

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

**U.S. COMMODITY FUTURES TRADING
COMMISSION,**

Plaintiff,

v.

**GUARDIAN ASSET GROUP, LLC and
ANDREW KURZBARD,**

Defendants.

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)
) **Case No. 9:15-cv-81354**
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)

) **Complaint for Injunctive and Other**
) **Equitable Relief, Restitution, and Civil**
) **Monetary Penalties Under the**
) **Commodity Exchange Act**
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Plaintiff U.S. Commodity Futures Trading Commission (“Commission”) alleges as follows:

I. SUMMARY

1. From at least February 2012, and continuing through at least February 2013 (the “Relevant Period”), Defendant Guardian Asset Group, LLC (“Guardian”), by and through the actions of its employees and agents, including but not limited to Defendant Andrew Kurzbard (“Kurzbard”) (collectively, “Defendants”), entered into, offered to enter into, or conducted any office or business in the United States for the purpose of soliciting or accepting any order for the purchase or sale of precious metals from retail customers on a leveraged or financed basis. These transactions constituted illegal, off-exchange retail commodity transactions. By this conduct, Defendants have engaged, are engaging, or are about to engage in conduct that violates Sections 4(a) and 4d(a) of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 6(a) and 6d(a) (2012).

2. Kurzbard controlled Guardian throughout the Relevant Period and failed to act in good faith or knowingly induced Guardian's violations alleged herein. Kurzbard is therefore liable for Guardian's violations pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2012).

3. At all relevant times, the acts and omissions of Kurzbard and others were committed within the scope of their employment, agency, or office with Guardian. Therefore, Guardian is liable under Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Commission Regulation ("Regulation") 1.2, 17 C.F.R. § 1.2 (2015), as a principal for the actions and omissions of Kurzbard, and any other manager, employee, or agent of Guardian, in violation of the Act.

4. Pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), the Commission brings this action to enjoin Defendants' unlawful acts and practices, to compel compliance with the Act, and to further enjoin them from engaging in any commodity-related activity.

5. In addition, the Commission seeks civil monetary penalties, restitution, and remedial ancillary relief, including but not limited to, trading and registration bans, disgorgement, rescission, prejudgment and postjudgment interest, and such other relief as the Court may deem necessary and appropriate.

6. Unless restrained and enjoined by this Court, Defendants are likely to continue to engage in the acts and practices alleged in this Complaint, or similar acts and practices, as more fully described below.

II. JURISDICTION AND VENUE

7. Section 6c of the Act, 7 U.S.C. § 13a-1, authorizes the Commission to seek injunctive relief against any person whenever it shall appear to the Commission that such person

has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act, or any rule, regulation, or order thereunder.

8. The Commission has jurisdiction over the conduct and transactions at issue in this case pursuant to Sections 2(c)(2)(D) and 6c of the Act, 7 U.S.C. §§ 2(c)(2)(D) and 13a-1 (2012).

9. Venue properly lies with the Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2012), because Defendants transacted business in this District, and certain transactions, acts, and practices alleged in this Complaint occurred, are occurring, or are about to occur within this District.

III. THE PARTIES

A. Plaintiff

10. Plaintiff U.S. Commodity Futures Trading Commission is an independent federal regulatory agency charged by Congress with the administration and enforcement of the Act, 7 U.S.C. §§ 1 *et seq.* (2012), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2015).

B. Defendants

11. Defendant Guardian Asset Group, LLC was a Florida limited liability company formed in February 2012 that was administratively dissolved in September 2014. Its principal place of business was West Palm Beach, Florida. Guardian was a telemarketing firm that solicited retail customers to invest in off-exchange retail commodity transactions. Guardian has never been registered with the Commission in any capacity.

12. Defendant Andrew Kurzbard is a resident of West Palm Beach, Florida. Kurzbard was an owner, principal, and controlling person of Guardian, overseeing its day-to-day operations. Kurzbard is not presently registered with the Commission.

IV. RELATED ENTITIES

13. Guardian introduced customers to AmeriFirst Management LLC (“AmeriFirst”), which held itself out as a precious metals wholesaler and clearing firm. AmeriFirst purported to confirm the execution of customer off-exchange retail commodity transactions.

