

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION**

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

UNITED STATES COMMODITY  
FUTURES TRADING COMMISSION,

Plaintiff,

vs.

HUNTER WISE COMMODITIES, LLC,  
*et al.*,  
Defendants.

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**SPECIAL MONITOR AND CORPORATE MANAGER'S  
THIRD STATUS REPORT**

Melanie E. Damian, Esq., the court-appointed Special Monitor and Corporate Manager (the "Monitor") for the Entity Defendants<sup>1</sup> in the above-captioned enforcement action, submits her third report (the "Report") concerning the status of the Monitorship, established pursuant to

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<sup>1</sup> The entity defendants (collectively, the "Entity Defendants") include the following: Hunter Wise Commodities, LLC ("HW Commodities"), Hunter Wise Services, LLC ("HW Services"), Hunter Wise Credit, LLC ("HW Credit"), Hunter Wise Trading, LLC ("HW Trading"), Lloyds Commodities, LLC ("Lloyds Commodities"), Lloyds Commodities Credit Company, LLC ("Lloyds Credit"), Lloyds Services, LLC ("Lloyd Services"), C.D. Hopkins Financial, LLC ("CD Hopkins"), Hard Asset Lending Group, LLC ("Hard Asset"), Blackstone Metals Group, LLC ("Blackstone"), Newbridge Alliance, Inc. ("Newbridge"), and United States Capital Trust, LLC ("US Capital").

HW Commodities, HW Services, HW Credit and HW Trading, collectively shall be referred to herein as the "HW Entities." Lloyds Commodities, Lloyds Credit, and Lloyd Services, collectively shall be referred to herein as the "Lloyds Entities." Hard Asset, CD Hopkins, Blackstone, New Bridge, and US Capital, collectively shall be referred to herein as the "Dealer Entities" and each one as a "Dealer Entity."

Additionally, the above-captioned action also commenced against the following individual defendants (collectively, the "Individual Defendants"): Edward Martin, Fred Jager, James Burbage, Baris Keser, Frank Gaudino, John King, David Moore, and Chadwick Hopkins.

this Court's *Order Temporarily Appointing Special Corporate Monitor* (the "Appointment Order") [ECF # 77], which the Court subsequently expanded in its *Order on Plaintiff's Motion for Preliminary Injunction* ("Injunction Order") [ECF #78], covering the period from July 1, 2013 through August 30, 2013 (the "Reporting Period").

## **I. INTRODUCTION**

### ***a. The Initial Report***

The Appointment Order and Injunction Order were entered on February 22, 2013 and February 25, 2013, respectively, following the Commodity Futures Trading Commission's ("CFTC") motion for preliminary injunction and for the Appointment of a receiver over the Entity Defendants [ECF #4]. The Appointment Order directed the Monitor to submit her conclusions and recommendations as to the viability of the Entity Defendants' operations within thirty (30) days after entry of that order (by March 22, 2013). *See* Appointment Order at ¶ 36. The Injunction Order, entered two days later, required the Monitor to submit her initial report summarizing her activities in carrying out her duties, within ninety (90) days of its entry (or by May 26, 2013). The Monitor met both of those deadlines by filing her initial report on March 22, 2013 (the "Initial Report") [ECF #102]. The Initial Report described the Monitor's initial efforts in carrying out her duties and her recommendations for the Estate.

### ***b. The Second Report***

On July 2, 2013, the Monitor filed her Second Status Report, covering the activities undertaken by the Monitor during the period from March 22, 2013 through June 30, 2013 (the "Second Report"). During the Second Report's reporting period, the Monitor continued to carry out her duties under the Appointment Order and Injunction Order. These duties included, among other things, the continued wind down of the Entity Defendants' operations, the continued marshaling of known assets of the Monitorship estate (the "Monitorship Estate"), and the

continued investigation, recovery and pursuit of additional assets belonging to the Monitorship Estate. *See* Injunction Order at ¶ 21(A) – (L).

*c. Monitor’s Duty to File Periodic Reports*

The Monitor continues to fulfill her duties under the Appointment Order and Injunction Order. Pursuant to Paragraph 24 of the Injunction Order, the Monitor is required to “periodically ... 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 [Monitorship Estate], and otherwise perform the duties mandated by [the] Order.” Accordingly, the Monitor provides herein a detailed description of her efforts and accomplishments during the current Reporting Period.

**II. STATUS OF MONITORSHIP (JULY 1, 2013 THROUGH AUGUST 30, 2013)**

*a. Ongoing Administration of the HW Entities*

i. Termination of Contracts

The Monitor’s and her professionals, including the law firm of Damian & Valori, LLP (“Lead Counsel”) and the forensic accounting firm of Kapila & Company (the “Forensic Accountants”), continue the systematic reduction in expenses incurred by the Monitorship Estate.

