No. _____

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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| U.S. Commodity Futures Trading Commission,<br>Plaintiff-Appellee,<br><br>vs.<br><br>Lake Shore Asset Management Limited,<br>Defendant-Appellant. | Emergency Motion for Stay Pending Appeal<br><br>No. 07 C 3598 |



**DEFENDANT-APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL**

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## APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Seventh Circuit Local Rule 26.1(b), on behalf of Defendant-Appellant, LAKE SHORE ASSET MANAGEMENT LIMITED, the following persons are the trial judge(s), all attorneys, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case and appeal, including parent corporations and all publicly held companies that own 10% or more of the party's stock:

| | |
|---|---|
| **District Court Judge:** | Hon. Judge Manning |
| **Magistrate Judge:** | Hon. Judge Mason |
| **Respondent/Plaintiff:** | U.S. Commodity Futures Trading Commission |
| **Plaintiff's Counsel:** | Diane Marie Romaniuk<br>Ava Michelle Gould<br>Rosemary C. Hollinger<br>Martin B. White |
| **Appellant/Defendant:** | Lake Shore Asset Management Limited |
| **Appellant/Defendant's Counsel:** | Constantine L. Trela Jr.<br>William J. Nissen<br>Steven E. Sexton<br>Sidley Austin LLP<br><br>Alexandre Schwab<br>Schwab Flaherty Hassberger Crausaz |
| **Persons Associated with Appellant/Defendant:** | Laurence Rosenberg<br>Philip Baker<br>Lake Shore Alternative Financial Asset Fund IV U.S. LLC |
| **Investors/Investor Representatives:** | Brian Trowbridge<br>Director of Corporate Directors Ltd.<br>Lake Shore Alternative Financial Asset Ltd. |

Lake Shore Alternative Financial Asset Account I Ltd.
Lake Shore Alternative Financial Asset Account II Ltd.

Lake Shore Alternative Financial Asset Fund I

Lake Shore Alternative Financial Asset Fund II

Lake Shore Alternative Financial Asset Fund III

Lake Shore Alternative Financial Asset Fund IV

MF Global Inc.
Man Financial

Lehman Brothers

FIMAT

Sentinel Management Group, Inc.

Jose Gomez
Independent Financial Consultant

Ming-Feng Chen
Year Full International Financial Co., Ltd.

Alejandro Marquez Espinosa
Independent Financial Consultant

Ricardo Gonzalez Sanchez
Amalfi Overseas

Sebastian Ang and Oh Chin Ping
Canadian Imperial Bank of Commerce

Tsai I. Ting
Deca Financial Management, Inc.

Abraham Bibliowicz
Family Council Financial
Consultants International Group
(FCFCIG) Inc.

Jamie Alviar Garcia
Independent Financial Consultant

LAU Ka Lee Alice
Asia Capital Partners Limited

Jose Fernando Hurtado
Independent Financial Consultant

David Thornton Humphreys
Newhaven Capital Limited

Mark Plummer
Partners Financial Services

Jeremy Peter Briduz
Prime Digital Company Limited

Maureen Chan
Royal Bank of Canada (Asia)
Limited

Antonio Recabarren
Recabarren and Partners Ltd.

Robert Stewart
Siglo International Ltd.

Philip van den Berg
Taler Closet Management Ltd.

Christopher Stockton
Vosart Limited

Cristobal Andres Cortes Rosselot
Athena Capital, Inc.

Lauro Brand
GBI Advisors

Andres Pedraea
Fernando Gaame
Caribbean Capital Administration
A.V.V.

S. Andrew Banks
Fleur De Lis, LLC

S. Andrew Banks
Nomizaiku, LLC

Royce Yudkoff
Heath Street Associates, LP

Royce Yudkoff
Stafford Insurance Co. Ltd.

Royce Yudkoff
Oishii Investments, LLC

Kent Hill

Mauricio Porras
Marlin Wealth Management Inc.

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CAYROS Capital AG

Bank of Montreal Ireland

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**DEFENDANT-APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL**

Defendant-Appellant Lake Shore Asset Management Limited ("LSAM") respectfully moves this Court for a stay pending appeal of the district court's Order Appointing Receiver ("Order") and the Memorandum and Order entered October 4, 2007, which granted plaintiff Commodity Futures Trading Commission's ("CFTC") motion for appointment of receiver and issued rules to show cause ("Memorandum and Order"). The Orders at issue attached hereto as Exhibits 1 and 2, respectively.

