UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Plaintiff, vs. 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., UNITED STATES CAPITAL TRUST, INC., HAROLD EDWARD MARTIN, JR., FRED JAGER, JAMES BURBAGE, FRANK GAUDINO, BARIS KESER, CHADEWICK HOPKINS, JOHN KING, AND DAVID A. MOORE, Defendants.	Case No.: 9:12-CV-81311-DMM Middlebrooks/Brannon

DEFENDANTS HUNTER WISE COMMODITIES, LLC, HUNTER WISE SERVICES, LLC, HUNTER WISE CREDIT, LLC, HUNTER WISE TRADING, LLC, HAROLD EDWARD MARTIN, JR., and FRED JAGER'S (THE "HW DEFENDANTS") RESPONSE IN OPPOSITION AND INCORPORATED MEMORANDUM OF LAW TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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Pursuant to the Commodity Exchange Act ("CEA"), the United States Commodity Futures Trading Commission ("CFTC") has exclusive jurisdiction over: (i) transactions involving swaps and contracts of sale of a commodity for future delivery; and (ii) transactions subject to regulation by the Commission under Section 19 of the CEA, *i.e.*, leveraged transactions. 7 U.S.C. 2(a)(1)(A). Effective July 16, 2011, with the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), the CFTC also obtained jurisdiction over other types of transactions including "retail commodity transactions" as defined in Section 2(c)(2)(D) of the Act. 7 U.S.C. §2(c)(2)(D). The CFTC asserts jurisdiction over the conduct and transactions at issue in this case solely pursuant to Section 2(c)(2)(D) of the CEA. Complaint, ¶8.

In that context, the CFTC spins a fascinating tale of deception purportedly masterminded by Hunter Wise Commodities, LLC ("HW Commodities") and its affiliates and principals to defraud individual retail customers engaged in the purchase and sale of precious and industrial metals ("precious metals"). The CFTC seeks the extraordinary remedy of injunctive relief as well as an order to freeze the HW Defendants' assets and to appoint a receiver, remedies that will essentially put them out of business. Yet, notwithstanding the submission of over 1,600 pages of exhibits in purported support of its request for such drastic remedies, the CFTC has failed to establish a substantial likelihood that it will succeed on the merits of the underlying case, namely that the HW Defendants engaged in illegal, off-exchange transactions and defrauded, or aided and abetted the defrauding of, retail customers of precious metals.

In both its Complaint and Motion for Preliminary Injunction (the "Motion"), the CFTC plays fast and loose with the facts, creating relationships between the HW Defendants and the retail customers where none exist; ignoring the principal-to-principal relationships between HW Commodities, Hunter Wise Credit, LLC ("HW Credit") and Defendant Lloyds Commodities LLC ("Lloyds") despite the existence of numerous contracts defining that relationship; and claiming that the metal purchased by HW Commodities does not exist despite agreements with various suppliers indicating that it does. The CFTC's so-called "evidence" is unpersuasive as it is filled with hearsay statements, unsupported legal conclusions and declaration testimony that is directly undermined by the agreements they rely upon and attach.

In addition to identifying these deficiencies, Defendants HW Commodities, Hunter Wise Services, LLC ("HW Services"), HW Credit and Hunter Wise Trading, LLC ("HW Trading") (together the "HW Companies"), and their principals, Defendants Harold Edward Martin, Jr. and Fred Jager, collectively the "HW Defendants", will demonstrate that:

- The HW Companies are all independent entities, dealing at arms' length with each other;

- The HW Defendants conduct business exclusively with other independent dealers and do not orchestrate or control how those dealers conduct their business;[1]
- The principal-to-principal metals business in which the HW Defendants engage is not subject to the jurisdiction of the CFTC as set forth in the CEA;
- The HW Defendants engage only in legitimate and enforceable transactions with other independent dealers to buy, sell, transfer, deliver and store precious metals and to finance the purchase of precious metals; and
- The HW Defendants did not defraud, or aid or abet any of the other Defendants in defrauding, retail customers.

While today's submission, together with the Motion to Dismiss and supporting memorandum filed by the HW Defendants, adequately support a denial of the CFTC's motion, the HW Defendants also move for expedited discovery and the opportunity to file a supplemental response after the completion of that discovery and prior to this Court's rendering of a decision or holding of an evidentiary hearing on the CFTC's Motion. As the CFTC itself has noted, prior to the filing of its Complaint, it conducted over a year-long investigation, in which it gathered tens, if not hundreds, of thousands of documents and took sworn testimony and/or conducted interviews with tens of witnesses. *See, generally,* Declaration of Heather N. Johnson ("Johnson Declaration"), ¶¶ 2-3, Pl. Appx at pp. 2-3.[2] Other than the documents they themselves produced, the HW Defendants have not had access to any of this information, not even the transcribed testimony of its own employees and principals which the CFTC refused to provide.

I. The CFTC Falsely Characterizes The HW Defendants' Business As Engaging In Transactions With Retail Customers

Underlying all of the CFTC's claims is the contention that the HW Companies sold or claimed to sell physical commodities to retail customers. (Complaint, ¶3). There is no evidence to support that claim and once debunked, much of the CFTC's case implodes.

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[1] HW Trading does not buy from, or sell to, individual persons, so-called retail customers. On occasions, HW Trading has sold to fewer than ten individuals (primarily friends and family) precious metals on a fully paid for basis and who took delivery. (Declaration of Harold Edward Martin, Jr. dated January 21, 2013 (the "Martin Decl."), ¶3.

[2] Citations to documents in the Appendix filed by the CFTC in support of the Motion shall be referenced as "Pl. Appx" and the applicable page number. Citations to the CFTC's Motion and supporting memorandum shall be referenced as "Motion" and the applicable page number.

HW Commodities is a wholesale precious and industrial metals dealer buying and selling physical gold, silver, copper, platinum and palladium exclusively with other counterparty dealers, including banks, financial institutions and independent dealers such as Defendant Lloyds Commodities LLC ("Lloyds"), a named defendant in this action. (Martin Decl. ¶2). Lloyds, in turn, purchases and sells precious metals with other dealers, who transact directly with retail customers. (*Id.* ¶25). None of the HW Defendants engage in transactions with retail customers. (*Id.* ¶3, 38).

