

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 12-81311-CV-MIDDLEBROOKS/BRANNON

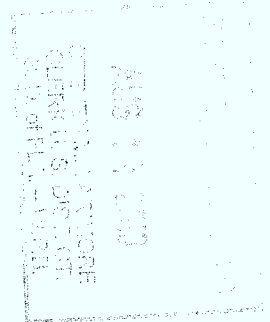
UNITED STATES COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff,

v.

HUNTER WISE COMMODITIES, LLC, *et al.*,

Defendants.



OMNIBUS ORDER

THIS CAUSE comes before the Court upon Motion by Plaintiff Commodity Futures Trading Commission (“CFTC”) for Clarification of Court Appointed Monitor’s Authority to Waive Attorney Client Privilege on Behalf of Corporate Entities and Request for Expedited Consideration (DE 169) (“Motion for Clarification”), filed July 18, 2013; Motion by Defendants Fred Jager (“Jager”) and Harold Edward Martin, Jr. (“Martin”) for Protective Order (DE 173) (“Motion for Protective Order”) filed on July 19, 2013; and Motion by Defendant Martin for Continuance Until Availability of Defendant Harold “Ed” Martin (DE 199) (“Motion for Continuance”) filed on August 9, 2013.¹ The CFTC seeks clarification regarding whether the Court’s Order Temporarily Appointing Special Corporate Monitor (DE 77), and subsequent Order on Plaintiff’s Motion for Preliminary Injunction (DE 78) (collectively, “Orders”) affirming the appointment, authorized the Special Monitor and Corporate Manager (“Special Monitor”) the

¹ The FDIC filed a Motion to Disqualify J.B. Grossman and J.B. Grossman, P.A. as Counsel (DE 182) that I will address in a separate Order.

right to waive the Entity Defendants'² attorney-client privilege. The Court has reviewed the record and is fully advised in the premises.

I. Procedural Background

On December 5, 2012, the CFTC filed its Complaint (DE 1) alleging thirteen Counts against Defendants³ for violations of several sections of the Commodity Exchange Act, Pub. L. No. 74-765, 49 Stat. 1491 (1936), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-203, 124 Stat. 1376 (2010). On December 6, 2012, the CFTC filed a Motion for Preliminary Injunction (DE 4) seeking to enjoin the Defendants from offering and executing illegal retail commodity transactions. *See id.* On February 22, 2013, after the Court held a hearing on the Motion for Preliminary Injunction, the Court issued an Order Temporarily Appointing Special Corporate Monitor.⁴ (DE 77). The Court issued an Order on Plaintiff's Motion for Preliminary Injunction (DE 78) on February 25, 2013 finding that the CFTC is entitled to a preliminary injunction and other equitable relief as well as

² For purposes of this Order, the term "Entity Defendants" refers to: Hunter Wise Commodities, LLC, Hunter Wise Services, LLC, Hunter Wise Credit, LLC, Hunter Wise Trading, LLC, Lloyds Commodities, LLC, Lloyds Commodities Credit Company, LLC, Lloyds Services, LLC, C.D. Hopkins Financial, LLC, Hard Asset Lending Group, LLC, Blackstone Metals Group, LLC, Newbridge Alliance, Inc., and United States Capital Trust, LLC.

³ For the purpose of this Order, the term "Defendants" refers to the Entity Defendants as well as individual Defendants David A. Moore, Chadewick Hopkins, Baris Keser, John King, Harold Edward Martin Jr., Fred Jager, James Burbage, and Frank Gaudino.

⁴ The Order Temporarily Appointing Special Corporate Monitor (DE 77) stated, in part, "The Corporate Manager shall have all powers, authorities, rights and privileges heretofore possessed by the officers, directors, and managers of the Entity Defendants under applicable state and federal law, by the governing charters, by-laws, articles and/or agreements." (DE 77 ¶ 5). Additionally, the Order explains, "Nothing in this Order shall be construed to require that any Defendants abandon or waive any constitutional or legal privilege which they may have available to them." *Id.* ¶ 41.

reaffirming the Special Monitor's authority as it relates to the Entity Defendants.⁵ *See id.* at 33-37.

On June 7, 2013, the CFTC deposed Defendant Martin. (*See* DE 158). CFTC represents that Defendant Martin testified that he received legal advice from Hunter Wise's former attorneys⁶ confirming the legality of Hunter Wise's retail commodity transactions at issue in this case. *Id.* Also, Defendants Burbage and Gaudino filed their Answer and Affirmative Defenses (DE 167) on July 16, 2013 in which they contend that they cannot be held liable for their conduct in part because they relied on counsel. (*See* DE 167 ¶¶ 5-7).

On June 19, 2013, Defendants Burbage and Gaudino provided a waiver of attorney-client privilege limited to advice and counsel Attorney Grossman provided them regarding Lloyds Commodities. (DE 180-3). Further, the Special Monitor waived attorney-client privilege as to the Entity Defendants on July 2, 2013. (*See* DE 169-1). On July 2, 2013, CFTC moved the Court to re-open discovery⁷ in this matter in order to depose Hunter Wise's former attorneys.⁸ (*See* DE 158). The Court granted CFTC's Motion to Re-Open Discovery (DE 163) on July 12, 2013 to allow the CFTC to depose Hunter Wise's former attorneys.

⁵ The Order on Plaintiff's Motion for Preliminary Injunction (DE 78) requires all Defendants and their agents to cooperate fully with and assist the Special Monitor in her duties. (DE 78 ¶ 23). The Order also preserves "any person's right to assert applicable privileges" while cooperating. *Id.*

⁶ For purposes of this Order, the term "Hunter Wise's former attorneys" refers to: Attorney J.B. Grossman of J.B. Grossman PA or the former firm Grossman Greenberg; Attorney John Giovannone of Greenberg Traurig; and Attorney Timothy Carey of Winston and Strawn, and formerly of Dewey Leboeuf.

