

**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,

v.

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

**RECEIVER'S MOTION TO APPROVE
(A) CLAIMS ADMINISTRATION PROCESS
AND (B) PLAN OF DISTRIBUTION**

Melanie E. Damian, Esq., the court-appointed Special Monitor and Corporate Manager for the Entity Defendants¹ and the Equity Receiver (the "Monitor" or "Receiver") for Defendants HW Commodities, LLC, HW Services, LLC, HW Credit, LLC and HW Trading, LLC

¹ The entity defendants (the "Entity Defendants" and each one an "Entity Defendant") include the following: Hunter Wise Commodities, LLC, Hunter Wise Services, LLC, Hunter Wise Credit, LLC, Hunter Wise Trading, LLC, Lloyds Commodities, LLC, Lloyds Commodities Credit Company, LLC, Lloyds Services, LLC, C.D. Hopkins Financial, LLC, Hard Asset Lending Group, LLC, Blackstone Metals Group, LLC, Newbridge Alliance, Inc., and United States Capital Trust, LLC.

Hard Asset Lending Group, LLC, CD Hopkins Financial, LLC, Blackstone Metals Group, LLC, Newbridge Alliance, Inc., and United States Capital Trust, LLC, collectively, shall be referred to herein as the "Dealer Defendants".

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

The Entity Defendants and Individual Defendants, collectively, shall be referred to herein as "Defendants".

(collectively, “Hunter Wise”) in the above-captioned enforcement action, moves (the “Motion”), pursuant to this Court’s *Order of Final Judgment, Permanent Injunction, Civil Monetary Penalty and Other Equitable Relief* [ECF # 306] (the “Final Judgment” or “Permanent Injunction”), for an order approving the Receiver’s (a) proposed claims procedure and claims forms (the “Claims Administration Process”); and (b) plan of distribution for assets of the Estate (the “Distribution Plan”). In support of this Motion, the Receiver states as follows:

I. SUMMARY

Since her appointment on February 22, 2013, the Receiver has marshaled a significant amount of the Estate’s assets, has liquidated certain assets with this Court’s approval, and has identified significant additional assets that she is seeking to recover for the benefit of the Estate. At present, the Estate holds \$5,999,954.36 in cash.

In light of the present amount of funds in the Estate, the difficult financial condition of so many of the defrauded customers and the entry of the Permanent Injunction (defined *infra*), the time is ripe for the Court to establish the Claims Administration Process for all retail customers and other creditors of the Entity Defendants and a plan to distribute the monies that the Receiver has recovered and will recover through the conclusion of the Receivership to the creditors who are determined through the proposed Claims Administration Process to hold allowed claims against the Estate. A claim of a customer or creditor will be allowed if that customer or creditor: (i) was a retail customer of an Entity Defendant (or of a dealer who utilized Hunter Wise to purchase metals for that customer),² transferred funds to an Entity Defendant (or to a Hunter

² Approximately 116 dealers, including the Dealer Defendants, utilized Hunter Wise to purchase metals for their retail customers. All such dealers, collectively, shall be referred to herein as “Hunter Wise Dealers” and each one a “Hunter Wise Dealer”. The Receiver proposes that, in addition to the retail customers of the Entity Defendants (which includes the Dealer Defendants), the retail customers of all Hunter Wise Dealers, including those dealers against which the CFTC

Wise Dealer), and did not receive from any Entity Defendant or Hunter Wise Dealer any amount, or received an amount less than the amount they transferred to any Entity Defendant or Hunter Wise Dealer, and thus incurred a net loss between July 16, 2011 and February 22, 2013,³ or (ii) provided good or services to one or more of the Entity Defendants and was not paid in full for those good or services between July 16, 2011 and February 22, 2013.⁴ The Receiver proposes to conduct one Claims Administration Process for all creditors of the Estate and to make an initial distribution and a final distribution to creditors with allowed claims based on the determinations made in the single Claims Administration Process. Within thirty (30) days following the

has entered orders imposing restitution obligations, may participate in the proposed Claims Administration Process, provided that the funds of those customers were actually transferred to Hunter Wise for the purpose of purchasing metals for those customers.

