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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: NELSON BUNKER HUNT and CAROLINE LEWIS HUNT, DEBTORS	CASE NO. 388-35726-HCA-11 (CONSOLIDATED ADMINISTRATIVELY)
NELSON BUNKER HUNT, Plaintiff v. COMMODITY FUTURES TRADING COMMISSION, Defendant	ADVERSARY NO. 388-3744
IN RE: WILLIAM HERBERT HUNT and NANCY JANE BROADDUS HUNT, DEBTORS	CASE NO. 388-35725-HCA-11 (CONSOLIDATED ADMINISTRATIVELY)
WILLIAM HERBERT HUNT, Plaintiff v. COMMODITY FUTURES TRADING COMMISSION, Defendant	ADVERSARY NO. 388-3745

BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION TO PLAINTIFFS' REQUESTS' FOR RELIEF UNDER 11 U.S.C. §105(a)

A. INTRODUCTION

Nelson Bunker Hunt and William Herbert Hunt have contrived this proceeding solely for the purpose of creating a tension between the Bankruptcy Code and the Commodity Exchange Act (the "Act") where none exists. They attempt to avoid their potential liability under the latter statute. Under Chapter 11 of the Bankruptcy Code, this Court is expeditiously proceeding to reorganize the estates of Nelson Bunker Hunt and William Herbert Hunt. Simultaneously, and with the full blessing of Section 362(b)(4) of the Code, the Commodity Futures Trading Commission is engaged in an administrative proceeding under its enforcement powers to determine whether these same individuals (and others) violated the anti-manipulation provisions of the Commodity Exchange Act in connection with one of the most notorious market escalations or "bubbles" in American history.

The gravity of the matter to the CFTC and the American public cannot be overstated. The Seventh Circuit has described the manipulation of futures as a "vicious" market influence which can produce "abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand . . . ." G.H. Miller & Co. v. U.S., 260 F.2d 286, 297 (7th Cir. 1958). As overseer of commodity futures market activities, the CFTC is responsible for insuring the integrity of the prices of commodities arrived at in these markets by protecting all market participants against manipulations, abusive trade practice, and fraud in the market place and by encouraging their competitiveness and efficiency.

Moreover, even if this Court finds, after hearing all the evidence, that the estates may incur legal expenses in connection with defending against the CFTC complaint, that fact in and of itself should not form the basis for

entering equitable injunctive relief under these circumstances. The debtors bear an enormous burden of proof under Section 105 of the Code. As will be shown, however, the debtors have met none of the criteria established by the Fifth Circuit.

More to the point, injunctive relief is unwarranted as a practical matter. In the event that the Court believes that the current posture of the proceeding before the Administrative Law Judge ("ALJ") would be potentially disruptive to the Chapter 11 proceeding, it need only direct Commission counsel to request the agency to modify the procedures so as remove such an impediment. Illustratively, if the Court is concerned that the ALJ would, at some future point, consider the Hunt's net worth independently of this Court's assessment, it need only direct the undersigned counsel to request the Commission to direct the ALJ not to consider, nor to order any discovery on this question, until 30 days after written notification to this Court, the debtors, and the creditors, that the ALJ is ready to proceed on the question.

In short, the proper goal here should be to harmonize this Court's proceeding with the Commission's proceeding. Grant of the debtor's unsupported request for injunctive relief would clearly disserve the applicable statutes and the public interest. In the final analysis, there is no principle of law which entitles a debtor to hide behind a bankruptcy court as a vehicle to avoid potential enforcement liability.

B. PROCEDURAL HISTORY

The Commodity Futures Trading Commission (the "Commission" or "CFTC") submits this additional brief in opposition to the Hunts' requests for extraordinary relief under 11 U.S.C. §105(a).1/ These adversary proceedings were commenced on October 25, 1988, when plaintiffs Nelson Bunker Hunt (NBH) and William Herbert Hunt (WHH) each filed complaints for injunctive relief under 11 U.S.C. §105(a). In each complaint, the Court is requested to issue a temporary restraining order and/or preliminary injunction enjoining the Commission from continuing with its administrative enforcement proceeding, In re Nelson Bunker Hunt, et. al., CFTC Docket No. 85-12.2/ This Court then set these matters for a hearing on October 27, 1988.

The Commission's October 27 memorandum explained in detail the massive investigation of events that gave rise to the highly-publicized "silver bubble" of 1979-1980, which ultimately led to the filing of the administrative complaint. Its memorandum also explained how the trial schedule of the CFTC proceeding was delayed by numerous extension requests filed by the Hunts, and was further delayed by a lengthy trial of Minpeco, S.A v. N.B. Hunt, et al., 81 Civ. 7619 (MJL)(S.D.N.Y. 1988)("Minpeco"). Finally, it discussed the

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1/ This brief supplements the memorandum of the Commission provided to this Court on October 27, 1988 (the Commission's October 27 memorandum), which is incorporated by reference here. The Commission has also filed an Appendix to this brief which contains the CFTC administrative complaint against the Hunts, the Division of Enforcement's Motion for Summary Disposition, relevant provisions of the Commodity Exchange Act as codified in the United States Code, relevant legislative history of the Bankruptcy Code and of the Commission's civil monetary penalty statute, CFTC caselaw construing the civil monetary statute, and unpublished opinions construing the Bankruptcy Code.

2/ The administrative complaint in In re Hunt may be found in Attachment A of the CFTC appendix.

pendency of the Commission's Division of Enforcement's (the "Division") pending motion for summary disposition seeking to apply collateral estoppel to the special jury verdicts in Minpeco.

The Commission also showed that the Hunts had not satisfied the criteria for injunction under 11 U.S.C. §105(a) because they were not currently facing irreparable harm and because they had made absolutely no showing that they were substantially likely to prevail on the merits of either the underlying CFTC proceeding or their post-trial efforts in Minpeco. The memorandum also stressed that there was a strong public interest favoring allowing the Commission to continue its proceeding against the Hunts, given the sheer magnitude of the alleged manipulative scheme involved.

At the October 27, 1988 hearing, an issue was raised as to whether the Commission's potential need to inquire into the Hunts' net worth, as a prerequisite for imposing civil monetary penalties against them, would interfere with this Court's jurisdiction to adjudicate the same or similar issues. With the understanding that the Division would request the ALJ to extend the Hunts' obligation to file a response to the motion for summary disposition for 30 days,[3/] this Court granted the Commission's request for additional time to brief the issues. In addition, this Court set a briefing schedule and continued the hearing until November 7, 1988. As a separate matter, the Court in effect directed the Commission to address or explain:

3/ The Division filed such a request on October 28, 1988. The ALJ granted the request by order dated October 31, 1988. Currently, the Hunts are not required to file a response the summary disposition motion until December 7, 1988.

