11 CIV 1013

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 2/15/11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. BRIAN KIM and LIQUID CAPITAL MANAGEMENT, LLC Defendants.	Civil Case No. _____ ~~[Proposed]~~ ***EX PARTE* STATUTORY RESTRAINING ORDER FREEZING ASSETS, PROHIBITING THE DESTRUCTION OR ALTERATION OF DOCUMENTS, GRANTING EXPEDITED DISCOVERY, ORDERING AN ACCOUNTING OF ASSETS, AND AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTIONSHOULD NOT BE GRANTED** (ECF CASE)

Plaintiff, U.S. Commodity Futures Trading Commission (the "Commission") has filed a complaint for a preliminary and permanent injunction and other relief, and moved pursuant to Section 6(c) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 1 *et seq.* (2006), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act ("CRA"), §§ 13101-13204, 122 Stat. 1651 (effective June 18, 2008, to be codified at 7 U.S.C. §13a-1 for an *ex parte* statutory restraining order freezing assets, prohibiting the destruction of books, records, or other documents, granting leave to the Commission to engage in expedited asset discovery for the purpose of discovering the nature, location, status, and extent of assets, and ordering Defendants Brian Kim ("Kim") and Liquid Capital Management LLC ("LCM") (collectively, the "Defendants") to show cause why a preliminary injunction should not be issued.

The Court has considered the pleadings, the declarations of Judith Slowly and Kelly Mok, and the memorandum of law filed in support of the Commission's application and now, being fully advised in the premises, finds that:

(1) This Court has jurisdiction over the subject matter of this case, and Section 6c of the Act, 7 U.S.C. §13a-1, as amended by the CRA, authorizes the *ex parte* relief;

(2) There is good cause to believe that the Defendants have engaged in, are engaging in, or are about to engage in fraud constituting violations of 7 U.S.C. § 6b(a)(2)(A)-(C) and § 6o(1), as amended by the CRA;

(3) Absent the entry of this statutory restraining order, the Defendants are likely to cause the dissipation or transfer assets and destruction of business records. As such, good cause exists for the freezing of Defendants' assets and for entry of an Order prohibiting the Defendants from destroying records and denying agents of the Commission access to inspect and copy records;

(4) Good cause exists for the freezing of the Defendants' assets and for entry of an order prohibiting Defendants from destroying records and denying agents of the Commission access to inspect and copy records;

(5) Good cause exists to permit asset discovery before the meeting of counsel pursuant to Rule 26(d) of the Federal Rules of Civil Procedure;

(6) Pursuant to Rule 30(a)(2) of the Federal Rules of Civil Procedure, immediate depositions are consistent with the principles of Rule 26(b)(2) of the Federal Rules of Civil Procedure;

(7) Weighing the equities and considering the Commission's likelihood of success in its claims for relief, the issuance of a statutory restraining order is in the public interest; and

(8) This is a proper case for granting a statutory restraining order to preserve the status quo, protect customers from loss and damage, and enable the Commission to fulfill its statutory duties, therefore the Court orders as follows:

DEFINITIONS

For the purposes of this Order, the following definitions apply:

1. "Assets" means any legal or equitable interest in, right to, or claim to, any real or personal property, including but not limited to chattels, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, receivables, contracts, insurance policies, and all cash, wherever located, whether in the United States or abroad.

2. The term "document" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes, but is not limited to, writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonable usable form. A draft or non-identical copy is a separate document within the meaning of the term.

3. The term "Defendants" refers to Brian Kim and LCM and any person insofar as he or she is acting in the capacity of an officer, agent, servant, employee, or attorney of any of the Defendants, and any person who receives actual notice of this Order by personal service or otherwise insofar as he or she is acting in concert or participation with any of the Defendants.

RELIEF GRANTED

I. Asset Freeze

IT IS HEREBY ORDERED that the Defendants, except as otherwise ordered by this Court, are restrained and enjoined from directly or indirectly:

A. Transferring, selling, alienating, liquidating, encumbering, pledging, leasing, loaning, assigning, concealing, dissipating, converting, withdrawing, or otherwise disposing of any assets, wherever located, including assets held outside the United States, except as provided in this Order, or as otherwise ordered by the Court;

B. Opening or causing to be opened any safe deposit boxes titled in the name or subject to access by any of the Defendants.