The district court stayed the appointment of a receiver by separate Memorandum and Order dated October 4, 2007 ("Stay Memorandum"), provided that LSAM file this emergency motion for stay by 12:00 noon on October 5, 2007. A copy of the Stay Memorandum is attached hereto as Exhibit 3.

In addition to staying the district court's orders which appointed a receiver and issued rules to show cause, LSAM respectfully moves this Court to stay all further proceedings in the district court pending resolution of LSAM's consolidated expedited appeal, Nos. 07-3057 & 07-3070, and this appeal. The issues that will be decided in the consolidated appeal, namely whether the CFTC and district court have jurisdiction over foreign investment funds composed of foreign investors, and whether the court can issue orders against companies who are non-parties with no locations or business in the U.S., are of paramount importance in this case. As long as these issues remain undecided by this Court, any actions taken by the district court will generate additional orders to be appealed, because they will be based on the exercise of jurisdiction which LSAM disputes and the scope of which is central to the resolution of this case. Judicial economy dictates that the district court's proceedings be stayed until this Court gives

guidance in the form of its decision on appeal, and the parties can then proceed on the basis of this Court's ruling.

## STATEMENT OF THE CASE

This appeal, which is the fourth[1] to arise from the same series of events in the space of about two months, presents important issues going to the heart of our system of justice. In a breathtakingly broad series of orders issued on October 4, 2007, the district court is attempting to prevent the defendant LSAM and numerous non-parties from asserting their legal rights in the district court, in this Court, in an English court and in other foreign jurisdictions.

These orders, if not stayed by this Court, would effect the following deprivations of fundamental rights:

1. With no trial or final judgment the district court is appointing a receiver to take over the businesses and assets of defendant LSAM and numerous, separate non-party companies which are associated with the same group of companies as defendant. This would not only result in the assets of these companies being confiscated without due process of law – the district court also expressly stated that the appointment of a receiver for defendant would prevent defendant from continuing to prosecute its pending appeal in this Court. Indeed, the district court stated, "it is true that appointing a receiver will prevent [LSAM] from continuing to litigate this case and the pending appeals." (Stay Memorandum, at 3, Ex. 3).

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[1] On July 27, 2007, LSAM filed an emergency motion for stay of injunction pending appeal (no. 07-2790). This Court vacated the ex parte temporary injunction on August 2, 2007. *CFTC v. Lake Shore Asset Mgmt. Ltd.*, No. 07 C 2790, -- F.3d --, 2007 WL 2206862 (7th Cir. Aug. 2, 2007). On August 7, 2007, LSAM filed an emergency motion to enforce mandate of the Court of Appeals (no. 07-2790). This Court issued an order responding to this motion on August 8, 2007. On August 29, 2007, LSAM filed a petition for review (no. 3057) and notice of appeal (07-3070), which the court has consolidated and has scheduled oral argument for October 23, 2007. LSAM's brief on appeal was filed on September 20, 2007.

2. The orders contain an antisuit injunction which would prohibit foreign non-parties which have done no business in the U.S. from continuing to prosecute a pending action in England in which they are seeking an English court order granting them access to their own assets. The orders also prohibit these non-parties, as well as other non-parties, anywhere in the world, from bringing actions in their own courts to challenge the lawfulness of any actions the receiver may try to take with respect to their assets.

3. The orders threaten counsel for defendant with sanctions for asserting the same principled jurisdictional arguments, soundly grounded in the law and the evidence, that defendant is asserting in the pending appeal in this Court. This order appears intended to drive a wedge between defendant and its counsel and thereby chill counsel's advocacy on behalf of defendant.

This appeal will turn on the same issues raised in the expedited consolidated pending appeal scheduled for argument on October 23: whether the CFTC and district court have jurisdiction over foreign investment funds sold to foreign investors and whether the district court can issue orders against companies which are not parties to this action and are located and do business outside the United States. Given the identity of the issues and the irreparable harm that will occur if the district court proceedings are not stayed, defendant respectfully moves that this Court at least stay the October 4, 2007 orders, but, more properly, stay all proceedings in the district court pending resolution of the consolidated pending appeal and this appeal.

