

03 CV 9127

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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Commodity Futures Trading Commission,

Plaintiff,

v.

ISB Clearing Corporation, Ian Bursztyn,  
and Vito Napoletano

Defendants.  
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U.S.D.C. S.D. N.Y.  
COMPLAINT FOR  
INJUNCTIVE AND OTHER  
EQUITABLE RELIEF AND  
FOR PENALTIES UNDER  
THE COMMODITY  
EXCHANGE ACT, AS  
AMENDED, 7 U.S.C. §§ 1-  
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**I. SUMMARY**

1. From at least April 2003 to the present, ISB Clearing Corporation, a Futures Commission Merchant ("FCM") registered with the Commodity Futures Trading Commission, its President, Ian Bursztyn, ("Bursztyn"), and its undisclosed principal, Vito Napoletano ("Napoletano") (collectively, the "Defendants"), repeatedly have filed financial reports with the National Futures Association ("NFA") that contain materially false statements that purported to identify accounts at banks or broker/dealers that held customer funds and the amounts of customer funds purportedly held in those accounts. By engaging in these acts willfully and knowingly, Defendants have violated Section 9(a)(4) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 13(a)(4) (2002). Further, by engaging in these acts, Bursztyn and Napoletano are liable as controlling persons for the violation by ISB of Section 9(a)(4) of the Act pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001). In addition, Defendant ISB is liable for the violation of Section 9(a)(4) of the Act by its officers, directors, managers, employees, and agents,

pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2001), and Commission Regulation 1.2, 17 C.F.R. § 1.2 (2002), as all such violations were within the scope of their office or employment with ISB.

2. Unless restrained and enjoined by the Court, Defendants are likely to continue to engage in the acts and practices alleged in this Complaint and in similar acts and practices, as more fully described below.

3. Accordingly, pursuant to Section 6c of the Act, 7 U.S. C. § 13a-1 (2002), the Commodity Futures Trading Commission (“Commission”) brings this action to enjoin such acts and practices, prevent the dissipation of assets, and compel compliance with the provisions of the Act. In addition, the Commission seeks civil penalties, the appointment of an equity receiver, an accounting, restitution, disgorgement and such other equitable relief as the Court may deem necessary or appropriate under the circumstances.

## **II. JURISDICTION AND VENUE**

4. The Commission has designated the NFA as a registered futures association. In furtherance of its official duties, the NFA requires its members who offer foreign currency futures and options contracts to retail customers to file weekly reports concerning certain forex balances to the NFA.

5. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), which authorizes the Commission to seek injunctive relief against any person whenever it shall appear that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation or order thereunder.

6. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2001), in that Defendants are found in, inhabit, or transact business in this District, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this district, among other places.

### **III. THE PARTIES**

7. Plaintiff United States Commodity Futures Trading Commission, is an independent federal regulatory agency that is charged with responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.* (2001), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1 *et seq.* (2002).

8. Defendant ISB Clearing Corporation (“ISB”) is a Delaware corporation that filed as a foreign business corporation with the New York Department of State on November 1, 2002. ISB became registered with the Commission as a Futures Commission Merchant (“FCM”) on March 17, 2003.

9. Defendant Ian Bursztyn (“Bursztyn”) resides in Commack, New York. Bursztyn is listed as the president of ISB. Bursztyn has been registered with the Commission since March 17, 2003 as an associated person (“AP”) and principal of ISB.

10. Defendant Vito Napoletano (“Napoletano”) resides in Brooklyn, New York. He has never been registered with the Commission in any capacity. Napoletano is an undisclosed principal and owner of ISB.

### **IV. STATUTORY BACKGROUND**

11. Section 9(a)(4) of the Act, 7 U.S.C. § 13(a)(4) (2001) makes it a violation of the Act for any person “willfully to falsify, conceal, or cover up by any trick, scheme, or artifice a material fact, make any false, fictitious, or fraudulent statements or

representations, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry to a registered entity, board of trade, or futures association designated or registered under this chapter acting in furtherance of its official duties under this chapter.”

12. Pursuant to Section 8 of the NFA’s Rules, members of the NFA are required to file reports and supplemental financial information deemed necessary by the NFA. The NFA requires that each week, member FCMs that offer off-exchange foreign currency futures and options contracts to retail customers report certain forex balances to NFA. These balances include Customer Funds on Deposit for Forex Transactions (“Separated Funds”), Total Liability to Customers, and Open Forex Positions.

