

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Commodity Futures Trading Commission,

Plaintiff,

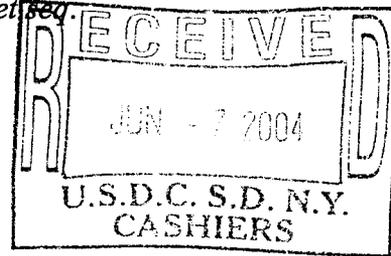
v.

Axess Trade Co., Inc.

Defendant.

04 CV 4293

COMPLAINT FOR INJUNCTIVE AND
OTHER EQUITABLE RELIEF AND FOR
PENALTIES UNDER THE COMMODITY
EXCHANGE ACT, AS AMENDED, 7
U.S.C. §§ 1 *et seq.*



COMMODITY FUTURES TRADING COMMISSION

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I. SUMMARY

1. Since at least September 2003, Axess Trade Co., Inc. ("Axess") has fraudulently solicited and accepted more than \$134,000 in funds from at least 12 retail investors for the purpose of speculatively trading illegal off-exchange foreign currency futures contracts. In an attempt to convince customers that it is a legitimate trading firm, Axess fraudulently misrepresents to customers that it is subject to the full regulation of the Commodity Futures Trading Commission ("Commission" or "CFTC") and the National Futures Association ("NFA"), even though Axess is neither registered with the CFTC in any capacity nor a member of the NFA. Axess also fraudulently misrepresents to customers that they will be afforded certain protections and remedies which are only available to customers of firms which are registered with the Commission.

2. These transactions have not been conducted on or subject to the rules of a board of trade designated or registered by the Commission as a contract market or derivatives transaction execution facility for such commodities, or executed or consummated by a member of such contract market or that is licensed, authorized or otherwise subject to regulation by any foreign futures authority.

3. By virtue of this conduct, Axess has violated Sections 4(a) and 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. §§ 6(a) and 6b(a)(i) and (iii), (2002), and Commission Regulation 1.1(b)(1) and (3), 17 C.F.R. § 1.1(b)(1) and (3) (2004).

4. Accordingly, pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1 (2002), Plaintiff CFTC brings this action to enjoin the unlawful acts and practices of Defendant and to compel its compliance with the provisions of the Act and Regulations thereunder. In addition, the Commission seeks disgorgement of Defendant's ill-gotten gains, restitution to customers, civil

monetary penalties, an accounting, and such other equitable relief as the Court may deem necessary or appropriate.

5. Unless enjoined by this Court, the defendant is likely to continue to engage in the acts and practices alleged in this Complaint and similar acts and practices, as more fully described below.

II. JURISDICTION AND VENUE

6. 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. In addition, Section 2(c)(2)(B) of the Act, 7 U.S.C. § 2(c)(2)(B) (2002) confers upon the Commission jurisdiction over certain retail transactions in foreign currency for future delivery, including the transactions alleged in this complaint.

7. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2002), in that Defendant is found in, inhabits, or transacts 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

A. Plaintiff

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.* (2002), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1 *et seq.* (2004).

B. Defendant

9. Axess Trade Co., Inc. (“Axess”) is a Panamanian corporation with its principal place of business at 244 Madison Avenue, New York, New York, 10016. Axess operates a website located at www.axesstrade.com, and is engaged in the business of soliciting the retail public to trade illegal off-exchange foreign currency futures contracts. Axess has never been registered with the Commission in any capacity.

IV. STATUTORY BACKGROUND

10. Section 2(c)(2)(B)(i)-(ii) of the Act, 7 U.S.C. § 2(c)(2)(B)(i)-(ii) (2002), provides that the CFTC shall have jurisdiction over an agreement, contract or transaction in foreign currency that is a sale of a commodity for future delivery, and is “offered to, or entered into with, a person that is not an eligible contract participant, unless the counterparty, or the person offering to be the counterparty, of the person is” a regulated entity, as defined therein. Section 2(c)(2)(B)(i)-(ii) of the Act was enacted by Congress as part of the Commodity Futures Modernization Act of 2000 (“CFMA”) in an effort “to clarify the jurisdiction of the Commodity Futures Trading Commission over certain retail foreign exchange transactions and bucket shops that may not be otherwise regulated.” CFMA § 2(5), Pub. L. No. 106-554, 114 Stat. 2763 (2000).

11. Section 1a(12)(A)(v) of the Act, 7 U.S.C. § 1a(12)(A)(v) (2002), defines an “eligible contract participant,” in part, as “an individual who has total assets in an amount in excess of – (I) \$10,000,000; or (II) \$5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual.”