## SUMMARY OF ARGUMENT

The requirements for a stay pending appeal are all satisfied: (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. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Bradford-Scott Data Corp. Inc. v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997).

## ARGUMENT

### I. An Order Appointing a Receiver is Appealable and a Stay of the Order and of All Further Proceedings in the District Court is Necessary under these Circumstances.

On October 4, 2007, LSAM filed a Notice of Appeal from the Memorandum and Order dated October 4, 2007, which grants plaintiff's motion for appointment of receiver and issues rules to show cause against defendant and its counsel, and appealed from the Order Appointing Receiver dated October 4, 2007. An order appointing a receiver is appealable pursuant to 28 U.S.C. § 1292(a)(2). On October 1, 2007, when it filed objections to the CFTC's motion for appointment of a receiver, LSAM also moved the district court for a stay pending appeal in the event the court granted plaintiff's motion to appoint a receiver. The district court granted in part the stay pending appeal by issuing an interim stay of its October 4, 2007 order appointing a receiver, provided that LSAM file this Emergency Motion for a Stay by 12:00 noon on October 5, 2007. Thus this emergency motion for stay is proper under Rule 8, Fed. R. App. P.

Moreover, a stay of all proceedings in the district court pending resolution of LSAM's appeal is appropriate because the orders issued by the district court on October 4, 2007, and matters currently pending in the district court, involve "aspects of the case involved in the appeal." *Bradford-Scott Data Corp.*, 128 F.3d at 505; *Goshtasby v. Bd. of Trs. of the Univ. of Ill.*, 123 F.3d 427, 428 (7th Cir. 1997) (staying district court proceedings where appeal involved non-frivolous objections to district court's jurisdiction). The Court in *Bradford* stayed proceedings where it found that the issue that the district court continued to litigate was the

"mirror image of the question presented on appeal" and therefore the "[c]ontinuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals." 128 F.3d at 505. So too here, a stay of the district court proceedings is warranted because the district court continues to litigate issues LSAM has presented on appeal and has threatened to defeat the point of LSAM's appeal. In fact, by appointing a temporary receiver and threatening to sanction counsel for LSAM personally for maintaining the same principled position that has been raised on appeal, the district court's order not only threatens to defeat the point of LSAM's appeal, but to defeat LSAM's appeal itself.

In the absence of a stay of all proceedings, numerous actions, all of which could be determined to be unlawful in whole or in part by this Court in the pending appeal, may take place. In addition to the rules to show cause the district court entered against LSAM and its counsel, the district court has pending before it a motion by the CFTC for rule to show cause why "Lake Shore Common Enterprise" (a non-entity and non-party) and Philip Baker (a non-party who has not been served or appeared) should not be held in contempt. The alleged contempt is the filing of a lawsuit in England in which non-residents of the U.S. are seeking a court order granting them access to their own assets in England. The CFTC also has pending discovery requests in which it seeks expansive interrogatory and deposition discovery concerning foreign activities that LSAM contends on appeal are outside the CFTC's jurisdiction. Similarly the CFTC is attempting to depose witnesses in Colombia and Chile; if LSAM's appeal is successful, these witnesses will have no discoverable evidence. Finally, in a motion filed October 4 that is particularly intrusive on the relationship between LSAM and its counsel, the

CFTC seeks to compel the law firm representing LSAM to produce all records of fees received in connection with the representation.

If LSAM prevails on its jurisdictional arguments in the pending appeal, the foregoing actions, which would involve substantial time and effort to address, will be unnecessary or their scope greatly reduced. Given this Court's expedited consideration of the pending appeal, and the continuing proliferation of appeals that has occurred in this case, the Court should call a halt to further proceedings in the district court until it decides the jurisdictional arguments in the pending appeal. LSAM therefore respectfully requests that this Court say all proceedings in the district court pending resolution of LSAM's appeals.

## II. LSAM Is Likely to Win on the Merits of Its Appeal

As described below, LSAM is likely to show on appeal that the district court abused its discretion in issuing the October 4 orders. *Pittsburg Equitable Meter Co. v. Paul C. Loeber & Co.*, 160 F.2d 721, 728 (7th Cir. 1947).

