

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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PAUL W. FRIEND,
Complainant,

v.

CFTC Docket No. 99-R133

THOMAS ALBERT BRESCIA and
ICG TRADING, INC.,
Respondents.

INITIAL DECISION ON DEFAULT

Complainant Friend ("Friend") originally named Evergreen International Trading, Inc. ("Evergreen"), ICG Trading, Inc. ("ICG") and Thomas Albert Brescia ("Brescia") as respondents in his June 18, 1999 complaint. Alleging churning, debit balance and misappropriation, Friend sought \$44,759.75 in reparations. Evergreen later settled with Friend for \$2,200. ICG has, to date, failed to file an answer to the complaint or any other responsive motion in the action.

The hearing in this matter took place in Muncie, Indiana on March 7, 2000. On the day of hearing, Brescia and Friend agreed to a settlement. ICG failed to make an appearance. The court received the parties' Settlement Agreement on June 6, 2000. Pursuant to the Settlement Agreement, Brescia was obliged to make a single lump sum payment of \$5,000.00 to Friend on or before March 10, 2001, with further payments in the amount of \$250.00 to be made on a monthly basis for a span of twenty (20) months starting April 10, 2001. In exchange for this \$10,000.00 payment, Friend agreed to release Brescia from liability in the above titled matter, CFTC Docket Number 99-R133. As a result, the court issued its "Order of Dismissal on Settlement" on July 7, 2000. This order specifically reserved the right to vacate the dismissal and order a default against Brescia if he failed to meet his obligations as outlined in the Settlement Agreement.

Subsequently, the court was informed through a letter received from Friend on May 2, 2001 that Brescia failed to make any of his required payments. The court issued an Order to Show Cause on May 7, 2001 requiring both Brescia and ICG to show by May 21, 2001 why they should not be found in default, with judgment against them for the full

amount of the losses sustained by Friend, plus interest from the date of the loss to the date of payment. Brescia was permitted to respond by May 24, 2001 after making an oral request for an extension of time. On May 29, 2001, Brescia faxed his response confirming his failure to make any payment. ICG made no response.

Based on the filings made by all parties in this matter, the court finds that both Brescia and ICG are in default. Under the CFTC rules, ICG, by failing to file an answer, has waived its right to contest the allegations in the complaint and evidence presented by Friend or to file affirmative defenses. The allegations in the complaint are deemed true under Rule 12.22. Additionally, as Brescia has not made any required payments since entering into the May 31, 2000 Settlement Agreement with Friend, the court finds that Brescia has failed to make a good faith effort to live up to the Settlement Agreement. As a result, the court's July 7, 2000 Order of Dismissal on Settlement is vacated. Having been found to be in default, Brescia and ICG are both jointly and severally liable for the all losses sustained by Friend in this matter, less the amount paid by Evergreen. Respondents are ORDERED to pay reparations to Friend in the amount of \$42, 559.75, plus interest compounded annually at a rate of 3.78% from July 31, 1998 to the date of payment, plus costs of \$50.00.

Any request to vacate this default must contain all of the elements of Rule 12.23. No *ex parte* motions will be considered.

So ordered.

Issued May 31st 2001


George H. Painter
Administrative Law Judge

David E. Vignola
Attorney-Advisor