

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

No. \_\_\_\_\_

05-2157

05 JUN 13 AM 11:38  
CLERK OF U.S. DISTRICT COURT  
S.D. OF FLA.

UNITED STATES COMMODITY FUTURES  
TRADING COMMISSION,  
Plaintiff,

v.

E-METAL MERCHANTS, INC., a Florida  
corporation, BENJI DAYAN, an individual, and  
ANDREW STERN, an individual,  
Defendants.

CIV-LEAD

KLEIN

---

**COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE AND ANCILLARY  
RELIEF PURSUANT TO THE COMMODITY EXCHANGE ACT, 7 U.S.C. § 1 ET SEQ.**

By and for its complaint, the United States Commodity Futures Trading Commission  
(Commission) alleges as follows:

**I. SUMMARY**

1. Since at least May 24, 2004 through the present, E-Metal Merchants, Inc. (E-Metal Merchants) has accepted over \$6.9 million from over 200 customers for the purpose of engaging in the purchase and sale of illegal off-exchange metal option contracts. E-Metal Merchants operates a Web site and provides customers with account-opening documents that state that the firm is engaged in the purchase and sale of off-exchange option contracts on physical metal.

2. E-Metal Merchants deposits customer money into a designated customer account. E-Metal Merchants moves the customer money from the firm's customer account to the firm's

operating account, from which E-Metal Merchants pays its corporate officers and others. Since May 2004, E-Metal Merchants has transferred from the customer account more than \$5.4 million to the firm's operating account, \$575,000 to the firm's off-shore account in New Zealand, and \$509,000 to Universal Financial Holding Company, a firm owned by the secretary of E-Metal Merchants, Andrew Stern.

3. The firm has paid the president, Benji Dayan, and the secretary, Stern, over \$1 million from the ill-gotten customer funds.

## **II. JURISDICTION AND VENUE**

4. The Commodity Exchange Act establishes a comprehensive system for regulating the purchase and sale of any commodity option contracts, including the illegal off-exchange metal option contracts purchased and sold by E-Metal Merchants. The Court possesses jurisdiction over this action pursuant to Section 6c of the Commodity Exchange Act ("Act"), as amended, 7 U.S.C. § 13a-1 (2002), which provides that, whenever it shall appear to the Commission that any 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 promulgated thereunder, the Commission may bring an action against such person to enjoin such practice or to enforce compliance with the Act. Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Part 32 of the Commission Regulations (Regulations), 17 C.F.R. § 32 (2004), grants the Commission regulatory authority over any commodity option contract and, in particular, prohibits transactions in off-exchange metal option contracts.

5. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e), because defendants transact business in this District and violations of the Act and Regulations have occurred, are occurring, or are about to occur within this District. In particular,

E-Metal Merchants maintains an office in this District and Dayan and Stern reside in this District.

### III. THE PARTIES

#### A. Plaintiff

6. The United States Commodity Futures Trading Commission is an independent federal agency of the United States government charged with the administration and enforcement of the Act and Regulations.

#### B. Defendants

7. E-Metal Merchants, Inc. is a Florida corporation located at 2999 NE 91<sup>st</sup> Street, Suite 804, Aventura, Florida, 33180. In May 2004, E-Metal Merchants registered as a corporation with the Florida Department of State. E-Metal Merchants is not registered with the Commission.

8. Benji Dayan is the president of E-Metal Merchants and currently resides at 200 172<sup>nd</sup> Street, Miami, Florida, 33160. In May 1998, Dayan was the subject of a National Futures Association (NFA) business conduct committee action which resulted in a one year temporary withdrawal of his NFA membership and, among other things, a three year ban from all supervisory responsibilities.

9. Andrew Stern is the secretary of E-Metal Merchants and currently resides at 3120 NE 165<sup>th</sup> Street, North Miami, Florida, 33160. Stern is currently a defendant in a pending Commission civil injunctive action alleging fraud in connection with the offer of illegal foreign currency futures contracts. Commodity Futures Trading Commission v. Sterling et. al., No. 04-21346 (S.D.Fla. June 2004). In November 2004, the NFA permanently barred Stern from

membership for, among other things, failing to supervise staff at Universal Financial Holding Company, a firm Stern owned.

#### IV. STATUTORY BACKGROUND

10. The Commission has the authority to regulate the off-exchange metal option contracts entered into between E-Metal Merchants and its customers.

11. Pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, “whenever it shall appear to the Commission that any 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 promulgated thereunder, the Commission may bring an action against such person to enjoin such practice or to enforce compliance with the Act.”