### A. The Appointment of a Receiver Would Improperly Deprive LSAM of the Ability to Continue to Assert Its Legal Rights

The appointment of a receiver prior to resolution of LSAM's expedited appeal and prior to a full adjudication of its claims on the merits would improperly deprive LSAM of its legal right to contest the CFTC's jurisdiction over LSAM's foreign activities. For this reason, LSAM urged the district court to include in its order a provision suggested by LSAM that made clear that in the event of an appointment of a receiver, LSAM would not lose its legal right to continue to defend the case. (Defendant's Objections to Second Proposed Order, Dkt. 171, at ¶ 11.) The district court essentially did the opposite: after granting plaintiff's motion for appointment of a receiver, the district court stated that "it is true that appointing a receiver will prevent [LSAM]

from continuing to litigate this case and the pending appeals." (Stay Memorandum, at 3, Ex. 3). Indeed, the receivership order provides that the receiver may "dispose of ... any actions or proceedings in state, federal or foreign jurisdictions [.]" (Order at 3(F).) This attempt by the district court to prevent LSAM from obtaining a decision on appeal should not be permitted by this Court, and therefore a stay is necessary.

The order granting a receivership also threatens sanctions against LSAM's counsel by issuing a rule to show cause why counsel should not be sanctioned under 28 U.S.C. § 1927 and Fed. R. Civ. P. 37(b)(2). Not only is this Order unwarranted under the facts and law, but its effect would be to further hamper LSAM from continuing to defend because it would drive a wedge between attorney and client and chill the attorney's advocacy. The basis for this rule to show cause, moreover, is counsel's advocacy of the same principled positions that LSAM is taking in its pending appeals in this case: namely (1) that the only activities of LSAM that are within the jurisdiction of the CFTC and the district court are LSAM's domestic activities which involved one U.S. investor investing in one U.S.-based fund, and (2) that the activities of other companies, which are not parties to this case and do business exclusively outside the U.S., are also not within the CFTC's and district court's jurisdiction. These positions of LSAM are soundly grounded in the evidence and law, as reflected in LSAM's appeal brief filed on September 20, 2007 in consolidated appeal numbers 07-3057 and 07-3070, and LSAM believes that these positions should prevail on appeal. The district court has no reasonable basis for threatening sanctions for counsel's continued advocacy of these positions.

The apparent intended effect of shutting down LSAM's defense is to coerce the production of foreign documents related to foreign investment activities that LSAM contends are outside of the jurisdiction of the CFTC and district court. LSAM's resistance to producing such

records to the CFTC is what led to this case to begin with. By preventing LSAM from continuing to defend in the district court and from prosecuting its appeal in this Court, the CFTC and district court seek to empower a receiver to obtain such records without giving LSAM the trial to which it is entitled, and without having to submit to review by this Court. LSAM has meritorious jurisdictional arguments and should not be deprived of its right to fully litigate those arguments before being forced to turn over records of foreign activities.

### B. The Order Exceeds the District Court's Jurisdiction.

It is undisputed in this case that LSAM had only one U.S. investor in one U.S. investment fund, and that this single investment took place in May 2007, less than two months before LSAM's business was shut down by the unlawful action of the National Futures Association and by this litigation. All other activities of LSAM and the other companies associated with the Lake Shore Group of Companies involved foreign investors investing in foreign investment funds. As argued at length in LSAM's appeal brief in the pending expedited appeal, the foreign activity is outside the jurisdiction of the CFTC and the district court. *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 664 (7th Cir. 1998) ("[I]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply within the territorial jurisdiction of the United States'."), *citing EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985, 993 (2d Cir. 1975) (When "a court is confronted with transactions that on any view are predominately foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.").

Nevertheless, the district court seeks to impose a receivership on the non-party foreign investment funds, none of which ever did business in the U.S., and the investors in which are exclusively foreigners. The district court lacks jurisdiction to appoint a receiver for these foreign funds, and the receivership order is therefore likely to be reversed on appeal for this reason.

