

solicited to trade foreign currencies, into a commodity trading account and thereafter by trading commodity futures other than foreign currencies without their knowledge and consent.

2. In addition, since December 21, 2000, SunState and Garbe have also solicited investors to enter into transactions in retail foreign currency options, in violation of provisions forbidding the offer or sale of illegal options. Specifically, SunState and Garbe have purportedly sold to at least one investor options on Euros which were not: 1) traded on or subject to the rules of a contract market which has been designated to trade commodity options, and 2) traded by or through a member of a designated contract market. By offering those options on Euros to that customer and others, SunState, which is not a designated contract market, offered illegal foreign currency options.

3. At all relevant times, Defendant SunState acted without benefit of registration as a commodity pool operator (“CPO”) with regard to investors’ monies solicited, accepted and received for the purpose of trading commodity futures. Garbe acted as an associated person of Sunstate.

4. Thus, Defendants SunState and Garbe have engaged, are engaging, or are about to engage in acts and practices which violate Sections 4b(a)(i), 4b(a)(iii), 4c(b), 4m(1) and 4o(1) of the Commodity Exchange Act, 7 U.S.C. §§ 6b(a)(i), 6b(a)(iii), 6c(b), 6m(1) and 6o(1)(1994), and Commission Regulations 32.11 and 33.3(a) thereunder, 17 C.F.R. §§ 32.11 and 33.3(a) (2000).

5. Accordingly, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (1994), Plaintiff Commodity Futures Trading Commission (“Commission” or “CFTC”) brings this action to enjoin the unlawful acts and practices of Defendants SunState and Garbe and to

compel their compliance with the provisions of the Act and Regulations thereunder. In addition, the Commission seeks civil penalties, an accounting and such other equitable relief as the Court may deem necessary or appropriate.

II.

JURISDICTION AND VENUE

6. The Act prohibits fraud in connection with the trading of commodity futures contracts and establishes a comprehensive system for regulating the purchase and sale of such contracts. In addition, Section 2(c)(2)(B) of the Act, as amended by the Commodity Futures Modernization Act of 2000, Appendix E, to Public L. No. 106-554 (December 21, 2000) expressly grants the Commission jurisdiction over certain retail foreign currency options, including options on physical currencies. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (1994), 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.

7. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (1994), 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

8. Plaintiff 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.* (1994), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1 *et seq.* (2000).

9. Defendant SunState Fx, Inc. is a Florida corporation incorporated on September 17, 1999, and located at 1877 South Federal Highway, Suite 308, Boca Raton, Florida 33432. SunState has never been registered with the Commission in any capacity.

10. Defendant Ulrich Garbe is 47 years old and his last known address is 2150 North Ocean Boulevard, 5 B, Boca Raton, Florida 33431. Garbe is an owner of SunState and its chief investment officer. He was registered with the Commission from August 30, 1993 until June 17, 1996 as an associated person (“AP”) of American Futures Group, Inc., which was formerly registered in several capacities, including as a futures commission merchant. Garbe also previously worked from May 21, 1991 until June 30, 1993 an AP of Statewide Trading Corporation, which is a registered as an introducing broker. Garbe is not currently registered with the Commission and his current whereabouts are unknown.

IV.

FACTS

Solicitation of SunState Investors

11. From at least March 2000 to the present, Garbe and SunState have solicited investors to trade foreign currency contracts. In written solicitation materials, Garbe has represented himself to be the chief financial officer and owner of SunState, as well as the head currency trader. Throughout the relevant period, SunState has employed independent brokers to solicit investors for SunState and account brokers and traders to manage investor accounts and trade currencies and exchange-traded commodity futures and options.

12. SunState investors customarily executed a Foreign Exchange Agreement and a Power of Attorney, which indicated that their funds would be used for spot and forward foreign currency, and did not include futures or any investment not in foreign currency, as possible uses of funds. The Foreign Exchange Agreement expressly provided that “from time to time Customer and [SunState] may enter into various forward and spot foreign exchange contracts.” Similarly, the Power of Attorney authorized SunState, as the investor’s agent and attorney, to “buy, and trade foreign currencies” in accordance with the terms in the Foreign Exchange Agreement.

