

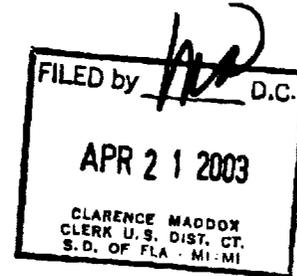
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6832-CIV-UNGARO-BENAGES

COMMODITY FUTURES  
TRADING COMMISSION,  
Plaintiff,

vs.

TRINITY FINANCIAL GROUP, INC.,  
CARRINGTON FINANCIAL  
CORPORATION, A. FRANCIS SIDOTI,  
and MARC STEPHEN WUENSCH,  
Defendants.



**ORDER AFFIRMING MAGISTRATE'S  
REPORT AND RECOMMENDATION**

THIS CAUSE is before the Court upon the Motion of Plaintiff Commodity Futures Trading Commission to Impose Coercive Sanctions ("Motion"), filed September 25, 2001.

THE MATTER was referred to the Honorable Stephen T. Brown, United States Magistrate Judge. A Report and Recommendation ("Report") dated January 3, 2003 has been filed, recommending a finding of civil contempt and incarceration, which may be purged by a payment, within sixty (60) days, of the sum of \$250,000 to be followed by monthly payments of \$1,500.<sup>1</sup> Plaintiff filed objections ("Objections") on January 30, 2003. Defendant Marc Stephen Wuensch ("Defendant Wuensch") filed a response to Plaintiff's objections ("Response") on February 14, 2003.

THE COURT has conducted a *de novo* review of the motion, the pertinent portions of the record, and is otherwise fully advised in the premises.

<sup>1</sup> On January 21, 2003, this Court granted Defendant Wuensch's request for an extension of time for the payment of the purging obligations and an increase in the monthly payment until thirty (30) days after this Court enters an Order on Magistrate Judge Brown's January 3, 2003 Report.

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The Magistrate Judge, after considering the motion, the response, the reply, all the pertinent materials in the file and after conducting a hearing where the arguments of counsel were heard, initially found that Defendant Wuensch had not paid in full the disgorgement Ordered by this Court on December 7, 1999.<sup>2</sup> Then, with regards to Defendant Wuensch's inability to pay defense, the Magistrate Judge found that

[t]here is no question that, viewed in a light most favorable to defendant, there exists substantial unaccounted-for missing dollars, save for defendant's own, unsupported testimony (under oath) as to why it allegedly cannot be accounted for.

Notably, though defendant claims that substantial sums were spent on "personal entertainment," no sort of any documentation has ever been offered regarding same, nor has the attempt to obtain any documentation been shown. . . . [T]here are millions of dollars unaccounted for.

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With regards to the gambling records, . . . [t]hose records, viewed in a light most favorable to defendant, document less than 10% of the missing dollars.

Report at 5-6.

The Magistrate Judge also found that "there is no question that substantial efforts were made by plaintiff and the receiver to locate other assets, without success. These efforts included retention of capable investigators who were unable to locate anything remotely supporting the obvious inference sought by plaintiff—that defendant has hidden assets somewhere in the world." Report at 8. As a result of this analysis, the Magistrate Judge recommended that "at the very least, serious sanctions . . . be imposed against the defendant. Considering and balancing both the non-accounted for dollars [by Defendant Wuensch] as well as the failure [of Plaintiff] to locate anything resembling hidden assets, this Court again recommends a finding of civil

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<sup>2</sup> This Court's December 1999 Order (DE 507) required Defendant Wuensch to disgorge a total amount of \$2,290,207.60. Insofar as Defendant Wuensch had been granted a credit of \$246,745.36, a balance of \$2,043,462.30 remained due.

contempt and incarceration” Report at 9. The Magistrate Judge further recommended “that said order be purged by a payment, within 60 days, of the sum of \$250,000, and an increase in the monthly payment to \$1,500.”<sup>3</sup> *Id.* Defendant Wuensch does not object to the Magistrate Judge’s Report. However, Plaintiff objects to the specific purging conditions, and seeks an increase of those conditions to \$575,000 as a lump sum payment, followed by \$2,500 of monthly payments. *See* Objections at 8.

The proper procedure for obtaining review of a magistrate judge’s order is set forth in Fed. R. Civ. P. 72(a) which provides in relevant part that “[w]ithin 10 days after being served with a copy of the magistrate judge’s order, a party may serve and file objections to the order . . . . The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion fo the magistrate judge’s order found to be clearly erroneous or contrary to law.” Fed. R. Civ. P. 72(a). Accordingly, “[r]eview under Rule 72(a) provides ‘considerable deference to the determinations of magistrates.’” *In re Search Warrants Issued Aug. 29, 1994*, 889 F. Supp. 296, 298 (S.D. Ohio 1995) (quoting 7 *Moore’s Federal Practice* ¶72.03[7.-3]).

As stated above, the Magistrate Judge issued his report after considering all the pertinent portions of the file and after conducting a hearing on the motion. He carefully balanced both the Defendant’s non-accounted for dollars and the Plaintiff’s failure to locate anything resembling

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<sup>3</sup> The Magistrate Judge used the approach adopted by the district court in *Wellington* as a benchmark to determine an appropriate amount for the purging condition. *See* Report at 8-9 (“Courts fashioning payment in lieu of incarceration have discussed payment of 5% of the disgorgement order.”). Indeed, in *Wellington*, the Eleventh Circuit approved the district judge’s decision to require a defendant, “under penalty of arrest and imprisonment, to pay five percent of the total amount due under the disgorgement order.” *See Commodity Futures Trading Commission v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1528 (11th Cir. 1992). In this case, the December 7, 1999 Order required Defendant Wuensch to disgorge a total amount of \$2,290,207.60. The Magistrate Judge, however, relied on this Court’s March 9, 1999 Order (DE 461), which required Defendant Wuensch to disgorge \$7,961,295, as a basis for determining the appropriate lump sum for the purging condition.

hidden assets before making his recommendation as to the purging conditions. Therefore, this Court must exercise "considerable deference" to the Magistrate Judge's determination that a lump sum of \$250,000 followed by monthly payments of \$1,500 constitutes appropriate purging conditions.

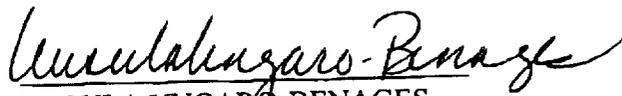
Additionally, to the extent the Magistrate Judge intended to set the lump sum of the purging conditions below five percent (as was done in *Wellington*), he did not do so when he recommended a lump sum of \$250,000 which represents almost eleven percent of the total amount of disgorgement Ordered by this Court on December 7, 1999. Nevertheless, Defendant Wuensch is willing to pay this sum.

For the forgoing reasons, it is hereby

ORDERED AND ADJUDGED that the Magistrate Judge's Report and Recommendation dated January 3, 2003 is RATIFIED, AFFIRMED AND APPROVED. It is further

ORDERED AND ADJUDGED that Defendant Wuensch is in civil contempt of this Court's December 7, 1999 Order and shall be incarcerated if he fails to pay, within thirty (30) days of this Order, the sum of \$250,000 into the Registry of the Court, and make monthly payments of \$1,500, commencing thirty (30) days from this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 21 day of April, 2003.

  
URSULA UNGARO-BENAGES  
UNITED STATES DISTRICT JUDGE

copies provided:  
Magistrate Judge Brown  
counsel of record