One strong reason why the law limits the CFTC's and district court's jurisdiction is to promote international comity. As the Supreme Court recently advised, "United States law governs domestically but does not rule the world[.]" *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1758 (2007). It is offensive and intrusive for a U.S. court to insert itself in foreign matters that are subject to the jurisdiction of foreign courts which are perfectly capable of dealing with matters arising in their jurisdictions. The record shows that there are already foreign court proceedings in England and Canada that relate to the same assets that the district court is reaching out to try to control. These matters involve persons who are not U.S. residents and whose investments were made outside the U.S. Principles of international law and comity should require the district court to defer to the Canadian and English courts on matters within their jurisdiction, just as the Canadian and English courts should defer to the U.S. court with respect to the single U.S. investor who invested in the U.S. fund. *See, e.g., Diorinou v. Mezitis*, 237 F.3d 133, 142 (2d Cir. 2001) ("American courts will normally accord considerable deference to foreign adjudications as a matter of comity."); *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987); *Paraschos v. YBM Magnex Int'l, Inc.*, 130 F. Supp. 2d 642, 644-46 (E.D. Pa. 2000).

Rather than showing deference to foreign courts, the district court's order seeks to prevent the proceedings pending in England from going forward. This is an improper antisuit injunction which seeks to bar persons from asserting their legal rights and adjudicating their

claims in an English court. *See General Elec. Co v. Deutz AG*, 270 F.3d 144, 162 (3d Cir. 2001) (reversing antisuit injunction); *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) (reversing antisuit injunction; "The days of American hegemony over international economic affairs have long since passed. The United States cannot today impose its economic will on the rest of the world and expect meek compliance, if indeed it ever could."). *See generally Allendale Mut'l Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 432 (7th Cir. 1993) ("But a state or nation cannot, by designating its own courts as the exclusive fora for the resolution of the class [of disputes], prevent another state or nation from allowing its own courts to resolve these disputes if the other state or nation *has an interest in them*[.]") (emphasis added).

The district court's Stay Order acknowledges that the appointment of a receiver may prevent Claimants in the English proceeding, which are foreign entities and are not parties to this case, from continuing to pursue their legal rights in England. (Order at 3, n.2, Ex. 2.) Moreover, the District court refused to include proposed language in the order that would have preserved the rights of those claimants to proceed, leading to the unavoidable conclusion that it is the district court's purpose to prevent the cases from proceeding. Such an Order from an American court, barring persons and entities in England, and their English counsel, from seeking to vindicate their rights in the English courts is a violation of Article 6 of the European Convention on Human Rights, art. 6, Nov. 4, 1950, which is attached hereto as Exhibit 4. Article 6 guarantees, in explicit terms, English persons and entities "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." (Ex. 4.)

Furthermore, English law would not permit the district court to appoint a receiver over assets in England. First, English courts do not recognize, and to the contrary have rejected, the concept of "common enterprise" that the Court applied as the basis for freezing the accounts of

non-parties in England and appointing a receiver for those non-parties. *See, e.g., Adams v. Cape Indus. plc*, [1991] 1 All ER 929, 961-71, Ex. 5; *In re Polly Peck Int'l plc*, [1996] 2 All ER 433, 448, Ex. 6. Indeed, in rejecting the argument that a foreign corporate parent and its U.S. subsidiary should be treated as a single economic unit, the English Court found that the parent corporation is "entitled . . . to organize its group activities so as to avoid being present in the United States." *Adams*, 1 All ER at 965.

Next, because the account owners of the assets held with the custodians in London are not part of this proceeding and bear no connection to the United States, it is highly unlikely that an English court would even recognize the authority of a U.S. appointed receiver. *See Schemmer v. Prop. Res. Ltd.*. [1975] EWHC (Ch) 273, Ex. 7. In *Schemmer*, plaintiffs sued six companies, all of which were incorporated outside of the United States, for violations of the Securities Exchange Act of 1934. *Id.* at 281-282. Three of the defendants were banks that held money in London in the name of another defendant. *Id.* at 282. The district court for the Southern District of New York appointed a receiver and authorized the receiver to institute proceedings in the United Kingdom to secure assets held with the banks. *Id.* at 285. The receiver instituted proceedings and the English court found that in order to recognize the title of the foreign receiver or to appoint an auxiliary receiver in England, the English court must be "satisfied of a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order, on English conflict principles, as having effect outside such jurisdiction." *Id.* at 287. The English court found no connection because (1) the Bahama Islands corporation ("PRL") was not made a defendant in the U.S. proceeding; (2) PRL was not incorporated in the United States; (3) there was no evidence that the Bahamas would recognize the U.S. order as affecting English assets; and (4) there was no

evidence that PRL itself, as opposed to associated companies, did business in the United States or that its central management and control was located in the United States. *Id.* at 287-88.