Effective July 3, 2013, the Monitor terminated the lease of the apartment located at 9 MacArthur Place, #2205, Santa Ana, California (the “Santa Ana Apartment.”). This action reduced the Monitorship Estate’s monthly expenses by more than \$3,800.<sup>2</sup> Following an agreement with Martin, the Monitor and Lead Counsel moved the contents of the Santa Ana Apartment, to a secure and insured storage facility, and subsequently sold them at an auction sale, as discussed below.

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<sup>2</sup> The HW Entities leased the apartment for Defendant Edward Martin (“Martin”).

Additionally, the Monitor and Lead Counsel recovered data from, and terminated the contracts with, data backup service Mozy Corporation. Further, the Monitor reduced the number of remote computer servers provided by Level 3 Communications, Inc.<sup>3</sup> These actions provided additional savings to the Monitorship Estate.

ii. Continued Oversight of the Precious Metals

As detailed in the Initial Report and subsequently updated in the Second Report, the Monitor identified limited quantities of physical precious metals belonging to certain Entity Defendants that are presently being stored at Baird & Associates (“Baird”), Delaware Depository Services (“DDS”), and International Depository Services of Canada (“IDS”).<sup>4</sup> The quantity of precious metals held by each of these bailees has remained unchanged since the filing of the Initial Report, and each has assured the Monitor that it will continue the freeze on these metals until further direction from the Monitor or order of this Court. A detailed report of the quantities and market values (as of September 26, 2013) of the precious metals stored at DDS is attached hereto as **Exhibit “A”**.

The precious metals that the Monitor transferred from the Irvine, California office of the HW Entities remain stored at a secure Via Mat International (“Via Mat”) facility in Miami, Florida. The quantity of the metals at Via Mat has remained the same since their arrival at the facility. As reflected in Exhibit J to the Monitor’s Initial Report, the total appraised

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<sup>3</sup> The Forensic Accountants and Lead Counsel access the remote-servers in their investigation of the Entity Defendants and Individual Defendants and potential assets and claims of the Monitorship Estate, as well as for purposes of administering the Monitorship Estate.

<sup>4</sup> The bulk of the physical precious metals are stored at DDS. However, IDS and Baird each hold a single 1000 oz. bar of silver, each of which has a present market value of \$19,560.

(numismatic) value of those metals as of March 6, 2013 was \$256,057.04.<sup>5</sup> See Initial Report, Exhibit J [ECF #102-J].

The Monitor secured and removed from the Santa Ana Apartment a limited number of coins and precious metals that are stored in a safe deposit box located at a bank in Miami, Florida. In August 2013, the Monitor had these coins and precious metals examined by a certified appraiser, who determined their total value to be approximately \$5,000.00. The Monitor will obtain a formal appraisal in the event the Court converts the Monitorship to a receivership or otherwise authorizes the Monitor to liquidate the coins and metals of the Estate.

iii. Insurance Claim

Prior to the shipment of the precious metals from the Irvine office to Via Mat's facilities in Miami, the Monitor discovered that three coins, each valued at approximately \$2,000, were missing. The Monitor and Lead Counsel filed a report of missing property with the Irvine Police Department, and filed a claim in an amount of \$6,020 with Hugh Wood, Inc., the insurance broker for the insurance policy covering the precious metals at the time of their disappearance. Subsequently, the Monitor and Lead Counsel complied with Hugh Wood, Inc.'s requests for additional information concerning the loss, and successfully recovered for the benefit of the Monitorship Estate \$5,770.00, representing the total value of missing coins less the \$250.00 deductible under the policy.

iv. The Monitor's Compliance with Government Subpoenas, Requests, and Notices

The Monitor routinely receives subpoenas, requests and notices from various government entities that require the Monitor to respond, provide information or records, and/or take other action in her capacity as the appointed Monitor of the Entity Defendants. Accordingly, the

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<sup>5</sup> Those metals' total value has likely declined since March 6, 2013, in light of the decline in certain precious metals market values.

