

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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2:33 pm, Sep 26, 2014

In the Matter of:)
)
)

DELAWARE DEPOSITORY)
SERVICES COMPANY, LLC)

Respondent.)
)
)

CFTC Docket No. 14- 32

**ORDER INSTITUTING PROCEEDINGS PURSUANT TO
SECTIONS 6(c) AND 6(d) OF THE COMMODITY EXCHANGE ACT, AS AMENDED,
MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that for a period of approximately 5 weeks, from in or about September 14, 2011 through October 13, 2011 (the “Relevant Period”), Delaware Depository Services Company, LLC (“DDSC”) violated Section 4(a) of the Commodity Exchange Act (“Act”), 7 U.S.C. §6 (2012). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondent engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, Respondent has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, Respondent consents to the entry of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, as Amended, Making Findings and Imposing Remedial Sanctions (“Order”) and acknowledge service of this Order.¹

¹ Respondent consents to the entry of this Order and to the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party; provided, however, that Respondent does not consent to the use of the Offer, or the findings or conclusions in this Order consented to in the Offer, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in bankruptcy or to enforce the terms of this Order. Nor does Respondent consent to the use of the Offer or this Order, or the

III.

The Commission finds the following:

A. SUMMARY

During the Relevant Period, Respondent violated Section 4(a) of the Act by confirming the execution of off-exchange financed commodity transactions with persons who were not eligible contract participants or eligible commercial entities as defined by the Act (“Retail Commodity Transactions”).

B. RESPONDENT

DDSC is a Delaware limited liability company with offices located at 3601 North Market Street, Wilmington, DE 19802. DDSC ships, receives and stores physical precious metals from its depository facilities located in Wilmington, Delaware. Respondent does not solicit or accept orders for the purchase or sale of metals. Respondent is not registered with the Commission.

C. OTHER RELEVANT ENTITY

Hunter Wise Commodities LLC (“Hunter Wise”) is a Nevada company that held itself out as “a physical commodity trading company, wholesaler, market maker, back-office support provider, and finance company.” Hunter Wise offered, entered into, and confirmed the execution of Retail Commodity Transactions involving gold, silver, platinum, palladium and copper throughout the United States using a network of telemarketing solicitors that it referred to as “Dealers.”

On February 19, 2014, the United States District Court for the Southern District of Florida entered summary judgment against Hunter Wise, finding that the transactions offered and entered into by Hunter Wise with retail customers were “retail commodity transactions” within the meaning of Section 2(c)(2)(D) of the Act. *CFTC v. Hunter Wise Commodities, LLC, et. al.*, 2014 WL 652888, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 33,101 (S.D.Fla., February 19, 2014) (NO. 12-81311-CIV).

D. FACTS

DDSC entered into an agreement with Hunter Wise to issue Position Reconciliation and Transfer Notices (“Notices”) to the retail customers of Hunter Wise. During the Relevant Period, DDSC sent Notices to certain of Hunter Wise’s customers that confirmed the execution of their Retail Commodity Transactions with Hunter Wise. Among other things, the Notices confirmed that a “transfer of commodities” had been made for the customer’s account as well as the transaction date, type of commodity traded, and the quantity of metals involved in the trade.

findings or conclusions in this Order consented to in the Offer, by any other party in any other proceeding.

The Notices did not pertain to any metals stored by DDSC. Rather, DDSC sent the Notices in reliance on information provided by Hunter Wise including trading account statements that were perceived by DDSC to reflect metals holdings of Hunter Wise. DDSC reviewed the total balance of metals reflected on these statements and compared that balance to Hunter Wise's obligations to its retail customers. If the total metal balance reflected on the trading account statements provided by Hunter Wise equaled or exceeded the total obligation Hunter Wise owed to its retail customers, DDSC would send Hunter Wise customers a Notice. These Notices were provided to DDSC by Hunter Wise.

DDSC voluntarily ceased sending the Notices and terminated its agreement with Hunter Wise after an internal review in October 2011. This review was prompted by an inquiry into the nature of the Notices by Commission Staff. Respondent further took additional voluntary measures, including substantial enhancements to its compliance program. Respondent did not receive any commission, fees or other form of compensation with respect to its activities involved in sending the Notices.

IV.

LEGAL DISCUSSION

A. The Hunter Wise Transactions Were Off-Exchange Retail Commodity Transactions

Effective July 16, 2011 the Dodd Frank Act extended the CFTC's jurisdiction to reach financed sales of commodities to retail investors², with limited exceptions. This authority, now at Section 2(c)(2)(D) of the Act, not only grants the CFTC jurisdiction over these transactions, but it also mandates that they be conducted on a registered board of trade by making these transactions subject to Section 4(a) of the Act.³ Retail commodity transactions (as described in Section 2(c)(2)(D) of the Act) which are not conducted on a registered board of trade are illegal.

The Hunter Wise transactions involved non-Eligible Contract Participants, i.e. retail customers, and the transactions were financed through loans. *CFTC v. Hunter Wise Commodities, LLC, et. al.*, 2014 WL 652888, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 33,101 (S.D.Fla., February 19, 2014) (NO. 12-81311-CIV); see also *CFTC v. Hunter Wise Commodities, LLC*, 749 F.3d 967 (11th Cir. 2014). Therefore, the transactions were subject to Section 4(a) of the Act "as if" they were futures contracts. 7 U.S.C. §2(c)(2)(D)(iii).