³ Focusing on the time period since passage of the Dodd Frank Act, from July 16, 2011 through February 25, 2013 (when this Court entered the Preliminary Injunction), approximately \$97,277,356.31 was invested by retail customers in the leveraged purchase of commodities through illegal, off-exchange transactions. These retail customers were charged approximately \$25,768,853.93 in total fees without disclosure of commissions, service fees and interest through the use of tactics intended to defraud (the “HW Fraud”). More than **61%** of the retail customers’ overall loss was attributed to exorbitant fees and **88%** of all retail customer net funds invested were lost to fees and trade-related losses. *See* consolidated chart of retail customer transactions for the period of July 16, 2011 to March 6, 2013, sorted by dealer, attached as Exhibit B, at pp. 6-9, to the Special Monitor and Corporate Monitor’s Initial Report (the “Initial Report”) [ECF # 102]. Although the Preliminary Injunction was entered on February 25, 2013, the Receiver generated this consolidated chart of retail customer transactions through March 6, 2013 to reflect any transactions that may have been made but not yet electronically recorded in Hunter Wise’s books through February 25, 2013, due to the freezing of its computer and accounting systems or otherwise. However, no transactions occurred after February 25, 2013.

⁴ The Commodity Exchange Act (7 U.S.C. *et seq.*, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act) “became effective on July 16, 2011 and 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.” *See Opinion and Order* [ECF # 308 at fn. 2]. Therefore, the scope of the CFTC claims in this enforcement action are limited to those transactions occurring on or after July 16, 2011. Accordingly, the Receiver proposes to limit the Allowed Claims (as defined *infra*) to the claims of retail customers who incurred losses, and creditors who were owed monies, after July 16, 2011.

conclusion of the Claims Administration Process, the Receiver seeks to make an initial distribution of eighty percent (80%) of the total amount of cash on hand at that time. After the asset recovery and liquidation phases of the receivership have been concluded, the Receiver proposes to make a final distribution of the remaining cash on hand in the Estate after payment of all administrative expenses that are incurred through the conclusion of the Receivership.

II. BACKGROUND

A. The Commencement of the CFTC Action

On December 5, 2012, the United States Commodity Futures Trading Commission (the “CFTC”) filed a complaint (the “Complaint”) for injunctive and other equitable relief and penalties [ECF # 1] under the Commodities and Exchange Act and the amendment thereto known as the Dodd-Frank Act (collectively, the “Act”). The CFTC alleged that the Defendant Entities offered and executed transactions for the purchase and sale of precious metals in violation of the Act. The CFTC also filed a Motion for Preliminary Injunction (the “Preliminary Injunction Motion”) [ECF # 4], seeking to enjoin the Entity Defendants from continuing their operations and further violations of the Act, and the appointment of the Monitor.

B. Appointment of Special Monitor and Corporate Manager

On February 22, 2013, following a hearing on the CFTC’s Preliminary Injunction Motion, the Court entered an Order Appointing Special Corporate Monitor, which, among other things, set forth the powers and duties of the Monitor with respect to the Entity Defendants (the “Appointment Order”) [ECF # 77]. The Monitor’s mandate was “to examin[e] the Entity Defendants’ finances and options, and make [a] recommendation about the alternatives to maximize the operations and asset value of the Entity Defendants” for the benefit of creditors, customers (mostly end-customers), and non-complicit member owners of the Entity Defendants.

Given the desire to preserve the Entity Defendants' assets, the Court also assigned to the Monitor the function of Corporate Manager for the Entity Defendants. The Monitor was charged with providing a report detailing the viability of the Entity Defendants as a going concern, in light of the preliminary injunction, which prohibited the central business of the Entity Defendants – the financed sale of unallocated precious metals.

C. The Monitor's Expanded Powers and Authority

The Court's February 25, 2013, preliminary injunction order (the "Preliminary Injunction") [ECF # 78] entered on the Monday following the entry of the Appointment Order, expanded and further explained the injunction set forth in the Appointment Order, and added to the Monitor's duties and responsibilities. The Preliminary Injunction required the Individual Defendants to submit a complete accounting of their personal finances as well as of any funds and assets they controlled in connection with the Entity Defendants, and all documents pertaining to the foregoing. The Preliminary Injunction also required the Individual Defendants to turnover all assets to the Monitor. *See* Preliminary Injunction at p. 34, ¶ 22.

D. Status Reports: Complete History and Status of Receivership

Since her appointment, the Receiver, pursuant to her duty as prescribed by the Appointment Order, has filed five (5) status reports, in which she detailed her efforts and accomplishments in this Monitorship/Receivership to date. A full description of the history of the Monitorship/Receivership and all of the Receiver's efforts and accomplishments in connection with identifying and marshaling assets of the Estate and otherwise fulfilling her duties under the Appointment Order, Preliminary Injunction and Permanent Injunction are detailed in the Receiver's Initial, Second, Third, Fourth and Fifth Status Reports (collectively, the "Reports") [ECF ## 102, 159, 213, 283 and 302, respectively].