Monitor and her professionals worked on responding to subpoenas, requests and notices from the following government entities, among others, during this Reporting Period:

- *Internal Revenue Service* - The Monitor, with the assistance of the Forensic Accountants and the tax accounting firm of Haskell and White, LLP (“Haskell”), continued to communicate and cooperate with the Internal Revenue Service (“IRS”) regarding additional documents requested by the IRS in connection with the Entity Defendants’ 2012 tax filings.
- *United States Mint (the “US Mint”)* - The Monitor responded to the US Mint’s notice of termination of HW Commodities’ contract.<sup>6</sup> In her Initial Report, the Monitor analyzed a business plan presented by Mr. Steven Fitch (HW Commodities’ former employee) for the continued operation of HW Commodities’ Institutional Sales segment, by principally selling precious metals to the US Mint. The Monitor determined and reported to the Court in the Initial Report that the business plan is not feasible, and therefore the Monitorship Estate should not continue HW Commodities’ Institutional Sales, including any sales pursuant to the contract with the US Mint.<sup>7</sup>

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<sup>6</sup> In 2012, the US Mint approved HW Commodities as a vendor of precious metals to the Mint. This contract permits HW Commodities to bid for specific orders put forth by the US Mint. However, HW Commodities is merely one of many approved vendors from whom the US Mint can accept bids. This contract did not bind the US Mint to procure its metals from HW Commodities. In fact, upon further discussion with representatives of the US Mint, the Monitor and Lead Counsel learned that the US Mint regularly relies upon certain vendors for its orders, and that HW Commodities had never bid on any specific orders.

<sup>7</sup> The Monitor “does not believe the Fitch business plan is feasible based on the capital that would be required, the number of dependent variables (including obtaining specific contracts from the US Mint) and the high volume of sales that would be required to generate a profit .... It would not be a prudent use of the HW Entities’ customer assets to engage in an unproven business model.” *See* Initial Report at p. 44.

Because the Court had not yet ruled on the Monitor's Recommendations, the Monitor, in an abundance of caution, sought to preserve the US Mint contract, and negotiated the suspension of the contract until further notice, rather than its termination. The Monitor and Lead Counsel's further investigation into the US Mint contract revealed that it is not difficult for a company to become an approved vendor of precious metals to the US Mint; therefore, should the Court ultimately determine that the HW Entities may continue its operations, they should have no problem obtaining such approval once again and entering into another contract with the US Mint. Further, the Monitor learned that the contract is non-assignable, and thus, it is of no value to the Monitorship Estate. Accordingly, the Monitor recommends abandoning the contract.

- *Florida Department of Agriculture and Consumer Services* - The Monitor and Lead Counsel responded to the Florida Department of Agriculture & Consumer Services' ("FL Dept. of Consumer Services") notices regarding US Capital's and Blackstone's non-compliance with Florida Statutes – the requirement that telemarketers carry a surety bond. As of the date of the Monitor's appointment, US Capital and Blackstone were not operating companies. As such, pursuant to the Injunction Order, the Monitor took steps to complete the wind down of their operations, including cancelling contracts with vendors and otherwise eliminating expenses that the Monitorship Estate would otherwise have to cover, such the renewal of their surety bonds. Because the surety bonds were no longer necessary, the Monitor informed the FL Dept. of Consumer Services of the commencement and the status of this enforcement action and the Monitorship, provided copies of the Appointment Order and the Injunction Order, and

explained the cessation of US Capital's and Blackstone's operations as the basis for the non-renewal of the surety bonds.

- *Florida Department of Financial Investigations* – The Monitor received a Subpoena by the Florida Department of Financial Investigations, seeking information concerning transactions between the Lloyds Entities and a certain dealer. The Monitor and Lead Counsel promptly responded to the subpoena by providing the information requested along with certain related documents and raising applicable privileges.
  - *State of Florida and State of Nevada – Divisions of Corporations* – Prompted by renewal notices, and in an abundance of caution in light of her pending Recommendations, the Monitor renewed the corporate filings of the Lloyds Entities and the HW Entities in the State of Florida and the State of Nevada.<sup>8</sup>
- v. Requests For Release of Metals and Funds Obtained or Transferred Through Hunter Wise International Commodities, Ltd.

During the Reporting Period, the Monitor communicated with and investigated the demands of two individuals, both citizens and residents of the United Kingdom, for the return of certain precious metals being held at a depository (DDS) and funds being held at a trading firm (Baird), in accounts under the name of entities affiliated with the HW Entities. These individuals claim that they had purchased the metals or transferred the funds through Hunter Wise International Commodities, Ltd., a Cayman Islands limited company (“HWIC Cayman”), and that neither they nor the metals and funds at issue have any connection to any of the Defendants to this action. DDS and Baird are aware of these individuals’ demands and claims, but, pursuant

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<sup>8</sup> Given the dormant or terminated operations of the Dealer Entities at the time of her appointment, the Monitor did not renew their corporate filings.

to the Monitor's demands and in an abundance of caution, have frozen the accounts pending the Monitor's investigation into the ownership and source of the metals and funds.

During the Reporting Period, the Monitor and Lead Counsel obtained and carefully examined further information and documentation from the two individuals in an effort to confirm that they indeed are the true owners of the metals and funds they seek and that the source of those metals and funds is not any of the Defendants or any related or affiliated person or entity. Lead Counsel also investigated the entities through which these individuals purchased the metals or transferred the funds and endeavored to trace the metals and funds to their source and investigate those sources.