A. HW Trading Buys and Sells Metals With Lloyds On A Principal-to-Principal Basis

On or about March 22, 2010, HW Commodities and Lloyds entered into an exclusive arrangement whereby HW Commodities agreed to refer all precious metals dealers in Florida to Lloyds (the "Referral Agreement").[3] (Martin Decl. ¶32 and Ex. 13). In consideration of that agreement, Lloyds agreed to transact exclusively with HW Commodities in its purchases and sales of precious metals and related services. (*Id.*). The Referral Agreement incorporated by reference three other agreements between HW Commodities and Lloyds that governed their trading relationship:

> WHEREAS, Lloyds is a precious metal dealer and is party to agreements with the HW Companies for the HW Companies to handle Lloyds' trading, financing and data processing needs relating to its business, as follows: (i) pursuant to a Dealer Purchase and Sale Agreement dated March 9, 2010 by and between Lloyds and Trading … Trading provides precious metal trading services to Lloyds . . .; (ii) pursuant to a Dealer Loan, Security & Storage Agreement dated March 9, 2010 by and between Lloyds and Credit . . ., Credit provides financing services for purchases of precious metals to Lloyds . . .; and (iii) pursuant to a Services Agreement dated March 9, 2010 by and between Lloyds and HW. . ., HW provides data processing services to Lloyds. . .

(Martin Decl. Exs. 13-14) (emphasis in original). Although the HW Defendants have been unable to locate executed copies of the Dealer Purchase & Sale Agreement, the Dealer Loan, Security & Storage Agreement and the Services Agreement, the HW Companies and Lloyds operated under their terms as of March 9, 2010 through the date of the filing of the Complaint. (Martin Decl. ¶¶26-31 and Exs. 1, 3, 12). The agreements are standard contracts that the HW Companies utilize with counterparty dealers and with which Lloyds' principal, Defendant James Burbage, was familiar, having executed similar agreements on behalf of another company he previously owned. (*Id.*).

[3] Effective January 5, 2012, HW Commodities and Lloyds amended that agreement to remove the exclusivity provisions. (Martin Decl. ¶33 and Ex. 14).

Pursuant to the Dealer Purchase & Sale Agreement, HW Trading maintains – but does not guarantee -- a two-way trading market for Lloyds and other counterparty dealers, providing Lloyds a price at which HW Trading will purchase inventory (the "bid" price) and a price at which it will sell inventory (the "ask" price). (Martin Decl. ¶4 and Ex. 1, ¶ 5). The bid and ask prices reflect the prevailing market price for the commodity at the time the order is placed plus or minus a spread differential. (*Id.*).

Lloyds may buy metal by paying the purchase price in full at the time of the transaction or by making a down payment of 25% of the purchase price and financing the remainder unpaid balance through HW Credit, another HW Commodities affiliate. (Martin Decl. ¶¶9, 29 and Ex. 3). Because HW Credit finances the balance of the purchase price due, HW Trading is paid in full by Lloyds at the time of each purchase. (Martin Decl. ¶9). In other words, the transaction is a spot purchase of metal. Lloyds pays interest on the unpaid loan balance and service fees on commodity purchases and commodity loans. (Martin Decl. ¶24 and Ex. 3).

In the event that Lloyds purchases precious metal with the aid of a loan from HW Credit, HW Trading assures that sufficient stocks of metal or commitments for the delivery of metal to cover the purchase obligation are on hand and identified on the books of HW Trading. (Martin Decl. ¶¶10, 14). Subject to any lien in favor of HW Credit, HW Trading will deliver the precious metal to a depository or other destination as directed by the counterparty dealer within seven (7) days, or such lesser period as required by law, to be held by or for Lloyds. (Martin Decl. ¶10 and Ex. 1, ¶4.3). When purchasing metal from its suppliers, HW Commodities either pays for the metal in full at the time of purchase or finances the transactions in a manner similar to how Lloyds finances its purchases with HW Trading, *i.e.,* by paying an initial down payment and financing the remainder of the purchase price with interest accruing on the loan. (Martin Decl. ¶15). Upon repayment of the loan, HW Commodities has an enforceable obligation against the suppliers for delivery of the metal into HW Commodities' possession. (Martin Decl. ¶¶16-22, Exs. 4-7).

Ownership and title of the metal, subject to any security interests held by HW Credit, passes to Lloyds at the time and place at which HW Trading receives full payment whether directly from the counterparty dealer or if the purchaser has financed its purchase, at the time HW Trading receives the balance of payment due from HW Credit. (Martin Decl. ¶¶6-7 and Ex. 1, ¶4.4; see also U.C.C., Sec. 2-401(1)).[4]

[4] Section 2-401(1) of the Uniform Commercial Code provides that upon identification of the goods to the contract, title passes from the seller to the buyer in any manner and on any conditions explicitly agreed on

B. HW Commodities Provides Administrative Services to Lloyds and Its Affiliates

At the time Lloyds began to trade with HW Commodities, it also entered into an agreement whereby HW Commodities, for a fee, would provide certain back-office services to Lloyds in connection with Lloyds' business including, but not limited to: (i) the creation of a Lloyds database; (ii) creation of web-based portals whereby Lloyds and Lloyds' dealers can access their information in the database; and (iii) the preparation of trade confirmations, month-end statements and other transaction-related documents. (Martin Decl. ¶30-31 and Ex.12). These services are ultimately performed by HW Services LLC ("HW Services") with information and data provided by Lloyds. (Martin Decl. ¶36 and Ex. 17).

In April 2011, Lloyds also executed the "Acknowledgement and Indemnification Agreement" whereby HW Commodities, HW Trading and HW Credit agreed to provide Lloyds upon its request with certain form templates which the HW Companies had prepared for their own internal use, subject to certain disclaimers. (Martin Decl. ¶33 and Ex. 15). Among other things, Lloyds acknowledged that: (i) it was an independent dealer fully responsible for its own operations; (ii) the HW Companies did not require or recommend the use of their forms and Lloyds was free to obtain and use forms from other sources; (iii) the form templates were not intended as legal, regulatory or accounting advice; and (iv) it was Lloyds' responsibility to have the form templates thoroughly reviewed and revised as necessary by its legal counsel and regulatory compliance experts for adoption into its business. (*Id.*).

