

U.S.C.A. – 7th Circuit  
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No. 07-3070

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

GINO J. AGNELLO  
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U.S. COMMODITY FUTURES  
TRADING COMMISSION,  
Plaintiff-Appellee,

vs.

LAKE SHORE ASSET MANAGEMENT  
LTD.,  
Defendant-Appellant.

No. 07-3070

Emergency Motion Proceedings  
on Appeal from  
Northern District of Illinois,  
Eastern Division, No. 07cv3598

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Opposition of Respondent CFTC to Defendant-Appellant's Emergency Motion for  
Stay of Preliminary Injunction Pending Appeal

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No. 07-3070  
Emergency Motion Proceedings  
on Appeal from  
Northern District of Illinois,  
Eastern  
Division, No. 07cv3598

Opposition of Plaintiff-Appellee CFTC to Motion for Stay of  
Preliminary Injunction Pending Appeal

Appellee Commodity Futures Trading Commission (“CFTC”), hereby opposes Appellant’s Emergency Motion for a Stay of Preliminary Injunction Order Pending Appeal. In light of the district court’s extensive factual findings of fraud and risk to customer assets, the Appellant has little or no chance of prevailing on the merits of its appeal. Moreover, denial of a stay pending appeal will cause, at most, limited injury to Appellant because, by Appellant’s own admission, the funds subject to a freeze pursuant to the preliminary injunction are in the form of commodity pools belonging to customers. The district court’s asset freeze thus does not limit Appellant’s access to its own money. Finally, in light of the jeopardy to customer funds documented by the district court, the balance of considerations affecting other parties strongly supports preservation of the asset freeze pending appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Proceedings Leading to Preliminary Injunction Hearing

On June 26, 2007, the CFTC, pursuant to Section 6c(a) of the CEA, 7 U.S.C.

§ 13 a-1(a), filed a complaint against Lake Shore Asset Management, Ltd. (“LSAM”), initiating *CFTC v. Lake Shore Asset Management, Ltd.*, No. 07cv3598 (N.D. Ill. June 26, 2007). The complaint alleged, among other things, that LSAM violated the Commodity Exchange Act (“CEA”) and CFTC regulations by refusing to make its books and records available for inspection and by failing to provide information about its pool participants and trading activities as required by Section 4n of the CEA, 7 U.S.C. § 6n and 17 C.F.R. §§ 1.31, 4.23 and 4.33. In order to preserve the status quo and to ensure that investor assets were not dissipated or transferred pending litigation, the CFTC moved for an *ex parte* statutory restraining order prohibiting LSAM or any other person or entity associated with LSAM from destroying or altering LSAM’s books and records, or denying the CFTC’s staff immediate access to LSAM’s books and records. On June 27, 2007, the district court granted the CFTC’s motion for a statutory restraining order. Following a hearing, the district court extended the order on July 10, 2007. On July 13, 2007, the district court ordered that the statutory restraining order remain in effect until further order of the court.

On August 8, 2007, this Court vacated the statutory restraining order because it had been extended past the 20-day time limit for temporary restraining orders under FRCP 65(b) . *Lake Shore Asset Management Ltd v. CFTC*, No. 07-2790, \_\_\_F.3d\_\_\_, 2007 WL 2206862 (7th Cir. Aug. 2, 2007). The August 2 order stated that the district court “should hold a prompt hearing to consider whether a preliminary injunction is appropriate....” *Id.* at 4. On August 8, 2007, this Court issued a further order stating, among other things, that a preliminary injunction

could limit LSAM's and its customers' holding or disposition of assets "only if the CFTC establishes, by a preponderance of the evidence at a hearing that customers' assets otherwise would be in jeopardy." *Lake Shore Asset Management Ltd v. CFTC*, Slip Op. No. 07-27902 at p.2 (7th Cir. Aug. 8, 2007).

Also on August 8, the CFTC amended its Complaint, alleging that LSAM engaged in fraud. In conjunction with the amended complaint, the CFTC moved for a preliminary injunction that would, among other things, prohibit further violations of the CEA, freeze assets under the control of LSAM, and require production and preservation of records. *See* Docket Entries 64-68.

