

2. Prior to July 18, 2007, Ms. Gould had asked Mr. Nissen to provide the Commission attorneys with dates on which Mr. Baker would appear on a voluntary basis for his deposition prior to the hearing on the preliminary injunction. Ms. Romaniuk followed up on that in her July 18, 2007, letter. Mr. Nissen had informed staff that Mr. Baker was unable to travel to the U.S. to be deposed due to health reasons. However, he was willing to be deposed in Switzerland. Mr. Baker resides in London. Plaintiff's attorneys recognized that the procedural hurdles to deposing a witness, even on a voluntary basis, in Switzerland are enormous as compared to taking depositions in England, which is a relatively straightforward process. Consequently, Plaintiff's attorneys offered to depose Mr. Baker in London. Mr. Nissen never provided Plaintiff with any dates on which the Commission could depose Mr. Baker.

3. On July 25, 2007, LSAM did not produce the bulk of the requested documents asserting the same types of defenses that it has throughout this action. (Exhibit B) Of particular note was that it was claiming that the requested records belonged to other Lake Shore entities.

4. In conformity with the requirements of the Federal Rules, Plaintiff attempted to schedule a meeting to discuss LSAM's objections and to develop a discovery plan pursuant to F.R.C.P 26 (f).

5. On July 24, 2007, LSAM presented the affidavit of Alexander Schwab, a Swiss attorney that expressed opinions on Swiss law. (Doc. 44-3) It was not clear, if Mr. Schwab was appearing on behalf of his client LSAM or opining as an expert witness. Ms. Hollinger spoke to Mr. Nissen and asked if Mr. Schwab was filing an appearance. Mr. Nissen said no. Then, she requested that LSAM produce Mr. Schwab voluntarily for

his deposition, offering if necessary to travel to Switzerland, if need be. Mr. Nissen refused to produce Mr. Schwab for his deposition taking the position that he was neither counsel nor an expert witness.

6. On July 27, 2007, the Plaintiff's counsel wrote to Mr. Nissen asking that he produce the following Lake Shore officers, directors and contractors for deposition on a voluntary basis: John V. Kurgan, Ron Cuomo, Ken Cuomo, Sebastian Sainsbury and Greg Hurd. Mr. Nissen has taken the position that since none of these witnesses are officers or employees of LSAM, LSAM is not required to produce them. Lake Shore has never produced any of these witnesses. (Exhibit D)

7. Subsequent to the filing of the Amended complaint adding the Lake Shore Group of Companies as a defendant and further alleging that it was a common enterprise, the Plaintiff renewed its request that the Defendant fully comply with its Request for Production of documents. Mr. Nissen refused.

8. On August 24, 2007, Plaintiff's counsel met with Stephen Sexton, one of defendant's attorneys, for the purpose of a discovery planning conference. He made it clear that he was not authorized to commit to a document production, to schedule any depositions, or to engage in discussions relating to electronic discovery. In essence, he was not authorized to participate in the planning process in a meaningful way.

9. On September 7, 2007, in reliance upon the order for expedited discovery and defendant's repeated claims that it wants this matter handled on an expedited basis, Plaintiff's counsel served interrogatories upon LSAM providing LSAM with 10 days to reply. Included within those interrogatories, Plaintiff inquired as to the location of the Lake Shore records, its current offices, the location of Philip Baker and what steps Lake

Shore was taking to preserve its books and records. Mr. Nissen refused to respond within the designated 10 days and refused to make a partial response within the 10 days.

(Exhibit E)

10. This is of particular significance given the turn of events that indicated a strong likelihood that the defendants were attempting to conceal, at the very least, their books and records, and were in hiding.

11. On September 19, 2007, the defendants presented the legal opinions of Mr. Schwab, Mr. Trowbridge and Johannes G. Terblanché regarding bank secrecy laws of Switzerland, Turks and Caicos and the British Virgin Islands. (Doc. 151-2) Ms. Hollinger immediately called Mr. Nissen and asked again whether they were filing appearances as counsel for the defendants. No, they were not. Then, she requested that they be produced in the U.S. for their depositions. Mr. Nissen said they were not expert witnesses. Ms. Hollinger pointed out that this neither fish nor fowl position was not acceptable. Either the three affidavits were in essence briefs submitted by counsel on behalf of their clients and subject to Rule 11 or they were of the nature of expert testimony and subject to discovery. Mr. Nissen pointed out that he did not think that they were subject to discovery since they were located in Switzerland, Turks and Caicos and the British Virgin Islands respectively and refused to produce them for depositions or to provide other discovery relative to them as required by the FRCP.

12. The gamesmanship did not stop here. Pursuant to the Court's order that the parties agree on a discovery plan, Mr. Nissen proposed a 90 day discovery schedule while refusing to produce any Lake Shore witnesses voluntarily and asserting that the Commission proceed under the Hague Convention which is well known to take 6-12

months. He later modified his position to a 6 month schedule—without agreeing to produce any witnesses on a voluntary basis. In other words, he is proposing a schedule that will make it impossible for the Plaintiff to depose Lake Shore insiders. (See Ex. F, letter from Romaniuk to Nissen dated September 19, 2007).