14. AmeriFirst described itself on its website as a precious metals clearing and financing firm for precious metals dealers and claimed to provide dealers with “tangible assets in a growing physical market[.]” AmeriFirst guaranteed that “every ounce of metal in [the dealer’s] customers [sic] account exists and is ready for delivery at any point and time.” On its website, AmeriFirst offered gold, silver and platinum in bar and coin form. AmeriFirst also claimed to provide customer financing options for precious metals dealers like Guardian. It operated throughout the United States using a network of over 30 solicitation firms referred to as “dealers.”

15. On February 25, 2013, AmeriFirst closed its operations.

16. On September 17, 2013, this Court, in an action captioned *CFTC v. AmeriFirst Management LLC*, entered a Consent Order of Permanent Injunction Against AmeriFirst, finding that AmeriFirst violated Sections 4(a), 4b(a)(2), 4d(a), and 6(c)(1) of the Act, 7 U.S.C. §§ 6(a), 6b(a)(2), 6d(a), and 9(1). Case No. 13-cv-61637-WPD (S.D. Fla. Sept. 17, 2013) (Doc. # 17). In the Consent Order, AmeriFirst neither admitted nor denied its violations of the Act. *Id.*

V. STATUTORY BACKGROUND

17. Section 2(c)(2)(D) of the Act, 7 U.S.C. §2(c)(2)(D), gives the Commission jurisdiction over “any agreement, contract, or transaction in any commodity” that is entered into with, or offered to, a non-eligible contract participant “on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or

counterparty on a similar basis” (“retail commodity transactions”) with respect to conduct occurring on or after July 16, 2011, subject to certain exceptions not applicable here. Section 2(c)(2)(D) of the Act, 7 U.S.C. § 2(c)(2)(D), makes Section 4(a) of the Act, 7 U.S.C. §§ 6(a), applicable to retail commodity transactions “as if” such transactions are contracts for the sale of a commodity for future delivery.

18. The Act defines an eligible contract participant (“ECP”), in relevant part, as an individual who has amounts invested on a discretionary basis, the aggregate of which exceeds \$10 million, or \$5 million if the individual enters into the transaction to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual. Section 1(a)(18)(xi) of the Act, 7 U.S.C. § 1a(18)(xi) (2012).

19. Section 4(a) of the Act, 7 U.S.C. § 6(a), in relevant part, makes it is unlawful for any person to 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, accepting any order for, or otherwise dealing in any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery unless the transaction is conducted on or subject to the rules of a board of trade that has been designated or registered by the Commission as a contract market.

20. Section 4d(a) of the Act, 7 U.S.C. § 6d(a), in relevant part, provides that it shall be unlawful for any person to be a futures commission merchant (“FCM”) unless such person shall have registered with the Commission as an FCM. In pertinent part, Regulation 1.3, 17 C.F.R § 1.3(p), defines an FCM as “[a]ny individual, association, partnership, corporation, or trust . . . engaged in soliciting or in accepting orders for . . . any agreement, contract, or

transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act” *See also* Section 1a(28) of the Act, 7 U.S.C. § 1a(28) (2012) (defining an FCM).

VI. FACTS

21. During the Relevant Period, Guardian operated as a telemarketing firm that solicited retail customers to engage in off-exchange retail commodity transactions involving leveraged precious metals. Although Guardian also offered precious metals on a fully-paid basis, the majority of its business was in off-exchange retail commodity transactions. Only Guardian’s off-exchange retail commodity transactions through AmeriFirst are at issue here.

22. At all times during the Relevant Period, Kurzbard was an owner, principal, and controlling person of Guardian. Kurzbard exercised control over the day-to-day operations of Guardian, was a signatory on and opened Guardian bank accounts, and entered into agreements with AmeriFirst on behalf of Guardian.

23. At various times during the Relevant Period, Guardian employed Kurzbard and other individuals to, among other things, solicit retail customers to engage in off-exchange retail commodity transactions. Kurzbard directly solicited retail customers to engage in off-exchange retail commodity transactions and managed the solicitation of funds by other Guardian employees.

