

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.  
★ 12-2009 ★

Commodity Futures Trading Commission,

CV 03 4999 (ILG)

Plaintiff,

PM. \_\_\_\_\_  
TIME A.M. \_\_\_\_\_

v.

A.S. Templeton Group, Inc.,  
Michael Vitebsky, and  
Boris Shuster, a/k/a/ Robert Shuster

**Final Judgment and Order for  
Permanent Injunctions, Civil  
Monetary Penalties, and Ancillary  
Equitable Relief Against Defendant  
Boris Shuster, a/k/a/ Robert Shuster**

Defendants, and

Chariot Consulting, Inc.,  
Shuster, Shuster & Shuster, Ltd., and  
Winn Industries Division of Ontario Limited,

Relief Defendants.

On October 1, 2003, the Commodity Futures Trading Commission ("CFTC") filed a Complaint charging defendants A.S. Templeton Group, Inc. ("AST"), Michael Vitebsky ("Vitebsky"), and Boris Shuster, a/k/a Robert Shuster ("Shuster") (collectively "Defendants") with defrauding AST customers in violation of Section 4b(a)(2) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 6b(a)(2) (2001), and CFTC Regulation 1.1(b), 17 C.F.R. § 1.1(b) (2002) ("Complaint"). The Complaint also charged defendant AST with soliciting, or accepting any order for, or otherwise dealing in, illegal off-exchange futures contracts in violation of Section 4(a) of the Act, 7 U.S.C. § 6(a) (2001). Vitebsky and Shuster were also charged with violating Sections 4(a), 7 U.S.C. § 6(a) (2001), and 4b(a)(2), 7 U.S.C. § 6b(a)(2) (2001), of the Act and CFTC Regulation 1.1(b), 17 C.F.R. § 1.1(b) (2002) as controlling persons of AST subject to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001).

On October 1, 2003, the Court issued an *Ex Parte* Statutory Restraining Order (“SRO”), which, among other things, froze the Defendants’ assets, granted the CFTC immediate access to all books and records related to the Defendants’ business, and ordered that the Defendants provide to the CFTC a full accounting of their assets and funds.

On November 24, 2003, upon consent of Shuster, this Court entered an Order of Permanent Injunction permanently enjoining him from directly or indirectly:

1. Cheating or defrauding or attempting to cheat or defraud other persons, or willfully making or causing to be made to another person any false report or statement thereof, or willfully entering or causing to be entered for another person any false record thereof, or willfully deceiving or attempting to deceive another person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed with respect to any order or contract for another person, or bucketing any order, or filling any order by offset against the order or orders of another person, or willfully and knowingly and without the prior consent of another person becoming the buyer in respect to any selling order of such person, or becoming the seller in respect to any buying order of such person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for:
  - a) hedging any transaction in interstate commerce in a commodity or the products or byproducts thereof;
  - b) determining the price basis of any transaction in interstate commerce in such commodity; or
  - c) delivering any commodity sold, shipped, or received in interstate commerce for the fulfillment thereof

in violation of Section 4b(a)(2) of the Act, 7 U.S.C. §6b(a)(2) (2001), and Section 1.1(b) of the Regulations promulgated thereunder (“Regulations”), 17 C.F.R. §1.1(b) (2002); or

2. Offering to enter into, entering into, executing, confirming the execution of, or conducting any office or business anywhere in the United States for the purpose of soliciting, accepting any order for, or otherwise dealing in any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery in violation of Section 4(a) of the Act, 7 U.S.C. § 6(a)(2001).

It was further ordered that the injunctive provisions of the Permanent Order of Injunction entered on November 24, 2003, shall be binding on Shuster, upon any person insofar as he or she is acting in the capacity of agent, servant, employee, successor, assign, or attorney of Shuster, and upon any person who receives actual notice of this Order by personal service or otherwise insofar as he or she is acting in active concert or participation with Shuster. The Permanent Order of Injunction also provided that it shall remain in full force and effect until further order of this Court, and that this Court retains jurisdiction of this matter for all purposes.

The CFTC has now submitted its Motion for Summary Judgment Against Shuster ("Motion") pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rules 56.1 and 56.2. The Court has carefully considered the Motion and other written submissions of the CFTC filed with the Court and being fully advised hereby:

**GRANTS** the CFTC's Motion and enters findings of fact and conclusions of law finding Shuster liable for violating Section 4b(a)(2) of the Act, 6b(a)(2) (2001), and CFTC Regulation 1.1(b), 17 C.F.R. § 1.1(b) (2002) of the Act. The Court also finds Shuster liable for violating Sections 4(a), 7 U.S.C. § 6(a), and 4b(a)(2) of the Act, 6b(a)(2) (2001), and CFTC Regulation 1.1(b), 17 C.F.R. § 1.1(b) (2002) as controlling persons of AST subject to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001). The Court further grants the CFTC's request for injunctive and ancillary equitable relief and a civil monetary penalty.

