In The United States District Court
For The Northern District Of Illinois
Eastern Division

U.S. Commodity Futures Trading Commission,	)	
	)	Civil Action No.: 07 C 3598
Plaintiff,	)	
	)	Honorable Judge Manning
vs.	)	
	)	Magistrate Judge Mason
Lake Shore Asset Management Limited, et al.	)	
	)	
	)	
Defendants.	)	

EMERGENCY MOTION OF DEFENDANT LAKE SHORE ASSET MANAGEMENT LIMITED FOR A STAY OF PRELIMINARY INJUNCTION ORDER PENDING APPEAL

On August 29, 2007, Defendant Lake Shore Asset Management Limited ("LSAM") filed a Notice of Appeal of the Court's Order entered August 28, 2007, granting in part plaintiff's motion for preliminary injunction. Pursuant to Rule 62(c), Fed. R. Civ. P., LSAM respectfully moves for a stay of this preliminary injunction order pending appeal. As described below, the requirements for a stay pending appeal are all satisfied in this case. These requirements are: (1) the appellant is likely to succeed on the merits, (2) the appellant will suffer irreparable injury unless the stay is granted, (3) no substantial harm will come to other interested parties, and (4) the stay will do no harm to the public interest. *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 637 F. Supp. 1014, 1019 (N.D. Ill. 1986).

ARGUMENT

I. LSAM is Likely to Succeed on the Merits on Appeal.

A. The Preliminary Injunction Order Improperly Enjoins Persons Not a Parties to the Proceeding.

The appeal of the preliminary injunction is likely to succeed on the merits because it enjoins persons who are not parties to this proceeding. It is well-established that an injunction may not enjoin persons who are not parties to the proceeding. *Scott v. Donald*, 165 U.S. 107, 117 (1897) (finding the injunction "objectionable because it enjoins persons not parties to the suit"); *Chase Nat'l. Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 436-37 (1934) (finding injunction clearly erroneous where it extended to "all persons to whom notice of the injunction should come" because it purported to affect rights of those who had "not been adjudged according to law."); *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 110-11 (1969) (finding injunction improperly issued against non-party although party had stipulated that it was the alter-ego of the non-party; the stipulation "cannot foreclose [the non-party], which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation"); *United States v. Kirschenbaum*, 156 F.3d 784, 796 (7th Cir. 1998) (finding injunction that purported to enjoin a non-party to be void).

B. The Evidence was Insufficient to Show that LSAM Violated Antifraud Provisions of the Commodity Exchange Act.

LSAM is also likely to succeed on the merits of its appeal because the evidence presented by plaintiff is insufficient to show that LSAM violated the antifraud provisions of the Commodity Exchange Act ("CEA"). The antifraud provisions are sections 4b and 4o. The requirement of misrepresentations or other fraudulent conduct needed to

establish a violation of these provisions was not established by the evidence, which was admittedly incomplete and subject to non-fraudulent interpretations. It was the plaintiff's burden to prove fraud, and not defendant's burden to disprove it.

In addition, plaintiff did not present any evidence that any person protected by the CEA received any allegedly misleading or fraudulent promotional materials. The only customer shown to have received promotional materials – the Bank of Montreal Ireland – was informed that the largest drawdown of the trading program was negative (-) 48.56% in July 2002, and did not receive allegedly fraudulent information. Sections 4b and 4o of the CEA do not prohibit conduct in the abstract, but rather proscribe certain conduct directed at an actual person. Section 4b prohibits a person from defrauding "such other person". 7 U.S.C. § 6b(a)(2)(i), (ii), (iii). *See Commodity Trend Serv., Inc. v. CFTC*, 233 F.3d 981, 992 (7th Cir. 2000). Similarly, Section 4o speaks of defrauding actual or prospective "clients," or "participants." 7 U.S.C. § 6o(1)(A), (B); *Commodity Trend Serv., Inc.*, 233 F.3d at 988. By failing to show that the allegedly fraudulent information was provided to any of the specified persons, plaintiff has failed to show a violation of Sections 4b or 4o of the CEA.

It also follows from the foregoing that an asset freeze against LSAM is not justified by the evidence. The evidence established that LSAM has no possession or control over customer funds, and therefore no funds are in jeopardy and no asset freeze is justified.

C. The Evidence Does Not Support Injunctive Relief Relating to Records.

LSAM is also likely to succeed on the merits of its appeal because the Order requiring LSAM to allow inspection of all of its books and records related to its non-U.S.

customers and non-U.S. activities is not narrowly tailored to maintain the status quo until the case may be adjudicated on the merits. *See Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001); *Chathas v. Local 134 IBEW*, 233 F.3d 508, 513 (7th Cir. 2000). Rather, the Order holds that any records that may be in LSAM's possession or control related to foreign investors and foreign activities were generated in LSAM's capacity as a U.S.-registered CPO or CTA, and must affirmatively be provided to the CFTC. However, as held in *New York Currency Research,* in order to state a claim for a violation of Section 4n of the CEA, the CFTC must not only show that LSAM was registered as a CPO or a CTA, but must also prove that LSAM was acting in one of those capacities when it made the records. *New York Currency Research Corporation v. CFTC*, 180 F.3d 83, 90-91 (2d Cir. 1999).