II. Identification and Preservation of Assets

IT IS FURTHER ORDERED, pending further Order of this Court, that any financial or brokerage institution or business entity that holds, controls, or maintains custody of any account or asset titled in the name of, held for the benefit of, or otherwise under the control of any of the Defendants, or has held, controlled, or maintained custody of any such account or asset of any of the Defendants at any time since at least January 2004 shall:

A. Prohibit any of the Defendants and all other persons from withdrawing, removing, assigning, transferring, pledging, encumbering, disbursing, dissipating, converting, selling or otherwise disposing of any such asset, except as directed by further order of the Court;

B. Deny any of the Defendants and all other persons access to any safe deposit box that is titled in the name of any of the Defendants or otherwise subject to access by any of the Defendants;

C. Provide the Commission, within five (5) business days of receiving a copy of this Order, a statement setting forth:

(1) the identification number of each such account or asset titled in the name of any of the Defendants or held on behalf of, or for the benefit of any of the Defendants or under the control of any of the Defendants;

(2) the balance of each such account, or a description of the nature and value of such asset as of the close of business on the day on which this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, the name of the person or entity to whom such account or other asset was remitted; and

(3) the identification of any safe deposit box that is either titled in the name of any of the Defendants, or is otherwise subject to access by any of the Defendants;

D. Upon request by the Commission, promptly provide the Commission with copies of all records or other documentation pertaining to such account or asset, including, but not limited to, originals or copies of account applications, account statements, signature cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instruments or slips, currency transaction reports, 1099 forms, trading records, and safe deposit box logs; and

E. Cooperate with all reasonable requests of the Commission relating to implementation of this Order, including producing records related to Defendant's accounts.

III. Accounting of Assets

IT IS FURTHER ORDERED that within five (5) business days following the service of this Order, the Defendants shall:

A. Provide the Commission with a full accounting of all funds, documents, and assets both within and outside the United States which are (1) titled in the name of any of the Defendants; or (2) held by any person or entity, for the benefit of any of the Defendants; or (3) under any of the Defendants' direct or indirect control; and

B. Provide the Commission access to all records of accounts or assets of any of the Defendants held by financial institutions located both within and outside the territorial United States by signing the Consent to Release of Financial Records attached to this Order.

IV. Maintenance of and Access to Business Records

IT IS HEREBY ORDERED that the Defendants, and all persons or entities who receive notice of this Order by personal service or otherwise, are restrained and enjoined from directly or indirectly destroying, mutilating, erasing, altering, concealing or disposing of, in any manner, directly or indirectly, any documents that relate to the business practices or business finances of any of the Defendants.

V. Commission's Access to and Inspection of Documents

IT IS FURTHER ORDERED that representatives of the Commission be immediately allowed to inspect the books, records, and other documents of any of the Defendants and his agents including, but not limited to, paper documents, electronically stored data, tape recordings, and computer discs, wherever they may be situated and whether they are in the possession of any

of the Defendants or others, and to copy said documents, data and records, either on or off the premises where they may be situated. Upon request of the Commission, the Defendants are ordered to deliver to the Commission documents of any of the Defendant, including but not limited to all books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, cancelled checks, records of wire transfers, and check registers), lists of customers, title documents, other papers, all keys, computer passwords, entry codes, and combinations to locks necessary to gain or to secure access to any of the assets or documents of any of the Defendants, including but not limited to, access to the Defendant's business premises, means of communication, accounts, computer systems, or other property and information identifying the accounts, employees, properties, or other assets or obligations of the Defendant.

VI. Service of Order

IT IS FURTHER ORDERED that service of a copy of this order upon Defendant LCM via Overnight Delivery to 817 Broadway, New York, NY 10003 and to its registered agent, Harvard Business Service, Inc., at 16192 Coastal Highway, Lewes, DE 19958 and upon Brian Kim via overnight delivery to 90 Prince Street, New York, NY 10012 shall be good and sufficient service thereof and that copies of this Order may be served by any means, including facsimile or e-mail transmission, upon any financial institution or other entity or person that may have possession, custody, or control of any documents or assets of any of the Defendants or that may be subject to any provision of this Order.

VII. Expedited Asset Discovery

IT IS FURTHER ORDERED that the Commission is granted leave, at any time after service of this Order, to take the deposition of and demand the production of documents from

any person or entity for the purpose of discovering the nature, location, status, and extent of assets of any of the Defendants, and the location of documents reflecting the business transactions of any of the Defendants; forty-eight (48) hours notice shall be deemed sufficient for any such deposition and five (5) days notice shall be deemed sufficient for the production of any such documents.

VIII. Depositions

IT IS FURTHER ORDERED that the limitations and conditions set forth in Federal Rule of Civil Procedure 30(a)(2)(A) regarding subsequent depositions of an individual shall not apply to depositions taken pursuant to this Order. No depositions taken pursuant to Paragraph VII shall count toward the ten-deposition limit set forth in Federal Rule of Civil Procedure 30(a)(2)(A). In accordance with Federal Rule of Civil Procedure 30(a)(2)(B), the deposition of Brian Kim may be taken whether or not he is confined in prison.