The Monitor and Lead Counsel completed their investigation with respect to the funds being held at Baird (approximately \$140,000), determining that the individual demanding their return, in fact, is the owner of those funds and did transact exclusively through HWIC Cayman, and that the source of those funds was not any of the Defendants or their affiliates. Upon receiving a sworn declaration or affidavit from this individual attesting to the foregoing, the Monitor will consult with counsel for the CFTC and make a final determination regarding whether to consent to Baird's release of the funds.<sup>9</sup>

With respect to the metals (7 gold bars worth approximately \$299,550) being held at DDS, the Monitor and Lead Counsel are still in the process of conducting their investigation and obtaining documents and information necessary to confirm the individual's claims to ownership of the metals, the source of the funds used to purchase the metals, and his affiliation, if any, with any of the Defendants or their affiliates. Upon confirming his claims, Lead Counsel will obtain

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<sup>9</sup> The declaration or affidavit will also provide that the individual shall not transfer the funds to (i) any of the Individual Defendants or those defendants' family members, friends, associates or affiliates, or (ii) HWIC Cayman or any of its principals, associates, employees, subsidiaries or affiliates.

from him a sworn declaration or affidavit similar in form to that which Lead Counsel is obtaining from the claimed owner of the funds at Baird.

***b. Subpoenas to Banks and Other Third Parties***

During the Reporting Period, the Monitor and her professionals continued gathering information concerning the Entity Defendants' operations and finances. The Monitor and her professionals received and analyzed additional documents from various financial institutions regarding bank accounts owned by the Entity Defendants, Individual Defendants, and their wholly owned entities.

In total, \$279,969.90 remains frozen at various bank accounts in the names of various Defendants and/or their wholly owned entities or affiliates, as detailed in **Exhibit "B"** attached hereto.

In addition, Lead Counsel issued subpoenas to and received information from dealers suspected of being affiliates of the Entity Defendants as well as third parties such as Amerifirst Management, LLC. At present, the Monitor and her professionals are investigating all leads that may result in the discovery of additional information regarding the extent and nature of the Entity Defendants' operations and the assets of all Defendants.

***c. Assistance in Other CFTC Investigations***

The Monitor and Lead Counsel assisted the CFTC in connection with its investigation of certain non-defendant dealers and their principals who did business with the HW Entities or otherwise had a connection to any of the Defendants. In particular, the Monitor and Lead Counsel located, reviewed and produced correspondence and documents related to those dealers and principals and prepared and provided to the CFTC analyses and summaries of information pertinent to the CFTC's investigations.

*d. Potential Claims Against Third Parties*

i. Potential Malpractice Claims Against Professionals

The Monitor and Lead Counsel continue to investigate potential claims against law firms that the HW Entities and/or the Lloyds Entities had previously engaged.<sup>10</sup> The Monitor and Lead Counsel's initial review and analysis of correspondence by or between the HW Entities, the Lloyds Entities and their various legal counsel, certain billing records and invoices, and the sworn testimony of certain Individual Defendants claiming that former counsel had advised them that the business model and operations of certain of the Entity Defendants complied with applicable law, prompted Lead Counsel to notify three particular former counsel of the Monitor's potential claims for legal malpractice against them and to demand copies of their respective malpractice liability policies. Meanwhile, counsel for the CFTC issued subpoenas for deposition *duces tecum* to such former counsel, requesting many of the same documents the Monitor had previously requested, and setting their depositions.

In light of certain applicable statutes of limitations, the Monitor negotiated and entered into tolling agreements with those attorneys and their respective law firms, to provide the Monitor and Lead Counsel with additional time to investigate her claims. Given the delay in former counsels' production of their billing records and invoices, correspondence, client files, work product and other documents requested by the Monitor and the CFTC, the tolling agreements had to be extended and the depositions of counsel had to be postponed.<sup>11</sup>

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<sup>10</sup> The Monitor terminated the representations of all legal counsel for the Entity Defendants within days after her appointment or learning of such counsel's representation. The Monitor also requested that such counsel produce all invoices, client files and attorney work product in connection with their representation of the Entity Defendants.

