

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 OPPOSITION TO DEFENDANT
LAKE SHORE ASSET MANAGEMENT LIMITED’S RESPONSE
TO COURT ORDER OF JANUARY 4, 2008**

Plaintiff, Commodity Futures Trading Commission (“Commission” or “CFTC”), submits this Memorandum in Opposition to Defendant Lake Shore Asset Management Limited’s (“LSAM” or “Defendant”) Response to this Court’s Order of January 4, 2008 (Docs. 376, 377).

The Commission states as follows:

I. FACTUAL BACKGROUND

A. This Court’s Orders

On August 28, 2007, this Court entered a preliminary injunction against LSAM, 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.).

The preliminary injunction also prohibited LSAM from “destroying, mutilating, concealing altering or disposing of any books and records, documents, correspondence ... or other property of Lake Shore Limited ... wherever located” Both injunctive provisions are binding on LSAM and “any person insofar as he or she is acting in the capacity of officer, agent, servant, employee, or attorney of Lake Shore Limited” and “any person who receives actual notice of this order by personal service, facsimile or otherwise insofar as he or she is acting in active concert or participation with Lake Shore Limited ...” (Doc. 118).

Prior to the Court’s entry of the preliminary injunction, the Court entered a statutory ex parte restraining order on June 27, 2007, which, among other things, restrained, enjoined and prohibited LSAM and all persons insofar as they are acting in the capacity of agents, servants, employees, successors, assigns or attorneys of the defendants and all persons insofar as they are acting in active concert or participation with them, from directly or indirectly:

Destroying, mutilating, concealing, altering or disposing of, in any manner, any of the books and records, documents, correspondence, brochures, manuals, electronically stored data, tape records or other property of the defendant, wherever located, including all such records concerning the defendant’s business operations, until further order of the Court. (Doc. 12, page 2).

The restraining order also ordered that the Commission be allowed to immediately inspect LSAM’s books, records, and other electronically stored data ... including all such records of defendant’s business operations, wherever they are situated and whether they are in the possession of defendant or others ...”

B. LSAM’s Scheme to Conceal Its Books and Records

From virtually the moment this Court entered its statutory ex parte restraining order on June 27, 2007, LSAM, which had been registered with the Commission as both a commodity pool operator (“CPO”) and commodity trading advisor (“CTA”) since January 2007, and its

managing partner Philip Baker (“Baker”), engaged in a course of conduct that violated both the statutory restraining order and the preliminary injunction. Specifically, a series of e-mail communications obtained by Plaintiff from the Bermuda authorities evidence a scheme by LSAM, Baker and their international counsel, beginning on June 29, 2007, to transfer LSAM’s books and records from Ontario, Canada to Bermuda and then to Switzerland in order to conceal those documents and thwart the Commission’s efforts to inspect them.

This scheme is memorialized in an agreement Baker entered into with Mercury Group Limited (“MGL”), which was outlined in a letter dated June 29, 2007 from Gregory Tolaram, Managing Director of MGL,¹ to Baker and the Board of Directors of LSAM.² (Exhibit 1, pages 1 and 2). Pursuant to the June 29, 2007 letter, MGL would provide to LSAM “maintenance of pre-sorted files once received in Bermuda” and “server co-location hosting.” (Exhibit 1, page 1). While the original letter agreement was dated June 29, 2007, it was subsequently back-dated to June 15, 2007, and purportedly signed by Baker, on behalf of LSAM, on that date. (Exhibit 2, pages 1-6). Similarly, a Corporate Administration Services Agreement between MGL and LSAM was also back-dated to June 15, 2007, and purportedly executed by Baker, on behalf of LSAM, on that date. (Exhibit 2, pages 7-15). Clearly, the back-dating of both agreements was an attempt by LSAM and Baker to conceal the fact that numerous LSAM documents were, in fact, transferred to Bermuda **after** the date of the statutory restraining order. Moreover, in an attempt to further deceive, the back-dated Letter Agreement was subsequently changed to reflect that Baker was executing the Agreement as Managing Director of the Lake Shore Group of

¹ MGL is a Bermuda company that sells a variety of corporate services.

² E-mails show that the day after the NFA went to LSAM’s Chicago office, the Lake Shore Group began the process of “reorganizing” into Pinnacle Ventures, by renting an office in Bermuda and sending Lake Shore employees there to set up the new office.

Companies Inc. Limited, not LSAM. (Exhibit 3, pages 1-4).³ On June 29, 2007, MGL received a total of 38 boxes of LSAM's documents in Bermuda. (Exhibit 4, pages 1-13).

