

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. COMMODITY FUTURES)	Civil Action No.: 07 C 3598
TRADING COMMISSION,)	
)	
Plaintiff)	Honorable Judge Manning
vs.)	Magistrate Judge Mason
)	
LAKE SHORE ASSET MANAGEMENT)	
LIMITED, LAKE SHORE GROUP OF)	
COMPANIES, INC., LTD., and)	
PHILIP J. BAKER;)	
)	
Defendants.)	

PLAINTIFF’S MEMORANDUM

Pursuant to this Court’s Order dated November 9, 2007 (Doc. 299), Plaintiff, Commodity Futures Trading Commission (“Commission” or “CFTC”), submits this Memorandum to address appropriate sanctions for Defendant Lake Shore Asset Management Limited’s (“LSAM” or “Defendant”) civil contempt of court based on its refusal to comply with the document portions of this Court’s preliminary injunction order (Doc. 118).

The Commission states as follows:

I. DISCUSSION

A. Lake Shore Asset Management Limited and Its Controlling Person Baker Should Be Barred from Presenting Any Evidence Relating to Information Contained in the Books and Records It Refused to Produce

On August 28, 2007, this Court entered a preliminary injunction against LSAM, individually and as part of the Lake Shore common enterprise that, among other things, restrained, enjoined and prohibited them from:

Refusing to permit authorized representatives of the CFTC to inspect and copy, when and as requested by those representatives, any books and records,

documents, correspondence, brochures, manuals, electronically stored data, tape records or other property of Lake Shore Limited, the Lake Shore common enterprise, and their agents, wherever located, and whether they are in the hands of any Lake Shore entity, to the extent that those records relate to activities of any Lake Shore entity taken as a CTA or CPO or that relate to trading that occurred on U.S. exchanges; ... (Doc. 118, page 84, 3.B.).

To date, LSAM has not complied with the above-described document production portions of this Court's preliminary injunction order. Indeed, LSAM's response to the Court's rule to show cause does not dispute that it is in civil contempt of court based on its refusal to conform to this Court's specific directives. Thus, the Court has requested that the CFTC address the question of appropriate sanction's for LSAM's refusal to comply with the preliminary injunction.

Civil contempt sanctions may be entered to coerce compliance with an injunction or compensate the complainant for the violation of the injunction. *Connolly v. J.T. Ventures*, 851 F.2d 930, 932 (7th Cir. 1988); *Tranzact Technologie, Inc. v. 1Source Worldsite*, 406 F.3d 851, 855 (7th Cir. 2005). A court has broad discretion to fashion a remedy based upon the nature of the harm and the probable effect of alternative sanctions. *Connolly*, 851 F.2d at 933.

It is well settled that a command to a corporation is a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt. *Connolly*, 851 F.2d at 935, (*quoting Wilson v. United States*, 221 U.S. 361, 376-77(1911)); *Tranzact Technologies, Inc.*, 406 F.3d at 856.

In the instant case, corporate Defendant LSAM and its controlling person, Philip Baker ("Baker"), have had numerous opportunities to obey the document production portion of this Court's injunction. There is no question that LSAM's and Baker's non-compliance is willful.

Given the foregoing, the CFTC respectfully requests that this Court bar LSAM, individually and as part of the Lake Shore common enterprise, and its controlling person Baker from presenting any evidence or testimony in the instant litigation relating to information contained within its books and records to the extent that those records relate to activities of any Lake Shore entity taken as a CTA or CPO or that relate to trading that occurred on U.S. exchanges. Such a bar should remain in place until such time as LSAM and Baker comply with the injunction and produce the requisite documents and should become permanent at least ninety days prior to a trial or hearing in this matter. The CFTC believes the ninety day time period is necessary to preclude LSAM and Baker from producing the documents on the eve of trial thereby prejudicing Plaintiff's case.

The practical implications of the foregoing sanction are far-reaching. For example, LSAM has continuously argued that it does not "own" the accounts at the three London futures commission merchants ("FCMs") and thus the Court lacks jurisdiction over the foreign activities of the Lake Shore funds. (Doc. 151, page 7). If this Court were to enter the preclusion sanction referenced above, LSAM and Baker would be barred from making such an argument because the books and records would conclusively establish the identity of the owners of the FCM accounts. Similarly, until LSAM and Baker complied with the document portion of the preliminary injunction, they would be barred from making any factual statements regarding the segregated managed accounts ("SMAs") because they have not produced any records relative to the SMAs or about trading at any FCMs other than Fimat, Man or Lehman Brothers.