12. Pursuant to Section 4c(b), 7 U.S.C. § 6c(b), “[n]o person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this Act which is of the character of, or is commonly known to the trade as, an ‘option,’ ‘privilege,’ indemnity,’ ‘bid,’ ‘offer,’ ‘put,’ ‘call,’ ‘advance guaranty,’ or ‘decline guaranty,’ contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.”

13. Pursuant to Regulation 32.11(a), 17 C.F.R. § 32.11(a), “it shall be unlawful on and after June 1, 1978, until further rule, regulation or order of the Commission, for any person to solicit or accept orders for, or to accept money, securities or property in connection with, the purchase or sale of any commodity option, or to supervise any person or persons so engaged.”

14. Pursuant to Regulation 32.11(b), 17 C.F.R. § 32.11(b), “[t]he provisions of paragraph (a) of this section shall not apply to any commodity option transaction conducted in

accordance with the provisions of § 32.4(a) [relating to commodity option contracts that are offered to a producer, processor, or commercial user of, or a merchant handling, the commodity which is the subject of the commodity option transaction], or any commodity option transaction conducted on or subject to the rules of a contract market or a foreign board of trade in accordance with the provisions of section 4c of the Act and any rule, regulation or order promulgated thereunder.”

## V. FACTS

### A. **E-Metal Merchants Engages In The Purchase And Sale Of Illegal Off-Exchange Metal Options**

15. E-Metal Merchants is a Florida corporation that is and has been, since at least May 2004, engaged in the sale and purchase of illegal off-exchange metal options.

16. E-Metal Merchants is not a producer, processor, or commercial user of, or a merchant handling, the metal which is the subject of the commodity option transactions in which it is engaged with its customers.

17. E-Metal Merchants solicits customers through introducing brokers (IBs). These customers are not producers, processors, or commercial users of, or merchants handling, the metal which is the subject of the commodity option transactions in which they were engaged with E-Metal Merchants.

18. The firm also operates a Web site ([www.ufhc/emetal.htm](http://www.ufhc/emetal.htm)) that, among other things, informs prospective customers that they can purchase and sell options on physical metal. In particular, E-Metal Merchants boasts that it has the first on-line trading platform on which to purchase and sell metal option contracts. E-Metal Merchants provides no information on its

Web site or elsewhere regarding the details of this purported on-line trading platform, in particular, who operates it and who can access it.

19. E-Metal Merchants provide its customers with account-opening documents that explain their accounts and the type of transactions in which the firm engages. These documents state on the very first page that the firm is involved in the purchase and sale of OTC (over-the-counter) options and that its OTC options are **not** traded on a regulated exchange.

20. Specifically, according to E-Metal Merchants, “. . . metal[] options positions entered between E-Metal Merchants, Inc. and [the customer] as counter party are not traded on or subject to the rules of an exchange regulated by the CFTC, nor are such OTC . . . metal options cleared or guaranteed by any clearing organization, but rather such contracts are bilateral agreements between E-Metal Merchants, Inc. and [the customer].”

21. In addition, the documents explain the risk associated with trading options, the effect of leveraging, the use of stop loss orders, the payment of commissions, the varying degree of risk associated with various types of options such as deep-out-of-the-money options, and the differences and risks associated with on-exchange and off-exchange options trading. Applicable to customers that sell, *i.e.* grant options, the documents explain that each customer shall maintain margin with E-Metal Merchants in such amounts as E-Metal Merchants requires. Customers also agree to meet all margin calls by immediate wire transfer to E-Metal Merchants or risk liquidation of their account.

22. Although not explained in the firm’s account documents, it appears that along with the opening of an account to purchase or sell options, E-Metal Merchants delivers to the customer, for a fee, a small amount of metal in the form of coins or bars. The metal is of the same type as that underlying the option. Customers are charged for the metal that is delivered to

them. For at least one customer, E-Metal Merchants charged less than two percent of his total investment (\$445 out of a \$25,000 investment). E-Metal Merchants used the remainder of his money to purchase metal option contracts.

23. Currently, E-Metal Merchants has over 200 customers. At least two customers were solicited to purchase and sell gold options with E-Metal Merchants. At least one monthly trading statement indicates a customer of E-Metal Merchants purchased and sold gold option contracts. The statement includes expiration dates for the option contracts as well as the amount of the option premium. The statement also identifies all open option positions at the time the statement was issued and the liquidation value of the account. The statement fails to indicate that the options were purchased or sold on an exchange or that the options were handled by a clearing firm associated with an exchange.