24. Kurzbard and Guardian’s other employees conducted nearly all of their solicitations by telephone. When soliciting customers for off-exchange retail commodity transactions, Kurzbard and Guardian’s other employees represented that to purchase a certain quantity of metal, customers needed to deposit a percentage of the total metal value and arrange for a loan for the remaining amount. AmeriFirst provided the financing for the loans to the

customers. However, Guardian did not disclose to all of its customers AmeriFirst's involvement in the off-exchange retail commodity transactions.

25. After a non-ECP customer invested, Guardian contacted AmeriFirst to accomplish the transaction. Guardian collected the funds needed for the transaction from the customer and sent them to AmeriFirst. AmeriFirst provided back office support services to Guardian and customer access to the details of the transaction.

26. With respect to retail commodity transactions, Guardian charged customers commissions, storage and other fees for purchasing the metal, and interest on loans to buy metal. AmeriFirst initially provided Guardian's share of the commissions and fees to Guardian after it received the customer's funds from Guardian. Later, AmeriFirst directed Guardian to deduct its commissions and fees from customer funds before forwarding those funds to AmeriFirst.

27. In the leveraged precious metals transactions at issue, Guardian's customers did not take delivery of precious metals.

28. During the Relevant Period, Guardian collected at least \$1,714,107 from its customers in connection with retail commodity transactions. Of this amount, \$434,413.54 was paid to Guardian in the form of commissions, markups, storage fees, and interest charges.

29. Guardian and AmeriFirst never bought, sold, loaned, stored, or transferred any physical metals for the off-exchange retail commodity transactions at issue. Likewise, Guardian and AmeriFirst never delivered any precious metals to any customers in connection with the financed metals transactions at issue.

VII. VIOLATIONS OF THE COMMODITY EXCHANGE ACT

**COUNT I
ILLEGAL OFF-EXCHANGE TRADING
Violations of 7 U.S.C. § 6(a)**

30. Paragraphs 1 through 29 of this Complaint are realleged and incorporated herein by reference.

31. During the Relevant Period, the retail commodity transactions described in this Complaint were offered and entered into by Defendants (a) on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis, (b) with persons who are not ECPs or eligible commercial entities as defined by the Act, and (c) without being made or conducted on, or subject to, the rules of any board of trade, exchange, or contract market.

32. The retail commodity transactions described in this Complaint involve commodities as defined in Section 1a(9) of the Act, 7 U.S.C. § 1a(9) (2012).

33. As set forth above, during the Relevant Period, Defendants Guardian and Kurzbard violated Section 4(a) of the Act, 7 U.S.C. § 6(a) by offering to enter into, entering into, executing, confirming the execution of, or conducting an office or business in the United States for the purpose of soliciting or accepting orders for, or otherwise dealing in, any transaction in, or in connection with, retail commodity transactions.

34. Each offer to enter into, execution, confirmation, solicitation, or acceptance of an order for a retail commodity transaction made during the Relevant Period to a non-ECP customer is alleged as a separate and distinct violation of Section 4(a) of the Act, 7 U.S.C. § 6(a).

35. Kurzbard directly or indirectly controlled Guardian and did not act in good faith, or knowingly induced, directly or indirectly, the acts constituting Guardian's violations of

Section 4(a) of the Act, 7 U.S.C. § 6(a). Pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), Kurzbard is therefore liable for each of Guardian's violations of Section 4(a) of the Act, 7 U.S.C. § 6(a).

36. The acts and omissions of Kurzbard and other managers, agents and other persons acting for Guardian described in this Complaint were done within the scope of their employment, agency, or office with Guardian. Therefore, Guardian is liable as a principal for each act, omission, or failure of Kurzbard and Guardian's other managers, agents and persons acting for Guardian, constituting violations of Section 4(a) of the Act, 7 U.S.C. § 6(a), pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C § 2(a)(1)(B) and Regulation 1.2, 17 C.F.R. § 1.2.