C. HW Services Provided Similar Administrative Services to Lloyds' Dealer Clients

At times relevant to the Complaint, Lloyds purchased precious metals from and sold precious metals to other dealers including Defendants C.D. Hopkins Financial, LLC, Blackstone Metals Group, LLC, Newbridge Alliance, Inc. and United States Capital Trust, LLC (the "Lloyds' Counterparty Defendants").[5] (Martin Decl. ¶25). The HW Defendants did not sell precious metals to, or buy precious metals from, the Lloyds' Counterparty Defendants at any time relevant to the Complaint. (*Id.*)

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by the parties. "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." Nev. Rev. Stat. §104.2401(1) (West 2013).

[5] While the CFTC refers to these four Defendants and their principals, Defendants Hard Asset Lending Group, LLC, Chadewick Hopkins, Baris Keser, John King and David Moore as the "Dealer Defendants", this characterization is misleading as it ignores that HW Commodities and Lloyds are also independent dealers. For that reason, the HW Defendants will refer to the four aforementioned Defendants and their principals as the "Lloyds' Counterparty Defendants").

Although the CFTC asserts that the HW Defendants orchestrated "all aspects of the [Lloyds' Counterparty Defendants'] business apart from the telemarketing solicitations," (Motion at 4), the evidence directly contradicts these conclusory assertions. For example, the testimonial excerpts of the Lloyds' Counterparty Defendants' principals submitted by the CFTC demonstrate that the Lloyds' Counterparty Defendants hired and fired their own sales associates, were solely responsible for all compliance-related issues, provided training to their employees, independently gathered market information (presumably for use by their sales agents), approved all promotional materials sent out to prospective customers and were ultimately responsible for all content on their respective websites. (*See e.g.,* excerpts of the sworn testimony of Chadewick Hopkins, John King, Boris Keser and David Moore, Pl. Appx. at 1335-38, 1344-46, 1352-53, 1358, 1365 and 1367). Further, the CFTC offers no evidence – because none exists – that the HW Defendants directed or in any way controlled the price at which Lloyds or any of the Lloyds' Counterparty Defendants executed transactions with their counterparties, *i.e.,* the retail customers. Nor does the CFTC point to any evidence demonstrating that the HW Defendants paid any salary or commission or other compensation to them.

While HW Services did create and host databases for Lloyds and each of the Lloyds' Counterparty Defendants and also generated and distributed monthly account statements, trade confirmations and other transaction-related documents to the Lloyds' Counterparty Defendants' retail customers, all of these administrative services were provided in connection with the service agreements signed by Lloyds and the Lloyds' Counterparty Defendants. (Martin Decl. ¶¶30-31, 35-38, and Exs. 12, 17). Pursuant to these agreements, the Lloyds' Counterparty Defendants outsourced many of the administrative services they needed to Lloyds who, in turn, outsourced them to HW Commodities. (Martin Decl. ¶38). However, the Lloyds' Counterparty Defendants retained exclusive control over their employees, their marketing procedures, the retail customers with whom they chose to do business as well as the type of transactions they would engage in with those retail customers. (*See,* Martin Decl. ¶ 38 and Pl. Appx. at 1335-38, 1344-46, 1352-53, 1358, 1365 and 1367).

D. The HW Defendants Did Not Engage In Any Transactions With, Or Receive Income From, The Lloyds' Counterparty Defendants' Customers

Despite its allegations, the CFTC has failed to establish any privity between the HW Defendants and the Lloyds' Counterparty Defendants' customer base. Notably, the CFTC does not submit a single agreement or contract between any of the HW Defendants and those customers to support the existence of a contractual relationship between them. All of the retail customer agreements submitted by the CFTC

demonstrate that these agreements were entered by the Lloyds' Counterparty Defendants with their customers. (See Declarations of Damar McElroy, Ex. A; Robert Bauman, Ex. B; Patricia Mercaldo, Ex. C; found in Pl. Appx. at 1375, 1467 and 1624).

Similarly, while the CFTC claims that the HW Defendants took in "more than $46 million in retail customer funds" and holds those funds in its bank and trading accounts, *see* Motion at 1-2, 4, the CFTC does not submit a single check, wire transfer receipt, bank statement or other document showing that a retail customer made payment to, or received funds from, any of the HW Defendants. To the extent the CFTC has submitted any documentation evidencing payments to and from the retail customers, those documents indicate that funds were transferred exclusively between the retail customers and one of the Lloyds' Counterparty Defendants. (*See, e.g.,* Decl. of Gale Vradenburg, Exs. B, I and Decl. of Robert Bauman, Ex. H, Pl. Appx. at 1436, 1452 and 1494).

Although the CFTC portrays the databases and portals created by HW Services for Lloyds and the Lloyds' Counterparty Defendants as the means by which the HW Defendants allegedly executed and confirmed retail customer orders (see Motion at 4-5, 12-14), that legal conclusion is wholly without merit. Using similar logic, a company such as ADP, which provides a myriad of payroll, human resources management and benefits administration services to other companies, *see* www.adp.com, would be considered by the CFTC to owe some duty to, or be the real party in interest vis-à-vis, the outsourcing company's employees by virtue of performing these administrative functions. That theory has been rejected. *See Walker v. Federal Express Corp*., 2012 WL 2855580 at *5-6 (6th Cir. 2012) (holding that ADP was not a fiduciary and did not owe a duty to a Federal Express employee based upon its performance of administrative duties such as sending conversion notices and providing biographical information on benefits to plan participants). Further, none of the HW Defendants received any compensation as a result of the transactions executed between the Lloyds' Counterparty Defendants and their customers. (Martin Decl. ¶38). The HW Companies generated income through the spread between the price at which HW Trading purchased precious metals and the price at which it sold precious metals to Lloyds, interest and fees charged to Lloyds and its other counterparty dealers. (Martin Decl. ¶24). Lloyds did not receive any commission from any of the HW Defendants. (*Id*).