Similarly here, an English court would be unlikely to recognize the authority of a U.S. appointed receiver because (1) the rightful account owners of the assets are not defendants in this proceeding; (2) these owners are not incorporated in the United States; (3) there is no evidence that the nations in which these owners are incorporated would recognize such an U.S. order; and (4) there is no evidence that any of these foreign entities are conducting business in the United States or are headquartered in the United States. Therefore, under English law, there would be an insufficient connection between the assets in England and a receiver for LSAM appointed by an U.S. court for the receivership to be recognized under English law. In addition to the proceeding in England, the order purports to prevent *any* foreign action relating to the receivership. Thus, under the order, if an appointed receiver were to seek to engage in an act that is unlawful under the law of a foreign country, such as seizing assets, any resident of that country who wished to challenge the receiver's actions under the law of that country and in the courts of that country would be precluded by the order from doing so.

For a U.S. court to enter an order which tramples on the sovereignty of other nations and their residents, as the district court's order does, would likely be deemed unenforceable in those other jurisdictions. A U.S. court, however, should not be entering an order that is unenforceable. Such an order would not only be offensive to persons in foreign countries, but also would breed disrespect for the U.S. court process in general. *See* Letter from Howard Kennedy, Ex. 8, filed in Dkt. 171 as Ex. A (expressing view of English solicitors that an English court, in deference to the courts of other nations, would never enter a worldwide order with the sweeping terms contained in the district court's order here).

### C. The Order Improperly Appoints a Receiver Over Entities Not Parties to the Proceeding.

The receivership order improperly appoints a receiver for entities not party to this proceeding. The only party that has appeared before the district court is LSAM; however, the order appoints a temporary equity receiver for the "Lake Shore Common Enterprise." This is not a legal entity, and the order is impermissibly vague and ambiguous as to which entities for which the receiver is appointed. The order does not define the entities comprising the "common enterprise," and the district court acknowledged that it does not know what companies are included. Memorandum and Order, at 6 n.5. Rather, the order names eight illustrative entities that are included within the "common enterprise" and further includes these eight entities' "affiliates and subsidiaries, all funds, properties, premises, accounts and other assets directly or indirectly owned, beneficially or otherwise by the Lake Shore Alternative Financial Asset Funds, individually or collectively, including, but not limited to, investors' funds." (Order at 1-2, Ex. 2.) "Lake Shore Alternative Financial Asset Funds" is also not defined and is not a legal entity or a party to this case.

The district court has no jurisdiction to appoint a receiver for non-parties. *See Scott v. Donald*, 165 U.S. 107, 117 (1897); *Chase Nat'l. Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 436-37 (1934); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110-11 (1969); *United States v. Kirschenbaum*, 156 F.3d 784, 796 (7th Cir. 1998). This is particularly true where, as here, the non-parties do not do business in the U.S. or with U.S. residents, so that they would not be subject to the district court's jurisdiction even if they were named as parties and served with process. Therefore, to the extent that the district court appoints a receiver for any entity other than LSAM, which is the only party present in this case, the order is contrary to law

and specifically the principle that a party's property may not be taken without due process of law.

The district court contends that it can enter orders against non-parties on the ground that they were part of a "common enterprise" with LSAM. However, there is no legal basis for entering orders against non-parties on the basis of a "common enterprise." The term "common enterprise" does not appear in the Commodity Exchange Act, which establishes the CFTC's jurisdiction. Rather, to the extent this term has been used in case law, it usually refers to imposing joint and several liability upon parties to an action who have worked together to violate the law. *See FTC v. Bay Area Business Council, Inc.*, 2004 WL 769388 (N.D. Ill. 2004); *CFTC v. Int'l Berkshire Group Holdings, Inc.*, 2006 WL 3716390 (S.D. Fla. 2006); *CFTC v. Wall Street Underground, Inc.*, 281 F. Supp. 2d 1260 (D. Kan. 2003); *CFTC v. Nobel Wealth Data Info. Servs.*, Inc., 90 F. Supp. 2d 676 (D. Md. 2000). Therefore the district court's attempt to justify the appointment of a receiver for non-parties on the ground that they are part of a "common enterprise" lacks any legal basis.

