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## FINAL NOTICE

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To: **GBG01007**

Date: **27 February 2004**

**TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you final notice about its decision to make a prohibition order**

### **PROHIBITION ORDER**

The FSA gave you a Decision Notice on 17 October 2003 which notified you that pursuant to section 56 of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to make a prohibition order prohibiting you from performing the functions set out at (a) below (as defined in the FSA's Supervision Manual at SUP 10.4) in relation to the regulated activities set out at (b) below carried on by authorised persons generally:

(a) Functions

- Investment adviser function;
- Customer trading function.

(b) Activities

- Dealing in investments as principal;
- Dealing in investments as agent;
- Arranging deals in investments;

- Advising on investments.

You have not referred the matter to the Financial Services and Markets Tribunal within 28 days of the date on which the Decision Notice was issued to you. Accordingly, for the reasons set out below, the FSA makes a prohibition order in the terms set out above.

## **REASONS FOR THE PROHIBITION ORDER**

### **Introduction**

1. The prohibition order is made by reason of the conduct of GBG01007 in 1996 and 1997 in his capacity as a dealer employed by Brandeis (Brokers) Limited ("BBL"). In particular:
  - 1.1 during 1996 and 1997 GBG01007 deliberately mispriced the Black Customers (as hereafter defined) in respect of their copper orders on frequent occasions;
  - 1.2 further on a number of occasions in 1996 and 1997 GBG01007 deliberately misused confidential information as to the Black Customers' intentions and orders;
  - 1.3 GBG01007 failed to ensure fair treatment to the Black Customers.

### **Relevant Statutory Provisions**

2. The FSA is authorised by section 56 of the Act to exercise the power to make a prohibition order if it appears to the FSA that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.
3. The FSA has in mind, when exercising its powers, section 2(2) of the Act which sets out the FSA's regulatory objectives, namely:
  - 3.1 the market confidence objective: that is, maintaining confidence in the financial system;
  - 3.2 the public awareness objective: that is, promoting public understanding of the financial system;
  - 3.3 the protection of consumers objective: that is, securing the appropriate degree of protection for consumers;
  - 3.4 the reduction of financial crime objective.
4. The procedure to be adopted in relation to prohibition orders is set out at sections 57 and 58 of the Act.

### **Relevant Guidance**

5. In deciding to make this prohibition order, the FSA has had regard to guidance published in the FSA Handbook, in particular in the Enforcement Manual at:

- 5.1 ENF 8.1.2. The exercise of the power to make a prohibition order assists the FSA to meet its regulatory objectives, including the market confidence objective. The FSA considers that GBG01007 presents such a risk to confidence in the market generally that it is necessary for the FSA to exercise its power to make a prohibition order in the terms proposed.
  - 5.2 ENF 8.6.1A. Where the individual is not an approved person, prohibition may be the only appropriate action available. In these cases, the FSA will consider the severity of the risk posed by the individual. The FSA considers that, as GBG01007 is not an approved person and it does not have the option of withdrawing approval or exercising its disciplinary powers in relation to him, a prohibition order is the only appropriate action available. The FSA further considers that this is a most serious case of lack of fitness and propriety such that GBG01007 presents such a risk to confidence in the market generally that it is necessary for the FSA to exercise its power to make a prohibition order in the terms proposed.
  - 5.3 ENF 8.6.2. The FSA considers that:
    - 5.3.1 GBG01007 is not fit and proper to perform functions in relation to regulated activities. In particular he does not satisfy the criterion of honesty, integrity and reputation. He has demonstrated a lack of openness and honesty in dealing with market participants and regulators. He has demonstrated a lack of ability and willingness to comply with regulatory, legal and professional standards and ethical standards. In addition he does not satisfy the criterion of competence and capability. He has demonstrated fundamental failings in his performance of functions in relation to regulated activities.
    - 5.3.2 The length of time that has passed since events in 1996 and 1997 is not sufficient to render the making of a prohibition order inappropriate. The conduct in question demonstrates a fundamental lack of fitness and propriety. GBG01007 subsequent conduct has not demonstrated any improvement, in that during the intervening period GBG01007 has persistently demonstrated a lack of openness and honesty in his dealings with regulators.
    - 5.3.3 GBG01007 poses a severe risk to confidence in the financial system.
6. In addition the FSA has had regard to the following:
    - 6.1 SUP 10: the FSA has considered the nature of the functions for which GBG01007 had received approval in the past and the standard of conduct to be expected of an approved person. The FSA considers that GBG01007 has failed fundamentally to satisfy this standard.
    - 6.2 FIT 2: the FSA has considered its guidance on the application of the Fit and Proper test for Approved Persons. The FSA considers that GBG01007 does not satisfy the criteria of (a) honesty, integrity and reputation and (b) competence and capability.

