

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 12-81311-CIV-MIDDLEBROOKS/BRANNON

UNITED STATES COMMODITY
FUTURES TRADING COMMISSION,

Plaintiff,

vs.

HUNTER WISE COMMODITIES, LLC,
et al.,

Defendants.

ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE is before the Court upon Plaintiff United States Commodity Futures Trading Commission's ("Plaintiff" or "CFTC") Motion for an Order of Preliminary Injunction (DE 4), filed December 6, 2012. A hearing on Plaintiff's Motion was held on February 22, 2013, and I appointed Melanie Damian, Esq. as Special Corporate Monitor immediately thereafter. (*See* DE 77). I have considered Plaintiff's Motion and all the declarations and exhibits attached thereto, as well as the Defendants' Responses, the Declaration of Defendant Harold Martin Jr., Plaintiff's Reply, and the evidence and argument presented at the February 22nd hearing, and I am otherwise fully advised in the premises. For the reasons set forth below, I find that the CFTC has jurisdiction over this matter and that they are entitled to a preliminary injunction and other equitable relief.

I. Background

A. The Complaint

The CFTC initially filed its 48-page Complaint (DE 1) asserting thirteen Counts against various Defendants¹ for violations of several sections of the Commodities Exchange Act (“the Act”). Over the years, the Commodities Exchange Act has been amended by the Food, Conservation, and Energy Act of 2008, the CFTC Reauthorization Act of 2008, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”). The enactment of recent amendments to the Act, namely the amendments by the Dodd-Frank Act, expanded the CFTC’s jurisdiction under the Act, and presents the Court with a matter of first impression relating to the scope of this expanded jurisdiction.

The Complaint alleges that three types of Defendant entities work together to offer and execute the transactions which allegedly violate the Act as follows: (1) the Hunter Wise Defendants,² which execute and confirm the execution of the transactions; (2) the Lloyds Defendants,³ which serve as intermediaries between Hunter Wise and approximately thirty telemarketing firms; and (3)

¹Defendants in this action are: Hunter Wise Commodities, LLC; Hunter Wise Credit, LLC; Hunter Wise Trading, LLC; Hunter Wise Services, LLC; Lloyds Commodities, LLC; Lloyds Credit Company, LLC; Lloyds Services, LLC; C.D. Hopkins Financial, LLC d/b/a C.D. Hopkins Metals Division; Hard Asset Lending Group, LLC; Blackstone Metals Group, LLC; Newbridge Alliance, Inc.; United States Capital Trust, LLC; and individuals David A. Moore; Chadewick Hopkins; Baris Keser; John King; Harold Edward Martin Jr.; Fred Jager; James Burbage; and Frank Gaudino.

²The term “Hunter Wise Defendants” refers to: Hunter Wise Commodities, LLC; Hunter Wise Credit, LLC; Hunter Wise Trading, LLC; Hunter Wise Services, LLC; and principal owners Harold Edward Martin Jr.; and Fred Jager. For sake of brevity, these entities and individuals are also referred to collectively as “Hunter Wise.”

³The term “Lloyds Defendants” refers to: Lloyds Commodities, LLC; Lloyds Commodities Credit Company, LLC; Lloyds Services, LLC; and individual owners James Burbage; and Frank Gaudino. For sake of brevity, these entities and individuals are also referred to collectively as “Lloyds.”

the Dealer Defendants,⁴ the telemarketing firms within the Hunter Wise network which solicit and engage retail customers. (See DE 1 at ¶ 11).

Specifically, the Complaint alleges in Count 1 that all Defendants violated 7 U.S.C. § 6(a) (Section 4(a) of the Act)⁵ by conducting off-exchange retail commodities transactions. (See DE 1 at 27-29).⁶

In Count 2, the Complaint alleges that the Hunter Wise Defendants violated 7 U.S.C. § 6b(a) (Section 4b(a) of the Act)⁷ by cheating, defrauding, or attempting to cheat or defraud retail customers

⁴The term "Dealer Defendants" refers to: C.D. Hopkins Financial, LLC d/b/a C.D. Hopkins Metals Division; individual Chadwick Hopkins; Hard Asset Lending Group, LLC; Blackstone Metals Group, LLC; individual Baris Keser; Newbridge Alliance, Inc.; individual John King; United States Capital Trust, LLC; and individual David A. Moore. For sake of brevity, these entities and individuals are also referred to collectively as the "Dealers."

⁵7 U.S.C. § 6(a), provides, in relevant part:

(a) Restriction on futures trading

. . . [I]t shall be unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting or 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 (other than a contract which is made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions) unless--

- (1) such transaction is 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; [and]
- (2) such contract is executed or consummated by or through a contract market[.]

Id.

⁶For each of the individual, non-entity Defendants and for each of the Counts, the Complaint alleges control person liability pursuant to 7 U.S.C. § 13c(b) (Section 13(b) of the Act).

⁷7 U.S.C. § 6b(a)(2), provides, in relevant part:

in connection with retail commodities transactions. (See DE 1 at 30-31).

In Count 3, the Complaint alleges that the Hunter Wise Defendants violated 7 U.S.C. § 9(1) (Section 6(c)(1) of the Act)⁸ by employing a scheme or artifice to defraud in connection with contracts of sale of commodities in interstate commerce. (See DE 1 at 31-32).

In Count 4, the Complaint alleges that Defendants C.D. Hopkins Financial, LLC (“CD

(a) Unlawful actions

It shall be unlawful—

...

- (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or swap, that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market—
 - (A) to cheat or defraud or attempt to cheat or defraud the other person;
 - (B) willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record; [or]
 - (C) willfully to deceive or attempt to deceive the other 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 or, in the case of paragraph (2), with the other person[.]

Id.

⁸7 U.S.C. § 9(1), provides, in relevant part:

It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after July 21, 2010[.]

Id.

Hopkins”), Hard Asset Lending Group, LLC (“Hard Asset”), and Chadewick Hopkins (“Mr. Hopkins”) violated 7 U.S.C. § 6b(a) (Section 4b(a) of the Act) by cheating or defrauding, or attempting to cheat or defraud, retail customers in connection with retail commodities transactions. (See DE 1 at 33-34).

In Count 5, the Complaint alleges that Defendants CD Hopkins, Hard Asset, and Mr. Hopkins violated 7 U.S.C. § 9(1) (Section 6(c)(1) of the Act) by employing a scheme or artifice to defraud in connection with contracts of sale of commodities in interstate commerce. (See DE 1 at 34-35).

In Count 6, the Complaint alleges that Defendants Blackstone Metals Group, LLC (“Blackstone”) and Baris Keser (“Mr. Keser”) violated 7 U.S.C. § 6b(a) (Section 4b(a) of the Act) by cheating, defrauding, or attempting to cheat or defraud retail customers in connection with retail commodities transactions. (See DE 1 at 35-36).

In Count 7, the Complaint alleges that Defendants Blackstone and Mr. Keser violated 7 U.S.C. § 9(1) (Section 6(c)(1) of the Act) by employing a scheme or artifice to defraud in connection with contracts of sale of commodities in interstate commerce. (See DE 1 at 36-38).

In Count 8, the Complaint alleges that Defendants Newbridge Alliance, Inc. (“Newbridge”) and John King (“Mr. King”) violated 7 U.S.C. § 6b(a) (Section 4b(a) of the Act) by cheating, defrauding, or attempting to cheat or defraud retail customers in connection with retail commodities transactions. (See DE 1 at 38-39).

In Count 9, the Complaint alleges that Defendants Newbridge and Mr. King violated 7 U.S.C. § 9(1) (Section 6(c)(1) of the Act) by employing a scheme or artifice to defraud in connection with contracts of sale of commodities in interstate commerce. (See DE 1 at 39-40).