The only party that the district court has power to put into receivership is LSAM, which is the only party which has appeared in the case. However, there is no basis for a receivership against LSAM either. As established at the preliminary injunction proceeding, the assets at issue are currently held with four custodians (the "Custodians"), three of which are located in London and the fourth is in Illinois. None of the accounts maintained by the Custodians is owned by LSAM. Rather, each account is owned by a separately incorporated company which does no business in the United States or with United States investors. The account documents of the Custodians show that LSAM is not the owner of any of the accounts, and has no right to withdraw funds from any of the accounts. Moreover, the assets at Sentinel are also unavailable

for a receiver to administer. In addition to the fact that the assets are not owned or controlled by LSAM, they are within the jurisdiction of the Bankruptcy Court, and the automatic stay in bankruptcy would preclude a receiver from obtaining them. *See* 11 U.S.C. § 362(a). Because LSAM does not hold assets, there are no assets for a receiver of LSAM to administer. Therefore, the only possible reason for placing LSAM into receivership would be, as discussed above, for the purpose of preventing it from continuing to assert its legal rights in this case. This is not a permissible basis for a receivership.

### D. The Traditional Factors Justifying An Appointment of a Receiver Are Not Present Here

The power to appoint a receiver is a "drastic, harsh and dangerous one" and "ought never to be made except in cases of necessity upon a clear showing that [an] emergency exists." *Tcherepnin v. Franz*, 277 F. Supp. 472, 474 (N.D. Ill. 1966) (*citing Connolly v. Gishwiller*, 162 F.2d 428, 435 (7th Cir. 1947)); *Kristoff v. Lenell*, No. 84-C-2784, 1985 WL 1716, at *5 (N.D. Ill. June 10, 1985) (citation omitted); 12 Wright & Miller, Federal Practice and Procedure § 2983 (2007) (appointment of a receiver should be granted "only in cases of clear necessity to protect plaintiff's interests in the property."). A motion for the appointment of a receiver prior to a determination of the dispute on the merits should be granted "only under the extremest of circumstances." *Kolb Coal Co. v. Sauter*, 295 F. 690, 690 (7th Cir. 1924); *Tcherepnin*, 277 F. Supp. at 474 (N.D. Ill. 1966). Here, no such circumstances exist and therefore, LSAM is likely to prevail on its appeal.

In considering whether the appointment of a receiver is appropriate, courts generally consider several factors, including fraudulent conduct on the part of defendant; imminent danger of the property being lost, diminished in value, or squandered; the inadequacy of the available

legal remedies; the probability that harm to plaintiff by denial of the appointment would be greater than the injury to the parties opposing appointment; and plaintiff's probable success in the action and possibility of irreparable injury to its interests in the property. 12 Wright & Miller § 2983; *CFTC v. Comvest Trading Corp.*, 481 F. Supp. 438, 441 (D. Mass. 1979). In considering these factors in this case, it is clear that the extraordinary and harsh remedy of receivership is not warranted.

The purpose of receivership is to maintain the status quo and preserve the assets in controversy pending the resolution of the litigation. *See O'Dowd v. Anderson*, No. 96-C-820, 1997 WL 563971, at *3 (N.D. Ill. July 11, 1997) (stating appointment of receiver is appropriate only in "cases of urgent necessity" where there is an "imminent danger of dissipation of the corporate assets"); *Chicago Title & Trust Co v. Mack*, 347 Ill. 480, 483 (Ill. 1932) (discussing origins of receivership in English Court of Chancery). Here, by Memorandum and Order dated August 28, 2007, the district court entered an asset freeze that prohibits LSAM from "withdrawing, transferring, removing, dissipating, concealing or disposing of . . . any assets . . . on deposit in any financial institution." (Memorandum and Order dated August 28, 2007, at 84-85 ¶ 3.) The current asset freeze is a continuation of various asset freezes that have been in effect since June 22, 2007. Moreover, even absent an asset freeze, LSAM does not own or have authority to withdraw or otherwise dispose of the assets held with the Custodians. Additionally, the assets held with Sentinel Management Group, Inc., which are the only assets held in the United States, are in the custody of a Bankruptcy Trustee appointed by the Bankruptcy Court. Finally, the English solicitors who brought the action in England on behalf of other Lake Shore Companies have expressly told the brokerage firm defendants that they do not intend to violate the U.S. court's asset freeze while issues are still being litigated, (especially including the