## **Facts and Matters Relied On**

7. The FSA considers that GBG01007 is not a fit and proper person to perform the functions set out at 'Action (a)' in relation to the activities set out at 'Action (b)' on the basis of the facts and matters set out at paragraphs 8 to 26.

### Background

8. During 1996 and 1997 GBG01007 was employed by BBL as a dealer on the London Metal Exchange ("the LME"). From September 1996 GBG01007 was responsible for:
  - 8.1 executing trades for BBL's proprietary copper trading book ("the copper book");
  - 8.2 executing trades in copper for other BBL proprietary trading books run by other BBL traders; and
  - 8.3 executing trades in copper with and for customers.
9. During this time Herbert Black and his associated companies American Iron and Metal Co Inc ("AIM") and Lito Trade Inc ("Lito") were each non-private customers of BBL. Black, AIM and Lito are hereafter severally and collectively referred to as "the Black Customers".
10. At the material time the Black Customers were very active in trading copper contracts on the LME. The Black Customers tended to trade in large volume for speculative purposes and were known by other market participants (including BBL and its employees) to do so. They were BBL's largest customer during 1996 and 1997 and its largest source of commission revenue.
11. BBL earned income from customer orders, including the orders of the Black Customers, through commission charged at pre-agreed levels. The customer would be charged the price paid by BBL and would pay an additional commission. It was an express term of the contract between BBL and the Black Customers that the Black Customers would be charged a specified commission.
12. As BBL's copper dealer, GBG01007 was responsible for calculating the prices to be reported to customers.
13. Much of the trading in LME copper contracts effected by BBL on behalf of the Black Customers had the following characteristics:
  - 13.1 while BBL carried out such transactions as a principal in form, it was a riskless principal (save for credit and operational risk involved in dealing with the Black Customers and the counterparty). The risk of going short or long attached to the Black Customers;
  - 13.2 BBL received a commission for effecting the transactions;
  - 13.3 the Black Customers gave BBL a considerable amount of discretion;

- 13.4 BBL had assured the Black Customers that it would always attempt to transact business with them on the best terms available at the relevant times (although BBL had, in its terms of business, also notified the Black Customers of the inherent conflict arising from its proprietary dealings and had excluded best execution).
14. In such circumstances, BBL's relationship with the Black Customers was in substance that of an agent, or that of a fiduciary, owing the following obligations:
- 14.1 to act in the best interests of the Black Customers, putting their interests ahead of its own;
- 14.2 to be truthful, open and fair with the Black Customers;
- 14.3 to attempt to procure for the Black Customers the best terms available at the relevant time;
- 14.4 where the Black Customers entrusted confidential information to BBL, to deal with that information for the purposes authorised by the Black Customers and not otherwise;
- 14.5 to charge the Black Customers prices which reflected the prices at which BBL had filled the order plus or minus the agreed commission;
- 14.6 where BBL received an order from the Black Customers, not to take advantage of that order so as to obtain an undisclosed benefit for itself or for a third party.
15. The FSA considers that the existence and scope of these obligations is clear and was clear at the material time. GBG01007 also himself owed the obligations set out at paragraph 14. GBG01007 deliberately breached each of those obligations in relation to the orders placed by the Black Customers in the manner set out below. This was misconduct of the most serious order.

#### Mispricing

16. It was an express term of the contract between BBL and the Black Customers that the Black Customers would be charged a specified commission. Accordingly the prices charged to the Black Customers in respect of orders placed by the Black Customers should have reflected the prices at which their orders had been executed. However on frequent occasions in 1996 and 1997:
- 16.1 GBG01007 charged the Black Customers prices which, in relation to buy orders, did not reflect and were higher than the prices at which their copper orders had been executed and which, in relation to sell orders, did not reflect and were lower than the prices at which their copper orders had been executed (each of which amounted to overcharging the Black Customers);
- 16.2 GBG01007 did not deal with the orders of the Black Customers fairly and in due tum;
- 16.3 GBG01007 did not allocate orders fairly (together referred to as mispricing).

17. GBG01007 deliberately mispriced the Black Customers in respect of their copper orders on frequent occasions in 1996 and 1997. In particular, GBG01007 mispriced the orders of the Black Customers on 22 dates in 1996 and 1997 in the total amount of about \$0.9 million.
18. Further on a number of occasions in 1996 and 1997 GBG01007 took advantage of confidential information as to the Black Customers' intentions and orders. In particular:
  - 18.1 GBG01007 traded ahead of the orders of the Black Customers and subsequently allocated tonnage to the Black Customers at prices higher or lower than the prices at which GBG01007 had himself traded;
  - 18.2 GBG01007 allocated tonnage to the Black Customers from the copper book at prices higher or lower than GBG01007 had transacted the executions in the market.
19. BBL profited substantially from GBG01007 deliberate mispricing of the Black Customers' orders, at the Black Customers' expense. This was misconduct of the most serious order.