B. Preliminary Injunction Hearing

On August 9, 2007, the district court began a three-day evidentiary hearing on the CFTC's motion for preliminary injunction. At the hearing, the CFTC introduced the testimony of Mary Beth Spear, an investigator with the CFTC's Division of Enforcement; Heather Johnson, a Supervisor in the National Futures Association's ("NFA") Compliance Department; John Brodersen, an Associate Director in the NFA's Compliance Department; and Eric Bloom, an official of Sentinel Management Group, Inc. ("Sentinel"), a company that managed cash holdings for LSAM commodity pools. The CFTC's documentary evidence included LSAM's due diligence and other financial records that were available to the CFTC as well as expert affidavits. LSAM also called Mary Beth Spear, John Brodersen, and Eric Bloom as witnesses. LSAM called no witnesses who were employed by or were principals of LSAM or otherwise had direct knowledge of LSAM's operations.

C. The District Court's Findings

On August 28, 2007, the district court issued an eighty-five page Order, granting in part and denying in part the CFTC's motion for a preliminary injunction. The court found that LSAM had committed fraud and that customer assets under the control of LSAM or related persons were in jeopardy. The court held that an asset freeze was necessary to assure availability of permanent relief. August 28, 2007 Order ("Order") at 79. The court further held LSAM was required to produce documents related to its U.S.-based futures-related business activity.

1. The Lake Shore Group of Companies

The district court made specific findings regarding three associated corporate entities: Lake Shore Group of Companies ("Lake Shore Group"); LSAM; and Lake Shore Asset Management, Inc. ("Lake Shore Inc.").

Lake Shore Group is registered in the Isle of Man while its office is in London, England. It is an "umbrella" organization that, among other things, operates four commodity pools or funds. Order, Findings of Fact ("FOF") at ¶ 12. Three of the funds, Lake Shore Alternative Financial Asset Fund I, Lake Shore Alternative Financial Asset Fund II, and Lake Shore Alternative Financial Asset Fund III are organized in the Turks and Caicos Islands. The fourth fund, Lake Shore Alternative Financial Asset Fund IV is organized in the British Virgin Islands and has a single U.S. investor. Order, FOF at ¶¶ 37-41. Sentinel Management Group, Inc. operates as a cash manager for the Funds. Order, FOF at ¶ 46. Based on the record as of the date of the preliminary injunction hearing, the district court found that, with the exception of one investment fund, Lake Shore

Group has not marketed to residents of the United States and all of its investment funds are located outside of the United States. Order, FOF at ¶ 13.

LSAM is a Bermuda corporation that was formed on September 12, 2006. LSAM became registered with the CFTC as a Commodity Trading Advisor (“CTA”) and a Commodity Pool Operator (“CPO”) to do business within the United States on January 17, 2007. Order, FOF at ¶ 2. Philip Baker is the Managing Director, Principal and President of LSAM. Order, FOF ¶ 4. LSAM is one of the companies associated with the Lake Shore Group. LSAM has been registered with the CFTC as a CPO and a CTA since January 17, 2007, and has been an NFA member since that time. Order, FOF at ¶ 70.

Lake Shore Inc. is also affiliated with the Lake Shore Group. Order, FOF at ¶ 16. LSAM is the reorganized version of Lake Shore Inc. *Id.* Prior to January 2007, Lake Shore Group held itself out as a CFTC registrant under the registration of Lake Shore Inc. Order, FOF at ¶ 71. Lake Shore Inc. was registered with the CFTC and the NFA until February 2007. Order, FOF at ¶ 73.

2. Lake Shore Group, LSAM, and Lake Shore Inc. Operated as a Common Enterprise

The district court issued specific findings in support of its conclusion that Lake Shore Group, LSAM and Lake Shore Inc. operated as a common enterprise.