litigation in this appeal before this Court), but that they want to make sure the assets remain in place in England, so that any attempt to move them out of England can be ruled on by the English court. Furthermore, those English brokerage firms have agreed that they will not seek to remove the funds from England without giving the English solicitors for the other Lake Shore companies at least 72 hours notice to enable the English attorneys for those other Lake Shore companies to seek the protection of the English courts. Therefore, as a matter of conclusive fact the status quo regarding those funds and accounts in English is preserved and there is no danger that they will be removed or dissipated. For these reasons, the CFTC has not shown that the assets currently frozen are in danger of being squandered or lost as a result of any action by LSAM.

The preliminary injunction which was entered by the district court, which remains in effect, was supposed to maintain the status quo pending a final resolution of the case. The appointment of a receiver, in contrast, would upset the status quo and grant the equivalent of final and permanent relief without an adjudication on the merits, as it is clearly the intent of the receivership order for the receiver to gather and distribute assets before the case is over. LSAM should not be deprived of its right to litigate the jurisdictional and other issues raised by this case through the appointment of a receiver.

## III. A Stay of the Appointment of a Receiver is Necessary to Prevent Irreparable Injury to LSAM

As discussed above, if a receiver is appointed, LSAM will lose its legal rights to litigate this case and its pending consolidated appeals. Such a deprivation of legal rights clearly constitutes irreparable harm. Moreover, the appointment of a receiver for LSAM prior to a full

adjudication of LSAM's claims would be a confiscation of LSAM's business, causing irreparable harm to LSAM's ability to do business in the future.

## IV. A Stay of the Order Appointing a Receiver Will Not Harm The Interests of the CFTC or Investors

A stay of the order appointing a receiver will not harm the interests of the CFTC or investors because, as discussed, above the preliminary injunction entered by the court on August 28, 2007 adequately protects their interests pending resolution of LSAM's consolidated appeal. The scope of the district court's jurisdiction to appoint a receiver is no greater than its jurisdiction to freeze assets. Therefore, to the extent the district court has jurisdiction over the assets, the CFTC's interest is adequately protected by the asset freeze, and it has no valid interest in moving and re-distributing assets before the case is concluded.

## V. A Stay of the Order Appointing a Receiver Would Promote the Public Interest

A stay of the preliminary injunction order would promote the public interest. It is in the public interest that U.S. courts not deprive litigants of their legal rights, including the right to contest the confiscation of property by a U.S. court. Moreover, it is in the public interest that U.S. courts not confiscate property of persons without due process of law. That is what will happen here if the order appointing a receiver is not stayed. Non-parties to this case will lose their property, and it will be re-distributed by a receiver. A stay would also be in the public interest because, consistent with principles of international comity and sovereignty as discussed above, 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.

## PRAYER FOR RELIEF

For all of the foregoing reasons, Defendant-Appellant Lake Shore Asset Management Limited respectfully prays (1) that the Court stay the district court's October 4, 2007 orders which appointed a receiver and issued rules to show cause, and (2) that the Court stay all further proceedings in the district court pending resolution of LSAM's consolidated expedited appeal, Nos. 07-3057 & 07-3070, and the appeal in this case.

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Respectfully Submitted,

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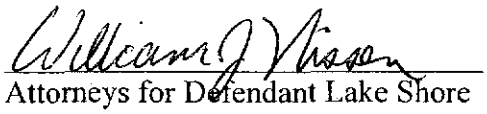

Attorneys for Defendant Lake Shore Asset Management Limited

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## CERTIFICATE OF SERVICE

I, Steven E. Sexton, an attorney, hereby certify that I have caused a true and correct copy of the foregoing Emergency Motion For Stay of Pending Appeal and Exhibits attached thereto to be served upon the following individuals by Electronic Means and Federal Express or Messenger on October 5, 2007.

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