24. Since May 2004, E-Metal Merchants has received over \$6.9 million from more than 200 customers. Approximately 24 of these customers designated in the "memo" section of their checks that the money was for the purchase of gold or silver option contracts. The other 175 customers did not include a notation on their checks relating to the type of transaction in which they engaged with E-Metal Merchants. Customer funds are all initially deposited into the E-Metal Merchants customer account on which Dayan and Stern are signators. After the customer funds were received into the customer account, E-Metal Merchants transferred approximately \$5.4 million of those funds to the firm's operating account, \$575,000 to the firm's off-shore account in New Zealand, and \$509,000 to Universal Financial Holding Company, a firm owned by Stern. From the operating account, E-Metal Merchants used the customer funds to pay its officers, IBs, and other entities. The firm paid Dayan and Stern over \$1 million from

ill-gotten customer funds. As of May 9, 2005, only \$325,000 has been returned to customers of E-Metal Merchants.

## **2. Dayan Is A Controlling Person Of E-Metal Merchants**

25. Dayan possesses control over the firm's business. He has knowledge of the type of transactions in which E-Metal Merchants engages or, at the very least, acts recklessly by disregarding the type of transactions in which the firm engages.

26. Dayan is the president of E-Metal Merchants. He registered the corporation with the Florida Secretary of State and signed the on-line annual report. He also submitted and signed the electronic articles of incorporation in which he specifically represents that E-Metal Merchants was organized and is engaged in "any and all lawful business."

27. Dayan is the co-signator, along with Stern, on the firm's customer account and has the ability to remove and transfer funds from the account.

28. As compensation for his duties, E-Metal Merchants has paid Dayan \$985,000 in customer funds obtained from the sale of illegal off-exchange option contracts.

29. Dayan is an experienced member of the commodity futures and options industry. He has been a member of the NFA since 1993 and has been registered with the Commission in relation to a variety of firms engaged in the purchase and sale of commodity option and futures contracts since 1995. Indeed, he is currently listed as a principal and registered as an associated person of FX Option1, Inc., a registered introducing broker likely in the business of purchasing and selling foreign currency option contracts. He is also listed as a principal of Forefront Investments, Corporation, a/k/a Qix Futures, Inc. d/b/a Forefront Forex, a registered futures commission merchant in the business of purchasing and selling off-exchange foreign currency futures and/or option contracts.



30. Dayan, the president of E-Metal Merchants and an experienced member of the commodity futures and options industry, possesses control over and knowledge of the type of off-exchange option contracts purchased and sold by E-Metal Merchants or acts recklessly by disregarding that information and, therefore, is liable pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), for E-Metal Merchants's violations of the Act.

**C. Stern Is A Controlling Person Of E-Metal Merchants**

31. Stern possesses control over the firm's business. He has knowledge of the type of transactions in which E-Metal Merchants engages or at the very least acts recklessly by disregarding the type of transactions in which the firm engages.

32. Stern is the secretary of E-Metal Merchants.

33. Stern is the co-signator, along with Dayan, on the firm's customer account and has the ability to remove and transfer funds from the account.

34. E-Metal Merchants has paid Stern \$150,000 in customer funds obtained from the sale of illegal off-exchange option contracts.

35. Stern has been a member of the NFA and registered with the Commission in relation to a variety of firms engaged in the purchase and sale of commodity option and futures contracts since 1985. Indeed, he is currently listed as a principal and registered as an associated person of Universal Financial Holding Company, a registered futures commission merchant which accepted customer money for the purchase and sale of commodity futures and option contracts. Stern is also listed as a principal pending of Qualified Leverage Providers, a futures commission merchant which also accepts customer money for the purchase and sale of commodity futures and option contracts. Finally, Stern is listed as a principal pending of Forefront Investments, Corporation, a/k/a Qix Futures, Inc. d/b/a Forefront Forex, a futures

commission merchant registered with the Commission and in the business of purchasing and selling off-exchange foreign currency futures and/or option contracts.

36. Stern, as secretary of the firm and an experienced member of the commodity futures and options industry, possesses control over and knowledge of the type of off-exchange option contracts purchased and sold by E-Metal Merchants or acts recklessly by disregarding that information and, therefore, is liable pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), for E-Metal Merchants's violations of the Act.

## **VI. VIOLATIONS OF THE COMMODITY EXCHANGE ACT**

### **E-METAL MERCHANTS IS ENGAGED IN THE PURCHASE AND SALE OF ILLEGAL OFF-EXCHANGE OPTIONS IN VIOLATION OF SECTION 4c(b) AND REGULATION 32.11 (7 U.S.C. § 6c(b) AND 17 C.F.R. § 32.11)**

37. Paragraphs 1 through 36 above are realleged and incorporated by reference.

38. Pursuant to Section 4c(b) of the Act, 7 U.S.C. § 6c(b), it is unlawful to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under the Act which is of the character of, or is commonly known to the trade as, an "option," "privilege," "indemnity," "bid," "offer," "put," "call," "advance guaranty," or "decline guaranty," contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.