Lake Shore Group, LSAM and Lake Shore Inc. have been referred interchangeably in the promotional materials put out by Lake Shore Group. Order, FOF at ¶ 19. Lake Shore Inc. and LSAM were both located at the same address. Order, FOF at ¶ 22. All of LSAM and Lake Shore Inc.’s printed materials are on

Lake Shore Group's stationery and contain Lake Shore Group's logos. Order, FOF at ¶ 24. Information and performance results for the funds managed and advised by LSAM are available on Lake Shore Group's website. Order, FOF at ¶ 25. LSAM solicited customers through dealers affiliated with Lake Shore Group. Order, FOF at ¶ 30. Lake Shore Group's PowerPoint or "pitch" describes LSAM as part of the Lake Shore entity. Order, FOF at ¶ 31.

LSAM's promotional materials state that it is doing business as a CFTC registrant and that it is a NFA member. Order, FOF at ¶ 73. LSAM's due diligence documents state that the company registered with the CFTC in 1996. Order, FOF at ¶ 75. Lake Shore's PowerPoint (the Pitch) contains numerous representations that Lake Shore Inc., now reorganized in to LSAM, is a CFTC registrant and a NFA member. Order, FOF at ¶ 77.

Lake Shore Group's website represented that it was founded as Lake Shore Inc. in 1993 and reorganized in 2006 as LSAM. Order, FOF at ¶ 78. The website represented that Lake Shore Group was regulated by the CFTC and the NFA. *Id.* Lake Shore Inc. acted as the CTA for the Lake Shore Alternative Financial Funds before LSAM was formed. Order, FOF at ¶ 83.

3. The Lake Shore Group's Misrepresentations and the Lake Shore Group's Losing Performance Record

The District court also issued specific findings in support of its conclusion that the Lake Shore Group common enterprise had committed fraud.

The Lake Shore Alternative Financial Asset Funds were trading commodity futures contracts on U.S. exchanges. A substantial amount of losses occurred in

those funds as the result of futures trading on U.S. futures exchanges. Order, FOF ¶ 91. The Lake Shore Group told its participants that the pools would trade commodity futures on U.S. exchanges. Order, FOF ¶ 92. Each of the fact sheets for the Lake Shore Alternative Financial Asset Fund states that they will trade commodity futures contracts that are traded on U.S. Exchanges. Order, FOF ¶ 93.

Lake Shore Group represented in trading account data that all of the Lake Shore Alternative Financial Asset Funds were profitable, where in fact, based upon examination by Mr. Brodersen of data from three futures commissions merchants (“FCMs”) traded for those funds, the trading accounts for the Lake Shore Alternative Financial Asset Funds lost \$29 million, over the past five years, with relatively heavy losses during late 2006 and the first part of 2007. Order, FOF ¶¶ 129, 130. Although Lake Shore Alternative Financial Asset Funds listed all of the funds as profitable, the overall loss of these funds meant that there had to be losses in individual funds, regardless of what transfers between funds had taken place. Mr. Brodersen testified that Lake Shore Group’s representation in promotional materials that no fund had lost money could not be reconciled with the FCM trading data. Order, FOF at ¶¶ 129, 130.

Although Lake Shore Group disclosed to investors in their promotional materials that investing in futures derivatives involves significant risk, it also represented that because of the implementation of a risk “overlay” in its trading program, the Funds had a target to lose not more than 5 percent per month each. Order, FOF at ¶ 68. Nevertheless, records from FCM showed monthly trading losses significantly higher than 5 percent during a considerable number of recent

time periods. For example, records for Lake Shore Alternative Financial Asset Fund II showed trading losses as high as 20.20 percent for May, 2007 and records for Lake Shore Alternative Financial Asset Fund I showed monthly trading losses as high as 70.87 percent for the same month. Order, FOF at ¶ 68.