E. Conversion from Monitorship to Receivership

On May 16, 2014, this Court entered the *Order of Final Judgment, Permanent Injunction and Civil Monetary Penalty and Other Equitable Relief* (the “Final Judgment” or “Permanent Injunction”) permanently enjoining Defendants from continuing to perpetrate their commodities trading fraud and ordered payment of restitution from the Defendants. [ECF # 306]. The Permanent Injunction also specifically granted the Receiver (previously serving as Special Monitor and Corporate Manager) “full authority to act as an equity receiver for the Hunter Wise entity defendants.” *See* [ECF # 306 at ¶ 5]. The Permanent Injunction requires that the Receiver pursue and collect restitution payments from the Individual Defendants and make distributions to defrauded creditors. *See id.* Further, the Permanent Injunction directs the Receiver to propose a distribution plan to the Court by July 15, 2014. Accordingly, the Receiver files this Motion seeking to approve the Claims Administration Process and Distribution Plan proposed herein. *See id.* at ¶ 7.

F. Court’s Findings of Fact and Conclusions of Law

Shortly after entry of the Permanent Injunction, on May 22, 2014, this Court entered a revised *Opinion and Order*, finding that Defendants “profited on the backs of more than 3,200 retail customers who lost over \$52 million from July 16, 2011 through February 25, 2013.” [ECF # 308 at p. 3]. Further, the Court found that Defendants violated Section 4b of the Act by defrauding customers in retail commodities transactions, violated Section 6(c)(1) of the Act and Regulation 180.1 by employing a scheme to defraud in connection with contracts for sales of commodities and aiding and abetting under Section 13(a) of the Act, 7 U.S.C. § 13c(a). The Court had previously entered the Order on Parties’ Motion for Summary Judgment [ECF # 281] in favor of the CFTC on count 1 – violation of Section 4(a) of the Act – conducting illegal off-

exchange transactions and count 12 – violation of Section 4d of the Act – for failure to register. Therefore, the Court ruled on all counts of the CFTC’s Complaint in favor of the CFTC and no further claims by the CFTC are pending. Accordingly, the Court ordered payment of restitution by Individual Defendants and authorized the Receiver to act as a full equity receiver to marshal assets, collect restitution and propose and implement a plan of distribution to defrauded creditors.

III. IDENTIFICATION AND MARSHALING OF ESTATE ASSETS

The Receiver continues to comply with her duties under the Appointment Order by diligently working to marshal, safeguard, and preserve assets of the Estate wheresoever located.

A. Collection of Restitution Amounts from Defendants

The Receiver is seeking to collect from the Defendants the restitution amounts set forth in the Final Judgment, in the Default Judgments entered against certain entity and individual Defendants, and in the Consent Judgments entered against the remaining entity and individual Defendants. In particular, the Receiver is conducting post-judgment discovery to locate assets of the Defendants not previously identified and frozen upon the entry of the Preliminary Injunction and will seek the recovery of all frozen assets not already transferred to the Estate and of any previously unidentified assets of the Defendants. The Receiver and her counsel are working with counsel for Defendants Fred Jager and Ed Martin to effect the transfer of their assets as partial payment of the restitution amount. And the Receiver will do the same with respect to the other individual Defendants. Any funds collected pursuant to these Judgments will be added to the Estate for distribution in accordance with the Distribution Plan that this Court approves.

B. Claims Against Insiders and Third Parties

The Receiver is actively pursuing the recovery of additional assets that she identified through her investigation, including without limitation potential claims against: (i) the members of the Hunter Wise, who received distributions from Hunter Wise, to recover those distributions pursuant to applicable fraudulent transfer law; (ii) the D&O insurance policy covering the misconduct of the directors and officers of Hunter Wise; (iii) the former legal counsel to Hunter Wise and Lloyds for legal malpractice; and (iv) the non-defendant dealers of Hunter Wise that received commissions, service fees and/or interest in connection with Hunter Wise retail customer transactions, and against which the CFTC has not yet entered administrative orders.