13. After investors executed the Foreign Exchange Agreement and Power of Attorney, SunState instructed its investors to wire transfer their funds to a SunState bank account. In March 2000, Sunstate instructed its investors to wire transfer their funds to a designated SunState account at Bank of America (“BOA”). SunState closed the BOA account in May 2000.

14. Sometime in April 2000 through August 2000, SunState investors were instructed to wire transfer their funds to a designated SunState account at First Union National Bank (“First Union”). Throughout the relevant period, SunState has maintained similar bank accounts for the receipt of customer funds at HSBC Bank USA (“HSBC”), Union Planters Bank (“Union Planters”) and Harris Trust and Savings Bank (“Harris”). As a result of the use of these bank accounts, all SunState investor funds were pooled for purposes of buying and trading foreign currencies.

15. Initially, SunState investors received weekly account statements, but towards the end of the relevant period, investors received only monthly statements or no statements at

all. SunState's statements identified only the percentage return on each account and a current account balance. The account statements did not show individual trade transactions.

16. At least one investor received letters purportedly confirming individual option transactions in foreign currency that were not executed on a board of trade that has been designated as a contract market by the Commission.

Sanwa Futures Account

17. On or about April 6, 2000, apparently without the knowledge or consent of SunState's investors, Garbe opened a commodity trading account at Sanwa Futures L.L.C. ("Sanwa"), a registered futures commission merchant ("FCM").

18. Account opening documents executed by Garbe for the Sanwa account reveal that Garbe named himself and John Upton ("Upton"), Tim Summerfield ("Summerfield"), and John Hyland, who were SunState traders, as individuals "authorized to buy or sell financial futures and futures options on behalf of SunState." Account opening documents also reveal that Garbe opened the Sanwa account purportedly as a hedge account for SunState.

19. On April 18, 2000, SunState wire transferred a total of \$1 million of SunState investor funds out of a bank account at First Union entitled SunState Customer Segregated Funds account into the Sanwa account.

20. SunState commenced futures trading in the Sanwa account in June 2000 and continued through November 2000. Among the contracts traded were a number of instruments that do not constitute transactions in foreign currency, including U.S. Treasury bond and Treasury note futures contracts traded on domestic designated contract markets, non-U.S. regulated Brent crude oil contracts and various futures traded on foreign exchanges.

21. The Sanwa account made approximately \$101,000, including approximately \$27,000 in interest. During the period June 2000 through November 2000, SunState transferred approximately \$1.1 million from the account by a series of wire transactions to bank accounts in the name of SunState at First Union, Union Planters, Harris, and HSBC. The Sanwa account was closed in March 2001 and the remaining funds of approximately \$6,500 in the account were wire transferred to SunState on March 19, 2001.

22. One investor, who invested \$100,000 via a deposit to the SunState Customer Segregated Funds account at First Union on April 12, 2000, just six days prior to SunState's transfer of \$1 million of customer funds to the Sanwa futures trading account, understood that he was investing solely in foreign currencies. That investor never intended to invest in futures, nor was he ever advised by SunState or Garbe that any portion of his funds was invested in futures. That investor never received any profits deriving from SunState's trading of futures at Sanwa.

SunState's Solicitation of Option Accounts

23. According to SunState's promotional materials, SunState provides "diversified trading strategies to profit in the global foreign exchange markets." Purportedly, among SunState's strategies in trading foreign currencies are the execution of: 1) short term scalping trades, 2) medium term structured trades and 3) longer term strategic trades via options. In connection with its longer term strategic trades, SunState's solicitation materials state that its longer term strategic trades "could last from 2 months to 6 months" and are implemented "via specific option strategies to capture our views."

