

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

David O. Braeger (CRD No. 2137240),

Respondent.

DISCIPLINARY PROCEEDING
No. 2015045456401

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Respondent David O. Braeger improperly used and converted \$30,000 in customer funds that he obtained from husband and wife customers TH and SE in July 2009 while Braeger was registered through member firm Newport Coast Securities, Inc. (BD No. 16944) ("Newport Coast"). Customers TH and SE provided Braeger with funds for investment in a private offering for Rubicon Capital Appreciation Fund, LLC ("Rubicon"), an entity that Braeger founded and managed.
2. However, instead of depositing TH and SE's funds into the escrow account for the Rubicon offering or causing them to be deposited at the escrow agent for the fund, Braeger endorsed his customers' check and caused it to be deposited elsewhere.
3. Braeger never invested the monies as instructed and never returned them to his customers. As a result, Braeger violated NASD Conduct Rule 2330(a) and FINRA Rule 2010.

4. Braeger further concealed his misconduct through a series of written and oral false statements he repeatedly made to TH and SE. First, from at least March 2011 to at least April 2014 Braeger misrepresented the status of Rubicon, falsely telling them that the fund was open, even though he had caused it to be closed and liquidated in or about July 2010 and returned funds to Rubicon investors other than TH and SE.
5. Second, from August 2009 to April 2010, Braeger provided quarterly statements to TH and SE, which falsely stated that their funds were invested in Rubicon when they were not.
6. Third, Braeger further misled TH and SE into believing their funds had been invested by providing them with annual tax documents that falsely ascribed a value and percentage share for their interest in Rubicon for tax years 2011, 2012 and 2013 even though Braeger had closed, liquidated and dissolved Rubicon in 2010.

RESPONDENT AND JURISDICTION

7. Braeger first became registered with FINRA as a General Securities Representative (“GSR”) on March 12, 1992.
8. During the period from March 1992 to May 2007, Braeger was registered as a GSR through a number of FINRA member and former FINRA member firms. From July 2004 to May 2007, Braeger also was registered as a General Securities Principal (“GSP”) through one of those firms.
9. Beginning October 8, 2008 to January 4, 2012, Braeger was registered as a GSR and GSP through member firm Newport Coast Securities, Inc. (BD No. 16944) (“Newport Coast”) (which until December 2009 was known as Grant Bettingen, Inc.).

10. During the period of January 2012 to July 23, 2014, Braeger was registered as a GSR and GSP at a succession of three FINRA member firms.
11. On July 23, 2014, member firm Midtown Partners (CRD No. 104223) filed with the Central Registration Depository a Uniform Termination Notice for Securities Industry Registration disclosing that Braeger's registrations with the firm had been terminated as of July 23, 2014.
12. Although Respondent is no longer registered with FINRA or associated with a FINRA member firm, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because the Complaint was filed within two years after the effective date of termination of Respondent's registration with Midtown Partners, namely, July 23, 2014; and (2) the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member.

BACKGROUND

Formation of Rubicon and Background of the Rubicon Offering

13. On December 1, 2008, Braeger established Rubicon as a Wisconsin limited liability company.
14. The business address for Rubicon was the same as Braeger's then-business address located in Mequon, Wisconsin.
15. Braeger was Managing Member of an entity known as Ceres Investment Management, LLC ("Ceres"), which was the Managing Member of Rubicon. As such, Braeger controlled Rubicon.

