

**IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Case No. 12-CV-81311-Middlebrooks/Brannon

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff,

v.

HUNTER WISE COMMODITIES, LLC,
HUNTER WISE SVCS., LLC, HUNTER
WISE CREDIT, LLC, LLOYDS
COMMODITIES, LLC, LLOYDS
COMMODITIES CREDIT CO., LLC,
LLOYDS SERVICES, LLC,
C.D. HOPKINS FIN'L., LLC,
HARD ASSET LENDING GRP., LLC,
BLACKSTONE METALS GROUP, LLC,
NEWBRIDGE ALLIANCE, INC.,
UNITED STATES CAP. TRUST, LLC,
HAROLD EDWARD MARTIN, JR.,
FRED JAGER, JAMES BURBAGE,
FRANK GUARDINO, BARIS KESER,
CHADEWICK HOPKINS, JOHN KING, and
DAVID A. MOORE,

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendants Lloyds Commodities, LLC, Lloyds Commodities Credit Company, LLC, Lloyds Services, LLC, James Burbage (“Burbage”) and Frank Guardino (“Guardino”) (collectively, for purposes of the instant motion, “Defendants”), hereby submit their opposition to the motion for preliminary injunction [DE 4], as follows:

I. INTRODUCTION

Defendants are joining in the opposition of co-defendant Hunter Wise. [DE 35.] However, Defendants are in a unique position in this action, and the Defendants are submitting this opposition to address the reason why a preliminary injunction against Defendants should not

issue. Clearly, the Lloyd Defendants are not alleged to have engaged in any fraudulent or deceptive conduct. *See* [DE 4 at 13 n.47] (“ . . . Lloyds is not charged in the Complaint with fraud. . .”).¹ Instead, Plaintiff has alleged that the Lloyds Defendants violated Section 4(a) of the Commodity Exchange Act (“CEA”), 7 U.S.C. §6(a), by engaging in some conduct associated with an off-exchange, leverage transaction; and aiding and abetting the same violation, a non-fraud-based offense, by third parties, the co-defendants in this action.

This unique position weighs heavily against the issuance of a preliminary injunction. Retail customers never submitted any orders to the Lloyds Defendants, and the Lloyds Defendants never maintained any accounts on behalf of retail customers. According to the Commission, the Lloyds Defendants merely “facilitate[ed] the flow of orders and funds for retail commodity transactions, performing data entry to facilitate the execution of transactions, and recruiting telemarketing firms like the Dealer Defendants to solicit retail customers to execute retail commodity transactions through Hunter Wise.” Motion at 12 [DE 4]. In other words, the Lloyds Defendants introduced the Dealer Defendants to Hunter Wise and performed merely ministerial acts. And there is nothing in Section 4(a) which prohibits introducing Firm A to Firm B, even if Firms A and B ultimately engage in commerce otherwise prohibited by Section 4(a)—especially where, as discussed below, the Lloyds Defendants believed the transactions would constitute spot transactions, rather than contracts for future delivery.

The Motion also suffers from other deficiencies, especially with regard to the Lloyds Defendants. For instance, the Commission has requested an asset freeze for all of the Lloyds Defendants, but has failed to allege any amount of disgorgement—much less any evidence which would support a claim of disgorgement. *See SEC v. ETS Payphones*, 408 F.3d 727, 735 (11th Cir. 2005) (*citing SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (the “power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment”).

Further, the Commission has requested an accounting “for the period of July 1, 2010 to the date of such accounting” [DE 4-1 at 8.] Yet, there is no allegation of any violative

¹ Despite the Commission’s statement that the Lloyds Defendants are not alleged to have engaged in fraud, at times the Commission has merged the Lloyds Defendants with their co-defendants to alleged, e.g., “Defendants also failed to disclose the significant losses being suffered by customers” [DE 4 at 14.] As the Lloyds Defendants had no relationship with the retail customers, the Lloyds Defendants owed no disclosure duty to them in the first place.

conduct prior to July 16, 2011, the effective date of the Dodd-Frank Act, Public Law 111-203, 124 Stat. 1376 (2010), which would warrant expanding an accounting by one year. Indeed, it took the Commission until December 14, 2011, to explain what “actual delivery,” a critical definition for determining whether a contract is a contract for future delivery, until December 14, 2011. In other words, the Commission could not even determine that the transactions at issue in this case were futures contracts until after that date.

II. ARGUMENT

A. LIKELIHOOD OF SUCCESS ON THE MERITS – THE LLOYDS DEFENDANTS DID NOT OPERATE A BUSINESS FOR THE PURPOSE OF TRANSACTING IN CONTRACTS FOR FUTURE DELIVERY

The Lloyds Defendants hereby incorporate and adopt their argument in Part II(B) and II(C) of their Motion to Dismiss [DE 34 at 3-4] as if stated in full herein. In essence, Section 4(a), by including the phrase “for the purpose of,” requires a showing of intent on the part of the Lloyds Defendants to have engaged in transactions in connection with the purchase or sale of commodities for future delivery. As the Commission has failed to allege any facts regarding this intent, a preliminary injunction should not issue.

B. THE SCOPE OF THE REQUESTED RELIEF IS OVERLY BROAD

The Commission is requesting a preliminary injunction, including an asset freeze, but the relief requested is overly broad.

1. THE COMMISSION HAS NOT ALLEGED ANY AMOUNT OF DISGORGEMENT AND IS NOT ENTITLED TO AN ASSET FREEZE

It is well settled that the Commission may obtain an asset freeze based on “producing a reasonable approximation of a defendant’s ill-gotten gains.” *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004); *see also ETS Payphones*, 408 F.3d at 735. In this case, while requesting an asset freeze of the Lloyd Defendants’ assets, the Commission has failed to provide any indication about the amount of disgorgement, much less any reasonable approximation of that number.