⁷ The discovery period closed on June 3, 2013. CFTC requested discovery be re-opened until July 26, 2013. (*See* DE 158).

⁸ The CFTC represented that Hunter Wise's former attorneys had no objection to re-opening discovery for the purpose of issuing subpoenas for their testimony and documents, but that they reserved the right to object to the subpoenas once issued on the grounds other than timeliness. (*See* DE 158).

The CFTC filed its Motion for Clarification (DE 169) on July 18, 2013.⁹ Defendants Jager and Martin filed a Response on July 19, 2013 opposing the Motion for Clarification and requesting an evidentiary hearing on this Motion for Clarification. (*See* DE 174). Defendants Jager and Martin also filed their Motion for Protective Order on July 19, 2013. (*See* DE 173). On July 22, 2013, the Special Monitor filed a Memorandum in Support of the Motion for Clarification. (*See* DE 178). The CFTC filed its Reply, noting its opposition to a hearing on the Motion for Clarification. (*See* DE 180).

II. Discussion

A. *Entity Defendants' Attorney-Client Waiver*

The CFTC seeks a Court Order affirming the Special Monitor's authority to waive and assert the Entity Defendants' attorney-client privilege. Defendants Jager and Martin object to the CFTC's subpoenas on the grounds that the Special Monitor does not have the authority to waive attorney-client privilege.

When a new manager gains control of an entity, the manager also gains the power to assert and waive the entity's attorney-client privilege. *See CFTC v. Weintraub*, 471 U.S. 343, 349 (1985). Furthermore, the previous management "may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties." *Id.* (citations omitted). The new management holds the privilege.

Through the Court's Orders in the instant matter, the Court gave the Special Monitor all the rights and privileges necessary to exercise the authority and discharge the responsibilities given to her by the Orders. When the Court authorized the Special Monitor's control over the

⁹ I found that the Motion for Clarification warranted an expedited briefing schedule. (*See* DE 170).

Entity Defendants, the Court authorized her power to assert and waive the Entity Defendants' attorney-client privilege as well. (*See* DE 77 ¶ 5). Accordingly, Plaintiff's Motion for Clarification (DE 169) is granted.

The Court's previous Orders did preserve the individual Defendants' privileges. (*See* DE 77 ¶ 41, DE 78 ¶ 23). The individual Defendants continue to hold their personal privileges. The Special Monitor made it clear that she has only waived the Entity Defendants' attorney-client privilege, not the privileges of individual Defendants. (*See* DE 178 n.1). Furthermore, the CFTC has stated expressly that it "is only seeking information from Grossman, Carey and Giovannone relating to their representation of the Hunter Wise entity defendants." (DE 180 at 3). Since the CFTC has represented it will limit the scope of its questioning to the representation of the Entity Defendants, Defendants Jager and Martin's Motion for Protective Order is denied.

B. *Motion for Continuance*

On August 9, 2013, Defendant Martin, by and through his counsel, filed a Motion for Continuance. (*See* DE 199). Defendant Martin, through counsel, seeks a continuance of the trial in this matter due to health concerns. Defendant Martin filed a letter from his cardiac physician, Arjun V. Gururaj, M.D., discussing his heart issues.¹⁰ (*See* DE 199-1). I find that Defendant Martin has shown that good cause exists to continue the trial in this matter. Defendant Martin's Motion for Continuance is granted.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that

1. The CFTC's Motion for Clarification of Court Appointed Monitor's Authority to Waive Attorney Client Privilege on Behalf of Corporate Entities and Request for Expedited Consideration (DE 169) is **GRANTED**;

¹⁰ Dr. Gururaj explained that if Defendant Martin's heart condition continued, he might require an "urgent pacemaker implantation." (*See* DE 199-1 at 2).

2. The Court's Order Temporarily Appointing Special Corporate Monitor (DE 77) and Order on Plaintiff's Motion for Preliminary Injunction (DE 78) gave the Special Monitor authority to exercise all privileges previously held by the officers, directors, and managers of the Entity Defendants;

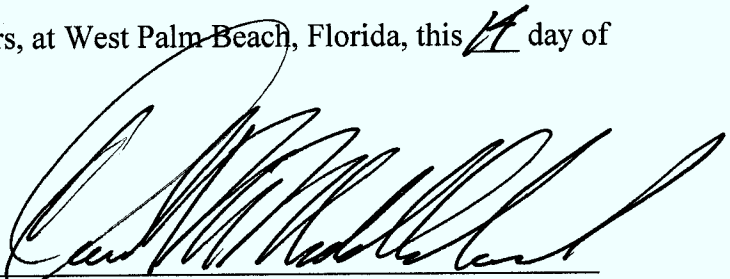
3. The Special Monitor was within the powers given to her by the Court when she waived the attorney-client privilege with respect to communications between the Entity Defendants and Hunter Wise's former attorneys, J.B. Grossman, Timothy Carey, and John Giovannone;

4. Defendant Jager and Martin's Motion for Protective Order (DE 173) is **DENIED**;

5. Defendant Martin's Motion for Continuance (DE 199) is **GRANTED**; and

6. The trial period in this matter, currently set for August 26, 2013, is **CONTINUED** to the two-week trial period commencing October 7, 2013. The Calendar Call currently scheduled for August 21, 2013 is **RESCHEDULED** to October 2, 2013.

DONE AND ORDERED in Chambers, at West Palm Beach, Florida, this 14 day of August, 2013.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT COURT

Copies to: Counsel of Record
Melanie E. Damian, Special Monitor and Corporate Manager
John King, *pro se*