

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

U.S. Commodity Futures Trading Commission,

Plaintiff,

v.

Damon Ripley,  
New York Capital Assets, Inc.

Defendants.

03 CV 9128 (GBD)

**Order For Entry of  
Injunctive Relief, Damages and  
Ancillary Equitable Relief Against  
Damon Ripley and New York Capital  
Assets, Inc.**

On November 18, 2003, the Commodity Futures Trading Commission (the "Commission") filed a Complaint charging Damon Ripley ("Ripley"), New York Capital Assets, Inc. ("NYCA") (collectively called the "Defendants") and others with violating Section 4b(a)(2)(i), (ii) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i), (ii) and (iii) (2002) and Commission Regulation 1.1(b)(i) (ii) and (iii), 17 C.F.R. § 1.1(b) (1), (2) and (3) (2001). Defendants also were charged as aiders and abettors under 13(a) of the Act, & U.S.C. § 13c(a) in that they had knowledge of the wrongdoing underlying the violations of Sections 4(a) and 4b(a)(2) of the Act, 7 U.S.C. § 6(a) and 6(b) (2001) and of Regulation 1.1(b). NYCA also was charged with violating Section 4(a) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 6(a). In addition, NYCA was charged with violating Section 4b(a)(2) of the Act and Regulation 1.1(b) through the conduct of 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), Commission Regulation 1.2, 17 C.F.R. § 1.2 (2000). Ripley also was charged as a controlling person for the violations by NYCA of Sections 4(a) and 4b(a)(2) (i), (ii) and (iii) of the Act, 7 U.S.C. §§ 6(a) and

6b(a)(2)(2001) and Commission Regulation 1.1(b) C.F.R. § 1.1(b) (2002) pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001).

On March 23, 2004, Defendants were properly served pursuant to Rule 4(d)(1) of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”). Defendants failed to answer or otherwise defend the Complaint within the time permitted by Rule 12(a)(1) of the Fed. R. Civ. P. Accordingly, on September 16, 2004, the Clerk of this Court entered a certificate of default against Defendants, and on January 13, 2005, this Court entered a default judgment against Defendants.

The Commission has now submitted its Application for Entry of Injunctive Relief, Damages and Ancillary Equitable Relief (“Application”) against Defendants pursuant to Fed. R. Civ. P. 55(b)(2) and Local Rule 55.2(b). The Court has carefully considered the Complaint, the allegations of which are well-pleaded and hereby taken as true, the Application, and other written submissions of the Commission filed with the Court, and being fully advised, hereby:

**GRANTS** the Commission's Application against Defendants and enters findings of fact and conclusions of law relevant to the allegations in the Complaint. The Court further grants the Commission's request for injunctive relief, damages, restitution and disgorgement. Accordingly, the Court now issues the following Order (“Order”) against Defendants.

## **I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Jurisdiction and Venue**

This Court has jurisdiction over the subject matter of this action and Defendants pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, 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.

Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1, in that Defendants were found in, inhabited, or transacted business in this district, and the acts and practices in violation of the Act occurred within this district, among other places, and Defendants benefited from these acts and practices.

**B. Findings of Fact**

Ripley owned, operated and used NYCA to actively participate in various schemes to defraud customers and misappropriate their investments. He has never been registered with the Commission in any capacity.

NYCA is a New York corporation. NYCA was incorporated in New York on September 21, 2001. From late 2001 until approximately August 2002, NYCA operated from 172 Madison Avenue, New York, NY and from Ripley's prior Brooklyn residence. NYCA has never been registered with the Commission in any capacity nor has it ever been one of the regulated entities whose foreign currency transactions fall outside the purview of the Commission's jurisdiction.