C. LSAM and Baker Change Control Over the Man Accounts

Similarly, on June 29, 2007, two days after the statutory restraining order issued, Baker sent an e-mail communication to LSAM's attorney, William Nissen, indicating that the asset manager for all LSAM's accounts at Man Financial ("Man") had been changed. Specifically, the undated letter changing the asset manager "authorizes the appointment of Geneva Asset Management, S.A." and "replaces Lake Shore Asset Management Limited and Lake Shore Asset Management Inc." and "is effective immediately." (Exhibit 5, pages 1-2). Indeed, not only was LSAM transferring its books and records in violation of the restraining order, but it was trying to change control over the Man accounts, thereby concealing and disposing of LSAM's property. Moreover, the Man Financial documents produced and attached as an Exhibit to Baker's Declaration and William Nissen's declaration dated July 19, 2007, as part of LSAM's Motion to Modify or Dissolve the Ex Parte Statutory Restraining Order, do not show this change. (Docs. 30, 37).

D. LSAM Uses Pinnacle as a Vehicle to Transfer Its Books and Records to Schwab in Switzerland the Day After Being Notified that the Seventh Circuit Denied LSAM's Motion for Stay of the Preliminary Injunction

It appears that LSAM's books and records remained in Bermuda with MGL until September 10, 2007, when Baker directed Tolaram, managing director of MGL, to cancel the purported Agreement of June 15, 2007. Specifically, on September 11, 2007, Schwab sent an e-mail communication to Tolaram stating that he was "acting on behalf of Lake Shore Asset

³ CFTC staff spoke to LSAM's international counsel, Alexandre Schwab, prior to initiating litigation and told him that the Commission was preparing to file an enforcement action against LSAM. Schwab's law firm is the Administrator for Geneva Asset Management Holdings SA, Geneva, a company which is a successor to one or more of the Lake Shore entities.

Management Ltd and confirm the request of Pinnacle Ventures to have you send to my address below the server and all books and records of "Lakeshore." (Exhibit 6, page 5).

Not only does the foregoing e-mail by Schwab establish that Baker has created a new entity, Pinnacle Ventures ("Pinnacle"), which is a successor to Lake Shore and a part of the Lake Shore common enterprise, but a later e-mail by Schwab to Tolaram confirms that Schwab is deliberately attempting to distance Pinnacle from other Lake Shore entities. Specifically, on October 5, 2007, Schwab sent an e-mail to Tolaram stating, "Please re-edit the letter so as to only refer to your client "Pinnacle Ventures" and do not include any other entities' names." (Exhibit 6, page 9).

Clearly, LSAM, and its international attorney Schwab orchestrated the turnover of LSAM's documents to yet another entity which, in reality, is inextricably intertwined with LSAM and a part of the Lake Shore common enterprise, merely another name. (Exhibit 7, pages 1-23). This is evidenced by an e-mail communication from Tolaram to Piercey, a Lake Shore employee, dated August 29, 2007, which was copied to Baker stating "Based on our initial discussions regarding Lakeshore as a client, and now the migration of that relationship to Pinnacle, we are requested to get the following from you before final execution of the agreement." (Exhibit 7, page 13). Thereafter, Tolaram, as Managing Director of MGL, sent a letter dated September 10, 2007 to the Board of Directors of Pinnacle, copying Schwab, cancelling the "Agreement of 15 June 2007 and all associated agreements." (Exhibit 6, page 8). Indeed, the letter expressly stated that MGL's acceptance of the termination "is on the strict understanding that Pinnacle Ventures Limited, Lakeshore Asset Management Limited, and Lake Shore Group of Companies Inc. Limited, their officers, directors, attorneys, agents, employee subsidiaries, parent companies or affiliated and /or related companies release The Mercury

Group Limited ... from any and all claims ... emanating from the said agreements.” (Exhibit 6, page 8).

As directed by Baker and Schwab, MGL transferred LSAM’s documents to Schwab on September 11, 2007. (Exhibit 8, pages 1-5). MGL also transferred LSAM’s computer server to Schwab in Geneva. (Exhibit 8, page 5). Indeed, the transfer date of September 11, 2007 is significant because on September 7, 2007, the Seventh Circuit Court of Appeals denied LSAM’s Motion for a Stay of the Preliminary Injunction and on September 10, 2007, William Nissen, LSAM’s attorney, learned about the denial and communicated such to LSAM. (See Doc. 293, page 7). The following day, September 11, 2007, Baker sent the e-mail communication to Tolaram telling him to send the Lake Shore marked boxes to Schwab by courier that day and to move the server to Switzerland. (Exhibit 6, pages 1-7).

On December 19, 2007, the CFTC sent a letter via facsimile and e-mail to Schwab, requesting that Schwab produce Lake Shore’s records to the Commission’s Chicago office within the next 72 hours. To date, Schwab has not responded to the CFTC’s request. (Exhibit 9, pages 1-4).