<sup>11</sup> The deposition of J.B. Grossman of the law firm of J.B. Grossman, P.A. ("Grossman PA"), is scheduled for October 10, 2013, and the deposition of Timothy Carey, of the law firm of Winston & Strawn LLP ("WS LLP") is scheduled for October 30, 2013. The deposition of the

In response to the CFTC's subpoena, WS LLP filed the action styled *CFTC v. Hunter Wise Commodities, LLC, et al.*, Case No. 1:13-cv-05251, in the U.S. District Court for the Northern District of Illinois, where the firm is located, and a motion to quash the subpoena on the bases that the documents sought were protected by the attorney client privilege and the attorney work product privilege held by WS LLP. The CFTC opposed this motion, and the Court denied it in part and granted it in part, directing the production of all requested documents, based on the Monitor's waiver of the attorney-client privilege, except for the attorney work product documents, the privilege for which was held by WS LLP. Accordingly, WS LLP produced numerous documents responsive to the Monitor's request and the CFTC's subpoena and a voluminous privilege log of the privileged attorney work product that it was not producing. The Monitor and Lead Counsel are currently reviewing the documents produced.

During the initial reporting period, the Monitor sought to retain Jason Mazer, Esq. and the law of Ver Ploeg and Lumpkin, P.A. ("Insurance Counsel"), as special insurance counsel to the Monitor, to advise and assist her and Lead Counsel to investigate and pursue potential claims covered by the insurance policies, negotiate with insurance carriers, and related matters. Before the Court approved their employment by the Monitor, Insurance counsel assisted the Monitor in connection with the notice claim she sent to the HW Entities' insurance carrier that issued their directors and officers liability insurance policy. Subsequently, on July 16, 2013, the Monitor filed an amended application to employ Insurance Counsel [ECF #171], which included a list of such counsel's hourly rates as requested by the Court, and, on September 4, 2013, the Court approved that application [ECF # 208]. Insurance counsel has provided and will continue to

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third former counsel to the HW Entities (at Greenberg Traurig) was cancelled because such counsel developed a serious health condition and recently passed away.

provide advice and assistance to the Monitor and Lead Counsel in connection with analyzing the professional liability insurance policies of former counsel to the Entity Defendants.

ii. Hunter Wise Financial Group, LLC, Hunter Wise Holdings, LLC, Hunter Wise Securities, LLC, and South Peak Texas Investments, LLC

After the entry of the Injunction Order, the Monitor and her professionals learned that prior thereto, at least \$2,659,804 (the “Jager Transfers”) was transferred from the HW Entities’ accounts to Individual Defendant, Fred Jager (“Jager”), and his entities, Hunter Wise Holdings, LLC (“HW Holding”) and Hunter Wise Financial Group, LLC (“HW Financial”). Subsequently, the Monitor entered into a stipulation with Jager, HW Holdings, and HW Financial (the “Jager Stipulation”) [ECF # 93], which this Court approved in an *Agreed Order Unfreezing Certain Bank Accounts*, entered on March 7, 2013 (the “Unfreeze Order”) [ECF #94].<sup>12</sup> As detailed in the Initial Report, within days after entry of the Unfreeze Order, Jager, HW Financial and HW Holdings, each made initial payments to the Monitor towards the sums owed.<sup>13</sup>

Pursuant to the Jager Stipulation and the Unfreeze Order, HW Financial and HW Holdings were required to obtain authorization from the Monitor for all disbursements made by either company. In keeping with this requirement, during the Reporting Period, HW Financial and HW Holdings submitted numerous disbursement requests to the Monitor and the Monitor carefully considered each one and approved various disbursements from HW Financial and HW Holdings.

Since filing the Initial Report, the Monitor discovered that Jager also received transfers from the HW Entities through South Peak Texas Investments, LLC (“South Peak”), an entity

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<sup>12</sup> Pursuant to the Jager Stipulation and the Unfreeze Order, Jager, HW Financial and HW Holdings agreed to pay back the Jager Transfers to the Monitor and subject their accounts to the Monitor’s oversight.

<sup>13</sup> On March 8, 2013, the Monitor received three (3) wire transfers into her fiduciary account in the total amount of \$200,000 in satisfaction of the initial payment requirement under the Unfreeze Order.

owned by Jager. Soon after her appointment, the Monitor froze all of Jager's bank accounts, including South Peak's accounts. The Monitor and Lead Counsel investigated South Peak and its assets and determined that the majority of its assets are non-liquid equity holdings in private companies focused on natural resources. As such, in order to facilitate the transfer of additional funds from Jager and his companies to the Monitorship Estate, including repayment of the amounts Jager received through South Peak, the Monitor commenced negotiations with Jager, HW Financial, HW Holdings, HW Securities, and South Peak. Upon reaching an agreement with Jager and his companies, the Monitor will consult with counsel for the CFTC and, with their consent, submit a stipulation and agreed order to the Court for consideration and entry.