From at least spring 2002 to November 2003, Defendants fraudulently solicited or assisted in the solicitation of funds from the retail public for the purpose of trading managed foreign currency accounts which were, in fact, illegal off-exchange foreign currency futures contracts. Defendants also aided, abetted and intentionally assisted others in defrauding investors by having NYCA falsely claim to have sufficient funds to act as a proper counterparty for its customers' transactions. Through these schemes, the Defendants misappropriated customer funds totaling \$226,522 for their own benefit rather than for trading foreign currency on behalf of their customers.

The foreign currency contracts that NYCA purported to offer and sell were for future delivery of foreign currencies that were cash settled in U.S. dollars. The prices or pricing formulas were established at the time the contracts were initiated and were settled through offset, cancellation, cash settlement or other means calculated to avoid delivery.

NYCA marketed its foreign currency trading accounts to individuals who had assets totaling less than \$5 million and had no business, personal or other need to take or make delivery in foreign currency or to hedge against movements in the foreign currency markets. Instead, investors entered into these transactions to speculate and profit from anticipated price fluctuations in the markets for these currencies. Investors did not anticipate taking – and did not take – delivery of the foreign currencies they purchased as a consequence of these investments. NYCA did not require investors to set up banking relationships in order to facilitate delivery of the foreign currencies.

NYCA was not a financial institution, broker or dealer, or associated person or affiliate of a broker dealer. NYCA was never a futures commission merchant (“FCM”) or an affiliate of a FCM. NYCA did not conduct its transactions on a facility designated as a contract market or registered as a derivatives transaction execution facility. Also, NYCA did not conduct its foreign currency futures transactions on or subject to the rules of a board of trade that had been designated by the Commission as a contract market, nor were its transactions executed or consummated by or through a member of such contract market.

## **C. Conclusions of Law**

### **1. Defendants’ Transactions Were Futures Contracts**

The foreign currency contracts offered and sold by Defendants were futures contracts. The contracts involved the purchase and sale of foreign currency for future -- as opposed to

immediate or deferred -- delivery. The contracts provided for delivery of a specific type of foreign currency at an unspecified point in the future at a price or pricing formula that was determined at the time the contract is entered. NYCA has never been a proper counterparty or an affiliate of a proper counterparty authorized under the Act or Regulations to engage in foreign currency future transactions with retail customers.

**2. Violations of Section 4b(a)(2) of the Commodity Exchange Act and Commission Regulation 1.1(b)**

From at least spring 2002 to November 2003, Defendants cheated or defrauded or attempted to cheat or defraud customers or prospective customers of NYCA and willfully deceived or attempted to deceive customers or prospective customers by, among other things: misappropriating funds received from customers and by making or assisted in the making of false statements to customers regarding the trading of its funds and the legitimacy of NYCA's operation all in violation of Section 4b(a)(2)(C)(i) and (ii) of the Act, 7 U.S.C. § 6b(a)(2)(C)(i) and (iii), and Regulation 1.1(b)(1) and (3), 17 C.F.R. § 1.1(b)(1) and (3). Defendants' conduct was in connection with the orders to make, or the making of, contracts of sale of commodities for future delivery, made or to be made, for or on behalf of any other persons, and such contracts for future delivery were or could be used for the purposes set forth in Section 4b(a)(2)(C)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(C)(i) and (iii).

Pursuant to Section 13(a) of the Act, 7 U.S.C. § 13a-1(a)(2001) Defendants also are liable as aiders and abettors, in that they had knowledge of the wrongdoing underlying the violation of Section 4b of the Act, 7 U.S.C. § 6b, and Commission and Regulation § 1.1(b), 17 C.F.R. § 1.1(b), and that they intentionally assisted the primary wrongdoers.

Ripley as the owner and operator of NYCA, directly or indirectly, controlled NYCA and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting these violations. Thus, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001), Ripley is liable for violating Section 4b of the Act, 7 U.S.C. § 6b, and Commission and Regulation § 1.1(b), 17 C.F.R. § 1.1(b) to the same extent as to all persons and entities under his control who have committed these violations.

Pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B), and Commission Regulation 1.2, 17 C.F.R. § 1.2, NYCA is liable for any violations of Section 4b(a) of the Act, 7 U.S.C. § 6b, and Commission Regulation 1.1(b), 17 C.F.R. § 1.1(b), by its officers, directors, managers, employees and agents, in that all such violations were within the scope of their office or employment with NYCA.

### **3. Violations of Section 4(a) of the Commodity Exchange Act**

From at least spring 2002 to November 2003, NYCA offered to enter into, executed, confirmed the execution of, or conducted an office or business in the United States for the purpose of soliciting, accepting any order for, or otherwise dealing in transactions in, or in connection with, a contract for the purchase or sale of a commodity for future delivery when: (a) such transactions were not conducted on or subject to the rules of a board of trade which was designated or registered by the Commission as a contract market or derivatives transaction execution facility for such commodity, and (b) such contracts were not executed or consummated by or through such contract market, in violation of Section 4(a) of the Act, 7 U.S.C. § 6(a).

Pursuant to Section 13(a) of the Act, 7 U.S.C. § 13a-1(a)(2001), Defendants also are liable as aiders and abettors, in that they had knowledge of the wrongdoing underlying the

violation of Section 4a of the Act, 7 U.S.C. § 6a, and that they intentionally assisted the primary wrongdoers.

Ripley as the owner and operator of NYCA, directly or indirectly, controlled NYCA and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting a violation of Section 4(a) of the Act, 7 U.S.C. § 6(a). Thus, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001), Ripley is liable for violating Section 4(a), 7 U.S.C. § 6(a), to the same extent as to all persons and entities under his control who have committed this violation.

#### **4. Appropriate Relief**

Permanent injunctive relief is warranted in light of the egregious nature of the Defendants' conduct in fraudulently soliciting and misappropriating customer funds over a 6-month period as well as Defendants' high level of scienter in conducting a well-planned scheme to systematically defraud the public. These facts demonstrate a reasonable likelihood of future violations.

Imposition of a civil monetary penalty is appropriate in this case as Defendants' violations of the Act were intentional and directly impacted the numerous victims of this fraud. Likewise, the remedies of disgorgement and restitution are appropriate to compensate the victims of Defendants' wrongful acts and to deprive Defendants of the use of ill-gotten gains.

## **II. ORDER FOR RELIEF**

### **A. Permanent Injunction**

**IT IS HEREBY ORDERED** that Defendants are permanently restrained, enjoined and prohibited from directly or indirectly:

1) offering or entering into, executing, confirming the execution of, or conducting an office or business in the United States for the purpose of soliciting, accepting any order for, or

otherwise dealing in transactions in, or in connection with, a contract for the purchase or sale of a commodity for future delivery;

2) cheating or defrauding or attempting to cheat or defraud such other person or willfully deceiving or attempting to deceive such other person by any means whatsoever in regard to any such order or contract in or in connection with any sale of any futures contract of any commodity that is or may be used for hedging or determining the price basis of any transaction or for delivering any commodity in interstate commerce for or on behalf of any other person;

3) cheating or defrauding or attempting to cheat or defraud any person or willfully deceiving or attempting to deceive any person by any means whatsoever for any foreign currency transaction within the Commission's jurisdiction;

4) trading on or subject to the rules of any registered entity;

5) soliciting funds for, engaging in, controlling, or directing the trading of any commodity futures or options accounts for any other person or entity, whether by power of attorney or otherwise; and

6) an order of permanent injunction prohibiting Defendants from applying for registration or seeking exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration, except as provided in Regulation 4.14(a)(9) or acting as an agent or officer of any person registered, exempted from registration or required to be registered with the Commission, except as provided in Regulation 4.14(a)(9).



**B. Civil Monetary Penalty**

**IT IS FURTHER ORDERED** that as of the date of this Order, Defendants shall each pay a civil monetary penalty in the amount of \$240,000, consisting of \$120,000 for each of the two charges of violations of the Act set forth in the Complaint plus post judgment interest. Post-judgment interest shall be determined by using the Treasury Bill rate prevailing on the date of this Order pursuant to 28 U.S.C. § 1961.