C. Securing and Liquidation of Receivership Assets

As reported in previous Status Reports filed with this Court, during the course of the Monitorship/Receivership, the Receiver took control of the precious metals held in accounts in the name of Hunter Wise at various depositories and at the office of Hunter Wise in Irvine, California. The metals held at depositories remain at those depositories, but the metals held at Hunter Wise's office were transferred to a secure storage facility in Miami Florida. The Receiver also recovered *de minimus* quantities of gold and silver bars and coins, and fashion watches (collectively, the "Martin Metals") from Hunter Wise's leased condominium unit in Santa Ana, California. Further, the Receiver negotiated the turnover of Defendant Frank Gaudino's Rolex Submariner watch. The Martin Metals and Mr. Gaudino's Rolex are being stored in a bank safe deposit box that the Receiver controls.

After terminating the lease of the Santa Ana condominium unit, the Receiver, with the consent of Ed Martin and the CFTC and this Court's approval, liquidated the contents of that unit, along with a boat and a car, belonging to Ed Martin due to the depreciating nature of those

assets. The proceeds of that liquidation were transferred to and remain in the Receiver's account for benefit of the Receivership Estate. Upon terminating Hunter Wise's office leases in Las Vegas, Nevada and Irvine, California, and the other Entity Defendants' office leases in South Florida, the Receiver moved all of the contents of those offices, including without limitation furniture and equipment, to secure storage facilities in Irvine, Las Vegas, West Palm Beach and Miami, for which the Receiver has been paying monthly rent (at a fraction of the monthly rental amount under the office leases).

The Receiver will now seek, by separate motion, this Court's approval to liquidate all of the metals held at depositories and the storage facility, the Martin Metals, Mr. Gaudino's Rolex, all of the furniture and equipment held at storage facilities, and all other personal property of the Defendants that the Receiver has recovered or will recover in the future. The proceeds of such liquidation will be held in the Receivership account and distributed in accordance the Claims Administration Process and Distribution Plan that is approved by this Court.

IV. AVAILABLE FUNDS FOR INTERIM DISTRIBUTION

The Estate currently has cash on hand in the amount of \$5,999,954.36, which the Receiver is holding in the Estate's trust accounts at Gibraltar Private Bank & Trust.

V. PROPOSED CLAIMS ADMINISTRATION PROCESS AND PLAN OF DISTRIBUTION

To date the Estate has recovered, gross of court-approved fees and costs and administrative expenses, assets in excess of \$8,195,236.17.⁵ In light of the significant remaining work to be done to recover additional assets of the Estate and to prosecute claims against

⁵ This amount includes \$6,988,965.13 in funds recovered from Defendants and proceeds from the sale of Defendant Martin's personal property, plus precious metals stored at depositories worth \$950,214 as of March 31, 2014, and precious metals stored at a secure storage facility with a numismatic value of \$256,057.04 as of March 6, 2013.

insiders, third parties and insurance carriers, the Receiver expects that she and her professionals will incur additional fees and costs in connection with fulfilling her duties. Therefore, the Receiver proposes an initial *pro rata* distribution to certain customers and creditors of eighty percent (80%) of the total amount of cash on hand upon the conclusion of the Claims Administration Process, with the remaining sum to be held by the Receiver as a reserve to cover the fees and costs that the Receiver and her professionals incur through the conclusion of the Receivership. The fund from which the proposed initial distribution will be made shall be referred to as the “HW Distribution Fund”.

The Receiver anticipates that, following the proposed initial distribution, the HW Distribution Fund will be replenished with additional funds that the Receiver recovers as a result of her various asset recovery efforts, as described above and in the Reports. As such, the Receiver expects to file with this Court a supplemental motion to approve a final distribution after the Receiver has completed her recovery efforts and a meaningful amount of funds are available for distribution, as the Receiver determines, using her business judgment, is in the best interest of the Estate and the defrauded customers and creditors. Any supplemental motion will, among other things, report the additional amounts that have been recovered and propose an amount to be distributed to customers and creditors with allowed claims after payment of all outstanding administrative expenses. Upon making the final distribution, the Receiver will file a motion with the Court to discharge the Receiver.

**A. Proposed Definition of “Allowed Claim”
and Basis for Distribution**

The Receiver, after consulting with her legal counsel, forensic accountants and counsel for the CFTC, has determined that the most equitable approach to distributing the Initial

Distribution at this stage in the Receivership is through a net-loss *pro-rata* method of distribution.

1. Limitation on Claims

The Receiver will provide notice of the proposed Claims Administration Process and Distribution Plan to all retail customers and creditors of the Defendants and encourage them to submit a claim to the Estate.