*e. Ancillary Litigation / Stay of Proceedings*

The Appointment Order provides for a stay of all litigation ("Ancillary Proceedings") against the Entity Defendants. *See* Appointment Order at ¶ 25. To date, the Monitor has negotiated stipulations with respect to certain of the Ancillary Proceedings, as detailed in the Second Report and subsequently approved by this Court [ECF # 151]. The Monitor has continued to negotiate with counsel for the plaintiffs in the remaining Ancillary Proceedings, for the purpose of entering into stipulations substantially similar in form and substance to that which the Court previously approved.

On September 6, 2013, the Court entered its *Omnibus Order* [ECF # 211], approving, among other things, the Monitor's initial recommendation [ECF #168] with respect to the Sabertooth Litigation.<sup>14</sup> After extensive consideration of the Sabertooth Litigation and its merits,

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<sup>14</sup> The action styled, *Lloyds Commodities, LLC v. Sabertooth Interactive, LLC*, Case No. CV-13-00375-JEM (the "Sabertooth Litigation"), pending in the United States District Court for the Middle District of California, was commenced by the Lloyds Entities against a media company that Lloyds Commodities, LLC engaged to create an online game that the principals of Lloyds believed would generate substantial revenues.

the Monitor determined that if she or Lead Counsel could locate counsel who would represent the Estate on a contingency fee basis, she should pursue this litigation. Lead Counsel conducted a thorough search for such counsel but the only attorney they could locate who would consider representing the Estate on a contingency fee basis was the Lloyds Entities' former counsel who filed the action and was familiar with the merit's the claims. Lead Counsel is in the process of negotiating the specific terms of the proposed contingency fee agreement. Upon reaching an agreement, the Monitor will consult with the CFTC and file an application with this Court to employ such counsel pursuant to the terms of that contingency fee agreement.

*f. Status of the Declaratory Action Pending in Northern District of Illinois*

Prior to the commencement of this enforcement action, HW Commodities filed the action for declaratory relief against the CFTC in the U.S. District Court for the Northern District of Illinois (the "Illinois Court") styled *Hunter Wise Commodity, et al. v. Futures Trading Commission*, Case No. 1:12-CV-07656. On September 18, 2013, the Illinois Court transferred the case to this District and the Clerk of the Court assigned it Case No. 13-CV-80945-Ryskamp/Hopkins (the "Declaratory Action").

Prior to transfer of the case to this District, the CFTC filed a motion to dismiss the case or, in the alternative, to transfer it to this Court because the issues underlying the claims alleged in that action mirror the core issues in this enforcement action. Defendants Martin and Jager, through their counsel Mr. Grossman, opposed that motion, moved to intervene in that Declaratory Action and have Mr. Grossman represent HW Commodities as the plaintiff, and filed two supplemental filings, which, among other things, misrepresented the actions of the Monitor in this case. Accordingly, the CFTC responded to the second supplemental filings to set the record straight and the Monitor joined in that response.

In her Initial Report, the Monitor provided her preliminary assessment of the Declaratory Action, explaining that she believed it should be dismissed or transferred to this District for the reasons expressed by the CFTC in its motion to dismiss. Having now fully assessed the claims alleged in the Declaratory Action, the Monitor believes that it should be dismissed because those claims and the underlying issues are substantially similar to the claims and issues in this action, Defendants Martin and Jager have preserved their rights and claims in their Eleventh Circuit appeal of the Injunction Order and the Appointment Order, and pursuing the Declaratory Action while this enforcement action is pending, and much further along, with the trial nearly two months away, would result in costly duplicative litigation and possible inconsistent legal determinations in the same District Court. Accordingly, pursuant to the authority and powers that the Court granted to her as corporate manager of HW Commodities, the Monitor intends to file a notice of voluntary dismissal of the Declaratory Action.

***g. Miscellaneous Claims and Enforcement of Stay Provision***

During the Reporting Period, the Monitor and Lead Counsel continued to prevent creditors and other third parties from collecting debts from and/or enforcing rights and filing claims against the Entity Defendants. Indeed, in response to various demands, Lead Counsel invoked the stay provision of the Appointment Order and forwarded copies of that Order and the Injunction Order.

***h. Depositions Conducted and Attended***

To date, the Monitor and Lead Counsel have taken the depositions of Individual Defendants Martin, Frank Gaudino (“Gaudino”) and James Burbage (“Burbage”). These depositions yielded significant information regarding each of these individuals’ assets, liabilities, present financial conditions, past and present financial and business dealings, and involvement with the Entity Defendants. After the depositions of Defendants Martin, Burbage and Gaudino,

the Monitor and her professionals continued to analyze the financial disclosures, bank statements and other documents and correspondence involving those Defendants and their entities.<sup>15</sup> Of particular focus to the Monitor and her professionals were the accounting records of Defendant Burbage's and Defendant Gaudino's wholly owned companies, Xcel Financial and Gaudino Financial, respectively, through which they received their compensation and other transfers from the Lloyds Entities.