D. The District Court's Entry of a Preliminary Injunction

Based on these and other findings, the district court held that LSAM was a mere continuation of Lake Shore Inc, and that the various Lake Shore Group entities, including LSAM, acted as a common enterprise and thus each company was jointly and severally liable for violations of the CEA. Order at 41-46. The district court further held that although both LSAM and Lake Shore Group were foreign entities, their activities related to the alleged scheme to defraud investors had occurred in the United States. Order at 50. Therefore the district determined that it had jurisdiction over LSAM and Lake Shore Group. *Id.* The district court further held that Lake Shore Group and LSAM were both CFTC registrants and acted as CTAs and CPOs in connection with the Lake Shore Alternative Financial Asset Funds. *Id.* The court stated that because LSAM acted as a CTA for Lake Shore Alternative Financial Asset Funds, it must allow inspection of books and records relating to this fund. *Id.* at 56. Finally, the court found sufficient evidence to establish that LSAM had committed fraud. Order at 63-70.

E. LSAM's Petition for Stay Pending Appeal

On August 29, 2007, LSAM moved for a stay pending appeal of the district court's August 28, 2007 Order. On August 30, 2007, after a hearing, the district court issued a twelve page order denying LSAM's request to stay the preliminary

injunction pending appeal. Docket Entry 126. The district court stayed only the document production part of its August 28, 2007 Order while this Court reviews LSAM's renewed emergency motion for a stay pending appeal.

## II. ARGUMENT

LSAM, as the party seeking a stay, has the burden of showing “(1) a likelihood of success on the merits; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the movant outweighs the harm to the opposing party if a stay is not granted; and (4) that the granting of the stay would serve the public interest.” *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999).

### A. LSAM is Not Likely to Succeed On the Merits of Its Appeal.

LSAM has little or no likelihood of succeeding on the merits of its appeal of the preliminary injunction. The CFTC is entitled to a preliminary injunction against future law violations if “there is a reasonable likelihood that the defendant, if not enjoined, will again engage in the illegal conduct.” *SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980).<sup>1</sup> See also *CFTC v. Hunt*, 591 F.2d 1211 (7th Cir. 1979); *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977). A district court may infer a likelihood of future violations from a defendant’s past unlawful conduct. *CFTC v. American Board of Trade, Inc.*, 803 F.2d. 1242, 1251 (2d Cir. 1986). The CFTC is entitled to an asset freeze if the preponderance of the evidence shows that customer assets would be in jeopardy absent a preliminary injunction. *CFTC v. Lake Shore Asset Management Limited*, No. 07-2790 (7th Cir.

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<sup>1</sup> The CEA authorizes the Commission to institute an action in a federal district court when it appears that “any registered entity or other person has engaged, is engaging, or is about to engage” in violations of the CEA. 7 U.S.C. § 13a-1(a).

Aug. 8, 2007). On review in this court, the district court's factual findings on these issues must be accepted unless they reflect clear error. *Brotherhood of Maintenance of Way Employees v. Union Pacific RR Co.*, 358 F.3d 453, 457 (7th Cir. 2004) (standard of review for grant or denial of preliminary injunction). Any balancing of factors by the district court is subject to review for abuse of discretion. *Id.* Conclusions of law are subject to *de novo* review.

The validity of the preliminary injunction in this case turns largely on issues of fact. The district court's grant of a preliminary injunction here was based on detailed findings supported by an extensive record. As discussed below, this is particularly true on the key issue of jeopardy of customer assets. To the extent that issues of law are material, the district court's conclusions are consistent with applicable precedent. As a result, LSAM does not have a significant chance of prevailing on the merits and is not entitled to a stay for that reason alone. *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006) (significant probability of success on merits needed along with other elements to justify a stay). At a minimum, LSAM's chance of success on the merits is sufficiently small that it can only obtain a stay if other relevant factors strongly favor it. LSAM cannot meet that burden.