The claim of a retail customer or creditor will be allowed (an “Allowed Claim”), such that the customer or creditor will be entitled to receive a *pro rata* distribution from the initial distribution based on that customer’s net loss as a result of transferring fund to one or more of the Entity Defendants and/or Hunter Wise Dealers, or the amount still owed to that creditor, provided that the customer or creditor sufficiently demonstrates to the satisfaction of the Receiver through documentation and/or sworn statements, among other things:

- (i) that such customer (a) transferred funds directly to any Entity Defendant, or any Hunter Wise Dealer that transferred those funds to Hunter Wise, in connection with the HW Fraud, and (b) did not receive from any Entity Defendant or Hunter Wise Dealer any amount, or received an amount less than the amount they transferred to any Entity Defendant or Hunter Wise Dealer, and thus incurred a net loss after July 16, 2011 (for purposes of calculating a customer’s net loss, if a customer had *excess equity* in its account at Hunter Wise on July 17, 2011, then the amount of such excess equity shall be treated as an amount “transferred” to Hunter Wise on that date⁶);

⁶ “Excess equity” is the cash amount in the retail customer’s account that was available for immediate withdrawal because it was above the margin call amount required to be maintained by

- (ii) that an Entity Defendant incurred a debt to such creditor after July 16, 2011, for goods or services that such creditor provided to such Entity Defendant;
- (iii) that such customer or creditor (a) was not an affiliate, family member or insider of any Defendant, any affiliate of any Defendant, any Hunter Wise Dealer, or the HW Fraud, and (b) did not knowingly assist any Defendant, affiliate of any Defendant, or Hunter Wise Dealer to effectuate, perpetuate or promote the HW Fraud or have knowledge of its fraudulent nature at the time funds were transferred to, or a debt was incurred by, those entities;

AND

- (iv) that the total amount of funds that such customer transferred to the Entity Defendants, their affiliates and/or Hunter Wise Dealers exceeds the total amount of funds that the Entity Defendants, their affiliates and/or Hunter Wise Dealers transferred back to such investor, or that the total value of the goods or services that the creditor provided to the Entity Defendants exceeds the total amount that the Entity Defendants paid to such creditor for those goods and services.

The Receiver may consider other factors in determining whether a claim is an Allowed Claim.⁷ If a customer cannot prove the foregoing factors (i), (iii) and (iv) or a creditor cannot prove the foregoing factors (ii), (iii) and (iv), that customer's or creditor's

the customer as part of his/her leveraged transaction, pursuant to the customer's agreement with Hunter Wise. *See* Initial Report [ECF # 102], at pp. 7-8.

⁷ Notwithstanding these factors for determining whether a claim should be allowed, the Receiver will analyze each claim individually and the circumstances surrounding each customer's transfers to and relationship with the Entity Defendants, their affiliates and/or Hunter Wise Dealers, and each creditor's transactions and relationship with the Entity Defendants, and reserves the right to object to and seek to disallow any claim.

claim will be disallowed and such customer or creditor will receive no distribution.⁸ If a *customer* makes the requisite showing regarding his or her claim and the Receiver determines that such claim is an Allowed Claim, the Receiver will calculate the amount of such Allowed Claim by subtracting the total amount of all transfers that such customer received from the Entity Defendants, their affiliates and/or Hunter Wise Dealers from the total amount of transfers that such customer made to those entities. If a *creditor* makes the requisite showing regarding his or her claim and the Receiver determines that such claim is an Allowed Claim, the Receiver will calculate the amount of such Allowed Claim by subtracting the total amount that the Entity Defendants paid to the creditor from the total value of the goods or services that such creditor provided to the Entity Defendants. **Customers and creditors with Allowed Claims will only be entitled to receive a *pro rata* distribution based on the *net loss* of the customer or the principal amount owed to the creditor;** the Receiver will not include within her calculation for distributions any profit that was reported or promised to a customer or any interest or fees that were promised to a creditor.

For example, a customer who demonstrates that he or she transferred a total of \$100,000 to the Entity Defendants, their affiliates and/or Hunter Wise Dealers and received back from those entities a total of \$60,000 would have, subject to the Receiver's final determination and the Court's approval, an Allowed Claim in the amount of \$40,000. Similarly, a creditor who demonstrates that the Entity Defendants owed them a total of \$100,000 but paid \$60,000 towards

⁸ To the extent a customer received transfers from Entity Defendants, their affiliates and/or Hunter Wise Dealers in excess of such customer's total transfers to those entities, or a creditor received transfers from Entity Defendants in excess of the value of the goods or services they provided, such that the customer or creditor profited from the HW Fraud, the Receiver reserves the right to pursue a claim against such customer or creditor for the return of the profit received and any other appropriate relief.

that debt would have, subject to the Receiver's final determination and the Court's approval, an Allowed Claim in the amount of \$40,000.