24. During the relevant period, SunState and Garbe, solicited investors to purchase options on foreign currency.

25. One investor, who invested a total of \$1.4 million with SunState, purchased two Euro Put/Dollar call options from Sunstate in January and February 2001. Specifically, that investor purchased a European style Euro Put/Dollar call option from SunState on January 26, 2001, paid a premium of \$23,687.50 for that option, which had a strike price of 0.9200 and an expiration date of February 28, 2001. He also purchased a similar European style Euro Put/Dollar call option from SunState on February 12, 2001, paying a premium of \$24,350 for that option, which had a strike price of 0.9225 and an expiration date of March 9, 2001.

26. Bank registers provided by SunState to the United States Securities and Exchange Commission (“SEC”) and to the above-referenced investor, indicate that his funds were not used to purchase foreign exchange options traded on any domestic designated contract market or foreign exchange.

SunState’s Inability to Repay Investors

27. On information and belief, SunState has had at least 160 investors who invested at least \$54 million. On information and belief, at least thirteen investors invested over \$1 million each and at least two of those investors invested over \$5 million each.

28. On information and belief, approximately \$25 million is owed to investors as of March 26, 2001.

29. Garbe is no longer residing in Boca Raton and as of mid March 2001, his whereabouts are unknown.

30. Hyland continues to maintain the SunState office in Boca Raton, but he has told investors who have demanded their funds that there are no funds remaining to repay investors. In fact, Hyland has told some investors that Garbe has stolen their monies.

Hyland has provided some investors with the March ledger which indicates that approximately \$25 million in investor funds is missing.

IV.

VIOLATIONS OF THE COMMODITY EXCHANGE ACT AND COMMISSION REGULATIONS

COUNT I

VIOLATIONS OF SECTION 4b(a)(i) AND (iii) OF THE ACT: FRAUD BY MISAPPROPRIATION AND MISREPRESENTATION

33. Paragraphs 1 through 22 and 27 through 30 are re-alleged and incorporated herein.

34. During the relevant time, SunState and Garbe violated Section 4b(a)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(i) and (iii) (1994), in that they cheated or defrauded or attempted to cheat or defraud investors or prospective investors in SunState and willfully deceived or attempted to deceive investors or prospective investors by, among other things: misappropriating and transferring \$1 million of SunState investor's commingled funds, which had been solicited to trade foreign currencies, into a commodity trading account and thereafter by trading commodity futures without their knowledge and consent.

35. Defendants engaged in this conduct in or in connection with 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 other persons where such contracts for future delivery were or may have been used for (a) hedging any transaction in interstate commerce in such commodity, or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof.

36. Each willful deception, misappropriation and act of unauthorized trading made during the relevant time period, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4b(a)(i) and (iii) of the Act.

COUNT II

**VIOLATION OF SECTION 4m(1) OF THE ACT:
FAILURES TO REGISTER AS A COMMODITY POOL
OPERATOR**

37. Paragraphs 1 through 22 are re-alleged and incorporated herein.

38. As defined by Section 1a(4) of the Act, 7 U.S.C. § 1a(4) (1994), a CPO is any firm or individual engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and that, in connection therewith, solicits, accepts, or receives from others funds, securities, or property, either directly through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market.

39. With certain specified exceptions and exemptions, not applicable here, all CPOs are required to be registered with the Commission, pursuant to Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (1994).

40. Specifically, SunState was a CPO with regard to the Sanwa account throughout the period April 2000 through November 2000, in that it accepted and received at least \$1 million from SunState investors for the purpose of trading commodity futures.

41. In connection with such conduct, SunState used the mails and other means or instrumentalities of interstate commerce, directly or indirectly, to engage in business as a CPO.

42. SunState engaged in these activities without the benefit of registration as a CPO, in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (1994).

43. Each use of the mails or any means or instrumentality of interstate commerce in connection with its business as a CPO without proper registration during the relevant time period, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (1994).