1. LSAM cannot succeed on its theory that the district court lacks jurisdiction.

The anti-fraud provisions of the CEA govern fraud that is committed, in part, outside the United States if commodity-related conduct within the United States plays a material role in committing the fraud or in causing the resulting injury. *Tamari v. Bache & Co.*, 730 F.2d 1103, 1108 (7th Cir. 1984). For example, if a party

induces a customer to trade commodities by means of fraudulent misrepresentations outside the United States, but the resulting transactions take place on American exchanges, the fraud is subject to the CEA. *Id.*<sup>2</sup> See *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 666 n.12 (7th Cir. 1998) (under *Tamari* “wiring of orders for commodity transactions to the United States and execution of those orders on Chicago exchanges was sufficient conduct” to bring transaction within CEA); *Psimentos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041, 1044-45 (2d Cir. 1983) (execution of trade on U.S. exchange consummated fraud initiated by overseas misrepresentation and caused injury by generating commission for broker that fraudulently induced transaction). So long as conduct within the United States materially contributes to the fraud, the CEA governs regardless of whether the domestic conduct, by itself, violates the law. *Kauthar*, 149 F.3d at 667 (analogous issue under securities laws).

The jurisdictional standard of *Tamari* and *Kauthar* is clearly met here. The district court’s findings establish that LSAM used U.S. exchanges to facilitate a fraud, even if the fraud was largely directed at overseas customers. The Lake Shore Group specifically told its pools participants that the pools would trade commodity futures contracts on U.S. exchanges. Order, FOF ¶¶ 92, 93. Such trading in fact occurred and resulted in either absolute losses for customers or, at a minimum, performance substantially below that claimed by LSAM. Order, FOF ¶¶ 129, 130.

Moreover, Lake Shore Inc. and LSAM were both CFTC registrants and acted

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<sup>2</sup> In *Tamari*, the alleged fraud included both misrepresentations and churning of accounts but the Court of Appeals did not distinguish between the two forms of fraud for purpose of its jurisdictional analysis. 730 F.2d at 1105.

as CTAs and CPOs in connection with Lake Shore Alternative Financial Asset Funds. Lake Shore Group promotional materials, the Lake Shore Group's website, as well as LSAM's due diligence state that LSAM is doing business as a CFTC registrant and a NFA member. Order, FOF ¶¶ 73, 75, 77. The CFTC has jurisdiction to address the conduct of its own registrants. 7 U.S.C. § 2(a)(1)(A).

While *Tamari* and *Kauthar* involved extraterritorial jurisdiction over fraud under the CEA and the analogous securities laws, the principle they set forth also applies to LSAM's failure to produce records. This failure was an unlawful act under section 4n(3)(A) of the CEA, 7 U.S.C. § 6n(3)(A), which requires registered CTAs and CPOs to maintain records as specified by the CFTC and to allow inspection of records by the CFTC and the Department of Justice. Since LSAM was engaged in commodity advisory business and the operation of commodity pools involving trading on United States exchanges, there was a material connection between domestic commodity activity and the violation of 7 U.S.C. § 6n(3)(A) of same sort that triggered extraterritorial jurisdiction over violations of anti-fraud statutes in *Tamari* and *Kauthar*. For the same reason, the policy underlying 7 U.S.C. § 6n(3)(A)—facilitating the ability of federal law enforcement agencies to ensure the integrity of United States futures markets—applies regardless of the nationality of LSAM's customers.<sup>3</sup>

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<sup>3</sup> *New York Currency Research Corp. v. CFTC*, 180 F.3d 83 (2d Cir. 1999), on which LSAM relies in arguing that 7 U.S.C. § 6n(3)(A) does not apply to its business, is distinguishable. The registrant in *New York Currency Research* fell outside the language of 7 U.S.C. § 6n(3)(A) because it did not actually do business as a CTA or CPO. By contrast, the district court in this case found that LSAM did business as a CTA and CPO on U.S. exchanges. Nothing in *New York Currency Research*

2. LSAM cannot succeed on its theory that the record does not support a finding of fraud.

The record strongly supports the district court's finding that LSAM and the Lake Shore Common Enterprise engaged in fraud. The court's finding is primarily based on the analysis of records of Lake Shore commodity pool activity provided by three London-based brokers, Man Financial London ("Man"), Lehman Brothers London ("Lehman"), and Fimat London ("Fimat"). The district court found that these brokers maintained trading accounts for all trading by the Lake Shore Alternative Financial Asset Funds, the commodity pools operated by LSAM and the Lake Shore Common Enterprise. Order, FOF at ¶ 44. The funds also maintained non-trading accounts at Sentinel, which Lake Shore employed as a cash manager for fund assets. Order, FOF at ¶ 46. The analyses of data provided by Man, Lehman, Fimat, and Sentinel was conducted by NFA and CFTC investigators, whom the district court found to be reliable and credible witnesses.