2. THE SCOPE OF THE REQUESTED ACCOUNTING IS OVERLY BROAD

The Commission has requested an accounting for the period commencing July 2010. There is no allegation of any wrongdoing by the Lloyds Defendants prior to July 16, 2011, the

effective date of the Dodd-Frank Act. As such, an accounting seeking an entire year prior to the allegedly violative conduct would be excessive.

C. THE COMMISSION'S ALLEGATIONS OF ONGOING CONDUCT ARE INADEQUATE

Significantly, most of the space of Plaintiff's Motion for Preliminary Injunction concern allegations of fraud and deceit by the Lloyd Defendants' co-defendants. Yet, of the space devoted to the Lloyds Defendants' conduct, the Commission's allegations of the Lloyds Defendants' ongoing conduct in favor of a preliminary injunction are extremely limited.

For instance, according to the Commission, the Lloyds Defendants did not respond to the Commission's "offer of an opportunity to provide evidence and legal arguments regarding the applicability of the Act to Defendants' transactions." [DE 4 at 3.] Of course, the Lloyds Defendants had no obligation to supply additional evidence or legal arguments to the Commission, and the fact that the Lloyds Defendants did not respond cannot be used to establish any ongoing conduct.

Moreover, the Commission has claimed that the Lloyds Defendants "have shown no indication that they intend to cease offering and executing retail commodity transactions despite being well aware of the investigation of their conduct for as long as a year." [DE 4 at 11.] However, based on the allegations in the Complaint, as well as the Motion, there are no allegations against the Lloyds Defendants of having ever offered or executed retail commodity transactions, as pointed out in Part II(B) of the Lloyd Defendants' Motion to Dismiss. *See* [DE 34 at 3-5.]

III. CONCLUSION

Based on the foregoing, Defendants Lloyds Commodities, LLC, Lloyds Commodities Credit Company, LLC, Lloyds Services, LLC, James Burbage and Frank Guardino respectfully request that the Court deny Plaintiff's Motion for Preliminary Injunction and enter such further relief as is fair and just.

Dated: January 22, 2013

Respectfully submitted,
SALLAH & COX, LLC
*Counsel for Lloyds Commodities, LLC,
Lloyds Commodities Credit Company, LLC,
Lloyds Services, LLC, James Burbage, and
Frank Gaudino*
2101 NW Corporate Blvd., Ste. 218
Boca Raton, FL 33486
561-989-9080 (Tele.)
561-989-9020 (Fax)

s/Joshua A. Katz
James D. Sallah, Esq. (Lead Counsel)
Fla. Bar. No. 0092584
jds@sallahcox.com
Joshua A. Katz, Esq.
Fla. Bar. No. 848301
jkatz@sallahcox.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have filed the foregoing and it was served by CM/ECF on January 22, 2013 on all counsel or parties of record on the attached service list.

s/Joshua A. Katz
James D. Sallah

SERVICE LIST

Service via CM/ECF

Brigitte Weyls, Esq.
Carlin R. Metzger, Esq.
Joseph A. Konizeski, Esq.
Rosemary Hollinger, Esq.
Thaddeus Glotfelty, Esq.
Counsel for Plaintiff U.S. Commodity Futures Trading Commission
US Commodity Futures Trading Commission
525 W Monroe Street, Suite 1100
Chicago, IL 60661
Phone: 312-596-0547
Fax: 312-596-0714
Email: jkonizeski@cftc.gov
Email: rhollinger@cftc.gov

Jeff C. Le Riche, Esq.
Peter L. Riggs, Esq.
Counsel for Plaintiff U.S. Commodity Futures Trading Commission
US Commodity Futures Trading Commission
4900 Main Street, Suite 500
Kansas City, MO 64112
Phone: 816-960-7745
Fax: 816-960-7754
Email: jleriche@cftc.gov
Email: priggs@cftc.gov

Jay Bruce Grossman, Esq.
*Counsel for Defendants' Hunter Wise Commodities LLC,
Hunter Wise Services, LLC, Hunter Wise Credit, LLC,
Hunter Wise Trading, LLC, Harold Edward Martin, Jr.,
and Fred Jager*
J.B. Grossman, P.A.
200 East Las Olas Boulevard, Suite 1660
Fort Lauderdale, FL 33301
Phone: 954-452-1118

Fax: 954-916-4448

Email: JBG@jbgrossmanpa.com

Richard Brian Carey, Esq.

Counsel for Defendant Blackstone Metals Group, LLC and Baris Keser

Carey Law Group, P.A.

801 Northpoint Parkway, Suite 7

West Palm Beach, FL 33407

Phone: 561-247-1266

Email: richard@rcareylaw.com

Jeffrey C. Pepin, Esq.

Counsel for Defendant Newbridge Alliance, Inc. and John King

The Law Offices of Paul J. Burkhart

800 Village Square Crossing

Palm Beach Gardens, FL 33410

Phone: 561-880-0155

Fax: 561-656-2070

Email: jpepin@paulburkhart.net

Bradford Cohen, Esq.

Counsel for David A. Moore and U.S. Capital Trust, LLC

Bradford Cohen Law

1132 SE 3rd Ave.

Fort Lauderdale, FL 33316-1110

Phone: 954-523-7774

Fax: 954-523-2656

Email: lawronin@aol.com

I further certify that I served the foregoing on the following parties who have not yet filed an appearance by U.S. mail as follows:

C.D. Hopkins Financial, LLC

Hard Asset Lending Group, LLC

Chadewick Hopkins

27 Coastal Drive,

Berlin, Maryland 21811