* the Commission's procedures for obtaining injunctions (cease and desist orders and trading prohibitions) and civil monetary penalties;

* the procedures after an injunction or civil monetary penalty is imposed by an ALJ;

* the procedures when those remedies are sought during the pendency of a bankruptcy;

* what is done about civil monetary penalties after imposition by the CFTC;

* the legislative mission behind the establishment of the CFTC;

* the legislative intent behind civil monetary penalties (whether they are for compensating victims or for punishment and deterrence);

* who receives the money when a civil money penalty is collected;

* the use of collateral estoppel in the Commission proceeding; and

* the question of success on the merits, irreparable injury, relative harm, and the public interest.[4/]

Because of the specific nature of this Court's questions about CFTC procedures, civil money penalties, and legislative intent behind assessment and collection of these penalties, and the Court's request for "a succinct statement of all these things,"[5/] the Commission has presented responses to these questions in a question and-answer format, which appears in Part C of this brief. In Part D, issues of the applicability of the automatic stay and the propriety of injunctive relief are briefed extensively.

4/ See generally Transcript of October 27, 1988 Hearing at 37-39; Transcript of October 28, 1988 Telephonic Conference at 4-7.

5/ Transcript of October 27, 1988 Hearing, at 38.

C. COMMODITY FUTURES TRADING COMMISSION RESPONSES TO SPECIFIC QUESTIONS ASKED BY THE COURT DURING THE OCTOBER 27, 1988 HEARING AND THE OCTOBER 28, 1988, TELEPHONIC CONFERENCE.

1. WHAT ARE THE PROCEDURES FOR ESTABLISHING LIABILITY IN CFTC ENFORCEMENT PROCEEDINGS BROUGHT PURSUANT TO THE COMMODITY EXCHANGE ACT?

The Commission's authority to take enforcement action and the general procedure to establish liability for any violations of the Commodity Exchange Act (the "Act"), or Commission rules are set out in Section 6(b) of the Act 7 U.S.C. §9. The rules of practice for enforcement proceedings are set forth in Part 10 of the Commission's rules, 17 C.F.R. Part 10.

The Commission commences an administrative action if it has "reason to believe" the law has been violated. The action formally begins when the Commission "authoriz[es] service of a complaint and notice of hearing upon one or more respondents." Section 6(b) of the Act, 7 U.S.C. §9; 17 C.F.R. § 10.21. This complaint sets forth the legal authority and jurisdiction under which the hearing is to be held and the conduct that is alleged to be in violation of the Act. 17 C.F.R. § 10.22.

The Commission's administrative enforcement cases are designated to be heard by an Administrative Law Judge (ALJ). The prosecution of the complaint is undertaken by the Commission's Division of Enforcement. Following service of the complaint, the respondent is afforded an opportunity to file an answer. 17 C.F.R. § 10.23.

Virtually all substantive discovery by the Division is completed before issuance of the administrative complaint. See generally, 17 C.F.R. Part 11 (governing Commission investigations). Commission Rule 10.42 then governs post-complaint discovery in the proceeding. 17 C.F.R. § 10.42. Under that rule, an ALJ may order the parties to file prehearing memoranda. In addition, 17 C.F.R. § 10.42(b) provides that, unless otherwise ordered, the Division of Enforcement "shall make available to respondents prior to the scheduled hearing date" copies of testimony and exhibits obtained during the Commission's investigation which preceded the filing of the complaint. The Commission has interpreted this rule to encompass the production by the Division of "any material of which it is aware that is arguably exculpatory as to either guilt or punishment." In re First Guaranty Metals, Co, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,074 at 24,340 (CFTC July 1980).

Apart from the required disclosures of the investigatory files, the Commission's rules limit pretrial discovery to the exchange of requests for admissions, 17 C.F.R. § 10.42(c), and to the taking of depositions or interrogatories to preserve testimony that will be unavailable at the hearing, 17 C.F.R. § 10.44. The rules also provide for the filing of motions for summary disposition, analogous to motions for summary judgment under the Federal Rules of Civil Procedure. 17 C.F.R. § 10.91.

At the hearing, any party has the right to notice, to be represented by counsel, to cross-examine witnesses, to present oral and documentary evidence, to subpoena witnesses, and to make argument. 17 C.F.R. §§ 10.66, 10.68. Evidence that is "[r]elevant, material and reliable ... shall be admitted." 17 C.F.R. § 10.67.

Following the hearing, any party may file proposed findings of fact and conclusions of law and briefs in support of those proposed findings and conclusions. 17 C.F.R. § 10.82. The ALJ must then write an initial decision which determines liability and, if warranted, impose sanctions. As noted, under Sections 6(b) and 6(c) of the Act, 7 U.S.C. §§ 9, 13b, all sanctions must be assessed "upon evidence received," i.e., after evidence establishing liability for the substantive violation of the Act (e.g., alleged manipulation) is received. In cases where the ALJ finds liability and determines that a civil monetary penalty is warranted, the ALJ has discretion to hold a separate sanctions hearing for that purpose. In re Rothlin [1982-1984 Transfer Binder] Comm. Fut. Rep. (CCH) ¶ 21,851 (CFTC 1981)]. See CFTC Appendix, Attachment H.) The ALJ's initial decision becomes the final order of the Commission unless a party files a Notice of Appeal with the Commission, or unless the Commission takes review of the case on its own motion. 17 C.F.R. § 10.84.

On appeal, the Commission undertakes review of the whole record and "may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part." 17 C.F.R. § 10.104. The Commission may also "make any findings or conclusions which in its judgment are proper based on the record in the proceeding." 17 C.F.R. § 10.104(b). The Commission's final order may be appealed to the United States Courts of Appeals where the court "shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the findings of the Commission, as to the facts, if supported by the weight of the evidence, shall in like manner be conclusive." Section 6(b) of the Act, 7 U.S.C. § 9.

2. WHAT SANCTIONS MAY BE IMPOSED UNDER THE COMMODITY EXCHANGE ACT?

Once liability for violations of the Act has been established "[u]pon evidence received," under sections 6(b) and 6(c) of the Act, 7 U.S.C. §§ 9, 13b, the Commission may assess against the violator one or more of the following sanctions: 1) a cease and desist order against further violations; 2) a ban on further trading on the Nation's futures markets; 3) a suspension or revocation of the violator's registration if he is registered with the Commission; and 4) a civil monetary penalty "of not more than $100,000 for each such violation."