16. The address for Ceres also was the same as Braeger's business address in Mequon, Wisconsin.
17. On January 15, 2009, Braeger, on behalf of Rubicon, signed a Placement Agent Agreement with Newport Coast so that Newport could sell Interests in Rubicon. At the time, Braeger also worked for Newport and was actively involved in marketing Rubicon to prospective investors.
18. According to the terms of a March 19, 2009, private placement memorandum ("PPM"), Rubicon offered up to \$50,000,000 in Rubicon Interests pursuant to Rule 506 of Regulation D of the Securities Act of 1933.
19. The offering initially had a minimum contingency of \$400,000 to be raised within 90 days (but subject to a 60-day extension). Pursuant to an amendment to the PPM dated April 1, 2009, the minimum contingency was reduced from \$400,000 to \$200,000.
20. The stated business purpose for Rubicon was to "engage[] in the speculative trading of commodities and futures contracts." As set forth in the PPM, Rubicon intended to invest the offering proceeds with selected Commodity Trading Advisors ("CTAs") who would effect commodities and futures transactions for Rubicon.
21. Braeger was the individual with responsibility for making "all investment and operational decisions for" Rubicon.
22. In accordance with the terms of the PPM and the Placement Agent Agreement, an escrow account was established for the offering at Bank A, a California bank where Newport Coast maintained its primary bank account (the "Rubicon Escrow Account"). Rubicon and Bank A entered into a March 31, 2009, Escrow Account

Agreement concerning the Rubicon Escrow Account, which Braeger signed on behalf of Rubicon.

Braeger Converts the \$30,000 Check from Customers TH and SE

23. In July 2009, Braeger solicited customers TH and SE to invest in the Rubicon offering.
24. On July 20, 2009, Braeger met with TH and SE at their home. At this meeting, TH and SE completed and signed a Subscription Agreement to invest \$30,000 in Rubicon (and also completed new account paperwork to open a securities account at Newport Coast). However, the Subscription Agreement that Braeger provided to customers TH and SE was different from and inconsistent with the terms of the PPM, and differed from all other Subscription Agreements provided to every other Rubicon investor.
25. Specifically, the Subscription Agreement that Braeger provided to TH and SE directed them to make checks payable to “Rubicon Capital Appreciation Fund, LLC,” whereas the PPM and the Subscription Agreements provided to other Rubicon investors directed that checks be made payable to Bank A, as Escrow Agent for Rubicon.
26. Customer SE then wrote a \$30,000 check dated July 20, 2009, drawn on the joint bank account she shared with TH at Bank B, that was made payable to “Rubicon Capital Appreciation Fund, LLC,” as Braeger had instructed.
27. Braeger endorsed TH and SE’s \$30,000 check by writing “for deposit only” on the back and signing his initials “DOB.”

28. Braeger did not deposit TH and SE's \$30,000 check in the Rubicon Escrow Account at Bank A and instead, on July 21, 2009, deposited it in a different account at Bank C.
29. On July 22, 2009, Braeger effected an online transfer of \$1,800.00 from a bank account that he maintained at Bank C to his personal account at Bank C. Braeger represented to TH and SE that \$1,800 was the amount of the "brokers commission" for their investment in Rubicon.
30. Braeger never sent the funds for TH and SE's Rubicon investment to Newport Coast to be deposited in the Rubicon Escrow Account at Bank A and the investment was not recorded on the books and records of Newport Coast.

Rubicon's Commodity/Futures Accounts

31. During the period from March 2009 to July 2010, Rubicon maintained five commodities/futures accounts at Clearing Firm D. These accounts were introduced through Introducing Firm E.
32. Between March 2009 and July 2010, Rubicon's commodities/futures accounts at Clearing Firm D received a total of \$448,674.78.
33. None of the funds deposited in Rubicon's commodities/futures accounts at Clearing Firm D were from the \$30,000 check that TH and SE gave Braeger to invest in Rubicon.
34. On or about July 13, 2010, Braeger closed the Rubicon accounts at Clearing Firm D after several customers requested withdrawals of their assets from Rubicon.
35. Introducing Firm E forwarded instructions from Braeger for Clearing Firm D to wire the proceeds from Rubicon's commodities/futures accounts at Clearing Firm D to a bank account in Rubicon's name at Bank C.

36. On July 13, 2010, Clearing Firm D wired a total of \$471,161.75 from Rubicon's commodities/futures accounts.
37. Braeger thereafter disbursed funds to Rubicon investors – but not to TH and SE.
38. In October 2010, Braeger caused Rubicon to be dissolved as a Wisconsin limited liability company. On October 25, 2010, Articles of Dissolution were filed with the Wisconsin Department of Financial Institutions.