The district court found, in essence, that the records of trading accounts for the Lake Shore funds showed a pattern of losses. Order, FOF at ¶¶ 91, 129, 130. By contrast, marketing documents prepared by Lake Shore claimed that Lake Shore had a record of highly profitable trading and that, when losses occurred, they were strictly limited by Lake Shore's trading system. Order, FOF at ¶¶ 129, 130. False or misleading claims regarding profitability and risk by CTAs and CPOs violate sections 4a and 4b of the CEA, 7 U.S.C. §§ 6b, 6c. *E.g., CFTC v. R.J.*

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distinguishes between CTA and CPO business done on behalf of foreign customers and that done on behalf of U.S. residents. In this regard it should be noted that the injunction here is limited to records relating to activity taken as a CTA or CPO or to trading on U.S. exchanges. Injunction at ¶¶ 3.A, 3.B.

*Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002); *Hirk v. Agri-Research Council Inc.*, 561 F.2d 96, 103-104 (7th Cir. 1977).

LSAM contends that the district court could not properly rely on results of trading in accounts held by Man, Lehman, and Fimat because it is possible that some Lake Shore trading took place through accounts at other brokers. The record, however, supported an analysis based on trading results from the three brokers whose records were relied upon by the court. In particular, there was credible evidence that Philip Baker, the Managing Director, Principal, and President of LSAM and Laurence Rosenberg, a principal of LSAM and director of several Lake Shore funds, admitted that all Lake Shore futures trading was handled through accounts at the three brokers. Order at 63-64. In the absence of specific evidence of trading on behalf of the Lake Shore commodity pools through accounts at other brokers, the district court could reasonably rely on these admissions.<sup>4</sup> At a minimum, it was not clear error to do so.

LSAM suggests that the promotional materials relied upon by the district court were not actually used by Lake Shore, but presented no evidence to this effect. The district court explicitly rejected this suggestion based on the sources of the documents in question, comparison with other LSAM documents in the hands of customers, and statements by a former LSAM salesperson concerning the sort of information relied upon by Lake Shore customers. Order at 76. The district court's findings based on the promotional materials were thus supported by the record.

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<sup>4</sup> This is particularly true in the procedural posture of this case, in which neither trial nor discovery has yet occurred.

Other evidence of fraud is reviewed in detail in the district court Order.

Order at 62-77. Overall, the record makes it highly unlikely that LSAM will prevail on its theory that it did not commit fraud.

3. The record demonstrates that customer funds were in jeopardy.

The district court made a number of findings demonstrating that customer funds under the control of Lake Shore were in jeopardy as of the time the court granted the CFTC's motion for a preliminary injunction freezing assets related to the Lake Shore Alternative Financial Asset Funds.<sup>5</sup> Most importantly, the court found a discrepancy of close to \$60 million between the combined assets of these funds as of June 11, 2007 and July 2, 2007. Order at 66-67. This discrepancy was based on a comparison of information obtained by the NFA from the LSAM web site in June 2007 (with certain adjustments based on information supplied by LSAM that eliminated double counting) and information supplied by Philip Baker to the CFTC and NFA in July 2007. *Id.* The \$60 million figure amounts to over 25 percent of assets on hand as of July 2, 2007. *See id.* LSAM did not seriously dispute the existence of the discrepancy in assets between the two dates and presented no specific explanation for it. *See* Order at 67. Instead, in cross-examination, LSAM proposed a number of hypothetical explanations that might

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<sup>5</sup> As noted above, the alternative asset funds were, in essence, commodity pools operated by Lake Shore. While the CFTC requested a preliminary injunction covering all assets controlled by LSAM, the district court excluded from the asset freeze all assets of so called "Segregated Managed Accounts" or "SMAs." SMAs accounted for close to three-quarters of all Lake Shore related assets.

have accounted for the discrepancy. *Id.*<sup>6</sup> The district court found these explanations to be unsupported by evidence and implausible as an explanation of a financial discrepancy of the magnitude at issue. Order at 67-70.