13. On September 20, 2007, the Plaintiff issued a notice of deposition to LSAM pursuant to Rule 30(b)(6) for a corporate representative to testify regarding specified matters listed in the Notice. (Exhibit G) The deposition is set for October 10. Plaintiff's asked Mr. Nissen to identify the corporate representative on October 3, 2007 at a face-to-face meeting. He refused to do so. Plaintiff's counsel asked Mr. Nissen again on October 5 in an email exchange to identify the corporate representative. He refused to do so, stating instead that he intended to file a motion for a protective order on October 9 and would not be producing any witnesses on October 10. In an October 8, 2007, e-mail, Mr. Nissen stated

As I previously informed Rosemary, we will not have a 30(b)(6) witness on Wednesday and will instead file for protective order. The only person who would be responsive to the request is Mr. Baker. He is in Germany and we expect to have a doctor's letter stating he cannot travel because of health reasons. He proposes that he submit to questioning on both the deposition topics and the interrogatories on an involuntary basis pursuant to German law. (Exhibit H)

14. Mr. Nissen's proposal is unacceptable. The Plaintiff properly served a Rule 30(b)(6) Notice of Deposition upon LSAM, a properly served party in this action. It is LSAM's obligation to produce a corporate representative. Defendant's representation that Mr. Baker remains unable to travel since July is disingenuous given that he is now offering to be deposed in Germany while he resides in England. Thus, he would appear to be able to travel at least to some extent. As further evidence of his bad faith and obstructionist tactics, he notably did not offer to provide his testimony via

videoconference. Finally, all he agreed to is to allow himself to be compelled to testify at great expense to the Plaintiff and after great delay.

15. Plaintiff has notified Mr. Nissen that it intends to depose Lake Shore investors who reside in Colombia and Chile respectively during the weeks of November 12 and December 3. While agreeing that he was available on those dates, he indicated that he intended to file a motion for a protective order and would seek to prevent the Plaintiff from obtaining deposition testimony from the non-US customers of Lake Shore partly based on relevancy grounds. This is from the same attorney who argued that the Plaintiff had failed to prove at the preliminary injunction hearing that any of the defendants' false statements and misrepresentations were actually made to customers! It would seem that the Plaintiff sought relief of this nature from the appellate court in its request that all proceedings at the District Court level be stayed.

16. On October 3, 2007, during a face-to-face meeting at the offices of SidleyAustin LLP, the Plaintiff's counsel attempted to resolve these matters with Mr. Nissen. He refused to produce any additional documents referring to his position as set out in LSAM's Objections and Responses to Plaintiff's Document Request, he refused to produce SidleyAustin's billing records (this is the subject of a separate motion to compel), and he refused to designate LSAM's corporate representative. Indeed, all he agreed to do was to respond to the Plaintiff's interrogatories by October 9 and that the dates of the South American depositions were agreeable while reserving the right to object to them going forward at all. However, on October 8, Mr. Nissen informed Plaintiff's counsel that his client would not be responding to Plaintiff's interrogatories. (Exhibit H)

17. The Plaintiff believes that discovery in this case cannot proceed in an orderly manner without intervention and close supervision by this Court.

WHEREFORE, the plaintiff requests that in addition to the relief that the Court may entertain in relation to its Rule 37 proceeding, that Defendants be ordered to:

a. provide expert discovery as provided by the FRCP as to Mr. Schwab, Mr. Trowbridge and Mr. Terblanché or that their affidavits be stricken from the record;

b. present a thoroughly prepared corporate representative on behalf of the Lake Shore Group of Companies for his deposition or that Mr. Baker's affidavits be stricken from the record and that Mr Baker and Lake Shore's other officers and directors be prohibited from submitting additional declarations or affidavits until they have been deposed;

c. pay all of Plaintiff's costs in obtaining letters rogatory necessary to compel the attendance of Lake Shore employees, officers and directors at depositions;

d. cease instructing nonparties not to cooperate with the Plaintiff's efforts to conduct discovery;

e. produce its employees, officers and directors on a voluntary basis for their depositions and that it provide the Plaintiff with suggested dates and places for the depositions of each of the employees, officers and directors of the defendant that the Plaintiff has stated it wants to depose;

f. are prohibited from introducing any evidence on the topics listed in the Rule 30(b)(6) Notice of Deposition and, in particular that the order specify that Mr. Baker is barred from presenting any evidence on this matters;

g. that the defendants reimburse the plaintiff for its costs incurred in bringing these violations to the attention of the Court; and

h. providing such other relief that the Court deems appropriate.

Date: October 9, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney with the Commodity Futures Trading Commission, certifies that on October 9, 2007, I caused the foregoing,

- *Plaintiff's Motion For Sanctions Pursuant To FRCP 37*
- *Notice of Motion*

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 ECF notification.

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