II. DISCUSSION

A. **As a Commission Registrant, Lake Shore Asset Management Limited Cannot Conceal Its Commodity Trading and Pool Records and Transfer Those Documents to Affiliates in an Attempt to Avoid Its Production Obligations**

As noted above, LSAM has been registered with the Commission as a commodity pool operator and a commodity trading advisor since January 2007. Registrants such as LSAM are strictly liable for recordkeeping violations. *In re Heitschmidt*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,263 at 42,206 (CFTC Nov. 9, 1994); *In re Buckwalter*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,995 at 37,687 (CFTC Jan. 25, 1991); *In*

re GNP Commodities, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,217-18 (CFTC Aug. 11, 1992), *aff'd sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993).

As the Commission reasoned in *In re Sean Kelly*, [1998-1999] Comm. Fut. L. Rep. (CCH) ¶ 27,514 at 47,373 (CFTC Nov. 19, 1998):

CTAs are required by Section 4n(3)(A) of the Act and Commission Rule 1.31 to provide the requested documents promptly. The Act and the Rules do not envision the necessity of filing a complaint or obtaining a subpoena. Failure by a registrant to provide the requested documents promptly impedes the Commission's inspection and oversight abilities.

In its Response to this Court's Order of January 4, 2008, LSAM asserts that "the documents outside of the United States that LSAML has been directed to produce are beyond LSAML's control. LSAML respectfully suggests that LSAML has produced all documents within its control." (Doc. 377, pages 1-2). Thus, LSAM believes it has fully complied with the requirements of this Court's Orders and of the CFTC in providing all requested documents and records of LSAM.

Given the factual background described above, particularly the facts established by the e-mail communications attached hereto, it is clear that the only reason LSAM's documents outside of the United States are "beyond" LSAM's control is because LSAM, Baker and Schwab have conspired to transfer those documents (as early as June 29, 2007) from Canada to Bermuda to Switzerland, using entities and affiliates that are inextricably intertwined with LSAM and therefore, part of the Lake Shore common enterprise. To suggest that LSAM has fully complied with both this Court's Orders and CFTC's document request is disingenuous at best and at worst, an attempt to mislead this Court by failing to apprise it of the efforts engaged in by LSAM and Baker to transfer and conceal LSAM's CTA and CPO books and records. In their efforts to

transfer and conceal LSAM's books and records, LSAM and Baker violated this Court's Orders and the recordkeeping provisions of the Commodity Exchange Act ("Act") and the Commission Regulations.

In *Dexia Credit Local v. Rogan*, 231 F.R.D. 538 (N.D. Ill. 2004), the district court held that a party need not have actual possession of documents to be deemed in control of them. Instead, the court found that the test is whether the party has the legal right to obtain them. *See also, In re Folding Carton Antitrust Litigation*, 76 F.R.D. 420, 423 (N.D. Ill 1977). This definition of control applies to persons and corporations. *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138, at 1144-45 (N.D. Ill. 1979). Once personal jurisdiction over the person and control over the documents by [this] person are present, a United States court has the power to order production of the documents. *Dexia*, 231 F.R.D. at 542; *In re Uranium*, 480 F.Supp. at 1145.

In the instant case, there is no question that: 1) this Court has personal jurisdiction over both LSAM and Defendant Lake Shore Group of Companies, Inc., Limited ("Lake Shore Group"); and 2) that LSAM or Lake Shore Group can obtain the books and records transferred to affiliates outside the United States, which operate as part of the Lake Shore common enterprise. Thus, LSAM has not complied with this Court's preliminary injunction order and the CFTC's document request.

Moreover, LSAM's failure to produce its books and records similarly violates Section 4n(3)(A) of the Act and Commission Regulations 1.31, 4.23 and 4.33. As the Seventh Circuit stated in its decision dated December 28, 2007, which affirmed the preliminary injunction against LSAM:

Lake Shore transacts its business in the United States. It voluntarily registered with the CFTC and joined the NFA. It assures customers that it is subject to U.S.

law, doubtless thinking that submitting to regulation in this nation would make its promises credible. Some of the trades occur on exchanges in the United States; some customers' assets are held here. ... Having registered with domestic agencies – and having assured the NFA as a condition of membership that no foreign secrecy law prevents compliance with this nation's disclosure requirements—Lake Shore must abide by federal law, including the record-keeping and disclosure rules.

Lake Shore Asset Management Limited v. CFTC, No. 07-3057, United States Court of Appeals for the Seventh Circuit, December 28, 2007.

III. CONCLUSION

Wherefore, the Commission respectfully requests that this Court order LSAM and the Lake Group to immediately produce its books and records to Commission representatives, including but not limited to, those transferred to LSAM's attorney, Schwab, in Switzerland, or instruct Schwab and any other person or entity who possesses LSAM's books and records to produce them to the Commission.

Date: January 9, 2008

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 January 9, 2008, I caused the foregoing,

- *Notice of Filing*
- *Plaintiff's Opposition to Defendant Lake Shore Asset Management Limited's Response to Court Order of January 4, 2008*

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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