2. Proposed Eligibility of Claimants

The Receiver proposes that only those customers that incurred a net loss after July 16, 2011 as a result of transferring funds to one or more of the Entity Defendants, their affiliates and/or Hunter Wise Dealers, and only those creditors to which one or more of the Entity Defendants incurred a debt after July 16, 2011, should be eligible to file a claim in this Receivership. All such customers and creditors, as determined based on the Receiver's forensic accountant's analyses, will receive the claims package (as defined below) including an approved form of notice and claim form. The Receiver will use her best efforts to notify all such customers and creditors by (i) sending claims packages by first class mail or Federal Express to their last known addresses, and by email to the extent email addresses are known, (ii) posting the notice and claim form on the websites of the Receivership (www.hunterwisemanager.com) and her counsel (www.dvllp.com), and (iii) filing them with the Court.

3. Proposed Claims Documentation

Based on the definition of Allowed Claim, the Receiver proposes to effectuate the Claims Administration Process and Distribution Plan as follows. The Receiver will deliver to all known customers and creditors two claim forms: (i) a Court-Ordered Legal Notice (the proposed form of which is attached hereto as **Exhibit A**); and (ii) a Proof of Claim and Release form (the proposed form of which is attached hereto as **Exhibit B**). The documents attached as Exhibits A and B shall be referred to collectively as the "Claims Package".

The Court-Ordered Legal Notice will apprise the potential claimants of how the Claims Administration Process was created, who is eligible to submit a claim in order to receive an

initial or subsequent distribution from the HW Distribution Fund, the process by which eligible claimants can submit a claim, and the process by which the Receiver will determine which eligible claims have Allowed Claims and thus are entitled to receive a distribution from the HW Distribution Fund. **See Exhibit A.** The Proof of Claim and Release will solicit, among other information: (a) details regarding the claimant's identity and contact information; (b) details regarding the amount and timing of the claimant's transfer of funds to one or more of the Entity Defendants, their affiliates and/or Hunter Wise Dealers, or details regarding the debt of any Entity Defendant to the claimant, including the value goods and services underlying such debt and the date(s) the creditor provided such goods and services to any Entity Defendant; and (c) details regarding the amount, timing and transfer of any monies received by the claimant from Defendants and/or their affiliates. **See Exhibit B.** The Proof of Claim and Release also will require the claimant to, *inter alia*, certify the accuracy of the information provided, produce to the Receiver appropriate documentation, and certify that each of the three factors of an Allowed Claim, set forth above, are satisfied. *Id.*⁹

B. Proposed Sequence and Timing of Claims Process

The Receiver proposes that the claims process proceed in accordance with the following schedule:

- a. Distribution Plan Approval: The date upon which this Court grants this Motion and approves the Receiver's proposed Distribution Plan shall be referred to herein as the "Plan Approval Date";

⁹ The Hunter Wise database contains detailed information concerning transfers between individual retail customers and the Entity Defendants and Hunter Wise Dealers, and the "excess equity" in each customer's account at various time intervals. All claims will be verified using the Hunter Wise database to the extent possible and verifiable. If a customer's claim may be verified using the Hunter Wise database, that customer's lack of additional documentation will not be a basis to deny such claim.

- b. Receiver's Mailing of Claims Package: The Receiver will send the Claims Package to known customers in the HW Fraud and creditors of Defendants via first class mail or Federal Express, and by email to the extent email addresses are known, within ten (10) days after the Plan Approval Date; and the Receiver will post the forms on the Receiver and her counsel's websites;
- c. Claims Bar Date: Customers and creditors would then have until forty-five (45) days after the Plan Approval Date (the "Claims Bar Date") to return the completed Proof of Claim and Release to the Receiver. Any completed Proof of Claim and Release not postmarked by the Claims Bar Date will be barred, and claims postmarked after the Claims Bar Date will not be allowed except for good cause shown;
- d. Receiver's Initial Determination of Allowed Claims: The Receiver will have until twenty (20) days after the Claims Bar Date ("Receiver's Initial Determination Date") to approve or reject, in whole or in part, all claims received. In the event that the Receiver were to reject any claim, in whole or in part, the Receiver would apprise the claimant, via first class mail and/or email, of the rejection of the claim, the basis for that rejection, and the process for appealing such rejection.
- e. Claimant's Request for Reconsideration of Initial Determination: Any claimant whose claim is rejected by the Receiver, in whole or in part, may request that the Receiver reconsider that denial by sending the Receiver a letter seeking a reconsideration, which must be postmarked within twenty (20) days after the Receiver's Initial Determination Date and which must state the basis of the claim and the claimant's response to the Receiver's notice of rejection.

