

Receivership of Any Property Owned by Kenneth Wayne Lee, Marjorie Lee, Darren Alexander Lee and David Armstrong Lee and Allow Defendant Lee to Trade for the Account of Investors for Purposes of Repayment to stay the Court-appointed temporary receiver, Stephen J. Moriarty (“Receiver”), and unfreeze Lee’s trading accounts to allow him to trade in an attempt to repay pool participants the funds he misappropriated and lost through trading (Docket No. 48) (“Motion to Stay”).

In the Motion to Stay, Lee also objects to the receivership of Relief Defendants Sheila, David, and Darren Lee’s assets. He argues that the more than \$1.9 million in Prestige assets that Sheila, David, and Darren Lee received were trading profits from their investments in Prestige. Lee’s arguments omit the fact that the Relief Defendants’ total “investment” in Prestige was \$45,638 and that Lee’s trading was, in its entirety, unprofitable.¹

Lee also objects to the Plaintiffs’ Motion for an Order Finding Kenneth Wayne Lee, Simon Yang, David Lee, and Darren Lee in Contempt of Court (Docket Entry No. 35) (“Motion for Contempt”) and asks the Court to halt discovery on the grounds that he already turned over all of his books and records and prepared a full accounting, and that any other relevant information is filed online and not accessible to him.

¹ Lee seems to make these arguments on behalf of the Relief Defendants. For example, he writes, “Lee and relief defendants have no records remaining” (Motion to Stay ¶ 5), “we have tried to comply” (Motion to Stay ¶ 13), and “Lee and Relief Defendants ask that ...” (Motion to Stay ¶ 13). As a legal matter, Lee has no standing to represent the Relief Defendants and the Court should disregard any arguments or requests Lee makes on behalf of them.

For all the reasons below, Plaintiffs Commission and the Oklahoma Department of Securities *ex rel.* Irving L. Faught respectfully submit that the Court should reject Lee's arguments, deny the Motion to Stay, and find Lee in contempt of Court for violating the Court's SRO and its Consent Preliminary Injunction.

A. The Court Should Not Stay the Receiver or Release Defendants' Trading Accounts

1. Lee Is Making the Same Fraudulent Misrepresentations to the Court That He Made to the Pool Participants

Lee's Motion to Stay should be denied because the arguments he makes for why the Receivership should be stayed are the same as the fraudulent misrepresentations he used to solicit pool participants and the same fraudulent misrepresentations that convinced the Court to enter the very Consent Preliminary Injunction that Lee now asks the Court to lift.

Lee admits that he lost pool participant funds and tells the Court, "[he] has indicated several times that he would like to have the chance to earn cash from trading commodities to repay customers." (Motion to Stay ¶¶ 4, 6, 12). He claims that "[he] is still willing and capable of doing this ... [he] is a capable trader and can earn the funds." (Motion to Stay ¶4). To support this statement, Lee tells the Court that "[he] earned large returns from 2003 to 2005" (Motion to Stay ¶4) and "had grown the accounts by more than \$4,500,000 by the end of 2005." (Motion to Stay ¶10).

Similarly, he fraudulently told pool participants, among other things, that he had never suffered any trading losses (Motion for SRO (Docket Entry No. 8) at p. 9) and that,

at the end of December 2003, Prestige had \$1 billion under management (Motion for SRO at p. 11). His representations are as false now as they were then.

As a general matter, any representations by Lee that he is or ever has been a successful trader are not true. It is clear from his trading records that Lee was never a profitable trader and he has produced no evidence to dispute that. Review of his trading accounts shows that, from 2003 through 2009, the Prestige Enterprise sustained net losses of \$4.3 million trading in its 30 commodity futures or foreign currency trading accounts in the name of Federated or Prestige at various Futures Commission Merchants (Motion for SRO at p. 15). Specifically with regard to the 2003-2005 time period Lee references, between January 2004 and December 2004, there were trading losses in Lee's on-exchange futures accounts of approximately \$208,848. Between January 2005 and December 2005, there were trading losses of approximately \$1,196,362 in those same accounts. (Second Declaration of Kara L. Mucha, attached hereto as Exhibit 1, ("Mucha") ¶¶ 17, 23-25). The only increases in his accounts were the result of pool participant deposits, and not trading profits. (Mucha ¶ 14).