In Count 10, the Complaint alleges that Defendants United States Capital Trust, LLC (“USCT”) and David A. Moore (“Mr. Moore”) violated 7 U.S.C. § 6b(a) (Section 4b(a) of the Act) by cheating, defrauding, or attempting to cheat or defraud retail customers in connection with retail commodities transactions. (*See* DE 1 at 40-41).

In Count 11, the Complaint alleges that Defendants USCT and Mr. Moore violated 7 U.S.C. § 9(1) (Section 6(c)(1) of the Act) by employing a scheme or artifice to defraud in connection with contracts of sale of commodities in interstate commerce. (*See* DE 1 at 41-42).

In Count 12, the Complaint alleges that the Hunter Wise Defendants violated 7 U.S.C. § 6d(a) (Section 4d(a) of the Act) by failing to register with the CFTC as a Futures Commission Merchant as described in Section 2(c)(2)(D)(i) of the Act. (*See* DE 1 at 43-44).

In Count 13, the Complaint alleges that the Hunter Wise Defendants and the Lloyds Defendants violated 7 U.S.C. 13c (Section 13(a) of the Act) by willfully aiding, abetting, counseling, commanding, inducing, or procuring the commission of the acts constituting violations of the Act committed by Defendants CD Hopkins, Blackstone, Newbridge, and USCT as alleged in Counts 1 and 5 through 11 of the Complaint. (*See* DE 1 at 44-45).

With regard to the relief requested, Plaintiff asks the Court to find violations as set forth above and grant injunctive relief pursuant to the violations. (*See* DE 1 at 45-48).⁹

B. Motion for Preliminary Injunction

In the instant Motion, Plaintiff seeks a preliminary injunction pursuant to the Act which would (1) enjoin Defendants from committing further violations of the Act and the CFTC

⁹For purposes of brevity, the Court opts not to set forth here the different forms of injunctive relief requested in the Complaint.

Regulations; (2) freeze Defendants' assets; (3) require an accounting from Defendants; (4) appoint a Receiver; and (5) preserve and allow for CFTC inspection of Defendants' books and records. (DE 4 at 20).

Defendants filed several responses opposing the preliminary injunction. Defendants USCT and Mr. Moore were the first to file their Response (DE 30). In the Response, they contest the factual allegations in the Complaint, argue that they were acting in good faith, and advise the Court that they have already voluntarily ceased conducting business and do not intend to continue business with Hunter Wise, Lloyds Commodities, or any other firm that does not offer actual delivery of financed commodities. Therefore, they claim, the preliminary injunction is unnecessary as to them.

Next, the Hunter Wise Defendants filed their Response (DE 36), in which they contend that the CFTC falsely characterizes the Hunter Wise Defendants' business as engaging in transactions with retail customers. Specifically, they claim that they only provided administrative services to the other Defendants; however, they later claim that they hold physical metal and have enforceable obligations with its suppliers for the physical delivery of metals to the dealers for the retail transactions. The Hunter Wise Defendants' remaining arguments are legal in nature, claiming that the CFTC lacks jurisdiction over their conduct, and that granting preliminary injunctive relief would cause injury to retail customers and the public interest generally.¹⁰

The Lloyds Defendants filed their Response (DE 37) on January 22, 2013, and join Hunter Wise's opposition. However, Lloyds argues, *inter alia*, that they are in a unique position in that they are not being charged with fraud, but rather they are just being charged with off-exchange financed

¹⁰Because the Hunter Wise Defendants' Response (DE 36) is the most substantive response, and because the other Defendants join in the arguments, the Court will focus its attention on the arguments contained therein.

transactions, and for aiding and abetting the off-exchange financed transactions. Thus, Lloyds argues, a preliminary injunction should not be issued against them.

Last, Defendants Newbridge and John King filed their Response (DE 43) on January 23, 2013. In the Response, these Defendants adopt the arguments raised in their Motion to Dismiss (DE 32) and argue generally that their transactions cannot establish the elements necessary for a preliminary injunction to issue.

On February 22, 2013, the Court held a hearing. At the hearing, the Court heard arguments from the CFTC, the Hunter Wise Defendants, and the Lloyds Defendants. Additionally, the Court heard testimony from Hunter Wise's accountant, Wayne Pinnell, Hunter Wise's Director of Operations, Sue Morales, and Hunter Wise's supervising trader, Herb Choi. At the conclusion of the hearing, I reached an initial determination that the Motion would be granted and that injunctive relief should issue immediately. At the request of the Parties, and given the expediency required under the circumstances and the potential harm to Defendants by appointment of a receiver, I temporarily appointed Melanie Damian, Esq. as Special Corporate Monitor. The terms of the temporary appointment are set forth in my Order Temporarily Appointing Special Corporate Monitor (DE 77).

II. Findings of Fact

The conduct at issue involves a nationwide scheme operated by several entities in order to defraud retail commodities transaction investors. As discussed further below, the Dodd-Frank Act expanded the CFTC's jurisdiction under the Act to include Defendants' conduct. The CFTC commenced a detailed investigation of Defendants' business operations and specifically the financed commodity transactions they offer to retail customers. The investigation resulted in substantial

findings by the CFTC, many of which were submitted to the Court in the form of affidavits, deposition testimony excerpts, and exhibits.

A. The Defendants and Other Relevant Entities

The scheme only appears complex because it involves several layers of entities and their subsidiaries, with each playing a different role. However, placing Defendants into three groups adds clarity to the web of entities involved in the commodities transactions at issue.

(i) The Hunter Wise Defendants

Defendant Hunter Wise Commodities, LLC (“HW Commodities”) was formed as a California Limited Liability Company (“LLC”) in July 2007 and has been registered as a Nevada LLC since October 2010. It maintains business addresses in Las Vegas, Nevada, and Irvine, California. Defendant Ed Martin (“Martin”) is the registered agent, and he and Fred Jager (“Jager”) are both managers and members of HW Commodities.

HW Commodities is the sole member of both Hunter Wise Credit, LLC (“HW Credit”) and Hunter Wise Trading, LLC (“HW Trading”). Martin and Jager are the sole members and managers of Hunter Wise Services, LLC (“HW Services”) and are the Chief Operating Officer and Chief Executive Officer of HW Services, respectively. HW Commodities, HW Credit, and HW Trading all share the same business address in Las Vegas and the same mailing address in Irvine. HW Services also shares the Irvine mailing address.¹¹

HW Commodities, the holding company, describes itself as being “in the business of providing a physical commodity trading, financing, and ‘back office’ platform for a network of

¹¹There are other Hunter Wise entities, such as Hunter Wise Financial Group, LLC, and Hunter Wise Holdings, LLC; however, they have not been named in the Complaint, and the Court opts not to discuss them in detail here.

Authorized Independent Dealers that transact leveraged sales in precious metals.” According to Hunter Wise’s “Confidential Private Placement Memorandum,” Hunter Wise Credit “will finance a portion of Dealer transactions for those wishing to utilize leverage in their accounts,” Hunter Wise Trading “maintains a two-way market for the investing public in selected physical commodities,” and Hunter Wise Services “will perform certain sales and administrative services on behalf of Hunter Wise Commodities, LLC.”¹²

Martin and Jager control the operations of the Hunter Wise entities, including executing contracts on behalf of Hunter Wise, controlling the bank accounts, and making hiring and firing decisions. In reality, these companies operate as a common enterprise under common ownership and control.