In addition to the deposition of the Individual Defendants, the Monitor or her counsel attended by telephone the depositions of representatives of various financial institutions, whose services the HW Entities used to conduct their business. Specifically, the Monitor and her counsel attended the depositions of representatives of Natixis Global Asset Management and Fidelity. These depositions provided the Monitor with a greater understanding of the Entity Defendants' operations, their effects on end-customers, and the Individual Defendants' involvement.

*i. Marshaling and Sale of Personal Property*

After his deposition, Defendant Martin agreed to turnover to the Monitor the majority of his depreciating assets (the "Martin Assets"), all of which were acquired using funds he received from the HW Entities, so that the Monitor could liquidate them for the benefit of the Estate. The Martin Assets included (i) 2007 Chrysler 300 automobile, (ii) a 2011 Centurion watercraft and trailer, and (iii) various personal property, including without limitation furniture and electronic equipment that were located in the Santa Ana Apartment and subsequently removed by the Monitor and stored prior to their auction sale.

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<sup>15</sup> Defendant Gaudino produced incomplete records for Gaudino Financial. As such, the Monitor and her professionals are communicating with Defendant Gaudino's counsel to obtain the complete accounting records for that company.

On July 9, 2013, the Court entered an *Order Approving the Stipulation for Turnover and Sale of Certain Depreciating Assets of the Monitorship Estate* (the “Sale Order”) [ECF # 161]. The Sale Order approved the stipulation by and between Defendant Martin and the Monitor for the sale by public auction of the Martin Assets to the bidder submitting the highest and best offer, free and clear of any liens, claims and encumbrances, authorized the Monitor to engage Tiger Remarketing Services as the auctioneer (the “Auctioneer”), and approved the Auctioneer’s proposal for the auction sale, marketing plan and expenses [ECF #160].

Lead Counsel worked with the Auctioneer to coordinate the auction sale, the inspection, valuation and relocation of the Martin Assets to the site of the auction, and the storage and insurance of those assets through the date of the auction. Prior to the auction, the Auctioneer estimated that the total net recovery for the Monitorship Estate from the auction would be between \$19,830.00 and \$28,830.00. On August 15, 2013, the auction sale generated gross revenues of \$59,506.24, with expenses for marketing, moving, storage, insurance and those associated with conducting the auction totaling \$11,976.18 to be deducted from the gross revenues.<sup>16</sup> Lead counsel negotiated a \$1,012.50 reduction in the expenses to be borne by the Estate so the expenses that were actually deducted from the gross revenues totaled \$10,963.68.<sup>17</sup> Therefore, the Monitorship Estate realized **net proceeds** of \$48,542.56, which is \$19,712.56 (or approximately 64%) above the high end of the Auctioneer’s estimated recovery. *See* the Auctioneer’s Settlement Statement and Lot Report, attached hereto as **Exhibit “C”**.

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<sup>16</sup> The Auctioneer’s fee was paid by the buyers as a “buyer’s premium” rather than by the Estate as a sales commission.

<sup>17</sup> Although the Auctioneer’s proposal, which this Court approved in the Sale Order, stated that the costs of the auction would not exceed \$8,820, Defendant Martin’s unexpected health problems delayed the turnover of the Martin Assets, which required the Auctioneer to postpone the auction one month, increasing the insurance and storage expenses.

In addition to the turnover and sale of the Martin Assets, the Monitor and Lead Counsel successfully negotiated with Defendant Gaudino the turnover of his Rolex Submariner watch, estimated to be valued between \$5,000 and \$6,000, which the Monitor is storing in a safe deposit box. Further, Lead Counsel coordinated the transfer to the Monitorship Estate of the \$48,386.38 that was frozen in an account of Gaudino Financial at Bank of America.

### **III. ACCOUNTING OF MONITORSHIP FUNDS AND TOTAL VALUE OF ASSETS OF MONITORSHIP ESTATE**

The Monitorship Estate currently has cash on hand in the amount of \$6,066,510.62, which the Monitor is holding in the Estate's trust accounts at Gibraltar Private Bank & Trust. See Monitorship Receipts and Disbursements attached hereto as **Exhibit "D"**. Therefore, upon adding the cash on hand to the present market value of the metals being stored at DDS (\$941,643.56), the present market value of the two (2) silver bars being stored at IDS and Baird (together, approximately \$42,000), and the numismatic value as of March 6, 2013 of the metals being stored at Via Mat (\$256,057.04), the total value of the assets of the Monitorship Estate is \$7,306,211.22.<sup>18</sup>

### **IV. STATUS OF ENFORCEMENT ACTION**

Due to Defendant Martin's health condition and the recent disqualification and termination of Defendants Martin and Jager's counsel, J.B. Grossman, the trial date has been re-scheduled twice, and is presently scheduled to commence on December 4, 2013.