39. Braeger never told TH and SE that he closed, liquidated and dissolved Rubicon.

Braeger Provides False Rubicon Quarterly Statements to TH and SE

40. During the period from August 2009 to April 2010, Braeger provided at least three quarterly statements to TH and SE regarding Rubicon's value and performance. These statements specifically identified both a purported dollar value and ownership percentage for TH and SE's Rubicon investment. For example, an April 21, 2010 statement states that the total value of TH and SE's Rubicon investment as of April 16, 2010 was \$31,843.36, which accounted for 6.02 percent of Rubicon's assets.
41. Braeger caused these quarterly statements to be prepared, including retaining his personal accountant to prepare the statements.

42. These quarterly statements were false at the time they were made because they misrepresented that TH and SE had funds invested in Rubicon, when they did not.

Braeger Repeatedly Misrepresents to TH and SE that Rubicon Was Still Open

43. On or about March 23, 2011, Braeger sent an email to TH falsely stating that Rubicon was still in existence when Braeger had caused the fund to be closed nearly eight months earlier.

44. In that same email to TH, Braeger lied about why he had stopped sending quarterly statements of Rubicon's performance and falsely stated to them that "[t]he fund is doing fair and if the trading advisors do not pick up performance, I may liquidate it this year."
45. At or about the same time as the above March 22, 2011 email, Braeger also made similar oral misrepresentations to TH and SE stating that Rubicon was still active and performing fairly, and that he had stopped sending quarterly statements to them because he had moved to California and needed to find a new accountant for Rubicon.
46. In or about October 2011, Clearing Firm D filed for bankruptcy. Thereafter, beginning no later than March 2012 and continuing to at least April 2014, Braeger made repeated oral and written misrepresentations to TH and SE that Rubicon's assets were lost, frozen or unavailable as a result of the Clearing Firm D bankruptcy. For example:
- a. in an email to TH dated March 26, 2012, Braeger stated that "as for the Rubicon fund, the monies will start to drip back into the account anytime. No new news. I will also keep you updated on this. It is very frustrating, but your money is protected by SIPC insurance and you will retrieve it";
 - b. in an email to TH dated August 16, 2013, Braeger stated that "Rubicon is still in [a] 'holding pattern'"; and
 - c. in an email to TH dated April 15, 2014, Braeger referred to and attached his March 22, 2011, email to TH. Braeger stated "can it be any more clear in my statement that the 'fund is doing fair and if it does not pick up performance, I

may liquidate it, etc.’ The fund was down but not the 10% that would have immediately closed it out.” Braeger further stated that it was his “intention” to close Rubicon and that it “went into process.” However, “[Clearing Firm D] went into bankruptcy in 2011,” inferring that the bankruptcy proceeding hindered the return of funds to the customers.

- d. in conversations with TH and SE in April 2014, Braeger falsely stated to them that: (i) in addition to TH and SE, there were several other investors in Rubicon as of 2014; (ii) prior to the Clearing Firm D bankruptcy, Braeger placed a trade to remove funds from Rubicon but proceeds were tied up in the bankruptcy proceeding; (iii) no investors ever withdrew funds from Rubicon, rather the number of Rubicon investors declined over time because a number of other investors “wrote off” their investment.

47. Statements that Rubicon’s assets were lost, frozen or unavailable due to the Clearing Firm D bankruptcy were false because Braeger had closed and liquidated Rubicon’s Clearing Firm D accounts in July 2010 – more than a year prior to the bankruptcy.

Braeger Provides False Tax Documents to TH and SE

48. During the period of 2011 to 2014, TH and SE often attempted to contact Braeger about Rubicon when they were preparing their annual income tax returns. TH and SE asked Braeger to send them Schedule K-1 tax documents to report their share of any income, deductions, credits and other items from their interest in Rubicon.