(ii) The Lloyds Defendants

Lloyds Commodities, LLC (“Lloyds Commodities”) was originally organized as a Florida LLC under the name “Burbage Financial Group, LLC” on November 10, 2009, with Defendant James Burbage (“Burbage”) as the sole member and manager. On March 12, 2010, Burbage changed the name of the company to Lloyds Commodities, LLC, and on November 8, 2010, he added Defendant Frank Gaudino (“Gaudino”) as a managing member. The registered agent for Lloyds Commodities is J.B. Grossman, P.A.,¹³ and Burbage and Gaudino are managers of the company. Lloyds Commodities’ principal address is in Palm Beach Gardens, Florida.

Lloyds Commodities has several affiliated companies, including Lloyds Commodities Credit

¹²However, as shown below, the Hunter Wise entities operate as a single common enterprise.

¹³This is the law firm of attorney Jay Bruce Grossman (“Grossman”), counsel for the Hunter Wise Defendants.

Company, LLC (“Lloyds Credit”) and Lloyds Services, LLC (“Lloyds Services”), which operate under the common ownership and control of Burbage and Gaudino. Lloyds Credit is a Nevada LLC, with the same listed business address as HW Commodities’ business address in Las Vegas. Burbage and Gaudino are the sole managers of Lloyds Credit and also list their addresses at the same Hunter Wise address in Las Vegas.

Lloyds Services is a Florida LLC formed on January 1, 2012. Grossman is its registered agent. Lloyds Commodities is the sole member and manager of Lloyds Services, whose principal address is in Palm Beach Gardens, Florida.

(iii) The Dealer Defendants

Defendant C.D. Hopkins Financial, LLC d/b/a C.D. Hopkins Metals Division (“CD Hopkins”) is a telemarketing firm that solicited retail customers. CD Hopkins was formed as a California LLC on July 30, 2010. On October 13, 2011, Defendant Chadewick Hopkins (“Mr. Hopkins” or “Chad Hopkins”) cancelled the California LLC and registered the company as a Nevada LLC. Chad Hopkins is the sole member and manager of CD Hopkins.

Hard Asset Lending Group, LLC (“Hard Asset”) is a corporate affiliate of CD Hopkins. It is a Florida LLC, with its principal address in Miami, Florida, and its registered agent is Corporate Creations Network, Inc. Chad Hopkins is the sole member and manager of Hard Asset. On April 30, 2012, CD Hopkins entered into an agreement with Blackstone Metals Group, LLC (“Blackstone”) in which CD Hopkins sold all of its client accounts to Blackstone.

Blackstone is a telemarketing firm that solicits retail customers to enter into commodities transactions. Blackstone was formed on July 5, 2011, as a Florida LLC with its principal address in West Palm Beach, Florida. On August 29, 2011, Baris Keser (“Keser”) became the registered

agent and sole managing member of Blackstone.

Newbridge Alliance, Inc. (“Newbridge”) is a telemarketing firm that solicits retail customers to enter into commodities transactions. It was incorporated in Florida on September 2, 2010, and its principal address is in West Palm Beach, Florida. The Law Offices of Paul J. Burkhart, PL is the registered agent of Newbridge, and John King (“King”), the company’s incorporator, is listed as the Chief Executive Officer.

United States Capital Trust, LLC (“USCT”) is a telemarketing firm that solicits retail customers to enter into commodities transactions. It is a Florida LLC which was formed on August 10, 2011, and its principal address is in Pompano Beach, Florida. Defendant David Moore (“Moore”) is USCT’s registered agent and sole managing member.

B. The Scheme and Defendants’ Roles

Hunter Wise is the conductor of this orchestra, with the other Defendants playing instruments at Hunter Wise’s direction. Hunter Wise recruits and engages intermediaries and sales firms, such as the Lloyds Defendants (an intermediary)¹⁴ and the Dealer Defendants (sales firms), to solicit retail customers to purchase physical metals¹⁵ on a financed basis. The Dealer Defendants solicit retail customers directly by phone and through their websites. These dealers tout leveraged or financed purchases and sale of physical metals as legitimate and safe investments, suggesting that these

¹⁴Lloyds acts as an intermediary between Hunter Wise and the sales firms or dealers. Lloyds entered into an agreement with Hunter Wise to recruit sales firms to execute retail commodity transactions through Hunter Wise. Lloyds also entered into contracts with the Dealer Defendants, according to which Lloyds agreed to provide services; however, it is actually Hunter Wise that provides the documents and services, and Lloyds provides no additional or different services to the sales firms. Rather, Lloyds acts only as a pass-through to Hunter Wise, adding one more layer of distance between Hunter Wise and the retail commodity transactions, and one more layer of costs charged to the retail customers.

¹⁵The metals solicited in this scheme include gold, silver, platinum, palladium, and copper.

transactions are more likely to profit (or less likely to result in a loss) than transactions that do not involve physical metals.¹⁶

Hunter Wise provides the Dealer Defendants (and other telemarketing firms not party to this lawsuit) with substantial assistance in marketing and managing the retail customers' accounts. Specifically, Hunter Wise provides the Dealers with educational videos, standard form contracts, internal company operations policies and procedures manuals, book keeping, reporting, and account management services, and even preparation and transmission of important transactional documents to retail customers. Hunter Wise also supplies the Dealers – through Lloyds – with telemarketing scripts to lure retail customers into transactions with Defendants.

Hunter Wise also provides the Dealers with internet-based access to what it calls the “Portal.” The Portal is a computer database operated by Hunter Wise to maintain account and trading records for all retail customer transactions, and provides the other Defendants with access to this information through the Portal. The Portal also allows dealers and retail customers to access their account and transaction information.¹⁷

Hunter Wise also uses the portal to generate at least three different reports that ultimately get distributed to the retail customer: (1) a Trade Confirmation; (2) a Transfer of Commodity notice; and

¹⁶The sales pitches to customers by the sales firms are taught to the dealers in training materials provided by Hunter Wise. Worth noting is that the sales firms do not disclose the overall track record of customers who enter into retail commodity transactions, likely because the large majority of retail customers suffer complete losses.

¹⁷Hunter Wise relies on the portal to argue that they only provide administrative services to Lloyds and the Dealer Defendants. However, it is the portal that allows Hunter Wise to control every aspect of the operation.

Further, when a dealer goes out of business, it is the portal that enables Hunter Wise to maintain control of the customers' accounts. When this happens, Hunter Wise merely moves the customers “in house” over to another dealer with the customer's trading position intact.

(3) a monthly account statement. These reports mislead retail customers by creating the illusion that actual commodities are being transferred into or out of their accounts, when in reality, no real metals are being transferred as a result of the transaction. (*See, e.g.*, Hearing Ex. 4a “Transfer of Commodity” Notice) (“Product shipped out of your Account”).¹⁸ It is further misleading that Hunter Wise generates these reports, which appear to be generated by each individual Dealer Defendant.¹⁹

The transactions, which do not occur on a registered commodity exchange, begin with the retail customer making a down payment to the dealer (usually 25% of the total purchase price of the metal) and purportedly receiving a loan for the balance of the purchase price.²⁰ The dealer then calls Hunter Wise (while the customer holds the line), places the customer’s order at a price determined by Hunter Wise, and Hunter Wise enters the customer’s order in the database. The transaction is not completed until the order reaches Hunter Wise for approval. Accordingly, Hunter Wise executes the retail transactions.

¹⁸Hunter Wise’s Director of Operations, Sue Morales, testified that the Transfer of Commodity notice does not actually give the customer any right to the metals, and they don’t actually get the commodity transferred through it.

¹⁹For example, when John Smith makes a trade on the portal, he will receive a Trade Confirmation notice and/or a Transfer of Commodity notice that appears to be from a Dealer Defendant, without any mention of Hunter Wise. However, the notice provided to Mr. Smith was drafted by Hunter Wise personnel and generated by Hunter Wise’s portal.