² A "retail customer" is a person that is not an Eligible Contract Participant ("non-ECP") as defined at section 1a(18)(A)(xi) of the Commodity Exchange Act, 7 U.S.C. § 1a(18)(A)(xi). Hunter Wise's retail customers did not have the \$5 million or more invested on a discretionary basis that is required to be an ECP.

³ If a transaction is conducted on an "exchange" or "board of trade," a regulated clearinghouse takes the opposite side of a customer's transactions, which eliminates the risk of default by a private counterparty.

B. Section 4(a) Prohibits Confirming the Execution of Off-Exchange Retail Commodity Transactions

Section 4(a) of the Act provides that unless the transaction is conducted on a regulated exchange, it is unlawful for *any* person to enter into, offer to enter into, execute, confirm the execution of, or conduct any office or business anywhere in the United States for the purpose of soliciting, or accepting any order for, or otherwise dealing in retail commodity transactions. 7 U.S.C. §6(a) (emphasis supplied).

C. Respondent Violated Section 4(a) of the Act

Respondent confirmed the execution of Retail Commodity Transactions in violation of Section 4(a) of the Act when it issued the Notices to retail customers of Hunter Wise.

V.

FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that, from September 14, 2011 through October 13, 2011, Respondent violated Section 4(a) of the Act, 7 U.S.C § 6(a).

VI.

OFFER OF SETTLEMENT

Respondent has submitted an Offer in which it, without admitting or denying the findings and conclusions herein:

- A. Acknowledges receipt of service of this Order;
- B. Admits the jurisdiction of the Commission with respect to all matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based on violation of or enforcement of this Order;
- C. Waives:
 - 1. the filing and service of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court;
 - 2. any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer;
 - 3. any and all claims that they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1-30 (2012), relating to, or arising from, this proceeding;

4. any and all claims that they may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-868 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), relating to, or arising from, this proceeding; and
 5. any claims of Double Jeopardy based on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;
- D. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondent have consented in the Offer;
- E. Consents, solely on the basis of the Offer, to the Commission's entry of this Order that:
1. makes findings by the Commission that Respondent violated Section 4(a) of the Act;
 2. orders Respondent to cease and desist from violating Sections 4(a) of the Act;
 3. orders Respondent to comply with the conditions and undertakings consented to in the Offer.

Upon consideration, the Commission has determined to accept the Offer.

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating Section 4(a) of the Act, 7 U.S.C. § 6(a).
- B. Respondent and its successors and assigns to comply with its undertakings as set forth below.
 - i. Public Statements: Respondent agrees that neither it nor any of its successors and assigns, agents or employees under its authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondents its successors and assigns shall undertake all steps necessary to ensure that all of its agents and/or employees under its authority or control understand and comply with this agreement.

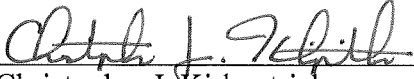
- ii. Contribution to the Hunter Wise Receiver: Respondent agrees to pay the amount of five hundred thousand dollars (\$500,000), within ten (10) days of the date of entry of this Order (“HW Receiver Contribution”).

Respondent shall make payment of the HW Receiver Contribution to Melanie Damian, Esq., the corporate receiver appointed by the court in CFTC v. Hunter Wise Commodities, LLC, No. 12-81311-CIV (S.D. Fla. May 16, 2014) (“Hunter Wise Receiver”). Respondents shall make such payments in the name of the “Delaware Depository Services Company, LLC HW Distribution Fund Administration Fund” and shall send such payments by electronic funds transfer, or U.S. postal money order, certified check, bank cashier’s check, or bank money order to Melanie Damian, Esq., Damian & Valori LLP, 1000 Brickell Ave. Ste. 1020, Miami, FL, 33131, under a cover letter that identifies Respondent and the name and docket number of this proceeding. Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581, as well as Rosemary Hollinger and Carlin Metzger, Commodity Futures Trading Commission, 525 W. Monroe, 11th Floor, Chicago, IL 60661. To the extent any funds remain at the conclusion of the receivership in the above referenced litigation, those funds shall be disposed of for the benefit of the Hunter Wise claimants as determined by the Receiver;

- iii. Cooperation with the Commission: Respondent shall cooperate fully and expeditiously with the Commission, including the Commission’s Division of Enforcement, and any other governmental agency in this action, and in any investigation, civil litigation, or administrative matter related to the subject matter of this action or any current or future Commission investigation related thereto.
- D. Partial Satisfaction: Respondents understands and agrees that any acceptance by the Commission or the Monitor of partial payment of HW Receiver Contribution shall not be deemed a waiver of its obligation to make further payments pursuant to this Order, or a waiver of the Commission’s right to seek to compel payment of any remaining balance.
 - E. Change of Address/Phone: Until such time as Respondent satisfies in full its HW Receiver Contribution as set forth in this Consent Order, Respondent shall provide written notice to the Commission by certified mail of any change to his telephone number and mailing address within ten (10) calendar days of the change.

The provisions of this Order shall be effective as of this date.

By the Commission.



Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 26, 2014