3. WHAT FACTORS MUST THE COMMISSION CONSIDER IN ASSESSING CIVIL MONETARY PENALTIES?

In the case of civil monetary penalties only, Section 6(d) of the Act, 7 U.S.C. §9a, mandates that the Commission "shall consider" for persons whose primary business involves the futures markets (a) "the appropriateness of such penalty to the size of the business of the person charged," (b) "the extent of such person's ability to continue in business," and (c) "the gravity of the violation." Alternatively, for persons whose primary business does not involve the use of the futures markets, Section 6(d) provides that the Commission "shall consider" (a) "the appropriateness of such penalty to the net worth of the person charged," and (b) "the gravity of the violation."

4. WHAT IS THE CONGRESSIONAL POLICY BEHIND CIVIL MONETARY PENALTIES UNDER THE COMMODITY EXCHANGE ACT?

The civil monetary penalty provisions were added to the Commodity Exchange Act in 1974. At that time, Congress comprehensively overhauled the Act and established the CFTC as an independent regulatory agency to succeed the previous administration of that statute by the Commodity Exchange Authority ("CEA"), a component of the Department of Agriculture. The legislative history reveals that the House Committee on Agriculture addressed the purpose of civil monetary penalties in two critical passages. First, the Committee solicited, received and considered the views of the General Accounting Office. In that regard, the Comptroller General informed the Committee that

> The basic function of commodity regulation is to preserve the price-basing and hedging services of the commodity futures markets. To preserve these services, CEA is dependent upon its ability to identify and deter violations of the act. Under current law when violations occur CEA may issue a cease and desist order or suspend or revoke the violator's right to continue in business or to use the futures markets. We believe that additional enforcement powers such as injunctions and civil penalties (fines) would be desirable to provide an effective means of preventing market price disruptions and protecting the market user.

Id. at pp. 67-68.

Additionally, the Committee considered and reprinted the comments of the Administrator of the CEA, who explained the purpose of civil penalties as follows:

> I favor giving the Secretary [of Agriculture] authority to impose money penalties in administrative proceedings. This would enable Administrative Law Judges, acting for the Secretary, to levy a sanction that better fits the violation. Under current law the only sanctions available are (a) a cease and desist order or (b) suspending or revoking the right to continue in business or to continue using the futures markets. With civil money penalties as an

> additional sanction, Administrative Law Judges can impose (a) a sanction on persons whose business involves using futures markets that is more stringent than a cease and desist order but less stringent than putting the violator out of business and (b) a heavier sanction on persons who would be penalized seriously by a suspension of their right to trade or do business."

H. R. Rep. No. 975, 93rd Cong. 2d Sess., pp. 51-52.

Acting on these concerns, Congress ultimately expanded the Commodity Exchange Act so as to deter violations by providing that upon proof that a person violated the Act, the Commission "may assess such person a civil penalty of not more than $100,000 for each such violation." Section 6(b), 7 U.S.C. § 9.

5. DO ANY OTHER FACTORS INFLUENCE ASSESSMENT OF CIVIL MONETARY PENALTIES?

The Commission has recognized that civil monetary penalties further "the remedial policies of the Act" and "deter others in the industry from committing similar violations of the Act." In re Brody, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,081 at 32,182 (CFTC 1986). (See CFTC Appendix, Attachment E.) The Commission fixes sanctions "on a case-by-case basis," and generally attributes "significant weight to the ALJ's choice of sanctions." In re Thomson McKinnon Futures, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,753 at 33,970 (CFTC 1987). See CFTC Appendix, Attachment F.)

In assessing the gravity of an offense, the Commission reviews the nature of the violation as well as the violator's intent. In re Bamaodah, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,010 at 31,997 (CFTC 1986). (See CFTC Appendix, Attachment G.) Moreover, in determining gravity the Commission has held that "[c]onduct that violates the core provisions of the Act's regulatory system--such as manipulating prices or defrauding customers--should be considered very serious even if there are mitigating facts and circumstances." In re Premex, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,165 at 34,890 (CFTC 1988)(See CFTC Appendix, Attachment M.)

The Commission considers Section 6(d)'s net worth requirement a protective device which safeguards respondents "from the imposition of excessive monetary penalties when considered in relation to their financial resources." In re Rothlin, supra, 27,573. The net worth provision is thus in the nature of an affirmative defense that must be invoked by the respondent. In re Rosenthal, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,221 at 29,190 (CFTC 1984)(See CFTC Appendix, Attachment I.).

Finally, the Commission has held that "the imposition of a civil monetary penalty should be considered with due regard for its collection." In re Nelson Ghun & Associates, Inc., [1984-1986 Transfer Binder] Comm.

Fut. L. Rep. (CCH) ¶ 22,255A at 29,341 (CFTC 1984) (Nelson Ghun I). (See CFTC Appendix Attachment J.) In this regard, the Division of Enforcement is required to introduce at the hearing any information that it has obtained through its investigation, or from the Commission's own files, which might bear on collectability. In re Nelson Ghun & Associates, Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,584 at 30,526 (CFTC 1985). (Nelson Ghun II) (See CFTC Appendix, Attachment K.) The Commission has also specifically noted that "[a] finding that a civil penalty would not be collectable does not preclude its imposition. In imposing such an uncollectable penalty, however, the ALJ should state a rationale for his action." In re Valk, [Current Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 24,043 at 34,596 (CFTC 1987)(See CFTC Appendix, Attachment L.)

6. HOW IS NET WORTH ESTABLISHED?

As outlined in In re Rothlin, supra, certain fundamental concerns must be addressed in the assessment of net worth. As an initial matter, whenever the Division of Enforcement seeks the imposition of a civil monetary penalty, it must make a recommendation to the ALJ specifying the amount it believes is warranted in light of the gravity of the offense. This recommendation must also take into account the collectibility of any penalty ultimately imposed as well as the Commission's precedent in analogous cases. Nelson Ghun II at 30,527.

A respondent confronted with the likelihood that a monetary penalty will be imposed may then invoke his rights under Section 6(d) to assert that the proposed penalty is excessive. As the Commission stated in Rothlin,

> Once invoked, the burden falls to respondent, at least at the outset, to produce such evidence and to create such a record as may be necessary to enable the Commission and its Administrative Law Judges to consider that party's net worth ... in conjunction with the penalty which the gravity of the offense would otherwise demand.