#### **V. FACTS**

13. Beginning in April 2003, the Defendants willfully and knowingly filed reports with the NFA that contained false information. The information was false in that it inaccurately stated the amount and location of customer funds on deposit. The customer funds had been solicited for the purpose of trading foreign currency contracts which were, in fact, illegal off-exchange foreign currency futures contracts.

14. The Defendants have filed at least 17 weekly reports containing false information for at least the following forex reporting periods: as of 4/25/03; as of 5/02/03; as of 5/09/03; for the period 5/12/03-5/16/03; for the period 5/19/02-5/23/03; as of 5/30/03; for the period 6/02/03-6/06/03; for the period 6/09/03-6/13/03; for the period 6/16/03-6/20/03; for the period 6/23/03-6/27/03; for the period 6/30/03-7/04/03; for the period 7/07/03-7/11/03; for the period 7/14/03-7/18/03; for the period 7/21/03-7/25/03; for the period 8/11/03-8/15/03; as of 8/22/03; as of 8/29/03.

15. For example, in the Report for the period as of April 25, 2003, ISB and Bursztyn reported that there were \$2,000,000 in ISB customer funds on deposit with JP Morgan Chase and an additional \$324,000 in ISB customer funds on deposit with Geneva International Bank. In fact, these ISB customer funds were not on deposit in these financial institutions.

16. Bursztyn, the President of ISB, submitted or caused to be submitted the NFA weekly forex forms knowing that they contained false information.

17. Napoletano, an undisclosed principal and owner of ISB, submitted or caused the submission of the NFA weekly forex reports knowing that they contained false information.

18. NFA is a registered futures association acting in furtherance of its official duties under the Act in requiring Defendants to file weekly forex reports.

#### **Controlling Persons**

19. Bursztyn is ISB's President and registered as both an AP and Principal of ISB. In addition, Bursztyn is responsible for filing the forex forms with the NFA.

20. Napoletano is an undisclosed Principal and owner of ISB. Napoletano is aware of and responsible for the filing of the forex forms with the NFA.

### **VI. COUNT**

#### **VIOLATION OF SECTION 9(a)(4) OF THE ACT**

21. Paragraphs 1 through 20 are re-alleged and incorporated herein.

22. Since at least April 2003, ISB, Bursztyn and Napoletano filed forex reports with the NFA that they knew contained materially false information. In so doing, Defendants willfully falsified material facts, made false, fictitious, or fraudulent

statements or representations, and made and used false writings and documents, knowing the same to contain false, fictitious, or fraudulent statements or entries, to a registered futures association acting in furtherance of its official duties. By those practices, Defendants have violated Section 9(a)(4) of the Act.

23. Bursztyn and Napoletano, as the owners and operators of ISB, have directly or indirectly controlled ISB and its scheme and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting the violations described in this Count I. Thus, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001), as described in this Count I, Bursztyn and Napoletano are liable for the violations described in this Count I, to the same extent as ISB.

24. Pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2001), and Commission Regulation 1.2, 17 C.F.R. § 1.2 (2002), ISB is liable for any violations of Section 9(a)(4) of the Act by its officers, directors, managers, employees, and agents, in that all such violations were within the scope of their office or employment with ISB.

## **VII. RELIEF REQUESTED**

WHEREFORE, the Commission respectfully requests that this Court, as authorized by Section 6c of the Act, 7 U.S.C. § 13a-1 (2001), and pursuant to the Court's own equitable powers:

- A. Find that Defendants have violated Section 9(a)(4) of the Act, 7 U.S.C. §§ 13(a)(4) (2002);
- B. Enter an *ex parte* statutory restraining order and an order of preliminary injunction restraining and enjoining Defendants and all persons insofar as they

are acting in the capacity of their agents, servants, successors, assigns, and attorneys, and all persons insofar as they are acting in active concert or participation with them who receive actual notice of such order by personal service or otherwise, from directly or indirectly:

1. destroying, mutilating, concealing, altering or disposing of any books and records, documents, correspondence, brochures, manuals, electronically stored data, tape records or other property of Defendants, wherever located, including all such records concerning Defendants' business operations;
2. refusing to permit authorized representatives of the Commission to inspect, when and as requested, any books and records, documents, correspondence, brochures, manuals, electronically stored data, tape records or other property of Defendants, wherever located, including all such records concerning Defendants' business operations;
3. withdrawing, transferring, removing, dissipating, concealing, or disposing of, in any manner, any funds, assets, or other property, wherever situated, including but not limited to, all funds, personal property, money or securities held in safes, safety deposit boxes and all funds on deposit in any financial institution, bank or savings and loan account held by, under the control, or in the name of any of the Defendants; and
4. appointing a temporary receiver to take into his or her immediate custody, control, and possession all cash, cashier's checks, funds, assets, and property of Defendants, including funds or property of investors wherever found, whether held in the name of any of the Defendants, or otherwise, including, but