The Monitor has been cooperating with all parties. Specifically, the Monitor has cooperated with the CFTC with respect to the CFTC's *Motion for Clarification of Court Appointed Monitor's Authority to Waive Attorney Client Privilege on Behalf of Corporate*

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<sup>18</sup> This amount does not include the funds held in the Individual Defendants or their wholly owned entities' frozen accounts, which have not yet been transferred to the Monitorship Estate's trust account.

*Entities and Request for Expedited Consideration* (the “CFTC’s Motion”) [ECF # 170], and filed a memorandum in support of that motion [ECF #178]. On August 14, 2013, the Court granted the CFTC’s Motion [ECF # 204], and approved the Monitor’s waiver of the attorney-client privilege with respect to communications between the Entity Defendants and the HW Entities’ former counsel. Accordingly, as discussed above, counsel for the CFTC has rescheduled the depositions of former counsel to provide them with additional time to produce all requested documents, including those to which the attorney-client privilege would have applied. *See* Section II(d)(i), *supra*.

## **V. END-CUSTOMERS, CREDITORS AND DEALERS**

The Monitor and Lead Counsel have received numerous telephone calls and mail and e-mail correspondence from end-customers, creditors and dealers, and/or their respective counsel, seeking information concerning the status of the Monitorship and the enforcement action. The Monitor and Lead Counsel have made every effort to answer their questions and address their concerns and continue to refer them to the Monitorship website located at [www.hunterwisemanager.com](http://www.hunterwisemanager.com). This website is regularly updated with recent filings, including the Monitor’s status reports and the Court’s orders, information regarding the Monitorship and the enforcement action, important dates and deadlines, questions frequently asked by end-customers, creditors and dealers, and the Monitor’s answers thereto, and other updates regarding the Monitor’s efforts to fulfill her duties under the Court’s Orders.

The Monitor has compiled lists of all known end-customers, creditors and dealers of the Monitorship. The most current lists are attached hereto as **Exhibit “E”**. The Monitor and her professionals recently mailed and emailed correspondence to all known end-customers and creditors of the Monitorship, providing an update regarding the enforcement action, and specifically informing them of the rescheduled trial date.

## **VI. ADMINISTRATIVE EXPENSES**

The administrative expenses of the Monitorship Estate comprise the expenses that the Estate has incurred in connection with marshaling, maintaining, and preserving the Defendants' assets, including the fees and costs incurred by the Monitor and her professionals. All administrative expenses of the Estate are reflected in the Monitorship Receipts and Disbursements (Exhibit D).

On July 25, 2013, the Monitor filed her *Second Application for Order Authorizing Payment of Fees and Expenses* (the "Second Fee Application") [ECF #131], seeking approval and authority to pay the fees and costs incurred by the Monitor and her professionals during the period of April 1, 2013 through June 30, 2013. On September 6, 2013, this Court granted the Second Fee Application as part of its Omnibus Order [ECF #211]. The fees and costs that the Monitor paid pursuant to the Court's Omnibus Order are reflected in Exhibit D.

## **VII. CONCLUSION**

The Monitor will continue to work with her team of professionals to locate, marshal and preserve all known and potential assets of the Monitorship Estate. Further, as authorized by the Appointment Order and the Injunction Order, the Monitor will continue to investigate and as appropriate pursue existing and potential claims against third parties on behalf of the Monitorship Estate. The Monitor will also continue to investigate and gather information regarding all Defendants' assets and transactions through subpoenas, depositions and other inquiries to financial institutions, and other entities and persons with any connection to the Defendants to discover potential claims against third parties and other sources of recovery. Further, the Monitor and her professionals will continue to analyze all documents obtained and, with the assistance of her Forensic Accountants, will trace all transfers of funds for the purpose of determining the propriety of such transfers and, to the extent appropriate, recovering them. Of

course, the Monitor will continue to perform all other duties as mandated by the Appointment Order and Injunction Order, and will continue updating the Court on a regular basis as to the status of the Monitorship.

Respectfully submitted this 30th day of September, 2013.

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/s/ Kenneth Dante Murena  
KENNETH DANTE MURENA, P.A.  
FLORIDA BAR NO. 147486  
IDO J. ALEXANDER, ESQ.  
FLORIDA BAR NO. 51892

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy Monitor's and Manager's Third Report was served upon all counsels of record via CM/ECF, and via Email and/or U.S. MAIL, to all parties listed in the Service List below, this 30th day of September, 2013.

/s/ Kenneth Dante Murena  
KENNETH DANTE MURENA, P.A.  
FLORIDA BAR NO. 147486

### **SERVICE LIST**

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