COUNT III

VIOLATIONS OF SECTION 4o(1) OF THE ACT: FRAUD BY A CPO AND AN ASSOCIATED PERSON OF A CPO

44. Paragraphs 1 through 22, 27 through 30, and 37 through 43 are re-alleged and incorporated herein.

45. SunState acted as a CPO in that it has engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise and in connection therewith, have solicited, accepted or received funds, securities or property from others for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market. Garbe acted as an unregistered associated person of a CPO pursuant to Section 4k(2) of the Act, 7 U.S.C. § 4k(2) (1994), in that he solicited funds for Sunstate.

46. During April 2000 through November 2000, SunState and Garbe violated Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (1994), in that as a CPO and associated person of a CPO, they directly or indirectly employed one or more devices, schemes, or artifices to defraud pool participants or prospective pool participants, or engaged in transactions, practices or courses of business which operated as a fraud or deceit upon pool participants or prospective pool participants by: misappropriating and transferring \$1 million of SunState

investor's commingled funds, which had been solicited to trade foreign currencies, into a commodity trading account and thereafter by trading commodity futures without their knowledge and consent.

47. Such acts were effected by use of the mails or other means or instrumentalities of interstate commerce.

48. Each act of misappropriation and each act of unauthorized trading made during the period April 2000 through November 2000, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (1994).

COUNT IV

VIOLATIONS OF SECTION 4c(b) OF THE ACT AND COMMISSION REGULATIONS 32.11 AND 33.3(a): OFFER AND SALE OF COMMODITY OPTIONS NOT CONDUCTED ON A BOARD OF TRADE WHICH HAS BEEN DESIGNATED BY THE COMMISSION AS A CONTRACT MARKET

49. Paragraphs 1 through 16 and 23 through 30 are re-alleged and incorporated herein.

50. Beginning on December 20, 2000 and continuing to the present the Defendants have offered to enter into, entered into, executed, confirmed the execution of, or conducted business for the purpose of soliciting, accepting any order for, or otherwise dealing in any transaction in, or in connection with, a commodity option when: (a) such transactions have not been conducted on or subject to the rules of a board of trade which has been designated by the Commission as a "contract market" for such commodity, and (b) such contracts have not been executed or consummated by or through a member of such contract

market, in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Commission Regulations 32.11 and 33.3(a), 17 C.F.R. §§ 32.11, 33.3(a).

V.

RELIEF REQUESTED

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

1. a preliminary and a permanent injunction prohibiting Defendants and any other person or entity associated with them, including any successor thereof, from engaging in conduct violative of Sections 4b(a)(i), 4b(a)(iii), 4c(b), 4m(1), and 4o(1) of the Act, 7 U.S.C. §§ 6b(a)(i), 6b(a)(iii), 6c(b), 6m(1), and 6o(1), and Commission Regulations 32.11 and 33.3(a), 17 C.F.R. §§ 32.11 and 33.3(a), and from engaging in any commodity-related activity, including soliciting new customers or customer funds;
2. an order directing Defendants and any successors thereof, to disgorge, pursuant to such procedure as the Court may order, all benefits received from the acts or practices which constituted violations of the Act, as described herein, and interest thereon from the date of such violations;
3. an order directing Defendants to make full restitution to every customer whose funds were received by them as a result of acts and practices which constituted violations of the Act, as described herein, and interest thereon from the date of such violations;

4. a civil penalty on each defendant in the amount of not more than the higher of \$110,000, or \$120,000 for violations on or after October 23, 2000, or triple the monetary gain to Defendants for each violation of the Act and Regulations;
5. an order requiring Defendants to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2); and
6. such other and further remedial ancillary relief as the Court may deem appropriate.

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ATTORNEYS FOR PLAINTIFF

William P. Janulis
Senior Trial Attorney
COMMODITY FUTURES TRADING
COMMISSION
300 South Riverside Plaza, Suite 1600N
Chicago, IL 60606-6615
(312) 353-7955
(312) 353-4502 (facsimile)
wjanulis@cftc.gov

Diane M. Romaniuk
Trial Attorney
(312) 886-3044
dromaniuk@cftc.gov

Scott R. Williamson
Deputy Regional Counsel
(312) 886-3090
swilliamsom@cftc.gov