This is hardly the track record of "a capable trader." Still, Lee claims that he needs just \$15,000 in start-up capital to earn back the money lost to investors – a number that he still has not provided to the Receiver in direct violation of the Court's orders – in, he "feels ... four (4) years." (Motion to Stay ¶¶ 11, 13). But, Lee also tells the Court that "[m]any times funds would show in the bank and [he] had no idea who they belonged to or what to do with them. On several occasions it would be two or three months before [he] knew where the funds came from or what to do with them." (Motion to Stay ¶ 9). It

is implausible that one who cannot read his bank statements well enough to identify deposits would be able to turn \$15,000 into millions of dollars in returns.

The Court has already determined that “[g]ood cause exists for the appointment of a Receiver to take control of all assets owned, controlled, managed or held by, on behalf of, or for the benefit of Defendants” (SRO ¶ 6) and that “[g]ood cause exists for the freezing of assets owned, controlled, managed by, on behalf of, or for the benefit of Defendants.” (SRO ¶ 5). Lee’s Motion to Stay not only fails to rebut the Court’s findings, but reinforces that the Consent Preliminary Injunction is as necessary as ever to preserve the status quo, meet the immediate need to further recover, protect, and possibly return, pool participant lost funds, and prevent Lee from further violations of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* (2006), as amended, 7 U.S.C. §13a-1 (2006) and the Oklahoma Uniform Securities Act of 2004, Okla. Stat. tit. 71, §§1-101 through 1-701 (Supp. 2004).

2. The Motion Is Out of Time

The Court also should reject the Motion to Stay because the arguments Lee raises should have been raised in the course of making objections, if any, to the Commission’s request for a preliminary injunction. The deadline for raising any such objections was November 30, 2009. (SRO ¶ 37). Lee has shown no good cause for making these arguments at such a late and inappropriate stage of these proceedings.²

² Lee’s contention that he was unaware of his ability to address the Court is disingenuous at best. First, Lee has known since this case was filed that he could address the Court himself. He knew that the Court ordered him to appear at the December 2, 2009 Order to Show Cause hearing on whether a preliminary injunction should issue and showed his

3. Lee Consented to the Preliminary Injunction

Third, the Court should reject Lee's Motion to Stay because he makes it *after consenting* to a preliminary injunction against him and after the Court entered that consent. Lee himself acknowledges his consent by writing, "Lee executed a document styled [PROPOSED] CONSENT ORDER OF PRELIMINARY INJUNCTION AND OTHER EQUITABLE RELIEF." This was consent to the clear language of the Consent Order of Preliminary Injunction: "the [SRO] previously ordered by the Court shall remain in full force and effect until further order of this Court" and, thus, consent to all of the provisions of the SRO, including the appointment of the Receiver and freezing of Defendants' financial accounts.

4. Lee Has Not Appeared in the Case

Lee lacks standing to make a Motion to Stay, as he has not appeared in this case and there is a Clerk's Entry of Default on the docket against him (Docket Entry No. 30).³

B. Sheila, David, and Darren Lee Should Remain Relief Defendants, Their Bank Accounts Frozen and Their Assets Under the Receiver's Control

To the extent the Court views the Motion to Stay as an opposition to the Commission's Motion and Brief in Support to Amend the *Ex Parte* Statutory Restraining

knowledge when he asked the Commission and the Court if he could be relieved from attending based on travel costs – not for lack of ability to address the Court. Second, Lee is no stranger to litigation. Lee has been a defendant in at least five civil and criminal cases, and was convicted of federal bank fraud in 1995.

³ "Once the default [under Rule 55(a) of the Federal Rules of Civil Procedure] has been established, defendant has no further standing to contest the factual allegations of plaintiff's claim for relief." *Volume Services, Inc. v. Sweeny*, 2010 WL 170446, 2 (D.Colo. 2010) (citing 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2688 at p. 63; *accord Olcott v. Delaware Flood Co.*, 327 F.3d 1115, 1125 n. 11 (10th Cir. 2003)).

Order to add the Relief Defendants (Docket Entry No. 34), the Court should disregard Lee's arguments. Lee does not have standing to argue on behalf of the Relief Defendants and, even if he did have standing, his arguments would fail.

Lee admits that the funds the Relief Defendants received "rightfully belong to Prestige or Federated" (Motion to Stay ¶ 10) and does not dispute that those funds came from the Prestige bank account ending in 9686 ("Prestige Bank Account"). But, he argues that the Relief Defendants were entitled to those funds because: "[Relief Defendants] deposited their own funds and earned profits to purchase their homes, vehicles and a small fishing boat from 2003-2006." (Motion to Stay at p. 8 ¶ 1).