II. The CFTC Must Do More Than Show A "Prima Facie Case of Illegality" To Obtain Injunctive Relief Against the Defendants

Although Section 6c(b) of the CEA authorizes the CFTC to bring an action to enjoin violations of the statute and, upon a "proper showing," to obtain a preliminary injunction, the CEA does not further define

what constitutes "a proper showing." Some courts in this Circuit have noted – and the CFTC also argues – that the CFTC must only demonstrate a prima facie case that a violation has occurred and a reasonable likelihood of a future violation. *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978); *CFTC v. Sterling Trading Group, Inc.,* 605 F. Supp. 2d 1245, 1290 (S.D. Fl. 2009). A "prima facie" case has been defined as "evidence of an amount and quality sufficient to send a case to the trier of fact," *see SEC v. Unifund Sal*, 910 F.2d 1028 (2d Cir. 1990), a far less strenuous standard than the "substantial likelihood of success on the merits" test traditionally employed by the Eleventh Circuit in private disputes. *LSSI Data Corp. v. Comcast Phone, LLC*, 696 F.3d 1114, 1119 (11th Cir. 2012). Some of these same courts state that traditional standards applicable to private parties seeking injunctive relief do not apply. *Sterling Trading Group*, 605 F. Supp. 2d at 1290. But this is not entirely true.

Whether to grant a statutory injunction "is governed by the traditional factors shaping the district court's use of the equitable remedy." *United States v. Ernst & Whinney*, 735 F.2d 1296, 1301 (11th Cir. 1984). The U.S. Supreme Court has held that the power given by Congress to district courts to grant injunctive relief must be guided by "the requirements of equity practice with a background of several hundred years of history." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S.Ct. 587, 591-92 (1944) ("If Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain."). *See also SEC v. Unifund SAL*, 910 F.2d at 1036-39 (rejecting the lower court's use of "a strong prima facie case" standard in favor of the traditional "substantial showing of likelihood of success" standard). Thus, unless the statute professes to adopt a different standard, federal courts are to treat enforcement proceedings "in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect." *Hecht*, 321 U.S. at 330; 64 S.Ct. at 592.

Traditionally, private litigants seeking a preliminary injunction must demonstrate: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction is issued; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction might cause the party to be enjoined, *i.e.* a balancing of harms; and (4) that if issued, the injunction would not be adverse to the public interest. *LSSI Data Corp.*, 696 F.3d at 1120. While courts have generally held that the government need not prove irreparable harm or the inadequacy of other remedies (*see Muller*, 570 F. 2d at 1300 and *Sterling Group*, 605 F. Supp. 2d at 1290), there is no statutory directive in the CEA to ignore the remaining elements, *i.e*., establishing a substantial likelihood of success on the merits and balancing the harms suffered by both parties should injunctive relief be granted. If read closely, it is evident

that even in cases where the "prima facie" standard is referenced, the courts have weighed the factual and legal arguments made by both parties and found one more persuasive or determinative of the outcome. *Muller*, 570 F.2d at 1298-99. Further, where the relief sought is more than to preserve the status quo, a more substantial showing of the movant is required. *Sterling Trading Group*, 605 F.2d Supp. at 1291; *Unifund SAL*, 910 F.2d at 1039.

Here, the CFTC seeks to enjoin the Defendants from committing further alleged violations of the CEA, to freeze the Defendants' assets, to require an accounting, to appoint a receiver and to preserve and allow inspection of their books and records – relief that is designed to do more than just preserve the status quo. In its Complaint, the CFTC argues that the entire framework in which the HW Defendants operate and conduct business is illegal under the CEA. Thus, an order enjoining the HW Defendants from further alleged violations of the CEA would force each of the HW Companies to cease all operations and lay off employees. (Martin Decl. ¶40). With the appointment of a receiver and freeze of assets, the principals and managers of the HW Companies would no longer control the operations and finances of their respective companies. As Lloyds is not the only dealer counterparty with which the HW Companies do business, the impact of an order granting such injunctive relief would reach far beyond the parties to this case. Given the nature of the relief the CFTC seeks, it is even clearer that the "substantial likelihood of success on the merits" standard should apply. *Sterling Trading Group*, 605 F.2d Supp at 1291; *Unifund SAL*, 910 F.2d at 1040. The CFTC cannot meet this burden.

III. The CFTC Has Utterly Failed to Establish That The HW Companies, Together With Their Principals, Operate As A Common Enterprise

The CFTC alleges that HW Commodities and its wholly owned subsidiaries "operate as a common enterprise under common ownership and control." Complaint, ¶13. The Motion mimics these allegations and further states that "[t]hey share resources, including office space and employees, and function to achieve a single common purpose." Motion. at 1, n.2. The CFTC fails to assert, or provide any documentation as to what resources these companies share other than office space and employees or how they "function to achieve a single common purpose." The CFTC asserts this theory – without providing any supportive case law or facts – as the basis for treating all of the HW Companies as one entity and failing to allege specific acts of wrongdoing by each company and their principals, Ed Martin and Fred Jager. As set forth in the HW Defendants' Motion to Dismiss, these allegations, even if true, are not adequate to withstand a motion to dismiss, let alone serve as the basis of injunctive relief against the HW Companies based upon the alleged violations of any one entity. *In re Amaranth Natural Gas Commodities Litigation*,

587 F. Supp. 2d 513, 538 (S.D.N.Y. 2008). Before a court may disregard the separateness of distinct legal entities, there must be evidence to justify piercing the corporate veil, *i.e.,* disregard of corporate formalities, inadequate capitalization, intermingling of funds or property and the failure to deal at arms' length. *Id.* A showing of common ownership and overlapping directors is insufficient as a matter of law. *Id.* The failure of the Complaint and this Motion to make any distinction between any of the HW Defendants should be grounds alone to conclude that the CFTC has failed to meet its burden under any legal standard, let alone made a showing of a "substantial likelihood of success on the merits" on its claims.

IV. The CFTC Has No Enforcement Jurisdiction Over The Transactions In Which The HW Defendants Engage

The CFTC asserts jurisdiction over the conduct and transactions at issue in this case solely pursuant to Section 2(c)(2)(D) of the Act which provides:

> (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 to (even if not entered into with), a person that is not an eligible contract participant or eligible commercial entity; and
> >
> > (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 connection with the offeror or counterparty on a similar basis.

The statute excepts certain transactions from Section 2(c)(2)(D)(i), including 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.