Additionally, the documents sent through the portal were drafted, and modified over the years, by Hunter Wise.

²⁰This method of “financing” is a large part of the scheme. When customers are solicited, they are given the option to “finance” their purchase, which they are told allows them to purchase 4-5 times the amount of metals they would be able to buy on their deposit alone. Because they are told of the lucrative advantages of financing, they put down their down payment thinking more metals will be purchased. However, more metals are not purchased, but extra fees and costs are tacked on for the purported loans provided to the customers.

To the extent that Hunter Wise argues that some customers do not finance their transactions, such is not important at this juncture, as the CFTC is only prosecuting the financed transactions – which equate to a very large percentage of the operation.

The customer funds pass from the dealer to Lloyds, who then passes them through to Hunter Wise.²¹ With this down payment, Defendants claim that they buy and sell physical metals and store them for the customers, but, in reality, do not own, store, or possess any physical metals in connection with any retail commodity transaction.

After funds are deposited by Hunter Wise in its own bank accounts and Hunter Wise makes a book entry in the portal, customers can begin long (buy) or short (sell) trades to speculate on the price movement of metals. From the instant the account is funded by the customer, the customer is charged substantial fees and costs associated with “trading” and “service fees.”²² These fees are then divided among the three levels – Hunter Wise, Lloyds, and the Dealer Defendants – pursuant to fee agreements between the Defendants. The customer’s equity in the account increases or decreases as the prices of metals fluctuate, while also subject to depletion on a daily basis due to interest charged and service fees. When a customer’s equity falls below 15% of the value of the total trading position, the customer receives a margin call, requiring the customer to deposit additional funds in order to maintain the trading position. If the customer’s equity drops to 9%, any open trading positions are liquidated in order to protect Hunter Wise.

As noted above, Hunter Wise does not actually buy, sell, loan, store, or transfer physical metals in connection with these retail commodity transactions. Instead, Hunter Wise records and tracks customer orders and trading positions, and then manages its exposure to these retail customer

²¹It appears that there may be instances when the customer funds are sent directly to Hunter Wise, as opposed to through Lloyds.

²²Specifically, customers are charged a commission (up to 38% of the funds sent to Defendants), a price spread (a 3-5% mark-up or mark-down from the current price of the metal), interest on the purported loan (at an annual rate of approximately 9.5%) and other fees (such as “service fees” of approximately 7% annually on the total market value of the account) until the long or short trading position is offset.

trading positions by using the customers' funds to trade derivatives – such as futures, forwards, and rolling spot contracts – in its own margin trading accounts. Hunter Wise has or had margin trading accounts with several independent entities.²³

Defendants rely on these margin trading accounts for the notion that they have possession of metals purchased for the retail transactions. However, the trades that Hunter Wise places in these accounts do not result in the transfer or delivery of metals, and Hunter Wise has never taken delivery of any physical metals as a result of the trades placed in these accounts.²⁴

III. Discussion

A. *The CFTC's Enforcement Jurisdiction*

The first issue that must be addressed is whether the CFTC has jurisdiction to prosecute their claims against Defendants. In doing so, it is helpful to first set forth the abbreviated background of the regulation of commodities to put in perspective the issues at hand.

The Commodity Exchange Act “is a remedial statute that serves the crucial purpose of protecting the innocent individual investor – who may know little about the intricacies and complexities of the commodities market – from being misled or deceived.” *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F. 3d 1321, 1329 (11th Cir. 2002). Initially, the only commodities regulated by

²³These entities include A-Mark Precious Metals, Inc., Standard Bank, PLC, Natixis Commodity Markets Ltd., R.J. O'Brien, and OANDA.

²⁴Representatives from the companies with which Hunter Wise has or had margin trading accounts have testified that they do not maintain an inventory of physical metals for Hunter Wise or its customers, that Hunter Wise has *never* taken delivery of physical metals as a result of trades in its accounts, and that Hunter Wise does not receive title to any physical metals as a result of trades in its accounts.

Although Sue Morales testified that they do ship out physical metals to customers on occasion, she noted that these transactions were a “small, small percentage” of the business. (*See Hearing Transcript of Sue Morales*).

Congress were certain grain futures transactions pursuant to the Grain Futures Act. In 1936, Congress renamed the Act to be the Commodity Exchange Act, and expanded its coverage to include additional agricultural commodities. Since then, the Act has been amended several times.

In 1974, the CFTC was established by the Commodity Futures Trading Commission Act, Pub. L. No. 93-463, 88 Stat. 1389. The CFTC is charged by Congress with administering and enforcing the Commodity Exchange Act and the Commission Regulations promulgated thereunder. *See* 17 C.F.R. §§ 1 *et seq.* After several amendments to the Act expanded the CFTC's jurisdiction, Section 742 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("the Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376, granted the CFTC new authority over certain leveraged, margined, or financed commodity transactions with retail customers, including authority to prohibit fraud in connection with such transactions in interstate commerce.

Specifically, the Dodd-Frank Act added Section 2(c)(2)(D) (7 U.S.C. § 2(c)(2)(D)) to the Act.²⁵ Section 2(c)(2)(D) provides, in relevant part:

(D) Retail commodity transactions

(i) Applicability

Except as provided in clause (ii), this subparagraph shall apply to any agreement, contract, or transaction in any commodity that is –

- (I) entered into with, or offered (even if not entered into with), a person that is not an eligible contract participant²⁶ or eligible commercial entity; and

²⁵Section 2(c)(2)(D) became effective on July 16, 2011.

²⁶The Act defines an eligible contract participant ("ECP"), in relevant part, as an individual who has amounts invested on a discretionary basis, the aggregate of which exceeds \$10 million, or \$5 million if the individual enters into the 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. 7 U.S.C. § 1a(18)(xi).

- (II) entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.

(ii) Exceptions

This subparagraph shall not apply to –

- (I) an agreement, contract or transaction described in paragraph (1) or subparagraphs (A), (B), or (C), including any agreement, contract, or transaction specifically excluded from subparagraph (A), (B), or (C).
- (II) any security;
- (III) a contract of sale that –
 - (aa) results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved; or
 - (bb) creates an enforceable obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery, respectively, in connection with the line of business of the seller and buyer[.]

7 U.S.C. § 2(c)(2)(D).²⁷ This section further states that, apart from the exceptions listed above, these types of transactions are subject to Sections 4(a), 4(b), and 4b of the Act “as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery.” 7 U.S.C. § 2(c)(2)(D)(iii).

Additionally, the Dodd-Frank Act amended Section 6(c) of the Act (7 U.S.C. §§ 9, 15)²⁸ to

²⁷It follows that a “retail customer” is a person that is not an ECP, i.e., an individual who does not meet the standards as set forth in 7 U.S.C. § 1a(18)(A)(xi). *See supra* note 26. In the instant case, Plaintiffs claim that Defendants’ retail customers do not have the \$5 million or more invested on a discretionary basis that is required to be an ECP. (*See* DE 4 at 3 n.1).

²⁸This provision was effective August 15, 2011.

broaden Plaintiff's anti-fraud jurisdiction as set out in Commission Regulation 180.1, which prohibits the "intentional or reckless" use of deceptive or manipulative practices, including making misstatements or omissions of material fact, in "connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity." *See* 17 C.F.R. § 180.1.

Given the CFTC's jurisdiction as set forth above, the issue at bar becomes whether such jurisdiction embodies Defendants' conduct. The amendment applies to the conduct at issue because (1) the retail customers are not eligible contract participants, (2) the transactions at issue were financed, and (3) each Defendant was working in concert with one another throughout the course of the transactions.