Accordingly, the Court **HEREBY ORDERS ADJUDGES AND DECREES** that judgment shall and hereby is entered in favor of Plaintiff CFTC and against Shuster and now issues the following Order for a Permanent Injunction, a Civil Monetary Penalty, and Ancillary Equitable Relief Against Shuster ("Order").

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Jurisdiction and Venue

This Court has jurisdiction over the subject matter of this action and Shuster pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2003), which authorizes the CFTC 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.

The CFTC has jurisdiction over AST's transactions because most, if not all, of the foreign currency futures transactions that Shuster offered, or entered into, were with persons who were members of the retail investing public who were not eligible contract participants. Shuster marketed AST's managed 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. In short, they were unsophisticated retail customers who intended to profit by speculating on the changing relative values of foreign currencies and the United States dollar through their accounts at AST.

Furthermore, pursuant to Section 2(c)(2)(B) of the Act, 7 U.S.C. § 2(c)(2)(B) (2003), AST was not a proper counterparty or an affiliate of a proper counterparty under the Act authorized to engage in foreign currency futures transactions with retail customers. Accordingly, the CFTC has jurisdiction over AST's transactions.

Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1 (2003), in that the acts and practices in violation of the Act occurred within this district, among other places.

**B. Findings of Fact**

From at least December 2000 to at least July 2001 (“the relevant time period”), AST, a Delaware Corporation, held itself out to the public as a firm that managed investments for retail customers in the foreign exchange market (“forex”). Shuster founded AST and was one of its three principals. Shuster was principally responsible for soliciting investments from potential customers and was a signatory on AST bank accounts. Shuster and AST were not registered with the CFTC.

During the relevant time period Shuster and others employed a sales force to solicit funds on behalf of AST from potential customers using high pressure sales tactics. With Shuster’s knowledge and consent, the sales force made false, fraudulent and misleading representations to potential retail customers in order to gain their trust. For example, Shuster falsely stated to customers that foreign currency investments carried very little risk and/or were safe. In addition, AST’s promotional materials and Shuster falsely informed customers that stop-losses were placed on their foreign currency transactions in order to falsely assure them that their losses can be limited.

The sales force represented to customers that they had many years experience working in the forex market when in truth the sales force had little or no experience in the forex market. Further, Shuster and others instructed the sales force to make false statements regarding the profits AST generated from forex trading. For example, Shuster falsely stated to one customer that he could expect to make about a three percent return on his investment with AST each month and that he would double his money in a year. Shuster falsely told another customer that he was guaranteed to triple his investment in just a few months. Shuster also told another customer that he was guaranteed to make four to five percent on his investment with AST

monthly. Customers also were told that AST historically generated for its customers profits as high as 42 percent a year, when in truth AST generated little or no profits for its customers trading in the forex market.

Shuster and others also instructed its sales force to make false and misleading representations regarding AST's use of customers' funds. The sales force told customers that their funds were pooled together and invested in the forex market. In fact, however, AST failed to transfer the large majority of investor funds to any forex trading firm for the purpose of executing forex trades. Rather, Shuster and others diverted investor funds to pay personal expenses, AST's operating expenses and to unrelated corporate accounts.

In order to generate additional investments and to hide the diversion of investor funds, Shuster and others created and mailed to customers false account statements which described trading activity purportedly undertaken on behalf of the customers. These statements also purported to show profits and losses. These statements were false because in many instances, no such trading activity had occurred. Customers were then falsely notified that catastrophic trading losses had wiped out their funds.

The contracts offered and sold by Shuster through AST were futures contracts. First, the contracts involved the purchase and sale of Japanese yen, Euros, Swiss francs, British pounds, Canadian dollars, Australian dollars and New Zealand dollars and these foreign currency contracts were for sale for future -- as opposed to immediate or deferred -- delivery. Further, AST promotional materials stated that commissions paid to AST were round-turn, covering both entering and exiting a position. Second, these contracts could remain open indefinitely since 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 was entered.