49. In response to these requests, Braeger provided to TH and SE false Schedule K-1 tax documents for Rubicon.

- a. In or about April or May 2012, Braeger provided TH and SE a Schedule K-1 for tax year 2011. That document falsely reported that TH and SE were “General partner[s] or LLC member-manager[s]” of Rubicon, holding a 33.333333% share, and that the 2011 beginning and ending values of their capital account with Rubicon were \$25,496.
- b. In April 2013, Braeger provided to TH and SE a Schedule K-1 for tax year 2012. That document falsely reported that TH and SE were “[g]eneral partner[s] or LLC member-manager[s]” of Rubicon, holding a 33.333333% share, and that the 2012 beginning and ending values of their capital account with Rubicon were \$25,496.
- c. In April 2014, Braeger provided to TH and SE a Schedule K-1 for tax year 2013. That document falsely reported that TH and SE were “[g]eneral partner[s] or LLC member-manager[s]” of Rubicon, holding a 33.333333% share, and that the 2013 beginning and ending values of their capital account with Rubicon were \$25,496.

FIRST CAUSE OF ACTION

Misuse and Conversion of Customer Funds

(Violation of NASD Conduct Rule 2330(a) and FINRA Rules 2150(a) and 2010)

50. The Department realleges and incorporates by reference paragraphs 1 through 49 above.

51. NASD Conduct Rule 2330(a) (which was in effect through December 13, 2009) and FINRA Rule 2150(a) (which became effective December 14, 2009) both state that, “No member or person associated with a member shall make improper use of a customer’s securities or funds.”

52. FINRA Rule 2010 requires members and associated persons, in the conduct of their business, to “observe high standards of commercial honor and just and equitable principles of trade.”
53. A violation of NASD Conduct Rule 2330(a) constitutes a violation of FINRA Rule 2010.
54. Braeger failed to follow customer instructions and improperly used and converted \$30,000 that customers TH and SE gave to him for their investment in Rubicon.
55. By reason of the foregoing, Braeger violated NASD Conduct Rule 2330(a) and FINRA Rules 2150(a) and 2010.

SECOND CAUSE OF ACTION
Misrepresentations to Customers
(Violation of FINRA Rule 2010)

56. The Department realleges and incorporates by reference paragraphs 1 through 55 above.
57. Misrepresentations made by members or associated persons to a customer regarding the value or status of an account or investment constitutes a violation of FINRA Rule 2010.
58. Braeger made the written and oral intentional misrepresentations and omissions to TH and SE concerning Rubicon, including:
- a. From August 2009 to April 2010, Braeger provided quarterly account statements for Rubicon to TH and SE that misrepresented TH and SE’s investment in Rubicon because the customers’ funds were never received into the Rubicon escrow account at Bank C and never invested in the Rubicon commodities/futures accounts at Clearing Firm D.

- b. After Braeger caused Rubicon to be closed in or about July 2010, Braeger omitted disclosing to TH and SE that Rubicon was closed and liquidated.
- c. Beginning no later than March 2011, Braeger misrepresented to TH and SE in written and oral statements that Rubicon was open and was performing fairly.
- d. Beginning no later than March 2012, Braeger made written misrepresentations to TH and SE that Rubicon funds were frozen, unavailable or lost due to the October 2011 Clearing Firm D bankruptcy.
- e. Braeger caused false Schedule K-1 tax documents to be provided to TH and SE for tax years 2011, 2012 and 2013.

59. By reason of the foregoing, Braeger violated FINRA Rule 2010.

RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed, including that Respondent be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest; and
- C. order that Respondent bears such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: July 20, 2016



Frank M. Weber, Senior Regional Counsel
Lara Thyagarajan, Regional Chief Counsel
FINRA, Department of Enforcement
Brookfield Place
200 Liberty Street
New York, New York 10281-1003
(212) 858-4324; (202) 721-6575
Email: Frank.Weber@finra.org