Hunter Wise's Response argues that the Dodd-Frank amendment does not apply to them because they do not engage in "leveraged or margined" transactions.²⁹ This argument ignores the language of the amendment, which encompasses transactions on a financed basis. *See* 7 U.S.C. § 2(c)(2)(D)(i)(II). As noted above, allowing the retail customers to finance their metals purchases was a lucrative aspect of the Defendants' business, and Hunter Wise controlled and enabled the dealers who engaged in the financed transactions with retail customers. Thus, at the very least, Hunter Wise acted in concert with those offering financed transactions. Further, Hunter Wise's own auditing accountant testified that Hunter Wise was in the business of financed commodities transactions.

Hunter Wise next argues that the transactions fall within the exceptions to the Dodd-Frank

²⁹Hunter Wise's Motion to Dismiss (DE 33) raises several jurisdictional arguments that are not made within the Response to the Motion for Preliminary Injunction. However, given the stage of the proceedings and that a ruling on the Motion to Dismiss is forthcoming by separate order, the Court will only address herein the arguments raised with respect to the preliminary injunction.

amendment. Specifically, Hunter Wise argues that Defendants are exempt under subsection (bb) because (1) its transactions are between Hunter Wise and the dealers, (2) these transactions create an enforceable obligation to deliver, (3) they have the ability to deliver and accept delivery of physical metal, and (4) the transactions are in connection with their respective lines of business. This argument holds no water, as the exception does not apply to the transactions between the Dealer Defendants and the retail customers. Given Hunter Wise's leading role in the scheme, such retail transactions place Hunter Wise within the jurisdictional purview of the CFTC.

Hunter Wise's Response further argues that the transactions between Hunter Wise and Lloyds are exempt under subsection (aa) because "actual delivery" occurs. Again, it is the transactions with retail customers that are at issue, not those between Hunter Wise and Lloyds. Moreover, actual delivery cannot occur where Hunter Wise has no metals to deliver.³⁰ Thus, the Court similarly rejects this argument.

B. Preliminary Injunction Standard

Pursuant to 7 U.S.C. § 13a-1 (Section 6c of the Act), the CFTC is authorized to bring an action in the appropriate district court to enjoin or restrain violations of the Commodities Exchange Act and the regulations promulgated thereunder. *See id.* Subsection (b) of the statute provides, "Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond." Although the statutory standard – "upon a proper showing" – is, on its own, unenlightening, courts have held that the traditional standards applicable to private parties seeking

³⁰Recall the testimony of several representatives of companies that provided trading accounts to Hunter Wise. This testimony establishes that Hunter Wise has no title to the metals held by companies like Standard Bank and A-Mark, nor do these companies maintain an inventory of physical metals for Hunter Wise or any of its customers.

injunctive relief do not apply. *See, e.g., CFTC v. Hunt*, 591 F. 2d 1211, 1220 (7th Cir. 1979); *CFTC v. Muller*, 570 F. 2d 1296, 1300 (5th Cir. 1978) (“In actions for a statutory injunction, the agency need not prove irreparable injury or the inadequacy of other remedies as required in private injunctive suits.”).³¹

Rather, the CFTC makes the requisite showing for issuance of injunctive relief pursuant to the statute when it presents a *prima facie* case³² that the defendant has engaged, or is engaging, in illegal conduct, and that there is a likelihood of future violations. *Hunt*, 591 F. 2d at 1220; *CFTC v. Sterling Trading Grp., Inc.*, 605 F. Supp. 2d 1245, 1290 (S.D. Fla. 2009). To determine whether there is a reasonable likelihood of future violations, courts should look at “the egregiousness of the defendant’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant’s assurances against future violations, the defendant’s recognition of the wrongful nature of his conduct, and the likelihood that the defendant’s occupation will present opportunities for future violations.” *S.E.C. v. Ginsburg*, 362 F. 3d 1292, 1304 (11th Cir. 2004) (quoting *S.E.C. v. Carriba Air, Inc.*, 681 F. 2d 1318, 1322 (11th Cir. 1982))³³; *see also Hunt*, 591

³¹*See Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir.1981) (*en banc*) (adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

³²Unlike “proper showing,” a “*prima facie* case” has clear meaning: a party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor. BLACK’S LAW DICTIONARY 1228 (8th ed. 2004).

³³Since the injunctive provisions of the Commodities Exchange Act are in all material respects similar to the injunctive provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d), and the Securities Act of 1933, 15 U.S.C. § 77t(b), the case law developed under those sections of the securities laws is instructive for courts considering equitable relief cases under Section 13a–1 of the Commodities Exchange Act. *See CFTC v. British Am. Commodity Options*, 560 F. 2d 135, 141 n.11 (2d Cir. 1977); *Sterling Trading Grp., Inc.*, 605 F. Supp. 2d at 1290 n.20; *CFTC v. J. S. Love & Assoc. Options, Ltd.*, 422 F. Supp. 652, 661 (S.D.N.Y.1976).

F. 2d at 1220 (“In drawing the inference from past violations that future violations may occur, the court should look at the totality of circumstances, and factors suggesting that the infraction might not have been an isolated occurrence are always relevant.”) (internal quotations omitted).³⁴

Further, under 7 U.S.C. § 13a–1(c) (Section 6c(c) of the Act), entitled “Writs or other orders,” the court may issue “writs of mandamus, or orders affording like relief, . . . including the requirement that such person take action as is necessary to remove the danger of violation” of the Act. It is well-established among this Circuit and others that the Commodities Exchange Act’s “unqualified grant of statutory authority to issue an injunction under § 13a–1 carries with it the full range of equitable remedies.” *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F. 3d 1339, 1344 (11th Cir. 2008) (citing cases). As part of this authority, “a district court may freeze a defendant’s assets to ensure the adequacy of a disgorgement remedy.” *CFTC v. Levy*, 541 F. 3d 1102, 1114 (11th Cir. 2008) (citing *SEC v. ETS Payphones, Inc.*, 408 F. 3d 727, 734 (11th Cir. 2005); *Muller*, 570 F. 2d at 1301); accord *CFTC v. Am. Metals Exch. Corp.*, 991 F. 2d 71, 79 (3d Cir. 1993) (“a freeze is designed to preserve the status quo by preventing the dissipation and diversion of assets”).

(i) The CFTC Presents a Prima Facie Case

In this instance, the CFTC has presented a prima facie case that Defendants are engaging in violations of the Commodity Exchange Act and the regulations promulgated thereunder. As mentioned above, the CFTC has provided to the Court the fruits of its detailed investigation,

³⁴At this stage in the proceedings, “a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is ‘appropriate given the character and objectives of the injunctive proceeding.’” *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F. 3d 982, 985 (11th Cir. 1995) (quoting *Asseo v. Pan Am. Grain Co.*, 805 F. 2d 23, 26 (1st Cir. 1986)). Thus, given the “character and objectives” of this preliminary injunctive proceeding, the Court rejects Defendants’ arguments that CFTC’s submissions are inadmissible based on certain evidentiary rules.

including affidavits and voluminous exhibits establishing Defendants' misconduct.

Specifically, the CFTC has presented a prima facie case that all Defendants are engaged in illegal conduct for violations of, *inter alia*, 7 U.S.C. § 6(a), by entering into, executing, or conducting an office or business in connection with financed retail commodity transactions that are not subject to a registered commodities market or exchange.³⁵ None of Defendants is registered with the CFTC in any capacity.