The extraterritorial reach of the CEA's recordkeeping requirements and the CFTC's jurisdiction over LSAM's investment activities outside the U.S. with non-U.S. investors, to the extent that LSAM engaged in such activities, remain to be litigated on the merits in a plenary trial. Therefore, the broad relief relating to records, which upsets the status quo and seeks to impose affirmative burdens on LSAM without a full hearing on the merits, is not warranted by the law or the evidence.

II. A Stay of the Injunction is Necessary to Prevent Irreparable Harm to the Business and Business Reputations of LSAM and Its Principals and also to Prevent Irreparable Harm to Innocent Third Party Investors.

Each day that the assets of innocent third party investors continue to remain frozen causes continuing and substantial irreparable harm, not only to the business and business reputations of LSAM and its principals, but also to innocent third party investors whose assets have been withheld by the Custodians.

Investors have been deprived of access to their own property since June 22, 2007, due to various asset freezes instituted by this Court and the National Futures Association. Plaintiff presented no evidence from investors showing that any investor supported an asset freeze pending resolution of this dispute and the Court erroneously excluded the only evidence from investors which demonstrated irreparable investor harm. As these declarations illustrated, the investors, who are non-U.S. persons investing in Funds organized outside the U.S., want access to their assets. Instead, they now face an indefinite deprivation of property as a result of the asset freeze.

In addition to harming the investors, the evidence showed that an asset freeze inflicts significant and continuing irreparable harm on the business reputations of LSAM and its principals. LSAM's principals have been engaged in the investment business for many years. Mr. Rosenberg is a former chairman of the Chicago Mercantile Exchange and Mr. Baker has been involved in investing clients' assets outside the United States for 13 years. The asset freeze makes it impossible to carry out LSAM's current business and its business expansion plans, and also harms LSAM's ability to do business in the future. The longer that the assets held with the Custodians continue to be frozen, the less likely it is that LSAM will be able to recover from this injury to its reputation and resume its business.

III. A Stay of the Injunction Will Not Harm Any Other Parties Interested In the Proceeding.

The preliminary injunction does not protect the public at large or investors. As discussed in Section II, *supra*, rather than protecting the interests of investors, the asset freeze harms the investors' interests. There is no evidence in the record that investors support the asset freeze and the proof presented by the CFTC does not show by a

preponderance of the evidence that the investors' assets are in jeopardy. The evidence in the proceeding only demonstrated that the CFTC and the National Futures Association were using incomplete records as a basis to formulate their fraud allegations against LSAM. Rather than use its recordkeeping dispute with LSAM to launch an investigation of LSAM, the CFTC should follow its investigative procedures, which do not provide for an asset freeze or other injunctive relief while the investigation is pending. 7 U.S.C § 15 (2007).

IV. A Stay Will Promote The Public Interest

A stay of the preliminary injunction order would promote the public interest. It is in the public interest that the courts not deprive persons of their property without due process of law. That is what has happened here, where non-parties to this case have lost access to their property based on the asset freeze instituted as part of the preliminary injunction order.

A stay would also be in the public interest because it would prevent a United States agency and a United States Court from interfering with transactions by non-U.S. persons outside the U.S. The Supreme Court has stated that "it is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 664 (7th Cir. 1998) (*citing EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). Principles of international comity dictate that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law[.]" Restatement (Third), Foreign Relations Law of the United States § 114. Moreover, absent fraudulent transactions which have a foreseeable and

substantial harmful effect in the United States, activities of foreign persons with foreign clients, even where such activity may result in trading on the U.S. exchanges, is not subject to U.S. jurisdiction. *See Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1108 (7th Cir. 1984). *See also Mak v. Wocom Commodities Ltd.*, 112 F.3d 287, 289 (declining to extend Tamari where the fraudulent transactions did not occur on a U.S. exchange). Here, plaintiff has not alleged any fraudulent transactions on the United States' exchanges. Rather, plaintiff alleges misrepresentation of the Funds' performance figures and the value of their assets under management. The essential core of this alleged fraud occurred outside of the United States and does not have adverse effects on the United States' exchanges. Moreover, there is no U.S. conduct that was essential to the completion of the alleged misrepresentation. Therefore, plaintiff's allegations are not actionable under United States law.

PRAYER FOR RELIEF

For all of the foregoing reasons, LSAM respectfully prays that the Court stay its preliminary injunction order pending appeal.

Respectfully Submitted,

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/s/ William J. Nissen
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CERTIFICATE OF SERVICE

I, Steven E. Sexton, an attorney, hereby certify that I have caused copies of the foregoing Emergency Motion of Defendant Lake Shore Asset Management Limited for a Stay of Preliminary Injunction Order Pending Appeal to be served upon the following individuals by ECF Notification and Electronic Means on August 29, 2007.

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