V. FACTS

A. **The Axess Solicitation**

12. Since at least September 2003, Axess has solicited, through an introducing broker, at least \$134,000 from at least 12 retail customers to trade illegal off-exchange foreign currency futures contracts.

13. Axess solicits prospective retail customers via personal solicitations, emails and its website located at www.axesstrade.com.

14. Axess's opening account documents are available on their website, including their Customer Trading Agreement ("Customer Agreement").

15. Axess instructs customers to fill out the opening account documents and send the forms directly to Axess.

16. Customers are further instructed to send their investment funds directly to Axess's bank account at JP Morgan Chase Manhattan Bank in New York, New York.

17. After their Axess account is open, customers are allowed to place trades online through the Axess trading platform, or they can place trades through an introducing broker.

B. **Axess Fraudlently Solicits Customers**

18. In an attempt to establish Axess as a legitimate operation, the Axess solicitations repeatedly reference the CFTC and the NFA, thereby creating the false impression that Axess is subject to the full regulation of the CFTC and the NFA.

19. The Axess solicitations also mislead customers into believing that they will be afforded certain protections and remedies that are only available to customers of trading firms which are registered with the Commission, or that are engaged in on-exchange trading.

20. For example, the Axess Trading Agreement makes the following material misrepresentations:
- (a) Any controversy between Trader and AXESSTRADE, arising out of or relating to Trader's account shall be, except as provided below, resolved by arbitration in accordance with Part 180 of the Commodity Exchange Act as amended;
 - (b) The CFTC has issued Regulation 21.03 requiring AXESSTRADE, foreign brokers and foreign traders to respond to special calls made by the CFTC for information regarding their futures and options trading. AXESSTRADE is also required by this regulation to notify all foreign brokers and foreign traders of the requirements of this regulation;
 - (c) The rights of AXESSTRADE are subject to the applicable requirements for the segregation of Trader funds and property under the Commodity Exchange Act, as amended (the "Act"); and
 - (d) If you believe a violation of the Commodity Exchange Act is involved and if you prefer to request a Section 14 "Reparations" proceeding before the CFTC, you have 45 days from the date of such notice in which to make that election.

21. These statements are false in that:

- (a) Part 180 of the Commission's Regulations, 17 C.F.R. § 180, dealt with the Commission's arbitration process and was removed and reserved by Congress on August 10, 2001. The Commission's arbitration process is now included in Commission Regulation 166.5 and is only available to customers of firms that are duly registered with the Commission. Since Axess has never been registered with the Commission in any capacity, the Commission's arbitration process would be unavailable to Axess' customers;
- (b) Paragraph 21(b) refers to obligations imposed upon duly registered firms, or firms that are engaged in on-exchange trading;
- (c) Paragraph 21(c) also refers to obligations imposed upon duly registered firms, or firms that are engaged in on-exchange trading; and
- (d) Pursuant to Section 14 of the Act, 7 U.S.C. § 18 (2002), the Commission's reparations program is only available to customers of entities that are duly registered with the Commission.

22. The NFA is a self-regulatory organization that has primary responsibility over its members under Commission oversight. The NFA is registered with the Commission as a futures

association. Under Sections 8a(10) and 17(o) of the Act, 7 U.S.C. §§ 12a(10) & 21(o) (2002), the Commission has delegated registration functions to the NFA.

23. Axess continued to mislead customers in their Customer Agreement when it sent at least one prospective customer an email in which it claimed that Axess was regulated by the NFA.

24. Axess has never been registered with the CFTC and has never been a member of the NFA.

C. Axess' Foreign Currency Transactions Are Illegal Off-Exchange Futures Contracts

25. The foreign currency contracts that defendant offers and sells are contracts for future delivery of foreign currencies that are cash settled in U.S. dollars ("futures contracts"). The prices or pricing formulas for these contracts are established at the time the contracts are initiated, and appear to be settled through offset. These contracts are offered to the general public and are not individually negotiated. Axess customers are subject to margin calls. The contracts are standardized in their terms.

26. The agreements between Axess and its customers do not contain any provisions concerning how a customer would make or take delivery of actual foreign currencies.

27. Axess customers do not anticipate taking – and do not take – delivery of the foreign currencies they purchased as a consequence of these investments.

28. Of the 12 customers identified who invested with Axess, none are eligible contract participants under the act. They are retail investors.

29. None of the 12 identified customers have a commercial need for foreign currency, and all invested in the foreign currency futures transactions offered by Axess for speculative purposes only.