For example, the court pointed out that transfers of assets between various Lake Shore funds would not significantly affect the total amount of assets in all of the funds in question. Order at 67. Similarly, LSAM suggested that changes in exchange rates might account for the discrepancy in assets, but identified no rate fluctuation during the relevant time period that would account for drop in value that occurred. Order at 68. The district court acknowledged that trading losses might have accounted for some of the discrepancy in assets and that trading losses, *per se*, do not imply wrongdoing. Order at 68. However, the court noted that Lake Shore claimed to have trading policies in place that automatically limited losses to 5 percent per month. Thus, losses of the order of 25 percent in less than a month would, themselves, raise serious questions concerning Lake Shore's honesty and handling of customer funds. *Id.*

The record also documented extensive transfers of funds from Lake Shore commodity pool cash management accounts at Sentinel to entities controlled by employees and officers of LSAM including an introducing brokerage business operated by Philip Baker. Order at FOF ¶¶ 94-106. Transferred money was used for purposes including payroll expenses and purchase of real estate in Greece. *Id.* While the district court did not hold that these transfers were *per se* unlawful, it

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<sup>6</sup> LSAM has not suggested that the discrepancy was due to wrongdoing or mismanagement on the part of Sentinel or other custodians of Lake Shore related assets.

concluded that they reflected conflicts of interests with customers that should have been disclosed. Order at 71-73. In the absence of better explanation of the transfers than was provided by LSAM, the failure to disclose them to customers was “troubling.” Order at 73. Moreover, since the transfers were at the direction of LSAM employees and officers, they belie LSAM’s claims that it had no control over customer funds.

The evidence thus strongly supports the conclusion that customer funds in Lake Shore commodity pools were in jeopardy. At a minimum, it supports a preliminary injunction freezing assets pending discovery and a full accounting.

4. The preliminary injunction was proper in scope.

LSAM contends, incorrectly, that the district court’s preliminary injunction cannot cover participants in the Lake Shore Common Enterprise other than LSAM because the latter were not parties before the court when the preliminary injunction was issued. LSAM Motion at 9. The amended complaint, however, named as parties LSAM, Lake Shore Group of Companies, Ltd., the Lake Shore Common Enterprise, and Philip Baker. First Amended Complaint at 4-5. Rule 65(a)(1) of the Federal Rules of Civil Procedure requires “notice to the adverse party,” not formal service, as a condition for issuance of a preliminary injunction. *See Corrigan Dispatch Co. v. Casa Guzman S.A.*, 569 F.2d 300 (5th Cir. 1978). Given the close relationship—indeed, substantial identity—among these parties found by the district court, it can reasonably be inferred that the notice of the CFTC’s motion for a preliminary injunction served on LSAM resulted in actual notice of the motion to all of them. *See* Order at 44-46. For example, on August 13, 2007 Philip Baker

prepared a "Second Declaration" for submission to the district court, strongly suggesting that he was abreast of proceedings in this case at a point shortly after the CFTC noticed its motion for a preliminary injunction. LSAM Motion for Stay, Ex. 3. The Lake Shore Common Enterprise thus had sufficient notice and opportunity to appear before the district court to bring it within the scope of the preliminary injunction.<sup>7</sup>

For all of these reasons, LSAM is extremely unlikely to succeed on the merits of its appeal of the district court's preliminary injunction.