CEA, § 2(c)(2)(D)(ii), 7 U.S.C. § 2(c)(2)(D)(ii).[6]

[6] Section (D) further states that these types of transactions are subject to Sections 4(a), 4(b) and 4b of the CEA "as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery. Section 4(a) requires a contract of sale of a commodity for future delivery to be conducted on or subject to

A. The HW Defendants Do Not Enter Commodity Transactions On a Leveraged or Margined Basis As Defined By the CEA and the CFTC Regulations

Although Section D does not define "on a leveraged or margined basis", that term is used and defined elsewhere in the CEA, and by the CFTC in its regulations, to refer to a standardized contract with other, specific attributes not found in the transactions entered by the HW Defendants. *See Gustafson v. Alloyd Co.*, Inc. 513 U.S. 561, 568, 115 S. Ct. 1061, 1066 (1995) (statutory terms should be construed consistently throughout the statute). Specifically, Section 19 of the CEA, entitled "Leverage Transactions", grants the CFTC jurisdiction over:

> A standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or function as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract.

7 U.S.C. § 23(a). In CFTC Regulation 31.4(w), the CFTC further narrowed the definition of a leverage contract, defining it as a contract, *standardized as to terms and conditions, for the long-term (ten years or longer)* purchase or sale by a leverage customer of a leverage commodity and which contains six additional elements including "initial and maintenance margin payments by the leverage customers" and "delivery of a commodity in an amount and form which can be readily purchased and sold in normal commercial or retail channels." 17 C.F.R. § 31.4(w) (emphasis added). When promulgating this regulation, the CFTC expressly stated that "[t]ransactions that do not meet the Commission's definition of a leverage contract are not within the Commission's regulatory jurisdiction under Section 19 of the Act and are not subject to Commission registration and regulation pursuant to Part 31." Regulation of Certain Leverage Transactions, 49 Fed. Reg. 5498-01, at 5498 (CFTC Feb. 13, 1984). In short, a metals transaction that lacks standardized terms and conditions, is less than ten (10) years in duration, or fails to provide for all of the six specifically listed elements of the Commission's definition is not a leverage transaction, *i.e.,* a transaction conducted on a leveraged basis.

The transactions executed by HW Trading and Lloyds do not have standardized terms. (Martin Decl. ¶5 and Ex. 2). Each transaction may differ as to quantity, quality and price. (*Id.*). In addition, the transactions do not have durations of ten years or longer. The transactions are complete at the time of purchase. (Martin Decl. ¶7). And, even if the transactions are financed, the term of the financing

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the rules of a board of trade and executed or consummated by or through a contract market. Section 4b prohibits certain fraudulent activity in connection with these transactions.

arrangement does not extend beyond four years. (Martin Decl. Ex. 3, ¶3.1). The transactions are not readily offset or liquidated because HW Trading is not obligated to repurchase the metal or offset the transaction. The Dealer Purchase & Sale Agreement expressly states that HW Trading does not guarantee a buy or sell market for the metals and warns that should Lloyds wish to dispose of the metal, a market may not be readily available. (Martin Decl. ¶4 and Ex. 1, ¶5).

Lastly, when purchasing metal from HW Trading, Lloyds does not pay margin. A margin or leveraged payment is a security deposit or performance bond paid by the customer, which is designed to protect against adverse price movements in the commodity. *Leist v. Simplot*, 638 F.2d 283, 287 (2d Cir. 1980). It is not a down payment on the purchase price as per the terms of the HW Credit-Lloyds financing agreement. (Martin Decl. ¶90 and Ex. 3).

The CFTC disputes that an actual loan is made, arguing that "Hunter Wise simply makes an internal accounting entry on its own books and tracks the value of each retail customer's account on a daily basis." (Motion at 5). This statement is inaccurate for two reasons. As noted above, the HW Defendants deal only with Lloyds; they do not enter into any transactions with retail customers. Further, a legitimate loan does not require that the borrowed funds be initially deposited into the borrower's account or a check issued to the borrower. Gas stations and department stores often have affiliates that are in the business of financing transactions between retail customers and those merchants, providing loans to customers by paying the merchant and making "an internal accounting entry on its own books and track[ing] the value of each retail customer's account on a daily basis," (Motion at 5) and charging the retail customer interest on the unpaid balance. Pursuant to the Dealer Loan, Security & Storage Agreement, HW Credit has an enforceable right against Lloyds for the full recovery of the unpaid loan amount plus accrued interest should Lloyds default and fail to make full payment on the loan. Likewise, Lloyds has an enforceable right against HW Credit for the delivery of the purchased metal into its possession should it pay the unpaid loan balance plus accrued interest.

Because the HW Defendants are not in the business of trading in leverage transactions or transactions "on a leveraged basis" under the CEA's and CFTC's definitions, the CFTC does not have jurisdiction over their transactions pursuant to Section 2(c)(2)(D)(i).

B. The HW-Lloyds Transactions Create Enforceable Obligations On Both Sides To Make and Take Delivery

Pursuant to Section 2(c)(2)(D)(ii)(III)(bb), the HW-Lloyds transactions are exempt from the CFTC's jurisdiction because:

- Each transaction is a contract of sale creating an enforceable obligation to deliver between HW Trading, as the seller, and Lloyds, as the buyer, and vice versa; and
- both HW Trading and Lloyds have the ability to deliver and accept delivery of physical metal;
- in connection with their respective lines of business.

7 U.S.C. § 2(c)(2)(D)(ii)(III)(bb).

HW Commodities and Lloyds are both in the line of business of buying and selling precious metals. Lloyds is not a mere "intermediary" or agent for the HW Defendants and each has enforceable obligations against one another as purchasers and sellers of metal for the payment and delivery of that metal. (Martin Decl., ¶¶6-9, 24 and Exs. 1, 3). Indeed, Lloyds describes itself as "a wholesale precious metals dealer, offering clients two way access to precious and industrial metals." (Martin Decl. ¶23 and Ex. 11). The Referral Agreement expressly disclaims the existence of any partnership or agency relationship between HW Commodities and Lloyds. (Martin Decl. Ex. 13). Lloyds is not authorized to and has not entered into any agreements with the Lloyds' Counterparty Defendants, their customers or any other entity on behalf of any of the HW Defendants. (Martin Decl. ¶24). Any monies Lloyds earns from the purchase or sale of metals to the Lloyds' Counterparty Defendants and other dealers, including interest and fees related to any credit that Lloyds extends to these entities, is the property of Lloyds alone. (*Id.*). None of the HW Defendants pay any commissions, salaries or other compensation to Lloyds or it principals. (*Id.*).