In re Rothlin, at 27,573. In Nelson Ghun II, the Commission emphasized that if a respondent does not present evidence that a proposed civil penalty is too severe for his financial circumstances, then under Rothlin he will have waived the opportunity available under Section 6(d) of the Act to rely on this factor. Id. at 30,525. The Commission's policy of placing the burden of going forward with evidence of net worth on the respondent derives from the view that the respondent is uniquely in possession of such evidence, and follows Sellersburg Stone Co. v. Federal Mine Safety & Health Review Comm., 736 F.2d 1147, 1152-53 and n. 14 (7th

Cir. 1984).6/ Once the parties have developed a record on net worth, the ALJ renders a decision which may be appealed to the Commission pursuant to 17 C.F.R. § 10.102.

7. WHAT ARE THE PROCEDURES FOR COLLECTING CIVIL MONETARY PENALTIES ONCE LIABILITY IS ESTABLISHED?

Under section 6(d), 7 U.S.C. § 9a, if a respondent fails to pay a civil monetary penalty, the Comission must refer the matter of collection of civil monetary penalties to the Attorney General, "who shall recover such penalty by action in the appropriate United States district court."

8. WHO COLLECTS CIVIL MONETARY PENALTIES?

The Attorney General of the United States seeks to collect civil monetary penalties imposed by the Commission in judicial proceedings which are entirely independent from the Commission's administrative enforcement proceedings.

9. ARE CIVIL MONETARY PENALTIES IN THE NATURE OF A RECOVERY OF PECUNIARY LOSS?

Civil monetary penalties are not in the nature of a recovery of pecuniary loss. Civil monetary penalties are remedial in nature and are imposed as a deterrent to violations of the Act. In re Brody, supra, at 32,182. Civil monetary penalties do not constitute restitution or compensation for actual pecuniary loss. Rather, a civil monetary penalty "connotes payment to the government, not payment to private parties who may have been wronged." In re Premex, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,992 at 28,368-69 (CFTC 1984), affirmed in part, reversed in part and remanded on other grounds, 785 F.2d 1403 (9th Cir. 1986)(See CFTC Appendix, Attachment N.). The funds do not become a part of the Commission's operating budget.

10. WHO RECEIVES THE FUNDS ONCE A CIVIL MONETARY PENALTY IS COLLECTED?

Civil monetary penalties are paid into the Treasury of the United States pursuant to 31 U.S.C. §3302(b)(1982). See, e.g., In re Premex,

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6/ But see Premex, Inc. v.CFTC, 785 F.2d 1403 (9th Cir. 1986) (CFTC as proponent of monetary penalty, must produce evidence that penalty is reasonable). On remand in Premex, the Commission stated that it does not agree with the Ninth Circuit's interpretation of Section 6(d) of the Act, citing In re Rothlin, supra. See [Current Binder] Comm. Fut. L. Rep. (CCH) ¶24,165 at 34,887 n.2 (CFTC 1988). (See CFTC Appendix, Attachment M.)

¶21,992 at 28,368-69. The funds do not augment or become a part of the Commission's operating budget.

11. WHAT IS THE COMMISSION'S POLICY REGARDING ESTABLISHING LIABILITY FOR, AND COLLECTING, CIVIL MONETARY PENALTIES DURING A BANKRUPTCY?

The Commission has not articulated a blanket policy for dealing with the effect of bankruptcy proceedings on civil penalties. In one case, In re Incomco, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,901 (CFTC 1987)(see CFTC Appendix, Attachment O), the Commission amended a complaint to withdraw a request for civil penalties against a firm registered with the Commission as a futures commission merchant. However, the assets of the firm were already in the hands of a bankruptcy trustee and the firm asserted that it was defunct. See CFTC v. Incomco, Inc., 649 F.2d 128 (2d Cir. 1981). Here, in contrast, the Hunt respondents apparently have substantial assets and are seeking to reorganize. In this circumstance, the Attorney General may file a claim with the bankruptcy court to collect any civil monetary penalty imposed by the Commission. Moreover, since a civil penalty is non-dischargeable, 11 U.S.C. §523(a)(7), and could be recovered after the conclusion of the Hunts bankruptcy. This was not the case in Incomco.

12. ASSUMING THAT THE COMMISSION FINDS LIABILITY WARRANTING A CIVIL MONETARY PENALTY, WHAT IMPACT WOULD AN ATTEMPT TO COLLECT THAT MONETARY PENALTY HAVE ON THE HUNTS' BANKRUPTCY ESTATES, REORGANIZATION PLANS, AND OTHER CREDITORS?

Assuming that the Commission finds liability warranting a civil monetary penalty, no attempt to collect or enforce the penalty (outside the Bankruptcy Court's reorganization plan or claims procedure) could occur during the pendency of the Hunts' bankruptcy proceedings because of the automatic stay provisions of 11 U.S.C. § 362(a).

The civil monetary penalty would constitute a non-dischargeable debt. 11 U.S.C. § 523(a)(7). Upon the Hunts' discharges from bankruptcy, or this Court's lifting of the automatic stay, the Attorney General would remain free to proceed with an action in the United States district court to collect any outstanding civil monetary penalty.

ARGUMENT

I. THE ONGOING CFTC ENFORCEMENT CASE AGAINST THE HUNTS IS NOT SUBJECT TO THE AUTOMATIC STAY PROVISIONS OF 11 U.S.C. §362(a).

Before proceeding to the main issue presented by the Hunts' complaints, namely, the propriety of injunctive relief against the Commission under 11 U.S.C. §105(a), this memorandum addresses the Court's inquiry as to the applicability of the automatic stay provision of 11 U.S.C. §362(a) to the Commission's administrative enforcement case.

Section 362(a) of the Bankruptcy Code, provides that a voluntary petition in bankruptcy operates as a stay, applicable to all entities, of

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title . . .

11 U.S.C. §§362(a)(1)-(a)(2). Nonetheless, section 362(b)(4) of the Bankruptcy Code carves out a broad exception to the automatic stay in the case of "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." Moreover, once a governmental unit obtains a judgment (other than a money judgment) against the debtor, section 362(b)(5) of the Code specifically authorizes the governmental unit to enforce that judgment, notwithstanding 11

U.S.C. §362(a)(2).[1] EEOC v. Rath Packing Co., 787 F.2d 318, 326 (8th Cir. 1986, cert. denied, 107 S.Ct. 307 (1986); NLRB v. Evans Plumbing Co., 639 F.2d 291, 293 (5th Cir. Unit B 1981).

