UNITED STATES OF AMERICA Before the COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

PETITION OF LAKE SHORE ALTERNATIVE FINANICAL ASSET LTD. TO STAY NFA No. 07-MRA-011 CFTC Docket No. CRAA-07-09 STAY CORDER DENYING PETITION ORDER DENYIN

On August 21, 2007, Lake Shore Alternative Financial Asset Ltd. ("LSAFA") filed a petition to stay the effective date of the Notice of Member Responsibility Action ("MRA") issued by the National Futures Association ("NFA") against Sentinel Management Group, Inc. ("Sentinel"), NFA No. 07-MRA-011.² Sentinel, the subject of the MRA, has not petitioned for a stay of the MRA. NFA opposes LSAFA's petition, asserting that LSAFA has failed to demonstrate that a stay is warranted. Because LSAFA does not have standing to request a petition to stay the MRA and has not established the extraordinary circumstances necessary to waive our regulations in order to grant the relief that it requests, the petition to stay is denied.

BACKGROUND

On August 17, 2007, NFA issued an MRA against Sentinel under NFA Compliance Rule 3-15. The MRA specifically prohibited Sentinel from liquidating, selling, transferring, encumbering, or otherwise disposing of any securities, investments, or other assets held on behalf

¹ LSAFA is not an NFA member and is not a party to the MRA against Sentinel. LSAFA is a corporation organized in the Turks and Caicos Islands and is one of the companies associated with the Lake Shore Group of Companies Inc. Ltd. ("LSGC"). Declaration of Philip Baker at 1, ¶ 2. LSAFA is a "separate and distinct" company from NFA member Lake Shore Asset Management Ltd. ("LSAM"), another company associated with LSGC. *Id* at ¶ 4. NFA instituted a separate MRA against LSAM, NFA Case No. 07-MRA-007. *Id*. at ¶ 5.

² Sentinel is a futures commission merchant ("FCM") member of NFA located in Northbrook, Illinois. Sentinel offers cash management services to FCMs and other financial institutions for the investment of customer funds and proprietary funds of such FCMs and financial institutions.

of certain accounts, including making disbursements to existing customers, without prior approval of NFA. MRA at 1.3 In the MRA, NFA alleged that on August 13, 2007, Sentinel notified its customers that it would cease to honor their redemption requests. According to the MRA, the next day, NFA went to Sentinel's offices and learned that Sentinel failed to maintain books and records, including records demonstrating the location of some customer assets and whether customer accounts were encumbered. Because NFA had reason to believe that Sentinel failed to maintain adequate books and records necessary to conduct its businesses, NFA made its action effective immediately in order to protect Sentinel's customers.

LSAFA characterizes NFA's MRA as an asset freeze and asserts that NFA's Compliance Rule 3-15 does not authorize asset freezes. LSAFA argues that Rule 3-15 limits NFA's choices of remedial measures in MRAs to those listed in the rule, *i.e.*, imposing summary suspensions, restricting operations, and requiring infusions of capital. LSAFA contends that Rule 3-15 does not allow NFA to implement a "freeze on a member's assets or on anyone else's assets." Pet. at 2. Second, LSAFA contends that NFA's asset freeze is an unconstitutional taking of property without due process of law. Pet. at 2. Third, LSAFA argues that NFA has no basis to exercise its authority independently in light of Sentinel's pending bankruptcy, contending that the bankruptcy court has adequate powers granted by Congress to protect assets. Pet. at 3. In this

³ Also on August 17, 2007, Sentinel filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of Illinois, Eastern Division, Case No. 07-14987.

⁴ NFA Compliance Rule 3-15(a) states in pertinent part:

A Member or Associate may be summarily suspended from membership, or association with a Member, may be required to restrict its operations (e.g., restrictions on accepting new accounts), or may otherwise be directed to take remedial action, (e.g., may be ordered to immediately infuse additional capital or to maintain its adjusted net capital at a level in excess of its current capital requirement), where the President, with the concurrence of the NFA Board of Directors or Executive Committee, has reason to believe that the summary action is necessary to protect the commodity futures markets, customers, or other Members or Associates.

regard, LSAFA argues that in the absence of a stay, if an aggrieved party such as LSAFA succeeded in petitioning the bankruptcy court to vacate its adoption of the MRA's provisions, NFA could nonetheless contend that the MRA remains effective. Fourth, LSAFA argues that we have no authority to grant NFA the power to freeze assets pursuant to an MRA. Finally, LSAFA argues that it is an aggrieved party with respect to the MRA, and that the asset freeze is causing irreparable harm because the MRA is preventing LSAFA from access to its own assets. Pet. at 3.

DISCUSSION

An MRA is an action taken to protect the public interest. It is "an extraordinary procedure that is commenced when NFA has reason to believe that summary and expeditious action against a member is necessary to protect the commodity futures markets, customers, or other NFA members." 55 Fed. Reg. 41061, 41063 (Oct. 9, 1990). In order to file a petition for stay of an MRA pending a hearing by the NFA, a person must be a "party aggrieved by the [NFA's] determination that the [MRA] should be effective prior to the opportunity for a hearing." 17 CFR § 171.41(a). Commission Regulation 171.2(i) defines who may be a party:

Party includes any person who has been the subject of a disciplinary action, membership denial action, or registration action by the National Futures Association; the National Futures Association itself; any person granted permission to participate as a party pursuant to § 171.27 of these rules; and any Division of the Commission that files a Notice of Appearance pursuant to § 171.28 of these rules.