Additionally, the CFTC has certainly presented a prima facie case that Defendants mislead and take advantage of retail customers, comprised largely of novice investors. The notion that Hunter Wise only interacts with dealers in conducting dealer-to-dealer transactions is transparent, as its own business plan (DE 4-4 at 21) touts "state of the art operations and worldwide human networks" that "allow[] the novice investor to participate in its products." This "Business Overview" contained in Hunter Wise's "Private Placement Memorandum" goes on to describe Hunter Wise Trading's function as "maintain[ing] a two-way market for the investing public in selected physical commodities." (DE 4-4 at 22). It appears that the "independent dealer" structure has been orchestrated by Hunter Wise to create separation between itself and its sales force, but it functions as a common enterprise to take advantage of and mislead the novice investor.³⁶

Accordingly, the CFTC has met its burden to present a prima facie case of violations of the

³⁵As discussed above, the basis for each Defendants' liability under this section is Section 2(c)(2)(D) of the Act, which provides that for the purposes of Section 4(a) enforcement, retail commodity transactions shall be treated "as if" they are contracts of sale of a commodity for future delivery, i.e., futures contracts.

³⁶Whether Hunter Wise had direct contact or dealings with retail customers is largely irrelevant for purposes of Section 4b application, as CFTC Rule 180.1 merely requires fraud *in connection with* these transactions.

Commodities Exchange Act.³⁷

(ii) The CFTC Demonstrates a Likelihood of Future Violations

Considering the factors set forth above, I find that the CFTC has also demonstrated a reasonable likelihood of future violations. This is not a one-time fraud. This is a careful and calculated system designed to maximize profits by taking advantage of ill-advised investors. Further, according to the CFTC's submissions, Defendants, with the exception of CD Hopkins,³⁸ have shown no indication that they intend to cease offering and executing retail commodity transactions. In fact, Defendants all contest the illegality of the scheme, indicating to the Court that Defendants do not accept responsibility, and that their operations will only be quelled by a court order.³⁹

Accordingly, given the totality of the circumstances, the Court finds that there is a reasonable likelihood of future violations of the Commodities Exchange Act, and preliminary injunctive relief is appropriate.

IV. Conclusion

In conclusion, the CFTC has enforcement jurisdiction over the conduct at issue. As noted above, the Court will address Defendants' jurisdictional arguments further in considering the

³⁷To be clear, the prima facie case has been presented against the individual Defendants as well for their roles as principals in the scheme. *See* 7 U.S.C. 13c(b).

³⁸CD Hopkins ceased operations and transferred the vast majority of its customer accounts to Defendant Blackstone in 2012.

³⁹Providing further support is the past conduct of several individual Defendants. The Declaration of Heather N. Johnson, investigator for the CFTC, outlines the past regulatory history of the principal Defendants. (DE 42-2 at 9). For example, in 1994 Defendant Martin was permanently restrained from similar misleading conduct. (DE 42-2 at 16). In 2008, Defendant Burbage was barred for one year from the National Futures Association ("NFA"). In 2007, Defendant Moore was permanently banned from NFA membership for defrauding customers of his former firm, World Trade Financial, Inc.

pending Motions to Dismiss. Further, the CFTC has met the standards for granting preliminary equitable relief, and the Court will do so as set forth below.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion for Preliminary Injunction (DE 4) is **GRANTED**. The terms of the equitable relief granted are set forth below.

DEFINITIONS

For the purposes of this Order, the following definitions apply:

1. "Assets" means any legal or equitable interest in, right to, or claim to, any real or personal property, including but not limited to chattels, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, receivables, lines of credit, contracts, insurance policies, and all cash, wherever located.

2. "Document" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes, but is not limited to, writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.

INJUNCTIVE RELIEF GRANTED

It is hereby **ORDERED AND ADJUDGED** that:

3. The Defendants are restrained, enjoined and prohibited, until further order of the Court, from directly or indirectly:

Engaging in conduct in violation of Section 4(a) by offering to enter into, entering into, executing, confirming the execution of, or conducting any office or business

anywhere in the United States, its territories or possessions, for the purpose of soliciting or 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, including any agreement, contract, or transaction in any commodity that is entered into with, or offered to (even if not entered into with), a person that is not an eligible contract participant or eligible commercial entity and where such agreement, contract or transaction is entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.

4. Defendants Hunter Wise Commodities, LLC, Hunter Wise Services, LLC, Hunter Wise Credit, LLC, Hunter Wise Trading, LLC, C.D. Hopkins Financial, LLC, Hard Asset Lending Group, LLC, Blackstone Metals Group, LLC, Newbridge Alliance, Inc., United States Capital Trust, LLC, Harold Edward Martin Jr., Fred Jager, Baris Keser, Chadewick Hopkins, John King, and David A. Moore are restrained, enjoined and prohibited, until further order of the Court, from directly or indirectly:

- A. Cheating and defrauding or attempting to cheat or defraud any person, or to willfully deceive any person in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made or to be made on or subject to the rules of a designated contract market, for or on behalf of any other person, including any agreement, contract, or transaction in any commodity that is entered into with, or offered to (even if not entered into with), a person that is not an eligible contract participant or eligible commercial entity and where such agreement, contract or transaction is entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis in violation of Section 4b(a)(1)(A) and (C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(1)(A) and (C);
- B. Directly or indirectly, in connection with any contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly: (1) use, employ, or attempt to use or employ any manipulative device, scheme or artifice to defraud; (2) make or attempt to make any untrue or misleading statement of a material fact, or to omit to state a material fact necessary in order to make the statements not true or misleading; or, (3) engage, or attempt to engage, in any act, practice, or course of business, which operates or would

operate as a fraud or deceit upon any person, in violation of Section 6c of the Act, 7 U.S.C. §§ 9 and 15 and Regulation 180.1, 17 C.F.R. § 180.1.

5. Defendants are further restrained, enjoined and prohibited, until further order of the Court, from directly or indirectly:

- A. Engaging in, controlling or directing the trading for any commodity futures or options accounts for or on behalf of any other person or entity, whether by power of attorney or otherwise;
- B. Entering into any commodity futures or options transactions for their own accounts, for any accounts in which they have a direct or indirect interest, and/or having any commodity futures or options traded on their behalf; and
- C. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration, except as provided for in Section 4.14(a)(9) of the Commission's Regulations, 17 C.F.R. § 4.14(a)(9), or acting, directly or indirectly, as a principal, agent, or any other officer, agent or employee of any person registered, required to be registered, or exempted from registration with the Commission, unless such exemption is pursuant to Section 4.14(a)(9) of the Commission's Regulations, 17 C.F.R. §4.14(a)(9).

It is further hereby **ORDERED AND ADJUDGED** that:

6. Defendants are further restrained, enjoined and prohibited, until further order of this Court, from directly or indirectly dissipating, withdrawing, transferring, removing, dissipating, disposing or concealing of any cash, cashier's checks, funds, assets or other property of, or within the custody, control or actual or constructive possession of Defendants including, but not limited to, all funds, personal property, money or securities held in Defendants' name, jointly or individually, whether held or maintained in safety deposit boxes, and including all funds on deposit in any financial or brokerage institution, futures commission merchant, bank or savings and loan account held by, under the actual or constructive control, or in the name of Defendants, jointly or individually, funds or property of Defendants' investors, wherever located, whether held in the name

of the Defendants, jointly or individually, or any other entity owned or controlled by Defendants, jointly or individually.

7. Defendants shall provide the CFTC access to all records of Defendants held by financial institutions located within or outside the territorial United States.