Third, after a foreign currency position was established, the position in the foreign currency was closed with no apparent transfer of currency other than U.S. dollars. Fourth, there is no indication in any of the customer records and materials that physical foreign currency was ever actually delivered or that AST held or had the ability to hold any currency that it purchased on behalf of its customers. Fifth, AST customers never intended or had the ability to take delivery of foreign currencies. AST customers expected that all of the foreign currency contracts traded in their accounts would be offset. In fact, the contracts were always settled by an offsetting transaction and did not ever result in delivery of foreign currencies. Customers did not have accounts at any foreign financial institution for the delivery of foreign currency and AST failed to maintain any such accounts on behalf of its customers. Sixth, based on bank and other available records, no such accounts appear to have existed for AST. Seventh, AST's customers did not obtain any right or interest in a particular lot of currency. Last, the transactions between AST and its customers were not part of the interbank market.

AST was not a proper counterparty or an affiliate of a proper counterparty under the Act authorized to engage in foreign currency futures transactions with retail customers. AST was not a futures commission merchant ("FCM") or an affiliate of a FCM, a financial institution, a broker or securities dealer, an associated person of a broker or dealer, an insurance company, a financial holding company or an investment bank holding company. AST did not conduct transactions on a facility designated as a contract market or registered as a derivatives transaction execution facility. AST's customers were not eligible contract participants under the Act. AST marketed its managed foreign currency trading accounts to individuals. Most, if not all, of its customers 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. In short, AST's customers were unsophisticated retail customers who intended to profit by speculating on the changing relative values of foreign currencies and the United States dollar through their accounts at AST.

### C. Conclusions of Law

#### 1. Violations of Section 4b(a)(2) of the Commodity Exchange Act and CFTC Regulation 1.1(b)

During the relevant time period, Shuster cheated or defrauded or attempted to cheat or defraud investors or prospective investors of AST, willfully made or caused to be made false reports, statements, or records, and willfully deceived or attempted to deceive investors or prospective investors by, among other things: diverting funds received from investors, making false statements regarding trading losses and profits and the legitimacy of AST's operation all in violation of Section 4b(a)(2) of the Act, 7 U.S.C. § 6b(a)(2) (2003), and CFTC Regulation 1.1(b), 17 C.F.R. § 1.1(b) (2003). *See CFTC v. AVCO Financial Corp*, 28 F. Supp.2d 104, 115 (SDNY 1992), *aff'd in relevant part sub nom, CFTC v. Vartul*, 228 F.3d 94 (2d Cir. 2000). Shuster's 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) of the Act, 7 U.S.C. § 6b(a) (2003).

During the relevant period, Shuster, as a principal of AST, directly or indirectly controlled the company and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting AST's violations of Section 4b(a)(2) of the Act, 7 U.S.C. § 6b(a)(2) (2001), and CFTC Regulation 1.1(b), 17 C.F.R. § 1.1(b) (2002). Thus, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001), Shuster is liable for AST's violations of Section 4b(a)(2) of the



Act, 7 U.S.C. § 6b(a)(2) (2001), and Regulation 1.1(b), 17 C.F.R. § 1.1(b) (2002), to the same extent as AST.

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

During the relevant time period, AST 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 CFTC 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) (2003). *See CFTC v. Int'l Financial Services, Inc.*, 323 F. Supp.2d 482 (SDNY 2004); *see also CFTC v. Int'l Foreign Currency, Inc.*, 334 F.Supp.2d 305, 310 (EDNY 2004).

During the relevant period, Shuster, as a principal of AST, directly or indirectly controlled AST and did not act in good faith or knowingly induced, directly or indirectly, AST's acts constituting the violations of Section 4(a) of the Act, 7 U.S.C. § 6(a) (2001). Thus, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001), Shuster is liable for AST's violations of Section 4(a) of the Act, 7 U.S.C. § 6(a) (2001) to the same extent as AST. *See CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1334 (11th Cir. 2002) (quoting *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1567 (11th Cir. 1995)); *see also In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103, 34,765 (CFTC Jan. 12, 1988) (citing S. Rep. No. 384, 97th Cong., 2d Sess. 47 (1982)); and *CFTC v. Baragosh*, 278 F.3d 319, 330 (4th Cir. 2002).