As explained in the Commission's October 27 memorandum, the CFTC is an agency of the United States government, see 7 U.S.C. §2, and thus indisputably qualifies as a "governmental unit" for purposes of 11 U.S.C. §§362(b)(4) and (b)(5). Moreover, as will now be shown, the Commission's ongoing administrative proceeding against the Hunts qualifies as a "proceeding . . . to enforce . . . [a] "police or regulatory power."

The legislative history of section 362(b)(4) makes clear that the exception to the automatic stay applies to administrative proceedings brought to enforce a variety of regulatory laws. Thus, as both the House and Senate Reports agreed,

> where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

H. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977); S. Rep. No. 989, 95th Cong. 2d. Sess. 52 (1978)(emphasis added). Similarly, the courts have held that the term "police or regulatory power" as used in Section 362(b)(4) is to be broadly construed. See Penn Terra v. Dept. Environmental Resources, 733 F.2d

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[1] The legislative history of the Bankruptcy Code is exceedingly clear on this point. The §362(b)(5) exception "extends to permit an injunction and enforcement of an injunction, and to permit the entry of money judgment, but does not extend to permit enforcement of a money judgment." H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1977)(emphasis added).

267, 273 (3d Cir. 1984). In addition, "[t]he exception from the automatic stay for proceedings to enforce police and regulatory powers is not . . . limited to those situations where imminent and identifiable harm" to the public is shown." In re Commonwealth Oil Refining Company, Inc. 805 F.2d 1175, 1184 (5th Cir. 1986)("CORCO").8/

The Commission's proceeding passes these tests with flying colors. It was brought to enforce the federal anti-manipulation laws, matters over which the Commission has exclusive regulatory jurisdiction.9/ One U.S. circuit court and one U.S. district court have already acknowledged that CFTC

8/ This Court has also inquired as to whether it was proper for the ALJ, rather than this Court, to rule on whether the Commission proceeding against the Hunts was not automatically stayed by the Hunts' filing of voluntary bankruptcy petitions on or about September 21, 1988. Significantly, the ALJ made a determination of this issue because the matter of the automatic stay was raised by the Hunts, and the ALJ was therefore forced to address the issue in determining whether he could proceed.

In any event, there was nothing improper about this procedure. As the Sixth and the Second Circuits both have recognized:

> The court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay.

NLRB v. Edward Cooper Painting, 804 F.2d 934, 939 (6th Cir. 1986); In re Baldwin-United Corp. Litigation, 765 F.2d 343, 347 (2d Cir. 1985). Moreover, as a practical matter, the ALJ's determination that the CFTC proceeding is not subject to the automatic stay had harmless consequences for this proceeding in light of the ALJ's order entered October 31, 1988, postponing the Hunts' obligation to respond to the Division of Enforcement's motion for summary disposition.

9/ The Commodity Exchange Act also makes the violation of the anti-manipulation laws a felony. See 7 U.S.C. §13(b). The CFTC has no authority to prosecute criminal violations, and its proceeding against the Hunts is purely civil and remedial.

administrative enforcement proceedings, like the one involved here, fall within section 362(b)(4)'s exception to the automatic stay. See CFTC v. Incomco, Inc., 649 F.2d 128, 133 (2d Cir. 1981); In re Appeal of Chicago Discount Commodity Brokers, Inc., No. 81 C 0600 (N.D. Ill. Nov. 18, 1981)(included in CFTC Appendix at Attachment P).

Nelson Bunker Hunt nonetheless asserts that the Commission's proceeding against the Hunts is subject to the automatic stay because it is aimed at protecting an alleged pecuniary interest in their estates.10/ This argument is specious. The sanctions sought in the CFTC proceeding include civil remedies in the nature of injunctive relief (a permanent cease and desist order against further violations of the anti-manipulation laws and a permanent prohibition from trading on the U.S. future markets). These remedies, if ultimately imposed against the Hunts after liability is established, will involve no claim on the assets of the Hunts' estates. Thus, neither remedy involves any pecuniary interest of the government in either debtor's assets.

Even the imposition of a civil monetary penalty against the Hunts would not transform the CFTC proceeding against them from one that enforces a governmental unit's police or regulatory powers into a proceeding exclusively "to protect a pecuniary interest in the debtor's property or estate." 124 Cong. Rec. H11,089; In re Commerce Oil Co., 847 F.2d 291, 296 (6th Cir.

10/ Significantly, neither of the complaints asserts that the Commission's administrative proceeding is subject to the automatic stay, and neither complaint requests this Court to enforce such a stay. Rather, both seek only an injunction under 11 U.S.C. §105(a). Moreover, although the memorandum supporting Bunker Hunt's complaint pays lip service to a possibility that the automatic stay may apply, the brief supporting William Herbert Hunt's complaint expressly concedes that the CFTC's proceeding is exempt from the automatic stay. See William Herbert Hunt Brief at pp. 9-10.

1988).[11] The CFTC has no pecuniary interest in the Hunt's estates. The Division has not yet established the liability of the Hunts and no civil monetary penalty has yet been assessed.[12] Moreover, as explained above, civil monetary penalties are sanctions that are punitive and deterrent, rather than pecuniary, in nature. They do not provide compensation to the victims of violators of the Act or to the Commission but, rather, penalize past wrongdoing and discourage future wrongdoing. They are payable to the U.S. Treasury and do not augment the CFTC's budget in any way. For this reason, any civil monetary penalties ultimately assessed against the Hunts would not establish a pecuniary interest of the government in the debtor's estate.[13]

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[11] In CORCO, the Fifth Circuit ruled that the "pecuniary interest" exception to the § 362(b)(4) exception to the automatic stay was limited to proceedings aimed solely at protecting a pecuniary interest of the government in the debtor's estate. 805 F.2d at 1184 n.7.

[12] For this reason, the CFTC proceeding cannot be considered a proceeding "to enforce a money judgment" as counsel for Manufacturers Hanover argued at the October 27 hearing. See In re Compton Corporation, et al., No. CA4-86-647-K (N.D. Tex. Aug. 9, 1988) slip opin. at 14-16 (See Attachment Q in CFTC Appendix); see also NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 943 (6th Cir. 1986).

[13] This is borne out by the legislative history of section 362(b)(4), discussed above, which provides that proceedings "attempting to fix damages for violations" of police or regulatory laws are within the exception to the automatic stay. H.R. Rep. No. 595, 95th Cong., 1st Sess. 342-3 (1977); S. Rep. No. 989, 95th Cong., 2d. Sess. 51-52 (1978). To the extent that the Bankruptcy Court in In re Commonwealth Cos., 80 B.R. 162, 164 (Bankr. D.Neb. 1987), suggests otherwise, it has committed clear error.