The money that went from the Prestige Bank Account to the Relief Defendants was pool participant money, and Lee has provided absolutely no evidence to the contrary. The Prestige Bank Account records from 2003 through 2009 show total deposits by the Lee family of \$45,638 (David Lee deposited nothing). (Declaration of Glen R. Grossman, attached hereto as Exhibit 2, ("Grossman") ¶ 6). The same bank records show at least \$1.9 million going out to the Relief Defendants.⁴ (Grossman ¶¶ 8-10).

If Lee's claims are true, then he earned a 4,000% profit on their overall investment. As stated above, however, Lee's trading records make clear that he was never a profitable trader, never mind a trader capable of earning a 4,000% return. The same counterargument applies to Lee's contention that \$900,000 of the Prestige Bank

⁴ To compare, the same records show at least \$8.7 million in pool participant funds deposited into the Prestige Bank Account and just \$3 million going back to pool participants. (Motion for SRO at Exhibit 8, Declaration of Glen R. Grossman).

Account funds that went to his family represent the 20% he earned on trading profits. (Motion to Stay ¶ 10).

Lee also would have the Court believe that he and Sheila Lee purchased their current home with “\$800,000 of their own funds which were available to them prior to any investors being involved and purchased the home they presently live in from these funds.” (Motion to Stay at p. 8 ¶ 1). This is not true. What is true is that the funds to purchase Lee and Sheila Lee’s current home came directly from the Prestige Bank Account (Grossman ¶ 8); it is also true that Lee and Sheila Lee’s deposits into the Prestige Bank Account totaled \$30,638 – nothing close to \$800,000. If Lee has evidence – other than his statements here – that he purchased his home with anything other than Prestige pool participant funds, he has yet to provide it.

C. Lee Has Not Turned Over All of His Books and Records and Has Not Provided a Full Accounting

To the extent Lee’s Motion to Stay can be viewed as an opposition to the Motion for Contempt, the Court should reject Lee’s arguments. Lee argues that he has complied with the records and accounting provisions of the Court’s Orders, but offers no evidence here that can refute the facts in Plaintiffs’ Motion for Contempt and still has not provided any of the required documents or information. Any facts he does include are restatements of the Plaintiffs’ charges against him. Thus, Lee fails to rebut Plaintiffs’ evidence that he has violated the records and accounting provisions of the Court’s orders and should be held in contempt for his violations.

Lee does not dispute – or even address – Plaintiffs’ assertions that he destroyed records, dissipated assets and continues to fraudulently solicit existing pool participants. Thus, Lee has admitted to violating those provisions and the Court should hold him in contempt for those violations as well. Lee does attempt to counter the Plaintiffs’ contention that Lee has fraudulently solicited his sons’ friends to provide him with \$15,000 in start-up capital in his plan to return pool participant funds. But his only defense, which is a poor one, is that: “These funds were offered by friends of my sons and not solicited by either Lee, Darren Lee or David.” Lee should be held in contempt for violating this Court’s SRO and Consent Preliminary Injunction.

Conclusion

For all the reasons stated above, the Commission respectfully requests that the Court deny Lee’s Motion to Stay and grant the Plaintiffs’ Motion for Contempt.

Dated: March 18, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 18, 2010, I caused one copy of **Plaintiffs Commodity Futures Trading Commission and Oklahoma Department of Securities ex rel. Irving L. Faught's Opposition to Defendant Kenneth Wayne Lee's Motion to Stay Receivership of Any Property Owned by Kenneth Wayne Lee, Marjorie Lee, Darren Alexander Lee and David Armstrong Lee and Allow Defendant Lee to Trade for the Account of Investors for Purposes of Repayment** and exhibits to be transmitted electronically email and served by U.S. mail on the following, who are not registered participants of the ECF System:

Simon Yang
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I hereby certify that on March 18, 2010, I electronically transmitted the **Plaintiffs Commodity Futures Trading Commission and Oklahoma Department of Securities ex rel. Irving L. Faught's Opposition to Defendant Kenneth Wayne Lee's Motion to Stay Receivership of Any Property Owned by Kenneth Wayne Lee, Marjorie Lee, Darren Alexander Lee and David Armstrong Lee and Allow Defendant Lee to Trade for the Account of Investors for Purposes of Repayment** to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Patricia A. Labarthe

Terra S. Bonnell

Stephen J. Moriarty

Warren F. Bickford, IV

/s/ Katherine S. Driscoll
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