Misuse of confidential information

20. Information as to the orders and intentions of the Black Customers was confidential and was provided to BBL and its employees, including GBG01007, on a confidential basis. BBL and its employees were not authorised by the Black Customers to disclose such information either internally or externally, save as was necessary in order to facilitate the provision of the advice or the execution of the order in question and save as required by any legal or any regulatory requirement.
21. On occasions in 1996 and 1997, GBG01007 misused confidential information relating to the intentions and orders of the Black Customers as follows:
  - 21.1 through disclosure of the Black Customers' intentions and orders to other BBL proprietary traders;
  - 21.2 through disclosure of the Black Customers' intentions and orders to third parties;
  - 21.3 through trading ahead of the Black Customers for the benefit of the copper book or for the benefit of other BBL proprietary trading books and for the benefit of third parties;
  - 21.4 through mispricing the Black Customers' orders.
22. In particular GBG01007 misused confidential information relating to the intentions and orders of the Black Customers on 26 dates in 1996 and 1997.
23. In deliberately misusing confidential information relating to the intentions and orders of the Black Customers, GBG01007 acted to the actual or potential benefit of BBL and to the actual or potential detriment of the Black Customers. BBL profited substantially from GBG01007 misuse of confidential information relating to the

intentions and orders of the Black Customers. This was misconduct of the most serious order.

24. If or to the extent that the mispricing and misuse of confidential information referred to at paragraphs 16 to 23 were not deliberate, they arose from a failure to act with due skill, care and diligence, which failure was of the most serious order.

#### Conflicts of interest

25. GBG01007 was required to ensure that BBL gave fair treatment to the Black Customers and did not unfairly place BBL's interests above those of the Black Customers in relation to the performance of his obligations. However, GBG01007:

25.1 failed to take any steps to avoid any conflict of interest arising;

25.2 failed to take any steps to ensure fair treatment to the Black Customers; and

25.3 unfairly placed BBL's interests above those of the Black Customers.

26. These failings were of the most serious order.

#### Fitness and propriety

27. In the light of the facts and matters set out at paragraphs 1 to 26, it appears to the FSA that GBG01007 is not a fit and proper person to perform the functions set out at 27.1 in relation to the regulated activities set out at 27.2 carried on by authorised persons generally:

27.1 investment adviser function and customer trading function;

27.2 dealing in investments as principal, dealing in investments as agent, arranging deals in investments and advising on investments.

28. GBG01007 has failed to satisfy the criterion of honesty, integrity and reputation. In particular GBG01007 deliberately mispriced orders and misused confidential information relating to the orders and intentions of the Black Customers. GBG01007 disclosed confidential information to other BBL proprietary traders and third parties. GBG01007 traded ahead of the Black Customers for the benefit of BBL and third parties. GBG01007 unfairly placed BBL's interests above those of the Black Customers. Accordingly GBG01007 has demonstrated serious and fundamental failings in his performance of his functions and has demonstrated that he is not fit and proper to perform such functions in relation to regulated activities carried on by authorised persons generally.

29. GBG01007 has also failed to satisfy the criterion of honesty, integrity and reputation in that:

29.1 GBG01007 has demonstrated a lack of openness and honesty in dealing with the Black Customers and in his subsequent explanations provided to SFA;

29.2 GBG01007 has demonstrated a lack of ability and willingness to comply with regulatory, legal, professional and ethical standards by:

- 29.2.1 his failure to ensure fair treatment to the Black Customers;
  - 29.2.2 his deliberate mispricing of the orders of the Black Customers and the misuse of confidential information relating to those orders;
  - 29.2.3 his lack of openness and honesty in his subsequent explanations provided to SFA.
30. If or to the extent that GBG01007 failings were not deliberate, they demonstrate a fundamental lack of due skill, care and diligence such that GBG01007 fails to satisfy the criterion of competence and capability.
31. The FSA considers that by his conduct in 1996 and 1997 GBG01007 demonstrated a fundamental lack of fitness and propriety. GBG01007 subsequent conduct has not demonstrated any improvement, whether by the acknowledgement of these serious failings or otherwise. Rather, GBG01007 has demonstrated a continuing lack of openness and honesty in his dealings with regulators.

### Conclusion

32. Accordingly it appears to the FSA that GBG01007 is not fit and proper to perform the functions set out at paragraph 27.1 in relation to the regulated activities set out at paragraph 27.2 carried on by authorised persons generally. The FSA considers that it is necessary to make this prohibition order as this is a most serious case of lack of fitness and propriety such that GBG01007 represents a risk to confidence in the market generally.

### **IMPORTANT**

This Final Notice is given to you in accordance with section 390 of the Act..

### **Publicity**

Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Notice relates. Under those provisions, the FSA must publish such information about the matter to which this Notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

### **FSA contact**

For more information concerning this matter generally, you should contact Anila Bedi (direct line: 020 7066 1304/fax: 020 7066 9721) of the Enforcement Division of the FSA.

Martyn Hopper  
FSA Enforcement Division