II. THE HUNTS HAVE NOT SATISFIED THE REQUISITE CRITERIA FOR INJUNCTIVE RELIEF PURSUANT TO 11 U.S.C. §105(a).

Because, as shown, the automatic stay clearly does not apply to the Commission's proceeding against the Hunts, the only remaining issue is whether the Hunts have made the requisite showing to justify their requests for extraordinary relief in the nature of a temporary injunction under 11 U.S.C. § 105(a). Under controlling precedent in the Fifth Circuit, the Hunts are required to make a strong showing that: 1) they are substantially likely to prevail on the merits; 2) there is a substantial threat that they will suffer irreparable injury if an injunction is not granted; 3) the threatened injury to the Hunts outweighs the threatened harm an injunction may cause to the party opposing an injunction; and 4) the granting of an injunction will not disserve the public interest. CORCO, 805 F.2d at 1189.

In its October 28 telephonic conference with counsel, the Court specifically requested briefing on the question of whether the Hunts have shown a substantial likelihood of success on the merits. As the Fifth Circuit has made clear, this is a central issue under 11 U.S.C. §105(a) because if the movants for an injunction cannot make the requisite showing of a substantial likelihood of success on the merits, this Court "need not address the remaining requirements for a §105 stay." CORCO, 805 F.2d at 1189-90.

A. The Hunts Have Not Made The Necessary Showing Of Substantial Likelihood of Success On The Merits.

In any consideration of whether a movant under 11 U.S.C. § 105(a) has shown a substantial likelihood of success on the merits, the first inquiry must be to identify what is meant by the term "merits." The Fifth Circuit has

resolved this inquiry by recognizing that to obtain relief under § 105(a), the movants must show a substantial likelihood of success on the merits of the underlying enforcement action. 805 F.2d at 1189. Thus, at a minimum, the Hunts must show a substantial likelihood of prevailing on the merits of the CFTC proceeding.14/

None of the Hunts' papers even address the likelihood that they will prevail on the merits of the underlying CFTC enforcement action. For this reason alone, their complaints should be summarily dismissed. What discussion there is is limited to the likelihood of succeeding on the merits of the Minpeco post-trial and appellate litigation and the narrow consequences that future events in Minpeco may have on the Division of Enforcement's pending motion for summary disposition. The fatal deficiency of this approach is that it completely sidesteps the question of whether the Hunts are substantially likely to prevail in the CFTC proceeding, even in the unlikely event that Minpeco is reversed and the Division is required to proceed with full-scale trial procedures. Under CORCO, this inquiry should therefore end. 805 F.2d at 1189.

Even if the likelihood of success on the merits of the Minpeco post-trial motions and appeals are assumed relevant to the propriety of §105(a) relief here, the Hunts have not made a colorable showing of a substantial likelihood of prevailing in Minpeco. The affidavit of Aaron Rubinstein itself speaks

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14/ Because this Court, during the October 28 telephone conference, expressed interest in Judge Carlson's approach in In re Security Gas & Oil Inc., 70 B.R. 786, 793 n.3 (Bankr. N.D. Cal. 1987), which extends the "success on the merits" concept to enforcement actions that unduly interfere with the bankruptcy adjudication, we address all of the Hunts' "success on the merits" contentions below.

only in terms of a mere possibility, rather than a likelihood, that the Minpeco verdicts may be modified as a result of their post-trial efforts in the Minpeco proceeding. (See Rubinstein Affidavit filed on behalf of WHH at 6,9). The respective complaints filed by the Hunts, and their respective supporting briefs, state nothing other than counsels' unsupported and self-serving belief that "there is a substantial likelihood" of reversal of the Minpeco verdicts. Bare assertions of this nature provide this Court no probative information about a likelihood of success of overturning these verdicts. They cannot be permitted to substitute for the strong showing of a substantial likelihood of prevailing that is required by § 105(a).

If anything, the Rubinstein affidavit, although filed on behalf of the Hunts, supports the conclusion that the Division is likely to succeed in its efforts to obtain summary judgment on the liability issues in the Commission proceeding through the use of collateral estoppel. According to the affidavit:

> The CFTC enforcement proceeding arises out of events in the market for silver and silver futures contracts in 1979 and 1980. At that time, there was an unprecedented increase in the price of silver and silver futures contracts. In its enforcement proceeding, the CFTC has alleged that the Debtors were members of a conspiracy, the goal of which was to manipulate the price of silver and silver futures contracts in violation of the Commodities Exchange Act ("CEA"). The CFTC enforcement action seeks a finding that the Debtors and the other respondents in the proceeding violated the CEA, seeks an injunction prohibiting the Debtors and the other respondents from any future trading in commodity futures contracts, and seeks penalties of as much as $50 million.15/

15/ The Division of Enforcement has made no request to date that the ALJ impose civil monetary penalties, much less specified an amount.

> The CFTC enforcement proceeding is related, in terms of allegations, as well as applicable legal principles, to a series of civil damage actions against the Debtors and others, all of which are pending in the United States District Court for the Southern District of New York. Among those civil actions is a case entitled Minpeco S.A. v. Nelson Bunker Hunt et al., in which a six month jury trial was recently concluded. Like the CFTC, the plaintiff in Minpeco alleged that the Debtors and others engaged in a conspiracy to increase the price of silver and silver futures contracts. The jury in the Minpeco case returned a verdict for the plaintiff in the amount of $132.45 million (after trebling under the antitrust laws and RICO and after the deduction of settlements which the plaintiff had received from others whom it had named as defendants). Judgment was entered in the Minpeco action in the amount $132.45 million before the Debtors filed their petitions for relief under the Bankruptcy Code.
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> As explained above, a civil jury in the Minpeco action returned a verdict which found, among other things, that the Debtors were engaged in a conspiracy to manipulate the price of silver. Similar allegations are raised in the CFTC enforcement action. In addition to that core issue, there are numerous other overlapping issues between the Minpeco action and the CFTC enforcement proceeding, such as the debtors' state of mind, the forces other than the respondents' trading which influenced the price of silver, the nature, size and scope or the market for silver, whether or not the price of silver was over "artificial," as that term is defined under the CEA, and a host of other subsidiary issues.

(Rubinstein Affidavit filed on behalf of WHH, at 1-3, 5.)