30. Axess does not conduct its foreign currency futures transactions on or subject to the rules of a board of trade that has been registered or designated by the CFTC as a contract market, nor are Axess's transactions executed or consummated by or through a contract market. Axess does not conduct transactions on a facility registered as a derivatives transaction execution facility.

31. Axess is offering to act, and is acting, as the counterparty to the transactions.

32. Axess is not an appropriate counterparty under the Act for the transactions herein.

VI. VIOLATIONS OF THE COMMODITY EXCHANGE ACT AND COMMISSION REGULATIONS

COUNT I:

**SALE OF ILLEGAL OFF EXCHANGE FUTURES CONTRACTS
IN VIOLATION OF SECTION 4(a) OF THE ACT**

33. Paragraphs 1 through 32 are re-alleged and incorporated herein.

34. During the relevant time period, Defendant, through its agents or employees, has 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 in violation of Section 4(a) of the Act, 7 U.S.C. § 6(a) (2002), when:

- (a) such transaction has not been conducted on or subject to the rules of a board of trade which has been designated or registered by the Commission as a contract market or derivatives transaction execution facility for such commodity;
- (b) such contract has not been executed or consummated by or through a contract market; and
- (c) such contract has not been evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: Provided, That each contract market or derivatives transaction execution facility member shall keep such record for a period of three years from the

date thereof, or for a longer period if the Commission shall so direct, which record shall at all times be open to the inspection of any representative of the Commission or the Department of Justice.

35. Each foreign currency futures transaction not conducted on a designated contract market or registered derivatives transaction execution facility made during the relevant time period, including but not limited to those conducted by the Defendant as specifically alleged herein, is alleged as a separate and distinct violation of Section 4(a) of the Act.

**COUNT II:
FRAUDULENT MISREPRESENTATION IN VIOLATION OF
SECTION 4b(a)(2)(i) and (iii) OF THE ACT AND REGULATION 1.1(b)(1) and (3)**

36. Paragraphs 1 through 35 are re-alleged and incorporated herein.

37. During the relevant time, Defendant, through its agents, violated Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii) (2002), and Regulation 1.1(b)(1) and (3), 17 C.F.R. §§ 1.1(b)(1) and (3) (2004), in that it cheated or defrauded or attempted to cheat or defraud investors or prospective investors in the investment program, and willfully deceived or attempted to deceive investors or prospective investors, by misrepresenting, among other things, that Defendant was subject to the full regulation of the CFTC and NFA, creating the fiction to prospective customers that they would be able to avail themselves of the protections offered to customers of actual CFTC registrants and NFA members.

38. Defendant, through its agents, 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.

39. Each misrepresentation made during the relevant period, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4b(a)(2)(i) and (iii) of the Act and Regulation 1.1(b)(1) and (3).

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 (2002), and pursuant to its own equitable powers:

- a. Find that Defendant violated Sections 4(a), 4b(a)(2)(i) and 4b(a)(2)(iii) of the Act, 7 U.S.C. §§ 6(a), 6b(a)(2)(i) and 6b(a)(2)(iii) (2002), and Regulations 1.1(b)(1) and (3) (2004);
- b. Enter orders of preliminary and permanent injunctions prohibiting the Defendant and any successors thereof, from engaging in conduct in violation of Sections 4(a), 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. §§ 6(a), 6b(a)(2)(i) and 6b(a)(2)(iii) (2002), and Regulations 1.1(b)(1) and (3) 17 C.F.R. § 1.1(b)(1)(2004), or 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;
- c. Enter an order directing the Defendant and any successors thereof, to disgorge pursuant to such procedure as the Court may order, all benefits received from the acts or practices that constituted violations of the Act, as described herein, and interest thereon from the date of such violations;

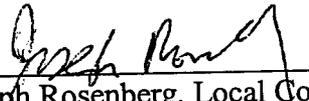
- d. Enter an order directing the Defendant and any successors thereof, to make full restitution to every Axxess customer as a result of acts and practices that constituted violations of the Act, as described herein, and interest thereon from the date of such violations;
- e. Enter an order assessing a civil monetary penalty against 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 or Regulations;
- f. Enter an order directing that the Defendant make an accounting to the court of all their assets and liabilities, together with all funds it 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, September 2003 to and including the date of such accounting;
- g. Enter an order requiring Defendant to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2); and
- h. Order such other and further remedial ancillary relief as the Court may deem appropriate.

Dated: June 7, 2004

Respectfully submitted,

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