

---

## FINAL NOTICE

---

To: **RXB01510**

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 RXB01510 in 1996 and 1997 in his capacity as a dealer employed by Brandeis (Brokers) Limited ("BBL"). In particular:
  - 1.1 on a number of occasions in 1996 and 1997 RXB01510 deliberately misused confidential information as to the intentions and orders of the Black Customers (as hereafter defined);
  - 1.2 RXB01510 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 RXB01510 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 RXB01510 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 RXB01510 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 RXB01510 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. RXB01510's subsequent conduct has not demonstrated any improvement, in that during the intervening period RXB01510 has persistently demonstrated a lack of openness and honesty in his dealings with regulators.

5.3.3 RXB01510 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 RXB01510 had received approval in the past and the standard of conduct to be expected of an approved person. The FSA considers that RXB01510 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 RXB01510 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 RXB01510 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 27.

### Background

8. During 1996 and 1997 RXB01510 was employed by BBL as an options dealer.
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 London Metal Exchange ("the LME"). BBL was a Ring Dealing Member of 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. At the material time BBL ran a proprietary trading book ("the copper book") as well as executing copper orders for customers. Both the copper book and the execution of customer orders were the responsibility of the BBL copper dealers. In addition, three other BBL proprietary trading books traded copper: the options book for which RXB01510 was responsible, the averaging/backpricing book and the arbitrage book. The dealers responsible for these three proprietary books would also give orders to the copper dealer.
12. 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.
13. BBL's copper dealer was responsible for calculating the prices to be reported to customers.
14. Much of the trading in LME copper contracts effected by BBL on behalf of the Black Customers had the following characteristics:
  - 14.1 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;
  - 14.2 BBL received a commission for effecting the transactions;
  - 14.3 the Black Customers gave BBL a considerable amount of discretion;

- 14.4 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).
15. 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:
- 15.1 to act in the best interests of the Black Customers, putting their interests ahead of its own;
- 15.2 to be truthful, open and fair with the Black Customers;
- 15.3 to attempt to procure for the Black Customers the best terms available at the relevant time;
- 15.4 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;
- 15.5 to charge the Black Customers prices which reflected the prices at which BBL had filled the order plus or minus the agreed commission;
- 15.6 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.
16. The FSA considers that the existence and scope of these obligations is clear and was clear at the material time. RXB01510 also himself owed the obligations set out at paragraph 15. RXB01510 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

17. 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:
- 17.1 BBL 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);
- 17.2 BBL did not deal with the orders of the Black Customers fairly and in due turn;

- 17.3 BBL did not allocate orders fairly (together referred to as mispricing).
18. BBL deliberately mispriced the Black Customers in respect of their copper orders on frequent occasions in 1996 and 1997. In particular, BBL mispriced the orders of the Black Customers on 29 dates in 1996 and 1997 in the total amount of about \$1.3 million.
19. Further on a number of occasions in 1996 and 1997 BBL took advantage of confidential information as to the Black Customers' intentions and orders. In particular:
- 19.1 BBL 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 BBL had itself traded;
- 19.2 BBL allocated tonnage to the Black Customers from the copper book at prices higher or lower than BBL had transacted the executions in the market.
20. BBL profited substantially from the deliberate mispricing of the Black Customers' orders, at the Black Customers' expense. This was misconduct of the most serious order.

Misuse of confidential information

21. Information as to the orders and intentions of the Black Customers was confidential and was provided to BBL and its employees 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.
22. On occasions in 1996 and 1997, BBL misused confidential information relating to the intentions and orders of the Black Customers as follows:
- 22.1 through disclosure of the Black Customers' intentions and orders to BBL proprietary traders;
- 22.2 through disclosure of the Black Customers' intentions and orders to third parties;
- 22.3 through trading ahead of the Black Customers for the benefit of the copper book or for the benefit of other BBL proprietary trading books or for the benefit of third parties;
- 22.4 through mispricing the Black Customers' orders.
23. RXB01510 actively sought confidential information in relation to the intentions and orders of the Black Customers, traded ahead of the Black Customers for the options book and for the benefit of a third party and disclosed the Black Customers' intentions and orders to third parties. In particular, RXB01510 misused confidential information relating to the intentions and orders of the Black Customers on the following dates:

17 May 1996  
25 June 1996  
28 June 1996  
11 July 1996  
15 November 1996  
30 April 1997

24. In deliberately misusing confidential information relating to the intentions and orders of the Black Customers, RXB01510 acted to the actual or potential benefit of BBL and to the actual or potential detriment of the Black Customers. BBL profited substantially from RXB01510's misuse of confidential information relating to the intentions and orders of the Black Customers. This was misconduct of the most serious order.
25. If or to the extent that the mispricing and misuse of confidential information referred to at paragraphs 17 to 24 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

26. RXB01510 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 its obligations. However, RXB01510:
- 26.1 failed to take any steps to avoid any conflict of interest arising;
- 26.2 failed to take any steps to ensure fair treatment to the Black Customers; and
- 26.3 unfairly placed BBL's interests above those of the Black Customers.
27. These failings were of the most serious order.

Fitness and propriety

28. In the light of the facts and matters set out at paragraphs 1 to 27 it appears to the FSA that RXB01510 is not a fit and proper person to perform the functions set out at 28.1 in relation to the regulated activities set out at 28.2 carried on by authorised persons generally:
- 28.1 investment adviser function and customer trading function;
- 28.2 dealing in investments as principal, dealing in investments as agent, arranging deals in investments and advising in investments.
29. RXB01510 has failed to satisfy the criterion of honesty, integrity and reputation. In particular RXB01510 deliberately misused confidential information relating to the orders and intentions of the Black Customers. RXB01510 actively sought confidential information; traded ahead of the Black Customers for the options book and for the benefit of a third party; and disclosed confidential information to third parties. RXB01510 unfairly placed BBL's interests above those of the Black Customers. Accordingly RXB01510 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.

30. RXB01510 has also failed to satisfy the criterion of honesty, integrity and reputation in that:
  - 30.1 RXB01510 has demonstrated a lack of openness and honesty in dealing with the Black Customers and in his subsequent explanations provided to SFA;
  - 30.2 RXB01510 has demonstrated a lack of ability and willingness to comply with regulatory, legal, professional and ethical standards by:
    - 30.2.1 his failure to ensure fair treatment to the Black Customers;
    - 30.2.2 his deliberate misuse of confidential information relating to the orders and intentions of the Black Customers;
    - 30.2.3 his lack of openness and honesty in his subsequent explanations provided to SFA.
31. If or to the extent that RXB01510's failings were not deliberate, they demonstrate a fundamental lack of due skill, care and diligence such that RXB01510 fails to satisfy the criterion of competence and capability.
32. The FSA considers that by his conduct in 1996 and 1997 RXB01510 has demonstrated a fundamental lack of fitness and propriety. RXB01510's subsequent conduct has not demonstrated any improvement, whether by the acknowledgement of these serious failings or otherwise. Rather, RXB01510 has demonstrated a continuing lack of openness and honesty in his dealings with regulators.

### Conclusion

33. Accordingly it appears to the FSA that RXB01510 is not fit and proper to perform the functions set out at paragraph 28.1 in relation to the regulated activities set out at paragraph 28.2 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 RXB01510 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