This testimony, which concedes the substantial similarity of the charges and the factual issues involved in both the Minpeco action and the CFTC proceeding, in and of itself establishes that the Division of Enforcement had substantial legal justification for filing its motion for summary disposition seeking to apply collateral estoppel.16/ Stated another way, in view of the

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16/ A copy of the Division of Enforcement's Motion for Summary Disposition may be found in Attachment B of the CFTC's Appendix filed with this memorandum.

remote possibility that the jury verdicts will be overturned, the Rubinstein affidavit tends to support the underlying merits of the Division's position, i.e., that preclusive effect should be accorded to the Minpeco verdicts.

The Hunts' also argue that, because of the pendency of their post-trial motions, the Division of Enforcement's motion for summary disposition based on collateral estoppel is premature as a matter of law, and therefore must be denied.17/ The case law does not demonstrate that the Hunts are likely to succeed on this point either. As their briefs concede, the Restatement (Second) on Judgments, 1981, § 13, comment f, and most state court cases allow collateral estoppel to be applied pending resolution of post-trial motions.18/

Thus, the authorities cited by the Hunts on this point, even viewed in the most favorable light, suggest only that the ALJ may take into account the pendency of post-trial motions when he evaluates the merits of a collateral estoppel motion. Conspicuously absent from the Hunts' papers is any authority that holds, as a matter of law, that the ALJ may not impose collateral estoppel under the current circumstances.

The two federal cases cited by the Hunts do not compel a different result. Rather, they illustrate that the pendency of a post-trial motion is, at most, one of many factors to be considered in determining whether it is

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17/ The Hunts' counsel raised this issue in a letter to the ALJ before the Division filed its motion, but the ALJ did not issue any ruling on this point. The Hunts have not renewed their contention since the Division's motion was filed on October 13, 1988.

18/ Other commentators are more uncertain as to what course a court should follow, and federal cases are very few. 1B Moore's Federal Practice ¶ 0.416[3], at 520; 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4432, at 302.

appropriate to employ collateral estoppel. In each case, the court specifically noted that the judgment which served as the basis for the collateral estoppel motion had been inconsistent with other judgments on the same issue, a key consideration set out in Parklane Hosiery v. Shore, 439 U.S. 322, 330 (1979). Here, in contrast, the Hunts have never been exonerated of manipulation in any litigated case. Grill v. United States, 516 F. Supp. 15, 17 (E.D.N.Y. 1981), aff'd without opinion, 697 F. 2d 300 (2d Cir. 1982);[19/] Trebesch v. Astra Pharmaceutical Prods., 503 F. Supp. 79 (D. Minn. 1980).

Similarly, should the Minpeco judgment be appealed, the commentators and federal cases are firm in the view that the pendency of an appeal does not preclude a judge from granting a motion to apply collateral estoppel. Hunt v. Liberty Lobby, Inc., 707 F.2d 1493, 1497 (D.C. Cir. 1983); 1B Moore's Federal Practice ¶ 0.416[3], at 521. The Commission has also so ruled in a prior case. In re Luizzi, [1982-84 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,833 at 27,512 (CFTC January 27, 1981), citing Pregar v. El Paso Nat'l Bank, 417 F.2d 1111, 1112 (5th Cir. 1969).

Finally, the Hunts assert that they have shown a substantial likelihood of success on the merits on a theory that the Commission's discretion to impose monetary sanctions "threatens" this Court's exclusive jurisdiction over

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19/ In fact, in yet another case where a plaintiff sought to impose collateral estoppel based on the same underlying action that was involved in Grill, the court, only a month after Grill, refused to apply collateral estoppel solely because of the presence of inconsistent judgments. In that subsequent case, the post-trial motions were apparently not even an issue. Young v. United States, 518 F. Supp. 921 (S.D.N.Y. 1981).

debtors' solvency and net worth formulations.[20] This claim is a red herring. Even though a net worth consideration must be undertaken prior to assessment of a civil monetary penalty, it does not follow that the Commission's procedure for consideration of the Hunts' net worth will interfere with this Court's resolution of similar issues. As an initial matter, the ALJ does not consider such matters unless and until liability has been established. Liability will not be established until the ALJ resolves the pending summary disposition motion and/or an administrative trial is concluded. Because the ALJ's resolution of the liability issues is, at a minimum, months away, it is disingenuous for the Hunts to assert that this Court faces an immediate threat to its authority to determine the valuation of the Hunts' assets.

Moreover, even if liability is ultimately established, there is no reason to assume that the ALJ or the Commission would undertake to separately unravel the Hunts' extraordinarily complicated financial circumstances while this Court is evaluating claims against the debtors (including their validity) and the assets which constitute property of the estates. If this Court has reached these determinations before a finding of liability in the CFTC proceeding, it is likely that the Commission would rely substantially if not exclusively on this Court's evaluation of the Hunts' net worth in meeting its own obligations under section 6(d) of the Act. Thus, there is no substantial

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[20] Before the imposition of any civil money penalty, the Commission is required by section 6(d) of the Act to consider, among other things, the Hunts' net worth.

likelihood that the Commission's consideration of the Hunts' net worth will interfere with this Court's jurisdiction over these issues.21/

B. The Hunts Have Not Shown That Irreparable Harm Would Result If They Are Denied Injunctive Relief.

The gravamen of debtors' claim that they will incur irreparable harm is that they will incur legal expenses to maintain their defense against the CFTC's allegations. If this Court were to allow the "irreparable harm" element of 11 U.S.C. §105(a) to be satisfied by a mere showing that the debtor will have to incur the legal expenses of defending against charges in a governmental regulatory enforcement proceedings, the Section 362(b)(4) exception to the automatic stay, and the congressional policy favoring the continuation of such proceedings in such circumstances, would be completely nullified. As the Eighth Circuit observed in addressing a claim that litigation expenses alone are sufficient to justify an injunction under 11 U.S.C. §105(a):

> We hold that the district court did not abuse its discretion in denying a request for a [11 U.S.C. § 105(a)] stay of the EEOC action. Congress by excepting certain actions from the automatic stay provision recognized that the debtor would likely incur litigation expenses as a result of any excepted lawsuit. Congress has therefore implicitly recognized that litigation expenses alone do not justify a stay of a proceeding.

21/ If the Court is nonetheless concerned that the ALJ may eventually consider the Hunts' net worth independently, and that this would pose an immediate threat to this Court's jurisdiction over net worth and valuation questions concerning the debtors' estates, an injunction against the Commission would still not be warranted. Rather, the General Counsel will follow these proceedings and be prepared to recommend to the Commission that it amend its hearing order, in the interest of comity, to provide, for instance, that the ALJ shall give this Court at least 30 days notice before permitting discovery, or holding hearings, on net worth issues.