B. Denial of a stay will not cause significant irreparable injury to LSAM or the Lake Shore Common Enterprise.

A number of considerations significantly limit the injury, much less irreparable injury, LSAM and the Lake Shore Common Enterprise are likely to suffer if a stay pending appeal of the preliminary injunction is denied. According to LSAM, the assets frozen by the preliminary injunction are commodity pools managed by LSAM or other participants in the common enterprise, whose beneficial owners are investors in the pools. Thus, according to LSAM's own admission, the preliminary injunction does not deprive LSAM or the Lake Shore Common Enterprise of the use of its own money. At worst it deprives LSAM of the opportunity to earn commissions or other fees for a limited period of time. Moreover, the preliminary injunction does not affect most of the assets under

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<sup>7</sup> Even if the preliminary injunction were held not to apply to the Lake Shore Common Enterprise, it would still apply to LSAM, which was acknowledgedly a party to the preliminary injunction proceeding. *See e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100 (1969). Moreover, a non-party with notice is prohibited from collaborating with LSAM in violating the injunction. *Id.* at 112.

management by Lake Shore. The district court limited its asset freeze to the four “Alternative Financial Asset Funds” operated by Lake Shore. Injunction at ¶ 3.C. The court thus excluded the so-called “Segregated Managed Accounts” from the scope of the injunction. These accounts include close to three-quarters of the assets managed by Lake Shore. Order at 63-67 and Ex. 1.

Lake Shore also contends that failure to stay the asset freeze will result in injury to its reputation. However, any incremental harm to reputation from failure to obtain a stay pending appeal, beyond the impact on Lake Shore’s reputation from the pending enforcement litigation itself, is clearly limited and speculative.

In short, Lake Shore’s claim of irreparable injury provides little if any support for a stay pending appeal.

C. The balance of other considerations and the public interest support denial of a stay pending appeal.

In light of the strong evidence that Lake Shore has engaged in fraud and that customer funds under the control of LSAM or the Lake Shore Common Enterprise are in jeopardy, the interests of customers support continuation of the preliminary injunction, without a stay pending appeal. LSAM argues that the preliminary injunction harms customers because it interferes with their access to invested funds, but there is no evidence that this consideration outweighs the risk of dissipation of assets. The district court determined that customer declarations opposing an asset freeze submitted by LSAM were entitled to no weight and should be excluded from the record since there was no evidence that customers were aware of the CFTC’s allegations of fraud against LSAM when the declarations were made.

Order at 78 n.13. Moreover, most of the declarations opposing an asset freeze submitted by LSAM were not from customers but from persons in the business of selling LSAM financial products either as dealers or intermediaries. LSAM Motion for Stay, Ex. 7. Such individuals would not necessarily have interests aligned with those of existing LSAM customers with money at risk in Lake Shore funds.

The relevant public considerations in this case are embodied in the CEA. Congress contemplated that persons such as LSAM who wish to do business as CPOs and CTAs should be subject to stringent anti-fraud rules and recordkeeping and inspection requirements. 7 U.S.C. §§ 6b, 6o, 6n(3)(A). Congress equally intended that the CFTC and district courts make use of document preservation orders and asset freezes as tools for policing futures markets. 7 U.S.C. § 13a-1(a).

#### CONCLUSION

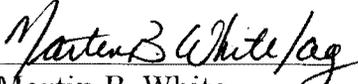
For the above reasons, Appellee CFTC respectfully requests that this Court deny LSAM's emergency motion for a stay pending appeal.

Respectfully submitted,

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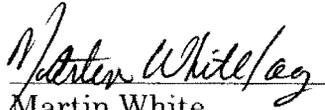
  
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Dated: Sept. 4, 2007

CERTIFICATE OF SERVICE

I, Martin B. White, hereby certify that an original and three copies of the foregoing opposition to Emergency Motion of the Preliminary Injunction was served on the Clerk of this Court by close of business, as ordered on August 31, 2007, and that a copy of the foregoing opposition to motion for stay was served by overnight express service on September 4, 2007 on counsel for petitioner:

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