8. Until further order of this Court, any firm, bank, financial or brokerage institution, futures commission merchant, corporation, partnership, association or other person or entity which holds, controls, or maintains custody of any funds, securities, assets or other property of any kind and who receives notice of this Order by personal service or otherwise, including Federal Express or other commercial overnight service, email or facsimile shall:

- A. Prohibit Defendants and any person other than the Corporate Monitor from withdrawing, removing, assigning, transferring, pledging, encumbering, disbursing, dissipating, converting, selling or otherwise disposing of any such asset except as directed by further order of the Court;
- B. Deny Defendants and any person other than the Corporate Monitor access to any safe deposit box that is titled in the name of Defendants, either individually or jointly; or otherwise subject to access by the Defendants; and,
- C. Cooperate with all reasonable requests of the CFTC or the Corporate Monitor relating to implementation of this Order, including producing records related to Defendants' accounts and Defendants' businesses.

9. The injunctive provisions of this Order shall be binding on Defendants, upon any person insofar as he or she is acting in the capacity of officer, agent, servant, employee or attorney of Defendants, and upon any person who receives actual notice of this Order by personal service or otherwise, including Federal Express or other commercial overnight service, email or facsimile, insofar as he or she is acting in active concert or participation with Defendants.

It is further hereby **ORDERED AND ADJUDGED** that:

- 10. Defendants and their agents, servants, employees, successors, assigns, attorneys and

all persons insofar as they are acting in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, including Federal Express or other commercial overnight service, email or facsimile, are restrained and enjoined from directly or indirectly destroying, mutilating, concealing, altering or disposing of, in any manner, any of the books and records, documents, correspondence, brochures, manuals, electronically stored data, tape records or other property of Defendants wherever located, including all such records concerning the Defendants' business operations.

It is further hereby **ORDERED AND ADJUDGED** that:

11. Defendants must permit representatives of the Plaintiff CFTC to immediately inspect the books, records and other electronically stored data, tape recordings, and other documents of the Defendants wherever they are situated and whether they are in the possession of the Defendants or others, and to copy said documents, data, and records either on or off the premises where they may be situated.

12. Defendants are restrained and enjoined from directly or indirectly refusing to make available for inspection by the CFTC, when as requested, any books, records, documents, correspondence, brochures, manuals, electronically stored data, tape records or other property of Defendants wherever located, including, but not limited to, all such records of Defendants' business operations.

It is further hereby **ORDERED AND ADJUDGED** that:

13. Defendants shall prepare, sign and file with the Court, by March 4, 2013 a complete and accurate accounting for the period of July 1, 2010 (two weeks prior to the passage of the Dodd-Frank Act) to the date of such accounting, which shall be no earlier than the date of this Order. Such

accounting shall include, without limitation, the identification of:

- A. All banks, futures commission merchants ("FCMs"), financial or brokerage institutions, including account numbers, which hold or have held funds, securities, commodity interests, assets, liabilities, and other property currently owned or controlled (legally, equitably or otherwise) directly or indirectly by Defendants, whether individually or jointly;
- B. All funds, securities, commodity interests, assets, liabilities, and other property currently owned or controlled (legally, equitably or otherwise) directly or indirectly by Defendants, whether individually or jointly;
- C. All funds, securities, commodity interests, assets and other property received directly or indirectly by Defendants, describing the source, amount, disposition, and current location of each listed item;
- D. All funds, securities, commodity interests, assets and other property transferred or otherwise disposed of directly or indirectly by the Defendants, describing the source, amount, disposition, and current location of each listed item, including accounts or assets of Defendants held by any bank, FCM, financial or brokerage institutions located inside and/or outside the territorial United States;
- E. All investors of Defendants, including name, address, telephone number and email, account number, deposit and withdrawal dates and amounts; and
- F. The names and last known addresses of each bailee, debtor or other person or entity currently holding any funds, securities, commodity interests, assets or other property owned or controlled (legally, equitably or otherwise) by Defendants, whether individually or jointly.

At a minimum, the accounting should also include a chronological schedule of all cash receipts and cash disbursements. In addition, each transaction shall be classified as business or personal. All business transactions shall disclose the business purpose of the transaction. The accounting shall be provided in an electronic format such as Quicken, Excel, or other accounting or electronic format spreadsheet. In addition, the Defendants shall supply true and accurate copies of any balance sheets, income statements, statements of cash flow, or statements of ownership equity previously prepared for the Defendants' business(es).

14. Defendants are further ordered to immediately identify and provide an accounting for all assets and property that are currently maintained outside the United States, including but not limited to all funds on deposit in any bank, futures commission merchant, financial or brokerage institution, including but not limited to funds, securities and assets held by, under the control of, or in the name of the Defendants, whether jointly, individually or otherwise.

15. It is further ordered that Defendants shall immediately take all steps within their power to repatriate all funds, securities, assets and other property held by, under the control of, or in the name of the Defendants, whether individually or jointly, outside the United States, including but not limited to all funds on deposit in any firms, banks, financial or brokerage institutions, futures commissions merchants, or other financial institutions, by transferring them as directed by the Corporate Monitor, for further disposition in this case.

BOND NOT REQUIRED OF PLAINTIFF

It is further hereby **ORDERED AND ADJUDGED** that::

16. Pursuant to Section 6c of the Act (7 U.S.C. § 13a-1) no bond need be posted by the Plaintiff, CFTC, which is an agency of the United States of America.

DIRECTIVES TO FINANCIAL INSTITUTIONS

It is further hereby **ORDERED AND ADJUDGED** that:

17. Pending further Order of this Court, any financial or brokerage institution, business entity, or person that holds, controls, or maintains custody of any account or asset owned, controlled, managed, or held by, on behalf of, or for the benefit of the Defendants, or has held, controlled, or maintained custody of any account or asset owned, controlled, managed, or held by, on behalf of, or for the benefit of the Defendants at any time since, shall:

A. Provide counsel for the CFTC, within five (5) business days of receiving a copy of this Order, a statement setting forth: (a) the identification number of each and every such account or asset titled in the name, individually or jointly, of the Defendants, or owned, controlled, managed, or held by, on behalf of, or for the benefit of the Defendants; (b) the balance of each such account, or a description of the nature and value of such asset as of the close of business on the day on which this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, and the name of the person or entity to whom such account or other asset was remitted; and (c) the identification of any safe deposit box that is either titled in the name, individually or jointly, of the Defendants or is otherwise subject to access by the Defendants; and

B. Upon request by the CFTC, promptly provide the CFTC with copies of all records or other documentation pertaining to such account or asset, including but not limited to, originals or copies of account applications, account statements, signature cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instructions or slips, currency transactions reports, 1099 forms, and safe deposit box logs.

SERVICE OF THE ORDER

It is further hereby **ORDERED AND ADJUDGED** that:

18. Copies of this Order may be served by any means, including by way of personal service, Federal Express or other commercial overnight service, email or facsimile, upon any financial institution or other entity or person that may have possession, custody, or control of any documents or assets of the Defendants or that may be subject to any provision of this Order: Carlin Metzger, Heather Johnson, Theodore Glotfelty, Brigitte Weyls, Peter Riggs, Nancy Hooper, Steven Turley, and Joseph Konizeski, all representatives of the Plaintiff, are hereby specially appointed to serve process, and/or effectuate service of process, including this Order and all other papers in this cause.

SERVICE ON THE COMMISSION

It is further hereby **ORDERED AND ADJUDGED** that:

19. The Defendants shall serve all pleadings, correspondence, notices required by this Order, and other materials on the Plaintiff Commission by delivering a copy to Carlin Metzger, Senior Trial Attorney, Joseph Konizeski, Chief Trial Attorney, or Rosemary Hollinger, Associate Director, Division of Enforcement, Commodity Futures Trading Commission, 525 W. Monroe, Suite 1100, Chicago, Illinois 60661.