EEOC v. Rath Packing Company, 787 F.2d at 325 (8th Cir. 1986) (citations omitted); In re Nicholas, 55 B.R. 212, 217 (D. N.J. 1985).22/

Moreover, as demonstrated in the Commission's October 27 memorandum, the only expenses presently facing the Hunts are the legal fees required to oppose the Division's summary disposition motion. The maximum expenditure currently facing the estates are the costs of researching and drafting an opposition to a 30-page memorandum, and possibly, the cost of an appearance at a hearing. The Hunts may not even incur these expenses if they move the ALJ for a stay of the summary disposition motion is granted pending finality of Minpeco, and such motion is granted.

In any event, even if the Hunts are ultimately required to expend legal fees to defend themselves in a full-scale trial before the ALJ, these fees cannot justify an injunction. To do so would bring the remedial policies of the Commodity Exchange Act squarely into conflict with the policies of the Bankruptcy Code. But, as shown, section 362(b)(4) makes clear that the conflict must be resolved in favor of allowing the governmental proceeding to continue.23/ Moreover, there is no basis to assume that 11 U.S.C. §105(a) is

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22/ To the extent that the Eighth Circuit's Rath decision conflicts with the Eighth Circuit's earlier decision in NLRB v. Superior Forwarding, 762 F.2d 695 (8th Cir. 1985), the Superior Forwarding case must be considered superseded.

23/ In re Security Oil & Gas, Inc., 70 B.R. 786 (Bankr. N.D. Ca. 1987) is distinguishable because, there, litigation expenses were not the source of the "irreparable harm" threatening the estate. To the extent that Judge Carlson's opinion could be read to authorize injunctions any time a governmental unit's proceeding requires the debtor to expend sums for legal fees to defend in such proceedings, it would be unnecessarily at odds with E.E.O.C v. Rath Packing Company, 787 F.2d at 325.

intended to countenance subordinating the public interest in maintaining the integrity of futures markets to the private interest of the Hunts' creditors.

C. The Hunts Have Not Shown That The Threatened Injury Outweighs The Harm To The Commission.

The Hunts argue that no harm would befall the Commission's efforts to enforce the anti-manipulation laws against the Hunts because, according to the Hunts counsel, the Hunts have already offered to submit themselves to the injunctive relief sought in the CFTC enforcement proceeding. Nothing could be further from the truth.

The Commission's complaint, in addition to seeking civil money penalties, calls for a permanent cease and desist order and a permanent prohibition from trading on the Nation's commodity exchanges after a finding of liability. This relief differs substantially from the temporary, provisional injunctive relief offered by the Hunts' counsel.

The premise of the Hunts' suggestion that the Commission will not be "harmed" by a §105(a) injunction if they agree to temporary injunctive relief is similarly flawed. Initially, the Commission is not required to find imminent harm to the futures markets in order to justify the continuation of its proceeding against the Hunts. See CORCO, 805 F.2d at 1184. More importantly, the temporary injunctive relief gains the Commission little, if anything at all: the Commission already has the means to ensure that the Hunts do not violate the anti-manipulation laws during the pendency of this bankruptcy

through invocation of its emergency injunctive powers conferred by section 6c of the Act.[24/]

The entry of a §105(a) injunction would cause the Commission substantial harm. Any further delays in the enforcement proceeding diminish the likelihood of successful prosecution of the case. Although nine years have elapsed since the events in question, it took an unprecedented investigation of the "silver bubble" lasting five years just to identify the Hunts' alleged manipulative scheme and then bring charges against them. As fully detailed in the October 27 memorandum, the Hunts were the parties primarily responsible for extensive delays which postponed scheduling of the administrative trial. The Minpeco trial still further delayed the administrative hearing. To now halt the CFTC proceeding would further frustrate the Commission's efforts to bring its determination of liability issues and injunctive relief to an expeditious conclusion.

Any injunction against the Commission would in all likelihood substantially increase the expense to the Commission of prosecuting the underlying action. As discussed in the October 27 memorandum, the Commission's enforcement proceeding involves other respondents who are not debtors in bankruptcy. The likely effect of an injunction would be to multiply the Commission's

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24/ Section 6c of the Commodity Exchange Act, 7 U.S.C. §13a-1, authorizes the Commission to seek injunctions in federal district court against violators of the anti-manipulation laws. Any such injunctive proceeding would fall within the exception of the automatic stay. 11 U.S.C. §362(b)(4).

expense of prosecuting the underlying action because the Commission may have to continue these proceedings against the other respondents.25/

D. The Hunts Have Not Shown That An Injunction Would Not Be Contrary To The Public Interest.

In support of an assertion that an injunction would not be contrary to the public interest, the Hunts cite the passage of time since the events in question, and rely again on their offer of temporary injunctive relief. But the public interest in the continuation of the CFTC proceeding goes far beyond the temporary expedient resolution proposed by the Hunts. During the highly publicized, unprecedented "silver bubble" in 1979 and 1980, many innocent processors, handlers and users were injured by the alleged manipulation of the silver futures markets at issue. These events severely undermined public confidence in the futures market as a mechanism for price discovery and hedging.

The Commission has been charged by Congress with protecting the integrity of the futures markets and to preserve public confidence in freely competitive markets by enforcing the anti-manipulation provisions of the Act. Manipulation is the most serious evil which the Commodity Exchange Act addresses. See 7 U.S.C. § 5. The magnitude and scope of the alleged manipulative activities at issue in the Commission's enforcement proceeding dwarf any prior manipulation case. The seven-month long manipulation is alleged to have

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25/ Unlike the Hunts, one of these respondents, Norton Waltuch, is registered with the Commission. Mr. Waltuch's registration is subject to revocation if he is determined to be liable for violating the anti-manipulation laws. Thus, the public interest would also militate in favor of continuing the proceeding against Mr. Waltuch.

disrupted markets severely.[26] The public interest in advancing the CFTC proceeding so that these serious issues may be resolved is overwhelming, and surely dwarfs the private interests claimed here.

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[26] The magnitude of the verdict in the Minpeco case involving only one market participant illustrates just how significant the manipulation found by the Minpeco was in monetary terms.

CONCLUSION

For all of the foregoing reason, the Commission respectfully requests that the requested injunctions be denied, and that the complaints in these adversary proceedings be dismissed.

Respectfully submitted,

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