In addition, both HW Commodities and Lloyds have the ability to make and take delivery of metal. The CFTC disputes the existence of any actual metal, claiming that HW Commodities simply "manages its exposure to retail customer trading positions by trading derivatives in its own over-the-counter margin trading accounts." (Motion at 6). None of these statements are accurate. HW Commodities has contracted with various companies (*e.g.,* Fidelitrade Incorporated, A-Mark Precious Metals, Inc., Standard Bank and Natixis Commodity Markets Limited) to obtain sufficient metal to cover obligations to Lloyds and other counterparty dealers. (Martin Decl. ¶¶15-17). While HW Commodities also maintains futures trading accounts with R.J. O'Brien and OANDA, the purpose of those accounts is to hedge against any intra-day or overnight price risk exposure due to purchases by HW Trading from counterparty dealers that it elects to hold (rather than selling back a like amount to its suppliers). (Martin Decl. ¶14). HW Trading does not purchase physical inventory from either OANDA or R.J. O'Brien. (*Id.*).

Similar to the Dealer Purchase & Sale Agreement, the A-Mark Agreement provides for the purchase and sale of metal "for immediate physical delivery at the full cash price of the [m]etal" or with

physical possession of the metal deferrable "for up to two years after the purchase of the [m]etals." (Martin Decl. ¶16 and Ex. 4, ¶¶2.A and 2.B). Financing is provided by A-Mark and requires a "down payment" and the payment of interest on a monthly basis on the outstanding loan balance. (*Id.*). Although the CFTC submits a declaration from Mr. Thor Gjerdrum, A-Mark's CEO, to bolster its theory that HW Commodities never actually purchases metal (see Gjerdrum Decl., Pl. Appx. at 1040), Mr. Gjerdrum's statements are directly contradicted by the terms of the agreement and are so full of inconsistencies that they should not be given any evidentiary weight. *See, e.g.*, *St. Paul Mercury Ins. Co. v. Mountain West Farm Bureau Mut. Ins. Co.*, 210 Cal. App. 4th 645, 658 (Cal. App. 2 Dist. 2012) (Under California law, the parol evidence rule prohibits the use of extrinsic evidence to establish the meaning of an agreement where the agreement is unambiguous.). For example, notwithstanding the clear language of Paragraph 2 of the A-Mark Agreement that the purchase transaction occurs at the time of down payment, Mr. Gjerdrum insists that HW Commodities "does not own any metals as a result of its margin trades with A-Mark" and that HW Commodities "has the right to purchase the quantity of metals associated with any individual margin trade at the trade price, *but only after it makes full payment.*" (emphasis added) (Compare Martin Decl., Ex. 4, ¶2.B and Gjerdrum Decl. ¶14). In addition, while Mr. Gjerdrum may be correct that A-Mark "does not loan any metals to Hunter Wise" (Gjerdrum Decl. ¶9), he seemingly ignores the provisions in Paragraph 2.B outlining the terms of A-Mark's financing of HW Commodities' metal purchases.

Mr. Gjerdrum also denies that HW Commodities acquires an ownership interest in the metal even though he makes an earlier reference to the minimum "equity" level HW Commodities must maintain at any given time in connection with these financed transactions. (Gjerdrum Decl. ¶¶11, 14). The term "equity" infers an ownership interest. Likewise, while he claims that A-Mark does not store any metals for HW Commodities in connection with its so-called margin trades, he states earlier that "A-Mark maintains sufficient inventory of physical metals to meet its obligations to HW Commodities and A-Mark's other customers". (Gjerdrum Decl. ¶¶ 8, 14). Because purchases accompanied by full payment result in the immediate physical delivery of the metal to the purchaser, Mr. Gjerdrum's reference to the storage of metal to meet its obligations to HW Commodities can only be a reference to HW Commodities' financed metal purchases and A-Mark's need to have sufficient metal on hand to meet its obligation to make immediate physical delivery to HW Commodities should it pay the unpaid loan balance on those transactions.

Mr. Gjerdrum's most enlightening statement is that "only after Hunter Wise pays in full will A-Mark *allocate, segregate* and deliver any metals to Hunter Wise." (emphasis added) (Gjerdrum Decl. ¶14). While it may well be true that A-Mark does not "allocate" specific metal for HW Commodities prior to full

payment, Mr. Gerjdrum's statement does not deny that metals purchased on a financed basis are kept in storage as part of an unallocated, fungible mass of metal sufficient to meet A-Mark's obligations to HW Commodities and its other customers – exactly the methodology used by HW Commodities in connection with Lloyds' metal purchases financed through HW Credit.

The agreements between HW Commodities and FideliTrade, Natixis and Standard Bank likewise reflect the terms under which Hunter Wise may purchase and sell metal. (Martin Decl. ¶17 and Exs. 5-7). Account statements from A-Mark and Natixis show purchases and sales of metal on a financed basis with interest charged on the unpaid loan balance. (Martin Decl. ¶¶19-20 and Exs. 8-9). The Natixis statement further indicates that it was holding stocks of gold and silver bullion in a vault at JP Morgan Chase Bank. (Martin Decl. ¶19 and Ex. 8). The CFTC's summary of a phone conversation with Natixis representatives in which Natixis allegedly stated that no metal is stored for HW Commodities is hearsay and directly contravened by this account statement. (Johnson Declaration ¶50, Pl. Appx. at 17-18). The Metal Ledger Statement from Standard Bank also shows holdings of platinum, palladium, gold and silver. (Martin Decl. ¶21 and Ex. 10).

HW Commodities plainly holds physical metal or has enforceable obligations with its suppliers for the physical delivery of metal. Thus, HW Trading certainly has the ability to make or take delivery of precious metals in connection with any purchases made by Lloyds. Lloyds likewise has the ability to make or take delivery, there being no evidence to the contrary. The HW Companies are thus exempt from regulation under Section 2(c)(2)(D)(ii)(III)(aa).