All payments made by Defendants pursuant to this Order shall be applied first to satisfy Defendants' Civil Restitution and Disgorgement obligations and, upon satisfaction of such obligations, shall thereafter be applied to satisfy the civil monetary penalties. Post-judgment interest shall accrue beginning on the date of entry of this Order.

Defendants shall each pay such civil monetary penalty by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's check or bank money order, made payable to the U.S. Commodity Futures Trading Commission, and sent to Dennese Posey, or her successor, Division of Enforcement, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21<sup>st</sup> Street, NW, Washington, D.C. 20581, under cover of a letter that identifies Defendants and the name and docket number of the proceeding; Defendants shall simultaneously transmit a copy of the cover letter and the form of payment to the Director, Division of Enforcement, U.S. Commodity Futures Trading Commission, at the following address: Three Lafayette Centre, 1155 21<sup>st</sup> Street, NW, Washington, D.C. 20581, and to the Regional Counsel, U.S. Commodity Futures Trading Commission, Eastern Regional Office, at the following address: 140 Broadway, 19<sup>th</sup> floor, New York, NY 10005.

**C. Disgorgement and Restitution**

**1. Disgorgement**

**IT IS FURTHER ORDERED** that as of the date of this Order, Defendants shall disgorge all benefits received, directly or indirectly, from acts or practices which constitute violations of the Act and Regulations as described. Defendants are therefore jointly and severally liable to disgorge their ill-gotten gains in the amount of \$226,522 plus pre-judgment interest and post-judgment interest. Pre-judgment interest from April 1, 2003, to the date of this Order shall be determined by using the underpayment rate established quarterly by the Internal Revenue Service pursuant to 26 U.S.C. § 6621(a)(2). Post-judgment interest shall accrue beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of this Order pursuant to 28 U.S.C. § 1961.

All disgorgement payments made by the Defendants shall be used to pay restitution to the defrauded customers. Defendants' disgorgement obligations are co-terminus with their restitution obligations, such that partial or full satisfaction or discharge of their disgorgement obligations shall simultaneously result in identical partial or full satisfaction or discharge of their restitution obligations. Further, Ripley's disgorgement obligation is co-terminus with Ripley's criminal judgment restitution obligation entered against Ripley on April 26, 2006, U.S. District Court for the Southern District of New York in *U.S. v. Napoletano, et al.*, S.D.N.Y. Docket No. 04 Cr. 156 ("criminal judgment obligation"). Accordingly, partial or full satisfaction or discharge of Ripley's criminal judgment restitution obligation shall simultaneously result in identical or partial or full satisfaction or discharge of Ripley's civil disgorgement obligation.

Defendants shall pay such disgorgement to Brian Rosner, Esq., the Court appointed Receiver, Rosner, Moscow & Napierala, LLP, 26 Broadway, 22<sup>nd</sup> floor, New York, NY 10004-

24424 by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's check or bank money order, under cover of a letter that identifies Defendant and the name and docket number of the proceeding; Defendants shall simultaneously transmit a copy of the cover letter and the form of payment to Steven Ringer, Steven Ringer, counsel of record for the plaintiff U.S. Commodity Futures Trading Commission and to the Director, Division of Enforcement, U.S. Commodity Futures Trading Commission, at the following address: Three Lafayette Centre, 1155 21<sup>st</sup> Street, NW, Washington, D.C. 20581, and to the Regional Counsel, U.S. Commodity Futures Trading Commission, Eastern Regional Office, at the following address: 140 Broadway, 19<sup>th</sup> floor, New York, NY 10005.