COUNT II
FAILURE TO REGISTER
Violations of 7 U.S.C. § 6d(a)

37. Paragraphs 1 through 36 of this Complaint are realleged and incorporated herein by reference.

38. During the Relevant Period, Guardian, through its managers, agents, and employees, acted as an FCM by soliciting and accepting orders for agreements, contracts, or transactions described in Section 2(c)(2)(D)(i) of the Act, 7 U.S.C. § 2(c)(2)(D)(i) (*i.e.*, retail commodity transactions) and, in or in connection with those transactions, accepted at least \$1,714,107 from its customers.

39. Section 4d(a) of the Act, 7 U.S.C. § 6d(a), provides that it shall be unlawful for any person to be an FCM unless such person shall have registered with the Commission as an FCM.

40. During the Relevant Period, Defendants failed to register with the Commission as an FCM, and therefore violated Section 4d(a), 7 U.S.C. § 6d(a).

41. Kurzbard directly or indirectly controlled Guardian and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting Guardian's violations of Section 4d(a) of the Act, 7 U.S.C. § 6d(a), alleged in this Complaint. Pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), Kurzbard is therefore liable for each of Guardian's violations of Section 4d(a) of the Act, 7 U.S.C. § 6d(a).

42. The acts and omissions of Kurzbard and other managers, agents and other persons acting for Guardian described in this Complaint were done within the scope of their employment, agency, or office with Guardian. Therefore, Guardian is liable as a principal for each act, omission, or failure of Kurzbard and Guardian's other managers, agents and persons acting for Guardian, constituting violations of Section 4d(a) of the Act, 7 U.S.C. § 6d(a), pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) and Regulation 1.2, 17 C.F.R. § 1.2.

VIII. RELIEF REQUESTED

WHEREFORE, the Commission respectfully requests that this Court, as authorized by Section 6c of the Act, 7 U.S.C. § 13a-1, and pursuant to its own equitable powers, enter:

- A. An Order finding that Defendants violated Sections 4(a) and 4d(a) of the Act, 7 U.S.C. §§ 6(a) and 6d(a).
- B. An Order of permanent injunction prohibiting Defendants, and any other person or entity associated with them, from engaging in conduct in violation of Sections 4(a) and 4d(a) of the Act, 7 U.S.C. §§ 6(a) and 6d(a);
- C. An Order of permanent injunction prohibiting Defendants, and any other person or entity associated with them, from directly or indirectly:
 - 1) Trading on, or subject to the rules of, any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012));

- 2) Entering into any transactions involving “commodity interests” (as that term is defined in Regulation 1.3(yy), 17 C.F.R. § 1.3(yy) (2015)) for their own personal or for any account in which they have a direct or indirect interest;
 - 3) Having any commodity interests traded on their behalf;
 - 4) Controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity interests;
 - 5) Soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity interests;
 - 6) Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2015);
 - 7) Acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2015)), agent or any other officer or employee of any person (as that term is defined in Section 1a(38) of the Act, 7 U.S.C. § 1a(38) (2012)), registered, exempted from registration, or required to be registered with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9); and
 - 8) Engaging in any business activities related to commodity interests.
- D. An Order directing Defendants, as well as any successors, to disgorge, pursuant to such procedure as the Court may order, all benefits received from the acts or

practices described herein that constitute violations of the Act, prejudgment interest from the date of such violations, and postjudgment interest;

- E. An Order directing Defendants, as well as any successors, to make full restitution, pursuant to such procedure as the Court may order, to every customer whose funds Defendants received or caused another person or entity to receive as a result of the acts and practices described herein which constitute violations of the Act, prejudgment interest from the date of such violations, and postjudgment interest;
- F. An Order directing Defendants, as well as any successors, to rescind, pursuant to such procedure as the Court may order, all contracts and agreements, whether express or implied, entered into between Defendants and any of the customers whose funds were received by Defendants as a result of the acts and practices which constitute violations of the Act, as described herein;
- G. An Order directing Defendants, as well as any successors, to pay civil monetary penalties under the Act, to be assessed by the Court, in amounts of not more than the greater of (1) triple the monetary gain to Defendants for each violation of the Act; or (2) \$140,000 for each violation committed, plus postjudgment interest;
- H. An Order directing Defendants, as well as any successors, to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2); and
- I. Such other and further relief as the Court deems proper.

Dated: September 29, 2015

Respectfully submitted,

s/Peter L. Riggs

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