IX. Service on the Commission

IT IS FURTHER ORDERED that the Defendants shall serve all pleadings, correspondence, notices required by this Order, and other materials on the Commission by delivering a copy to Lara Turcik, Trial Attorney, Division of Enforcement, U.S. Commodity Futures Trading Commission, Eastern Regional Office, 140 Broadway, 19th Floor, New York, New York 10005.

X. Order to Show Cause

IT IS FURTHER ORDERED that Defendants, show cause before a motion term of this Court, at Room 11B, United States Courthouse, 500 Pearl Street, in the City, County and State of New York, on March 2, 2011, at 9:30 a.m. o'clock in the morning/afternoon thereof, or as soon thereafter as counsel may be heard, why an order should not be issued pursuant to

Section 6c of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 6c, 7 U.S.C. § 13a-1 (2006), ordering that:

A. Defendants are enjoined from further violations of the Act; specifically, prohibiting the Defendant from violating Sections 4b(a)(2)(A)-(C) of the Act, to be codified at 7 U.S.C. §6b(a)(2)(A) - (C), Section 4o(1) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §6o, and Section 9(a)(4), as amended by the CRA, to be codified at 7 U.S.C. §13(a)(4);

B. Defendants and any of their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with the Defendants, including any successor thereof shall be prohibited from, directly or indirectly:

1. Cheating or defrauding or attempting to cheat or defraud any other person, or making or causing to be made any false report or statement thereof or causing to be entered for any person any false record thereof, or deceiving or attempting to deceive any other person by any means whatsoever, in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of any commodity option transaction in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and CFTC Regulation 33.10, 17 C.F.R. § 33.10 (2009);

2. Willfully falsifying, concealing, or covering up by any trick, scheme, or artifice a material fact, making any false, fictitious, or fraudulent statements or representations, or making or using any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry to a registered entity, board of trade, or futures association designated or registered

under the Act acting in furtherance of its official duties under the Act in violation of Section 9(a)(4) of the Act, 7 U.S.C. § 13(a)(4);

3. Trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(29) of the Act, as amended, 7 U.S.C. § 1a(29));

4. Entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2010)) ("commodity options"), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i)) ("forex contracts") for their own personal account or for any account in which they have a direct or indirect interest;

5. Having any commodity futures, options on commodity futures, commodity options, and/or forex contracts traded on their behalf;

6. 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 futures, options on commodity futures, commodity options, and/or forex contracts;

7. Soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;

8. 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);

9. Acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2010)), agent or any other officer or employee of any person registered, exempted from registration or required to be registered with the Commission, except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2010).

B. Continuing the freeze on the assets of the Defendants;

C. Ordering Injunctive Defendants to repatriate to the territory of the United States and deliver to the Registry of this Court all funds and assets located in foreign countries which are (1) titled in the name individually or jointly of Defendants; or (2) held by a person or entity for the benefit of any Defendants; or (3) under such Defendants' direct or indirect control, whether jointly or singly;

D. Ordering the Defendants, financial or brokerage institutions, business entities, and others to provide all documents specified in this Order to the Commission; and

E. Ordering any additional relief this Court deems appropriate.

Should the Defendants wish to file a memorandum of law or other papers concerning the issuance of a preliminary injunction against the Defendants, such materials shall be filed, served and received by all parties at least two (2) days before the hearing date ordered above.

XI. Force and Effect of Order

IT IS FURTHER ORDERED that this Order shall remain in full force and effect until further order of this Court, and that this Court retains jurisdiction of this matter for all purposes.

SO ORDERED,

On this _____ day of February 2011.

_____
The Honorable _____
U.S. District Judge
United States District Court
_____ District of New York

All parties shall appear before this Court on February 18, 2011 at 3:30 pm in Courtroom 11B for a conference.

Denise Cote
February 15, 2011
10:25 am

CONSENT TO RELEASE OF FINANCIAL RECORDS

I, _____, do hereby direct any bank, financial institution or trust company at which I have an account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to said accounts to any attorney of the U.S. Commodity Futures Trading Commission, and to give evidence relevant thereto, in the matter of U.S. Commodity Futures Trading Commission v. Brian Kim, *et al.*, Docket No. _____ now pending before the United States District Court for the Southern District of New York, and this shall be irrevocable authority for so doing. This direction is intended to apply to the laws of countries other than the United States which restrict or prohibit the disclosure of bank information without the consent of the holder of the account, and shall be construed as consent with respect thereto, and the same apply to any of the bank accounts for which I may be a relevant principal.

Dated: _____, 2011

_____
Signature