**2. Restitution**

**IT IS FURTHER ORDERED** that as of the date of this Order, Defendants shall pay and be jointly and severally liable for restitution to defrauded customers in the amount of \$226,522 (two hundred twenty six thousand five hundred twenty two dollars) plus pre-judgment interest and post-judgment interest. Pre-judgment interest from April 1, 2003, to the date of this Order shall be determined by using the underpayment rate established quarterly by the Internal Revenue Service pursuant to 26 U.S.C. § 6621(a)(2). Post-judgment interest shall accrue beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of this Order pursuant to 28 U.S.C. § 1961. Defendants are ordered to make such payments to Brian Rosner, Esq., the Court appointed Receiver, Rosner, Moscow & Napierala, LLP, 26 Broadway, 22<sup>nd</sup> floor, New York, NY 10004-24424 by cashier's check, certified check or postal money order, under cover of a letter that identifies the name and docket number of this action and the name of this Court, with a copy to Steven Ringer, counsel of record for the plaintiff U.S. Commodity Futures Trading Commission and to the Director, Division of

Enforcement, U.S. Commodity Futures Trading Commission, at the following address: Three Lafayette Centre, 1155 21<sup>st</sup> Street, NW, Washington, D.C. 20581, and to the Regional Counsel, U.S. Commodity Futures Trading Commission, Eastern Regional Office, at the following address: 140 Broadway, 19<sup>th</sup> floor, New York, NY 10005.

All payments made pursuant to this Order by Defendants shall first be made to the defrauded customers for restitution, pursuant to a payment plan that will be determined by the Court, until those amounts (including interest) are fully satisfied. All payments after satisfaction of the restitution shall be applied to the civil monetary penalty described herein.

Ripley's restitution obligation is co-terminus with Ripley's criminal judgment restitution obligation entered against Ripley on April 26, 2006, U.S. District Court for the Southern District of New York in U.S. v. Napoletano, et al., S.D.N.Y. Docket No. 04 Cr. 156 ("criminal judgment obligation"). Accordingly, partial or full satisfaction or discharge of Ripley's criminal judgment restitution obligation shall simultaneously result in identical or partial or full satisfaction or discharge of Ripley's civil restitution obligation.

**D. Prohibition on Transfer of Funds**

**IT IS FURTHER ORDERED** that Defendants shall not transfer or cause others to transfer funds or other property to the custody, possession or control of any other person for the purpose of concealing such funds or property from the Court, the Plaintiff, or any officer that may be appointed by the Court.

**E. Permanent Receiver**

**IT IS FURTHER ORDERED** that Brian Rosner, Esq., Rosner, Moscow & Napierala, LLP, 26 Broadway, 22<sup>nd</sup> floor, New York, NY 10004-24424 is appointed as 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, to prevent further evasions and violations of the federal commodity laws by the Defendants and to satisfy Defendants' obligations to pay restitution, disgorge their ill-gotten gains and to pay civil monetary penalties.

**F. Notices**

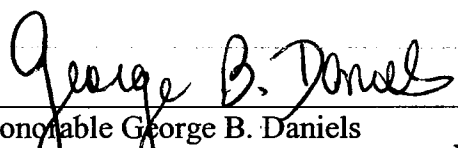
**IT IS FURTHER ORDERED** that all notices required to be given by any provision in this Order shall be sent by certified mail, return receipt requested, as follows:

Notice to Commission:      Regional Counsel  
   U.S. Commodity Futures Trading Commission  
   Division of Enforcement - Eastern Regional Office  
   140 Broadway, 19<sup>th</sup> floor  
   New York, New York 10005.

**G. Jurisdiction**

**IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this case to assure compliance with this Order and for all other purposes related to this action.

**SO ORDERED** <sup>NOV 07 2006</sup> \_\_\_\_\_, New York on this \_\_\_\_ day of \_\_\_\_\_, 2006.

  
\_\_\_\_\_  
Honorable George B. Daniels  
UNITED STATES DISTRICT COURT  
Respectfully submitted,  
U.S. COMMODITY FUTURES TRADING  
COMMISSION  
Stephen J. Obie  
Regional Counsel

**GEORGE B. DANIELS**