C. The HW Trading/Lloyds Transactions Are Further Exempt From the CFTC's Jurisdiction Pursuant to the Statutory Exemption in Section 2(c)(2)(D)(ii)(III) Because Actual Delivery Occurs

The transactions between HW Trading and Lloyds are also exempt from the CFTC's enforcement authority pursuant to the "actual delivery" exemption, codified at 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa). Pursuant to their agreement, delivery must occur within seven days of the purchase. (Martin Decl. ¶10 and Ex. 1, ¶4.3) Although Lloyds does not obtain physical possession of the purchased metal if the transaction is financed through HW Credit, delivery is made "as an undivided share of a fungible lot and held in safekeeping on a fungible basis with the commodities of other Depository Dealers." (Martin Decl. ¶13 and Ex. 1, ¶4.4.). Delivery is possible – and is made -- because HW Trading either has metal on hand or has enforceable obligations with several institutions for the supply of metal.

In issuing its Interpretative Notice defining the term "actual delivery", the CFTC seeks to expand its jurisdiction under Section 2(c)(2)(D)(ii)(III)(aa) of the CEA over transactions that Congress expressly exempted from the CFTC's regulatory authority in the subsequent subsection, *see* §2(c)(2)(D)(ii)(III)(bb) of the CEA. Compare 7 U.S.C. §2(c)(2)(D)(ii)(III)(bb) with Retail Commodity Transactions Under Commodity Exchange Act, 76 Fed. Reg. 77670-72 (Dec. 14, 2011). In that Notice, the CFTC has taken the untenable position that actual delivery does not occur unless the metal is physically delivered to the buyer, even if the seller has covered its delivery obligation to the buyer through a third party contract and "regardless of whether the agreement, contract or transaction between the buyer and the seller purports to create an enforceable obligation on the part of the seller . . . to deliver the commodity to the buyer." Retail Commodity Transactions, 76 Fed. Reg. at 77,672. This interpretation is in direct contravention of Section 2(c)(2)(D)(ii)(III)(bb), which expressly exempts transactions from the CFTC's enforcement authority where those transactions create an enforceable obligation to deliver between a buyer and a seller that have the ability to deliver and accept delivery in connection with their business. *See supra*, Part IV.B.

V. The CFTC Fails To Substantiate Any of Its Allegations of Fraud Against The HW Defendants

The CFTC's allegations of fraud under Sections 4b and 6(c)(1) of the CEA and CFTC Regulation 180.1, see 17 C.F.R. 180.1, fail to state a claim for which relief may be granted, see Fed. R. Civ. P. 12(b)(6), let alone suffice to justify injunctive relief. Fraud allegations are to be pled with particularity, identifying the specific misrepresentations or omissions or other acts committed by each defendant. Fed. R. Civ. P. 9(b). However, the CFTC in its Complaint simply alleges that the HW Defendants collectively engaged in fraud, making no distinction between the four companies and two individuals or providing any specifics as to what those alleged misrepresentations were or when and to whom they were made. These allegations are insufficient as a matter of law. *Amaranth*, 587 F. Supp. 2d at 543 (dismissing fraud claims where plaintiffs simply made generalized allegations, lumping all of the floor broker defendants together). Even assuming the CFTC's fraud allegations in Counts II and III of the Complaint are sufficiently pled to withstand a motion to dismiss, the CFTC cannot demonstrate a substantial likelihood of success on the merits.

To establish liability under Section 4b(a) of the CEA, the CFTC must show: (1) that a misrepresentation, misleading statement or omission was made; (2) with scienter; and (3) that the misrepresentation, misleading statement or omission was material. *Sterling Trading Group*, 605 F. Supp. 2d at 1351. Scienter is established if the defendant intended to defraud, manipulate or deceive or if

defendant's conduct represents an extreme departure from the standards of ordinary care. *Id.* at 1352. The CFTC fails to overcome even the first element, that a misrepresentation was made.

The CFTC argues that "Hunter Wise. . . misrepresented the nature of the product they sold by telling customers that they (1) sell and transfer ownership of physical metals to customers; (2) make loans to customers to purchase the physical metals; and (3) store customers' physical metals in independent depositories." (Motion at 14). The first fatal flaw in this argument is that none of the HW Defendants had a relationship with retail customers and, therefore, could not "tell" them – let alone misrepresent -- anything.

The HW Defendants did not solicit or advertise to retail customers. (Martin Decl. ¶38). The CFTC does not submit contrary evidence and even admits in its Motion that the HW Defendants orchestrate "all aspects of [the Lloyds' Counterparty Defendants'] business *apart from* the telemarketing solicitations." (Motion at 4 (emphasis added)). The HW Defendants did not buy metals from, or sell to, any retail customers. (Martin Decl. ¶38). The HW Defendants did not provide financing to retail customers or store metals for them. (*Id.*). The CFTC does not submit any evidence, either documentary or testimonial, showing otherwise. The HW Defendants do not have access to, nor have knowledge of: (i) the terms of the agreements between the Lloyds' Dealer Defendants and the retail customers; or (ii) the representations made to the retail customers. (*Id.*). If any misrepresentations were made by Lloyds' Dealer Defendants to the retail customers, the HW Defendants would have no knowledge of it. Also glaringly absent in the CFTC's Complaint and Motion is any allegation that a retail customer who had fully paid and wanted to take physical delivery of the metal did not receive it, an indication that these sales and purchases and accompanying financing were not shams.

The crux of the CFTC's claim appears to be that the HW Defendants are liable because the web-based portal that HW Services created allowed a retail customer to access his or her account and that the information he or she viewed – both through the portal and on any hard copy account statement, which was also generated by HW Services -- showed sales and/or purchases and interest charges for financed metals, all of which the CFTC claims were sham transactions. But again, the HW Defendants were not parties to those transactions and had no affirmative duty to disclose the alleged fraud, even if they were aware of it. *See Amaranth*, 587 F. Supp. 2d at 545 (the provision of ministerial or routine clearing functions by a clearing firm to a primary broker who is acting in violation of the law does not establish an aiding and abetting claim against the clearing broker). The data loaded into those databases was provided by the Lloyds' Dealer Defendants through Lloyds. (Martin Decl. ¶38). The creation of the web-based portals and the generation of account statements were ministerial services that were provided by IT personnel of HW

Services at the behest of Lloyds pursuant to the terms of the Referral Agreement and the Services Agreement. (Martin Decl. ¶¶30-32, 35-38 and Exs. 12,13 and 17). The CFTC does not allege or establish any facts supporting an affirmative duty on the part of a HW Defendant to disclose any alleged fraud in connection with the transactions between the Lloyds' Dealer Counterparties and their retail customers.