- f. Receiver's Final Determination: The Receiver has until thirty (30) days after the Receiver's Initial Determination Date (which is ten (10) days after the claimants' deadline to request reconsideration of initial determination) (the "Receiver's Final Determination Date") to reconsider any request by any claimant whose claim was initially rejected by the Receiver and to apprise the claimant, via first class mail and/or email, of the reconsideration or rejection of the claim.
- g. Claimant's Appeal of Receiver's Final Determination: Any claimant whose claim was finally rejected by the Receiver may appeal the Receiver's rejection of the claim to the Court by filing with the Court an Appeal of the Receiver's Final Determination, which must be postmarked twenty (20) days after the Receiver's Final Determination Date, (the "Appeal Deadline") and which must state the basis of the claim and the claimant's response to the Receiver's Final Determination.
- h. Receiver's Response to Appeals: The Receiver's Response to all appeals filed with this Court shall be due within fifteen (15) days after the Appeal Deadline. Following the time for the Receiver's response, the Court may make a final determination or may set the matter for hearing. A final determination by the Court is final for all purposes. There shall be no further appeal of such proceedings.
- i. Receiver's Motion to Approve Initial Distribution: The Receiver shall file her motion to approve the initial distribution, which motion would apprise the Court of the status of approved and rejected claims, the status of pending appeals, if any, the Receiver's expectation regarding administrative fees and costs, and proposed interim distribution calculations and methodology, by no later than 140 days after the Plan Approval Date.

The foregoing schedule is reflected in the following summary timetable:

Day 0	Plan Approval Date
Day 10	Notice/Proof of Claim forms sent out
Day 45	Claims Bar Date
Day 65	Receiver's Initial Determination Date
Day 85	Investor Deadline for Appealing to Receiver
Day 95	Receiver's Final Determination Date
Day 115	Investor Deadline for Appealing to the Court
Day 130	Receiver Response to Appeals Deadline
Day 140	Receiver Files Motion to Approve Initial Distribution
TBD (based on completion of asset recovery phase)	Receiver Files Motion to Approve Final Distribution

C. Proposed Distribution to Customers and Creditors with Allowed Claims

The Receiver and her counsel will review all Proofs of Claim and Releases received from customers and creditors as of the Claims Bar Date and determine the total amount of Allowed Claims. The Receiver then will determine what percentage of the total Allowed Claims is represented by the proposed initial pro rata distribution of eighty percent (80%) of the total amount of cash on hand upon the conclusion of the Claims Administration Process (the "*Pro Rata Percentage*"). For example, if there was a total of \$50 million in Allowed Claims, and \$5,000,000 in funds available for distribution, then the *Pro Rata Percentage* would be 10%. To continue with the example on pages 13-14, *supra*, the customer with an Allowed Claim of \$40,000, would receive \$4,000 as a distribution from the Initial Distribution based on the *Pro*

Rata Percentage of 10%. Upon this Court's approval, the Receiver will make the Initial Distribution to approved claimants (based on determinations made in the Claims Administration Process). Following completion of the Receivership work, the Receiver will make a second and final *pro rata* distribution to approved claimants of the funds remaining in the Estate (less administrative expenses), following the entry of an order granting the Receiver's motion to approve such final distribution; however, approved claimants need not resubmit any claim forms.

VI. LEGAL ARGUMENT

The Receiver believes that the foregoing proposed Claims Administration Process and Distribution Plan will provide a fair, equitable, and efficient method for distributing the proceeds of the Estate to defrauded customers and creditors. *See Section V.A., supra*, at pp. 11-12. Generally, the District Court has broad powers and wide discretion to grant relief in an equity Receivership, including in approval and implementation of a claims process and plan of distribution. *See SEC v. Infinity Group Co.*, 226 Fed. Appx. 217, 218 (3d Cir. 2007) ("District Courts have wide equitable discretion in fashioning distribution plans in Receivership proceedings, and we review the District Court's order only for abuse of that discretion.") (citations omitted); *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 331 (5th Cir. 2001) (finding that a district court has wide latitude when it exercises its inherent equitable power to approve a plan to distribute Receivership assets and that such approval is reviewed for abuse of discretion). When approving a distribution plan, the District Court has the authority to approve any plan provided it is fair and equitable. *See SEC v. Byers*, 637 F. Supp. 2d 166, 174 (S.D.N.Y. 2009) (citing *S.E.C. v. Wang*, 944 F.2d 80, 81 (2d Cir. 1991)). The most common method of distribution approved by Receivership courts is the net loss/net investment method.