not limited to, all books and records of account and original entry, electronically stored data, tape recordings, all funds, securities, contents of safety deposit boxes, metals, currencies, coins, real or personal property, commodity futures trading accounts, bank and trust accounts, mutual fund accounts, credit card line-of-credit accounts and other assets, of whatever kind and nature and wherever situated, and authorizing, empowering and directing such receiver to collect and take charge of and to hold and administer the same subject to further order of the Court, in order to prevent irreparable loss, damage and injury to investors, to conserve and prevent the dissipation of funds, and to prevent further evasions and violations of the federal commodity laws by the Defendants;

C. Enter orders of preliminary and permanent injunctions prohibiting Defendants and any other person or entity associated with them, including any successor thereof, from:

1. engaging in conduct, in violation of Section 9(a)(4) of the Act, 7 U.S.C. §§ 13(a)(4) (2002); and

2. soliciting funds for, engaging in, controlling, or directing the trading of any commodity futures or options accounts for or on behalf of any other person or entity, whether by power of attorney or otherwise;

D. Enter an order directing Defendants to provide Plaintiff immediate and continuing access to their books and records;

E. Enter an order appointing a permanent equity receiver to take into his or her immediate custody, control, and possession all cash, cashier's checks, funds, assets, and property of Defendants, including funds or property of investors



wherever found, whether held in the name of any of the Defendants or otherwise, including, but not limited to, all books and records of account and original entry, electronically stored data, tape recordings, all funds, securities, contents of safety deposit boxes, metals, currencies, coins, real or personal property, commodity futures trading accounts, bank and trust accounts, mutual fund accounts, credit card line-of-credit accounts and other assets, of whatever kind and nature and wherever situated, and authorizing, empowering and directing such receiver to collect and take charge of and to hold and administer the same subject to further order of the Court, in order to prevent irreparable loss, damage and injury to investors, to conserve and prevent the dissipation of funds, and to prevent further evasions and violations of the federal commodity laws by the Defendants;

- F. Enter an order directing Defendants to take such steps as are necessary to repatriate to the territory of the United States all funds and assets of ISB customers described herein which are held by Defendants or are under their direct or indirect control, jointly or singly, and deposit such funds into the Registry of this Court and provide the Commission, equity receiver, and the Court with a written description of the funds and assets so repatriated;
- G. Enter an order directing Defendants, and any successors thereof, to disgorge, pursuant to such procedure as the Court may order, all benefits received including, but not limited to, salaries, commissions, loans, fees, revenues and trading profits derived, directly or indirectly, from acts or practices which

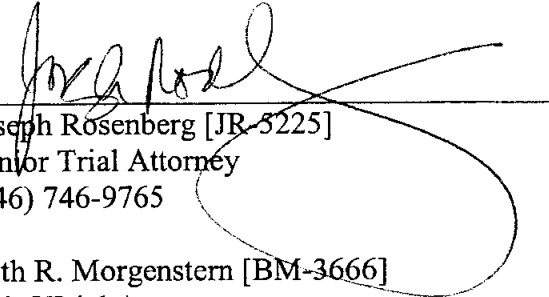
constitute violations of the Act as described herein, including pre-judgment interest thereon from the date of such violations;

- H. Enter an order directing Defendants to make full restitution to every investor whose funds were received by them as a result of acts and practices which constituted violations of the Act and Regulations, as described herein, and interest thereon from the date of such violations;
- I. Enter an order assessing a civil monetary penalty against each defendant in the amount of not more than the higher of \$120,000 or triple the monetary gain to the defendant for each violation by the defendant of the Act and Commission Regulations;
- J. Enter an order directing that Defendants make an accounting to the court of all their assets and liabilities, together with all funds they received from and paid to clients and other persons in connection with commodity futures transactions or purported commodity futures transactions, and all disbursements for any purpose whatsoever of funds received from commodity transactions, including salaries, commissions, interest, fees, loans and other disbursements of money and property of any kind, from, but not limited to, April 2003 through and including the date of such accounting;
- K. Enter an order requiring Defendants to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2) (2001); and
- L. Order such other and further remedial ancillary relief as the Court may deem appropriate.

Dated: New York, New York  
November 17, 2003

U.S. COMMODITY FUTURES TRADING COMMISSION

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