## II. ORDER FOR RELIEF

### A. Permanent Injunctions

#### IT IS THEREFORE ORDERED THAT:

1. This Court's prior Order of Permanent Injunction against Shuster, dated November 24, 2003, is incorporated herein permanently enjoining him from directly or indirectly violating Sections 4b(a)(2) and 4(a) of the Act, 7 U.S.C. §§ 6b(a)(2) and 6(a)(2002), and Section 1.1(b) of the Regulations, 17 C.F.R. §1.1(b)(2001);
2. Shuster is permanently restrained, enjoined and prohibited from engaging directly or indirectly in any activity related to trading in any commodity, as that term is defined in Section 1a(4) of the Act, 7 U.S.C. § 1a(4), ("commodity interest"), including but not limited to the following:
  - A. Trading on or subject to the rules of any registered entity, at that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29);
  - B. Engaging in, controlling or directing the trading for any commodity interest account for or on behalf of any other person or entity, whether by power of attorney or otherwise;
  - C. Soliciting, receiving, or accepting any funds from any person in connection with the purchase or sale of any commodity interest contract;
  - D. Applying for registration or claiming exemption from registration with the CFTC in any capacity, and engaging in any activity requiring such registration or exemption from registration with the CFTC, except as provided for in Regulation 4.14 (a)(9), 17 C.F.R. § 4.14(a)(9) (2004), or acting as a principal, agent or any other officer or employee of any person registered, exempted from registration or required to be registered with the CFTC, except as provided for in Regulation 4.14 (a)(9), 17 C.F.R. § 4.14(a)(9) (2004);
  - E. Entering into any commodity interest transaction for his own personal account, for any account in which he has a direct or indirect interest and/or having any commodity interests traded on his behalf; and/or
  - F. Engaging in any business activities related to commodity interest trading.

3. Shuster is further permanently restrained, enjoined and prohibited from filing a petition in bankruptcy without providing the CFTC with prompt notice by Certified Mail of such filing.

4. The injunctive provisions of this Order shall be binding upon Shuster, upon any person insofar as he or she is acting in the capacity of officer, agent, servant or employee of Shuster, and upon any person who receives actual notice of this Order, by personal service, email or facsimile, insofar as he or she is acting in active concert or participation with Shuster.

**B. Civil Monetary Penalty**

**IT IS FURTHER ORDERED** that as of the date of entry of this Order, Shuster shall pay a civil monetary penalty in the amount of \$240,000 plus post-judgment interest, pursuant to Section 6c of the Act., 7 U.S.C. § 13a-1. 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 entry of this Order pursuant to 28 U.S.C. § 1961.

Shuster shall pay this penalty by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, Shuster shall make the payment payable to the Commodity Futures Trading Commission and send to the following address:

Commodity Futures Trading Commission  
Division of Enforcement  
Attention: Marie Bateman – AMZ-300  
DOT/FAA/MMAC  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169  
Telephone: 405-954-6569

If the payment is to be made by electronic funds transfer, Shuster shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with

those instructions. Shuster shall accompany the payment of the penalty with a cover letter that identifies the payor Defendant and the name and docket number of this proceeding.

Shuster shall simultaneously transmit copies of the cover letter and the form of payment to (a) the Director, Division of Enforcement, Commodity Futures Trading Commission, at Three Lafayette Centre, 1155 21<sup>st</sup> Street, NW, Washington, D.C. 20581, (b) Chief, Office of Cooperative Enforcement, Division of Enforcement, at the same address, and (c) Regional Counsel, Commodity Futures Trading Commission, Eastern Regional Office, at 140 Broadway, 19<sup>th</sup> Floor, New York, NY 10005.

Any acceptance by the CFTC of partial payment of Shuster's civil monetary penalty obligations shall not be deemed a waiver of Shuster's requirement to make further payments pursuant to this Order, or a waiver of the CFTC's right to seek to compel payment of any remaining balance.

**C. Restitution**

**IT IS FURTHER ORDERED** that Shuster's violations of the Act and Regulations merit the award of significant restitution. However, the Court recognizes that Shuster is already subject to a \$310,000 criminal judgment restitution obligation entered in *U.S. v. Shuster*, E.D.N.Y. Docket No. 04 Cr. 628 (ILG) ("criminal restitution obligation") for the misconduct at issue in this civil action. Because the criminal court imposed restitution, the Court is not ordering additional restitution.

**D. Partial Payments**

**IT IS FURTHER ORDERED** that any acceptance by the CFTC of partial payment of Shuster's Civil Restitution Obligation shall not be deemed a waiver of the respective requirement

to make further payments pursuant to this Order, or a waiver of the CFTC's right to seek to compel payment of any remaining balance.

**E. Prohibition on Transfer of Funds**

**IT IS FURTHER ORDERED** that Shuster 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 CFTC, or any officer that may be appointed by the Court.

**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 CFTC:	Regional Counsel Commodity Futures Trading Commission Division of Enforcement - Eastern Regional Office 140 Broadway, 19 <sup>th</sup> Floor New York, New York 10005 Phone: (646) 746-9700 Fax: (646) 746-9740
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All such notices to the CFTC shall reference the name and docket number of this proceeding.

**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, at Deerpark, New York on this 5<sup>th</sup> day of January, 2008.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

Respectfully submitted,

COMMODITY FUTURES TRADING  
COMMISSION  
Attorneys for Plaintiff

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