39. Pursuant to Regulation 32.11(a), 17 C.F.R. § 32.11(a), "it shall be unlawful on and after June 1, 1978, until further rule, regulation or order of the Commission, for any person to solicit or accept orders for, or to accept money, securities or property in connection with, the purchase or sale of any commodity option, or to supervise any person or persons so engaged."

40. Pursuant to Regulation 32.11(b), “[t]he provisions of paragraph (a) of this section shall not apply to any commodity option transaction conducted in accordance with the provisions of § 32.4(a) [relating to commodity option contracts that are offered to a producer, processor, or commercial user of, or a merchant handling, the commodity which is the subject of the commodity option transaction], or any commodity option transaction conducted on or subject to the rules of a contract market or a foreign board of trade in accordance with the provisions of section 4c of the Act and any rule, regulation or order promulgated thereunder.”

41. During the relevant time period, E-Metal Merchants violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b) and Regulation 32.11(a), 17 C.F.R. § 32.11(a), by engaging in the purchase and sale of off-exchange metal options where neither E-Metal Merchants, nor its customers are producers, processors, or commercial users of, or merchants handling, the metal which is the subject of the commodity option transactions in which the firm and its customers were engaged.

42. Each off-exchange metal option contract entered into between E-Metal Merchants and its customers including, but not limited to those specifically alleged in this complaint, is a separate and distinct violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulation 32.11(a), 17 C.F.R. § 32.11(a).

43. Dayan, the president of E-Metal Merchants and an experienced member of the commodity futures and options industry, possesses control over and knowledge of the type of off-exchange option contracts purchased and sold by E-Metal Merchants or acts recklessly by disregarding that information and, therefore, is liable pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), for E-Metal Merchants’s violations of the Act.

44. Stern, as secretary of the firm and an experienced member of the commodity futures and options industry, possesses control over and knowledge of the type of off-exchange

option contracts purchased and sold by E-Metal Merchants or acts recklessly by disregarding that information and, therefore, is liable pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), for E-Metal Merchants's violations of the Act.

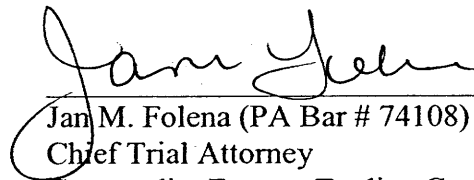
## **VII. RELIEF REQUESTED**

Accordingly, 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 E-Metal Merchants, Dayan, and Stern violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulation 32.11(a), 17 C.F.R. § 32.11(a);
- B. a permanent injunction enjoining E-Metal Merchants, Dayan, and Stern and all persons insofar as they are acting in the capacity of agents, servants, employees, successors, assigns, or attorneys of defendants, and all persons insofar as they are acting in active concert or participation with defendants, who receive actual notice of the order, by personal service or otherwise, from directly or indirectly engaging in conduct that violates Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulation 32.11(a), 17 C.F.R. § 32.11(a), and from engaging in any commodity-related activity, including soliciting and/or accepting new customers;
- C. an order directing E-Metal Merchants, Dayan, and Stern and any successors, to disgorge, pursuant to such procedure as the Court may order, all benefits received including, but not limited to, salaries, commissions, loans, fees, revenues and trading profits derived, directly or indirectly, from acts or practices which constitute violations of the Act as described herein, including pre-judgment interest thereon from the date of such violations;

- D. an order directing E-Metal Merchants, Dayan, and Stern and any successors to make full restitution to every customer as a result of acts and practices which constitute violations of the Act and Regulations, as described herein, and interest thereon from the date of such violations;
- E. an order assessing a civil monetary penalty against E-Metal Merchants, Dayan, and Stern in the amount of not more than the higher of \$120,000 for those violations committed before October 23, 2004, and \$130,000 for those violations committed after October 23, 2004, or triple the monetary gain to the defendant for each violation of the Act or Regulations;
- F. an order requiring defendants to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2); and
- G. such other and further remedial ancillary relief as the Court may deem appropriate.

Respectfully submitted,



---

Jan M. Folena (PA Bar # 74108)  
Chief Trial Attorney  
Commodity Futures Trading Commission  
Division of Enforcement  
1155 21st Street, NW  
Washington, D.C. 20581  
(202) 418-5313 (Folena)  
(202) 418-5531 (Fax)

Dated: June 13, 2005