A Receiver has discretion to fashion a distribution method that maximizes the number of customers and creditors who receive a distribution. *See SEC v. Huber*, 702 F.3d 903, 907 (7th Cir. 2012). Specifically, a Receiver may opt to utilize the “net loss method of distribution to maximize the overall utility of the customers.” *Id.* In *Infinity Group*, the Third Circuit affirmed the District Court’s approval and implementation of a plan of distribution that provided for a *pro rata* distribution of receivership proceeds, based on net loss, to all innocent victims of the defendant’s Ponzi scheme because that plan was determined to be the fairest approach to the greatest number of customers. *See id.* at 218-19. The net loss approach is preferred over the rising tide approach when a large number of customers would not be allocated Receivership assets under the rising tide method. *See, e.g., Byers*, 637 F. Supp. 2d at 182 (rejecting the rising tide method because 45% of customers would not receive additional compensation); *see also U.S. Commodity Futures Trading Com’n v. Barki, LLC*, No. 3:09 CV 106-MU, 2009 WL 3839389 at *2 (W.D.N.C. Nov. 12, 2009) (approving the net investment method over the rising tide method because 55% of customers would not receive additional compensation under the rising tide approach).

The Receiver is proposing the net loss/net investment *pro rata* method of distribution rather than the rising tide method because the Receiver believes, based on her investigation of the retail customers’ accounts and preliminary calculations, that implementing a rising tide method would result in a substantial percentage of the retail customers with approved claims not receiving any distributions from the Estate. In fact, under the rising tide method, the entire HW Distribution Fund would be distributed to a small percentage of the customers – those who suffered the largest losses, in amount and as a percentage of the total amount they transferred to their Hunter Wise accounts for the purchase of metals.

As for the specific type of net loss/net investment method of distribution, the Receiver is proposing a plan providing for a pooled *pro rata* distribution, rather than a distribution of the assets of each Entity Defendant or Hunter Wise Dealer to the customers of that entity. Receivership courts have approved such a plan, when those entities were intertwined and utilized to perpetrate one fraud and/or their funds were commingled. *See, e.g., SEC v. Amerifirst Funding, Inc.*, 2008 WL 919546 *2-4 (N.D. Tex. 2008) (approving pooling of funds and *pro rata* distribution to all customers of all entities involved in a unified scheme to defraud where the entities were intertwined and their funds were commingled) (citing *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 331-32 (5th Cir. 2001) (affirming a pooled *pro rata* distribution because it was “a logical way to divide the money” and finding that the absence of commingling between various Receivership entities does not render such a distribution inequitable)); *see also SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 88-89 (2nd Cir. 2002) (“Courts have favored *pro rata* distribution of assets where . . . the funds of the defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders.”). Because the Defendants, in fact, were intertwined and used by Defendants to perpetrate one fraudulent investment scheme, all of their customers overlapped in the sense that all of them, regardless of the dealer they utilized to purchase the metals, were Hunter Wise customers, and their funds were commingled in various Hunter Wise accounts, the Receiver’s pooling of the assets recovered for all Defendants’ customers and creditors and the pooled *pro rata* distribution proposed herein is both logical and equitable.

Accordingly, the Receiver submits that this Court should exercise its discretion to approve the proposed Claims Administration Process and Distribution Plan as detailed herein.

VII. CERTIFICATION

Undersigned counsel hereby certifies that he has conferred with counsel for the CFTC regarding the relief requested herein and such counsel consents to that relief.

VIII. CONCLUSION

WHEREFORE, for the foregoing reasons, the Receiver respectfully requests that this Court enter an order: (1) approving the Claims Administration Process and Distribution Plan proposed herein; (2) authorizing the Receiver to mail a Claims Package (in the form proposed herein) to all eligible claimants; and (3) granting such other relief as this Court deems just and appropriate.

Dated: July 15, 2014.

Respectfully submitted,

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/s/ Kenneth Dante Murena

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Receiver's Motion to Approve (A) Claims Administration Process; and (B) Plan of Distribution was served via CM/ECF this 15th day of July, 2014, upon all counsels of record and by U.S. MAIL on the 15th of July, 2015, to all parties listed in the attached Service List.

/s/ Kenneth Dante Murena _____

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