APPOINTMENT AND AUTHORITY OF THE CORPORATE MONITOR

It is further hereby **ORDERED AND ADJUDGED** that:

20. Melanie Damian, Esq. is appointed Corporate Monitor for the Entity Defendants as described in the Court's prior order, dated February 23, 2013 (DE 77).

I. *Powers of the Corporate Monitor*

21. In addition to the authorities already granted the Corporate Monitor, the Corporate Monitor is directed and authorized to accomplish the following:

- A. Take exclusive custody, control and possession of all funds, property, and other assets in the possession of, or under the control of Defendants, wherever situated that the Corporate Monitor has a reasonable basis to believe is related to this action. The Corporate Monitor shall have full power to sue for, collect, receive and take possession of all goods, chattels, rights, credits, moneys, effects, land, leases, books, records, work papers, and records of accounts, including computer-maintained information and digital data and other papers and documents;
- B. Enter and inspect the business premises of Defendants and to take documents or other property related to Defendants;
- C. Preserve, hold and manage all Corporate Monitorship assets, and perform all acts necessary to preserve the value of those assets, in order to prevent any loss, damage or injury to retail customers;
- D. Prevent the withdrawal or misapplication of funds entrusted to Defendants, and otherwise protect the interests of the retail customers;
- E. Collect all money owed to Defendants;

- F. Initiate, defend, compromise, adjust, intervene in dispose of, or become a party to any actions or proceedings in state, federal or foreign jurisdictions necessary to preserve or increase the assets of Defendants necessary to carry out the duties pursuant to this Order;
- G. Choose, engage, and employ attorneys, accountants, appraisers, and other independent contractors and technical specialists, as the Corporate Monitor deems advisable or necessary in the performance of duties and responsibilities upon obtaining leave of this Court and thereafter, only upon further order of this Court;
- H. Issue subpoenas to obtain documents and records pertaining to the Corporate Monitorship, and conduct discovery in this action on behalf of the Corporate Monitorship estate;
- I. Open one or more bank or securities accounts as designated depositories for funds of Defendants. The Corporate Monitor shall deposit all funds of Defendant in such designated accounts and shall make all payments and disbursements from the Corporate Monitorship estate from such accounts. The Corporate Monitor is authorized to invest Corporate Monitorship funds in U.S. Treasury securities, money market funds or other interest-bearing accounts as appropriate in the Corporate Monitor's judgment;
- J. Make payments and disbursements from the Corporate Monitorship estate that are necessary or advisable for carrying out the directions of, or exercising the authority granted by, this Order. The Corporate Monitor shall apply to the Court for prior approval of any payment of any debt or obligation incurred by Defendants prior to the date of entry of this Order, except for payments that the Corporate Monitor deems necessary or advisable to secure assets;
- K. Close out all commodity futures positions or other outstanding positions and/or hold such assets without further court order; and
- L. Advise the Court should it be determined that additional powers are necessary to protect the interests of retail customers, or whether conversion to a receivership would be more suitable under the circumstances.

II. *Delivery to Corporate Monitor*

22. Immediately upon service of this Order upon them, Defendants and any other person or entity served with a copy of this order shall, immediately or within such time as permitted by the Corporate Monitor in writing, deliver over to the Corporate Monitor:

- A. Possession and custody of all funds and all other assets, belonging to Defendants;
- B. Possession and custody of documents of Defendants, including, but not limited to, all books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, and check registers), client lists, title documents and other papers;
- C. All keys, computer passwords, entry codes, PIN numbers and combinations to locks necessary to gain or to secure access to any of the assets or documents of Defendants, including but not limited to, access to business premises, means of communication, accounts, computer systems, or other property; and
- D. Information identifying the accounts, employees, properties or other assets or obligations of Defendants.

III. *Cooperation with Corporate Monitor*

23. Defendants, their agents and representatives, and all other persons or entities served with a copy of this Order shall cooperate fully with and assist the Corporate Monitor in the performance of the Corporate Monitor's duties. This cooperation and assistance shall include, but not be limited to, providing any information to the Corporate Monitor that the Corporate Monitor deems necessary to exercising the authority and discharging the responsibilities of the Corporate Monitor under this Order; and advising all persons who owe money to Defendants that all debts should be paid directly to the Corporate Monitor. However, this requirement does not impinge on any person's right to assert applicable privileges.

IV. *Corporate Monitor's Report to the Court and Compensation*

24. The Corporate Monitor shall maintain written accounts, itemizing receipts and expenditures, describing properties held or managed, and naming the depositories of Corporate Monitorship funds; make such written accounts and supporting documentation available to the

Commission for inspection, and, within ninety (90) days of being appointed and periodically thereafter, as directed by the Court, file with the Court and serve on the parties a report summarizing efforts to marshal and collect assets, administer the Corporate Monitorship estate, and otherwise perform the duties mandated by this Order.

25. The Corporate Monitor and all personnel hired by the Corporate Monitor as herein authorized, including counsel to the Corporate Monitor, are entitled to reasonable compensation for the performance of duties pursuant to this Order and for the cost of actual out-of-pocket expenses incurred by them for those services authorized by this Order that when rendered were (1) reasonably likely to benefit the Corporate Monitorship estate or (2) necessary to the administration of the estate. The Corporate Monitor and all personnel hired by the Corporate Monitor shall be compensated solely out of funds now held by or in the possession or control of or which may in the future be received by Defendants, or from proceeds of the sale of Defendants' assets, and shall not be entitled to any compensation from the Commission. The compensation of the Corporate Monitor and all personnel hired by the Corporate Monitor shall be entitled to priority as administrative expenses. The Corporate Monitor shall file with the Court and serve on the parties periodic requests for the payment of such reasonable compensation, with the first such request filed no more than ninety (90) days after the date of this Order and subsequent requests filed quarterly thereafter. The requests for compensation shall itemize the time and nature of services rendered by the Corporate Monitor and all personnel hired by the Corporate Monitor. The Corporate Monitor shall not increase the hourly rates used as the bases for such fee applications without prior approval of the Court.

V. *Limitation of Corporate Monitor's Liability*

26. The Corporate Monitor and all persons hired by Corporate Monitor are entitled to rely

on all outstanding rules of law and Court orders and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment or decree. In no event shall the Corporate Monitor or persons hired by Corporate Monitor be liable to anyone (1) with respect to the performance of their duties and responsibilities as Corporate Monitor or persons hired by Corporate Monitor, or (2) for any actions taken or omitted by them, except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties. Nothing in this provision is intended to provide a defense against liability for any actions taken by the Defendants or their personnel prior to the appointment of Corporate Monitor.

VI. No Bond

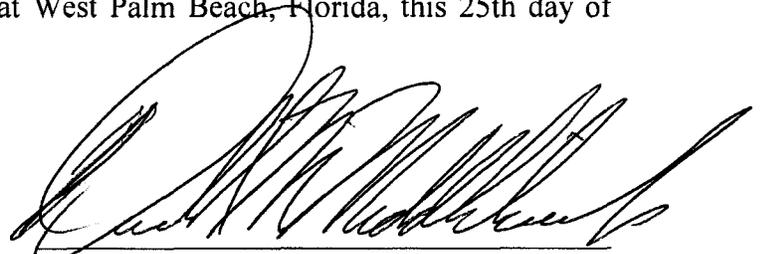
27. The Corporate Monitor is appointed without bond.

COURT MAINTAINS JURISDICTION

Finally, it is hereby **ORDERED AND ADJUDGED** that:

28. This Preliminary Injunction shall remain in full force and effect during the pendency of this case, or until further order of this Court, upon application, notice and an opportunity to be heard, and that this Court retains jurisdiction of this matter for all purposes related to this action.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 25th day of February, 2013.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record;
Melanie Damian, Esq.