Moreover, LSAM has asserted that it should not be required to produce any SMAs because "the SMAs are maintained in foreign countries for foreign customers." (Doc. 151, page 6). Because LSAM's books and records would establish the nature, identity and amount of the

SMA, LSAM and Baker would be precluded from making the foregoing argument until they produce their books and records to the CFTC.

In sum, such a sanction would bar LSAM and Baker from playing “hide the ball” with this Court, the CFTC and the Receiver because they would be precluded from introducing any testimony or making any argument that derived from an examination of LSAM’s books and records maintained in its capacity as a CTA or CPO that they have refused to produce. Thus, Defendants could not benefit from their refusal to comply with a court order and such a sanction would coerce their compliance with the preliminary injunction.

B. Lake Shore Asset Management Limited and Baker Should Be Required to Compensate CFTC for Costs Associated with the CFTC’s Obtaining Documents that Should Be Produced by Defendants

Civil contempt sanctions are designed for the dual purposes of compelling compliance with a court order and compensating the complainant for losses caused by the contemptuous conduct. *FTC v. Cleverlink Trading Limited*, 2007 WL 2875626 at *15 (N.D. Ill. 2007); *Aero Products Intern., Inc. v. Intex Recreation Corp.* 2005 WL 1182430 at *7 (N.D. Ill. 2005); *Tranzact Technologies, Inc.*, 406 F.3d at 855.

Because LSAM and Baker have refused to comply with the document portions of the preliminary injunction, the CFTC will be forced to issue subpoenas to banks, FCMs and other financial institutions and to reconstruct LSAM’s business operations, particularly with regard to customer funds received and disbursed. Thus, the CFTC will incur costs for copying, scanning and compiling documentation that Defendants should have produced by virtue of the preliminary injunction order or through discovery. Since the foregoing costs are caused by LSAM’s and Baker’s contemptuous conduct, the CFTC requests that this Court require LSAM and Baker to reimburse the CFTC for the costs attendant with the reconstruction of documents that would

ordinarily have been produced by Defendants, such as any commodity trading records, ledgers, bank records, customer records and records relating to Defendants' CTA and CPO activities. Moreover, should Defendants fail to reimburse Plaintiff for such costs, Plaintiff would not be required to produce such documents to Defendants in the course of discovery. Such a sanction would compel LSAM and Baker to either comply with the injunction's document production requirement or reimburse the CFTC for its costs occasioned by the Defendants' contemptuous conduct.

II. CONCLUSION

Wherefore, the CFTC respectfully requests that this Court order that LSAM, individually and as part of the Lake Shore common enterprise, and through its controlling person Baker be:

- 1) barred from presenting any evidence or testimony in the instant litigation relating to information contained within LSAM's books and records to the extent that those records relate to activities of any Lake Shore entity taken as a CTA or CPO or that relate to trading that occurred on U.S. exchanges. Such a bar should remain in place until such time as LSAM and Baker comply with the injunction and produce the requisite documents and should become permanent at least ninety days prior to a trial or hearing in this matter; and 2) require LSAM and Baker to reimburse the CFTC for the costs attendant with the reconstruction of documents that would have been produced by Defendants pursuant to the preliminary injunction, such as any commodity trading records, bank records, customer records and records relating to Defendants' CTA and CPO activities. Moreover, should LSAM and Baker fail to reimburse Plaintiff for such costs Plaintiff would not be required to produce such documents to them in the course of discovery.

Date: November 15, 2007

Respectfully submitted,

/s/ Diane M. Romaniuk

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CERTIFICATE OF SERVICE

The undersigned, an attorney with the Commodity Futures Trading Commission, certifies that on November 15, 2007, I caused the foregoing,

- *Notice of Filing*
- *Plaintiff's Memorandum*

to be electronically filed with the Clerk of the Court using CM/ECF and to be served on the following individuals by Electronic means and/or ECF notification.

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