result of the conduct alleged herein, defendants Gerbasio and Braun, knowingly and/or recklessly, in connection with the purchase or sale of securities, directly or indirectly, by the use of means or instrumentalities of interstate commerce, or of the mails, or of facilities of a national securities exchange, each:

(a) employed devices, schemes or artifices to defraud;

(b) made untrue statements of material fact, or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or

(c) engaged in acts, practices, or courses of business that operated as a fraud or deceit upon any person.

41. By engaging in the foregoing conduct, defendants Gerbasio and Braun violated Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5 [17 C.F.R. § 240.10-5] thereunder.

WHEREFORE, the Commission respectfully requests that this Court enter an Order:

I.

Permanently restraining and enjoining defendants Gerbasio and Braun from violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder.

II.

Directing defendants Gerbasio and Braun to disgorge any and all ill-gotten gains, together with prejudgment interest, derived from the activities set forth in this Complaint.

III.

Directing defendants Gerbasio and Braun to pay civil penalties pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)], in an amount to be determined by the Court.

IV.

Grant such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,

s/Catherine E. Pappas
Amy J. Greer, PA Bar No. 55950
Catherine E. Pappas, PA Bar No. 56544

Attorneys for Plaintiff:

**SECURITIES AND EXCHANGE
COMMISSION**

Mellon Independence Center
701 Market Street, Suite 2000
Philadelphia, PA 19106
Telephone: (215) 597-3100
Facsimile: (215) 597-2740

Dated: April 21, 2005