LSAFA is not the subject of NFA's MRA, it is not the NFA itself and it is not a Division of the Commission.

The only avenue available for LSAFA to become a "party" for purposes of 171.41(a) is as an intervenor in an existing proceeding. Commission Regulation 171.27 authorizes the "limited participation in the proceeding by [any] interested person," subject to our permission. It does not

contemplate initiation of a proceeding by a third party. Accordingly, LSAFA is not a person that may file a petition to stay NFA's MRA against Sentinel.⁵

Under Commission Regulation 171.14, we waive our rules to prevent undue hardship on any party or for other good cause shown in extraordinary circumstances. *American Financial Trading Corp. v. NFA*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,381 at 58,719 (CFTC Dec. 21, 2006). A person requesting waiver thus has a heavy burden.

MRAs are remedial in nature and are limited to situations where NFA finds that immediate intervention is imperative. 55 Fed. Reg. at 41063. NFA's action should be based upon a threat to the commodity futures markets, customers and members of NFA, as well as the likelihood that the threat will continue. *Id.* Therefore, any party seeking a stay of an MRA would have to show that there was no such threat. LSAFA has made no such showing here.

There is no undue hardship that would be prevented by permitting LSAFA to appear that is not contemplated by the structure and purpose of MRAs. Whenever an MRA is issued, third parties may lack access to their funds. LSAFA has not shown that this particular MRA is different in any way from other MRAs. Nor has LSAFA explained in what way it may be

⁵ Even if there were an existing proceeding, LSAFA has not shown that it is a proper intervenor. LSAFA has alleged a private interest in staying the MRA, but it has not demonstrated that it represents a public interest as required by Commission Regulation 171.27.

different than any other customer or creditor that also lacks access to its funds.⁶

The principal party in interest is not before us. Sentinel, the sole subject of the MRA, received an opportunity to request a hearing before NFA. Sentinel, however, neither availed itself of that opportunity nor approached the Commission to stay the MRA. The effect of granting a stay of the MRA against Sentinel at the request of LSAFA, a non-respondent/non-NFA member third party, when no hearing has been requested by Sentinel, would create the possibility that the MRA would be stayed indefinitely without providing NFA with the opportunity to present evidence of the appropriateness of its action to a hearing tribunal, or the opportunity to examine adverse witnesses and evidence that are controlled by parties over which NFA has no authority. Such an outcome would be adverse to both NFA's and the public's interest.

LSAFA also has not shown other good cause to waive the rules. The bankruptcy court issued an order maintaining the MRA "in full force and effect until otherwise directed by order

⁶ We have held that NFA Rule 3-15 "authorizes NFA to fashion remedial measures suitable for a particular case and to deal with unforeseen circumstances as they arise." Commonwealth Financial Group, Inc. v. National Futures Association, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,993 at 44,804 (CFTC Mar. 18, 1997). Moreover, it has been NFA's longstanding practice, without Commission objection, to restrict the distribution of funds by and to its members pursuant of MRAs, under appropriate circumstances. See, e.g., In the Matter of Glory Fund I, Inc. et al., NFA Case No. 96-MRA-006 (Nov. 15, 1996); In the Matter of Peter James Scott, et al., NFA Case No. 01-MRA-001 (August 6, 2001); In the Matter of Melrose Asset Management Corp., et al., NFA Case No. 02-MRA-002 (Sept. 3, 2002); and In the Matter of Longboat Global Funds, et al., NFA Case No. 04-MRA-002. Indeed, as far back as 1986, NFA has imposed such restrictions, which the Commission has upheld. Weinberg v. National Futures Association, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,087 (CFTC June 6, 1986) (upholding an MRA that "prohibited NFA members from dispensing funds to [the member subject to the MRA] without NFA's approval").

⁷ The MRA notice stated that Sentinel was "entitled to a prompt hearing on this matter before NFA's Hearing Committee if it so requests." MRA at 2.

[of] this Court." (Emphasis added). LSAFA's proper avenue for relief appears to be before the bankruptcy court. Even if the Commission granted a stay in this proceeding, the bankruptcy court order imposing the MRA's restrictions remains in place. Our authority to stay the MRA is questionable in light of the automatic stay imposed by federal bankruptcy statutes on proceedings pending in other forums.

Consequently, we find no extraordinary circumstances warranting the unusual step of waiving the regulations and granting LSAFA permission to initiate a proceeding.⁹

CONCLUSION

Because LSAFA has not established that we should waive the rules in order to permit it to appear before us, its petition to stay NFA's MRA against Sentinel is denied.

IT IS SO ORDERED.

By the Commission (Acting Chairman LUKKEN and Commissioners DUNN, SOMMERS and CHILTON).

David A. Stawick

Secretary of the Commission

Commodity Futures Trading Commission

Dated: September 17, 2007

⁸ In re Sentinel Management Group, No. 07-14987 (Bankr. N.D. Ill. Aug. 20, 2007)(Stipulation and Order Restricting Debtor's Operations).

⁹ We reject LSAFA's claims that NFA's asset freeze against Sentinel is an unlawful and unconstitutional seizure of property, Pet. at 4, for the reasons stated in our recent opinion in *Lake Shore Asset Management, Ltd. v. NFA*, CRAA No. 07-02 (CFTC Aug. 30, 2007).