The CFTC also alleges that despite "rosy predictions of likely profits and assurances of safety," Defendants failed to disclose the significant losses being suffered by customers. But a duty to disclose only arises where a "defendant's failure to speak would render the defendant's *own* prior speech misleading or deceptive." *Ziemba v. Cascade Int'l Inc.*, 256 F.3d 1194, 1206 (11th Cir. 2001) (emphasis in original); *see also*, *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1332-33 (11th Cir. 2002), *cert. denied*, 543 U.S. 1034 (2004). The CFTC's Complaint and its Motion are completely devoid of allegations that any of the HW Defendants communicated with retail customers and made "rosy predictions" of profits. While the CFTC alleges that the HW Defendants provided sample telemarketing scripts to Lloyds, (see Johnson Decl., ¶¶43 and 61, and Exs. II and PP at Pl. Appx. 16,20, 409 and 557),which Lloyds then forwarded to the Lloyds' Dealer Defendants, the CFTC does not identify who sent or received these materials, does not identify any fraudulent statements in these materials, does not allege that the HW Defendants knew these materials would be forwarded to the Lloyds' Dealer Defendants' and that they would be used by the Lloyds' Counterparty Defendants, does not allege that the Lloyds' Dealer Defendants used any of these materials in soliciting retail customers, or that these misrepresentations were material. In similarly conclusory fashion, the CFTC alleges that the HW Defendants provide Lloyds and the Lloyds Dealer Counterparties with training videos but fails to allege that anything in these videos was fraudulent. (See Johnson Decl., ¶61 and Ex. PP, Pl. Appx. at 20, 557).

Lacking any proof that the HW Defendants made misrepresentations to the retail customers or had knowledge that any of the transaction data given to HW Services was fraudulent, the CFTC cannot establish liability under either Section 4b and 6(c)(1).

VI. The HW Defendants Are Not Futures Commission Merchants As Defined By The CFTC

Although the definition of "futures commission merchant" (FCM) has many subparts, the CFTC relies on only one in asserting that each of the HW Companies is required to register as a FCM. The relevant subpart provides that a FCM is any individual, association, partnership, corporation or trust that:

> (1) is engaged in soliciting or in accepting orders for, or acting as a counterparty in, any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or 2(c)(2)(D)(i); and

(2) in connection with those activities, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

Section 1a(28) of the CEA, 7 U.S.C. §1a(28). None of the HW Defendants meet this definition.

As fully set forth in Part IV above, the HW Companies did not engage in transactions described in Section 2(c)(2)(D)(i) of the CEA. The HW Defendants did not solicit or accept orders nor did they accept any money, securities or property from retail customers. (Martin Decl. ¶38). The CFTC utterly fails to meet its burden of proof with respect to these elements. As a result, the CFTC also fails to establish liability on the part of Messrs. Martin and Jager as controlling persons of the HW Companies.

VII. The Balancing of Harms Weighs Against Granting Preliminary Injunctive Relief

Injunctive relief must also be denied on the ground that the CFTC cannot show that the injury to the retail customers, or the public interest generally, outweighs the damage the proposed injunction may cause the HW Defendants. *See U.S. v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983) (affirming lower court's denial of preliminary injunction, noting that a decision as to the propriety of a preliminary injunction turns on the balance of harm and the ability to compensate an injured party); *but see United States v. Am. Therapeutic Corp*., 797 F. Supp. 2d 1289, 1291 (S.D. Fl. 2011) (a statute's enactment is an implied finding that violations will harm the public and ought, if necessary be restrained).

Admittedly, Congress enacted the Dodd Frank Amendments to the CEA to protect the public interest. However, in this action, the CFTC seeks to enforce relatively new statutory provisions of the CEA and newly promulgated regulations that have greatly expanded its regulatory enforcement power. The HW Defendants have raised numerous arguments both in their Motion to Dismiss the Complaint and in this response, challenging the CFTC's interpretation of these statutory provisions and its authority to bring these claims against them. These issues are largely ones of first impression, there being as of yet no binding – or really any -- precedent defining these provisions or sanctioning the CFTC's position. The lack of precedent supporting any of the CFTC's theories of liability against the HW Defendants together with the draconian nature of the injunctive relief it seeks weighs against granting such relief.

Indeed, the CFTC does not seek merely to preserve the status quo. By attacking the entire framework under which the HW Defendants do business, an order of preliminary injunctive relief enjoining future violations (assuming without the benefit of a hearing on the merits that the conduct is illegal) would effectively cause the HW Defendants to cease operations, not only with Lloyds, but with all of its counterparty dealers. (Martin Decl. ¶41). By freezing the HW Defendants' assets and appointing a

receiver, the CFTC also jeopardizes the ability of HW Defendants' counterparties from unwinding their holdings of metal in the ordinary course of business and prevents HW Commodities from hedging its market exposure in connection with its own metal holdings through its R.J. O'Brien and OANDA accounts. (*Id.*). If the purpose of such relief is to preserve the assets of the HW Companies, such draconian measures are unlikely to serve those objectives. With respect to Messrs. Martin and Jager, the CFTC has made no effort to demonstrate the necessity of freezing their personal assets. The CFTC has introduced no evidence that Lloyds, or for that matter, any other counterparty dealer with whom the HW Defendants did business, ever failed to receive metal or cash amounts that were due to them on request. Nor has the CFTC introduced any evidence that the HW Defendants or anyone else associated with the HW Defendants misappropriated any metal or funds belonging to any counterparty dealer. Injunctive relief, whether granted under a court's traditional equitable powers or via a statutory grant of authority, is still an equitable remedy and must be considered in that light. Here, the balance of equities simply does not support the injunctive relief that the CFTC seeks.

Conclusion

For the reasons set forth above, the CFTC has failed to show a substantial likelihood of success on the merits of its claims as stated in the Complaint and thus has failed to meet its burden of proof justifying injunctive relief. The HW Defendants further request that the Court grant it expedited discovery and an opportunity to supplement this response, either through an additional written submission or at an evidentiary hearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jay Bruce Grossman
Jay Bruce Grossman

SERVICE LIST
U.S. Commodity Futures Trading Commission v. Hunter Wise Commodities, LLC, et al.
Case No. 9:12-cv-81311-DMM
United States District Court, Southern District of Florida

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