UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 03-80612-Civ-Marra/Vitunac

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff

vs.

MICHAEL LAUER,
LANCER MANAGEMENT GROUP, L.L.C. and
LANCER MANAGEMENT GROUP II, L.L.C.,

Defendants,

and

LANCER OFFSHORE, INC.,
LANCER PARTNERS, LP, OMNIFUND, LTD.,
LSPV, INC. and LSPC, L.L.C.,

Relief Defendants.
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REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Order of Reference (DE 515) from United States District Judge Kenneth A. Marra "for appropriate disposition of all pre-trial discovery motions, and all motions that relate directly to these motions," and Order of Reference (DE 594) "for appropriate disposition of Plaintiff's Application for an Order to Show Cause Why Defendant Michael Lauer Should Not be Held in Contempt of the Court's Asset Freeze Order (DE 567)." Pending before the Court are the following:

1) Order to Show Cause Why Defendant Michael Lauer Should Not be Held in Contempt of the Court's Asset Freeze Order (DE 647), filed December 3, 2004;

Lauer's Response to Plaintiff's Application for an Order to Show Cause Why Lauer Should Not be Held in Contempt of the Court's Asset Freeze Order (DE 685), filed December 27, 2004;

SEC's Reply to Defendant Lauer's Opposition to Plaintiff's Application for an Order to Show Cause (DE 727), filed January 18, 2005;

Supplement to Plaintiff's Application for an Order to Show Cause Why Defendant Lauer Should Not be Held in Contempt of the Court's Asset Freeze Order (DE 728), filed January 18, 2005;

Receiver's Joinder With Plaintiff SEC's Application for an Order to Show Cause Why Defendant Lauer Should Not be Held in Contempt of the Court's Asset Freeze Order (DE 759), filed February 1, 2005;

2) Order to Show Cause Why Defendant Michael Lauer Should Not be Held in Contempt of the Court's December 3, 2004 Order Requiring Him to Provide a Disclosure Statement Within Five Days (DE 691), filed December 23, 2004;

Respondent Lauer's Compliance With Rule 26(a)(1) of the Federal Rules of Civil Procedure (DE 703), filed January 3, 2005;

3) Order to Show Cause Why Respondent Should Not be Held in Contempt for Violating the November 8, 2004 Order (DE 675), filed December 17, 2004;

Lauer's Response to the Court's Order to Show Cause Why the Respondent Should Not be Held in Contempt for Violating the November 8, 2004 Order (DE 726), filed January13, 2005;

SEC's Reply to Lauer's Opposition in Response to the Court's Order to Show Cause Why Lauer Should Not be Held in Contempt for Violating the November 8, 2004 Order (DE 738), filed January 24, 2005;

4) Order to Show Cause Why Lauer Should Not be Held in Contempt of this Court's December 22, 2004 and January 5, 2005 Orders Requiring Him to Appear for His Duly Noticed Deposition (DE 719), filed January 13, 2005;

Lauer's Response Affidavit to Court's Order to Show Cause Why the Respondent Should Not be Held in Civil Contempt (DE 754), filed January 27, 2005;

SEC's Reply to Lauer's Opposition to the Court's order to Show Cause why Lauer Should Not be Held in Contempt of the Court's December 22, 2004 and January 4, 2005 Orders Requiring Him to Appear for His Duly Noticed Deposition (DE 770), filed February 4, 2005.

The Asset Freeze Order

On July 10, 2003, the Court entered a Temporary Restraining Order (DE 19) that froze all

of Lauer's assets and required him to provide a sworn accounting. One week later, the Court entered a Preliminary Injunction Order (DE 22), by consent. The Preliminary Injunction Order continued the blanket freeze on Lauer's assets ("Asset Freeze Order"). The asset freeze, in pertinent part, stated the following:

> Defendants . . . are [ ] restrained from, directly or indirectly, transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of, or withdrawing any assets or property owned by, controlled by, or in the possession of any Defendant . . . . This asset freeze shall apply to any accounts, banking, brokerage or otherwise in the names of third parties on which Lauer is a signatory.

This asset freeze acted as a blanket freeze on all "assets or property owned by, controlled by, or in the possession" of Lauer. (DE 22, at 5-6).

The SEC claims that Lauer secreted $19,812 in dividends from the Millennium Fund into a bank account over which he exercised *de facto* control in violation of the Asset Freeze Order. Specifically, the SEC states that Lauer endorsed a December 12, 2003 distribution check in the amount of $11,011 to Heidi Carens. Carens then deposited the check in her business bank account which, according to the SEC, has a business address identical to Lauer's personal residence. Thereafter, on April 7, 2004, the SEC alleges that Lauer endorsed a second distribution check in the amount of $8,801 to Judith Brisman. In both instances, the SEC claims that Lauer violated the Asset Freeze Order by transferring or assigning his interests.

In addition, the SEC lists instances when it claims that Lauer made transfers into the Carens/Lauer account, including a check for $21,500 from the sale of a Mini Cooper, and $11,500 from the sale of a BMW Motorcycle. In its Supplement to the Motion for Contempt (DE 727), the SEC details additional assets diverted by Lauer in willful violation of the Asset Freeze Order,

including $139,258 from the liquidation of an insurance policy[1], and $71,571 from the sale of luxury furniture and from rental income. The SEC reiterates that Lauer failed to disclose any of these transactions. The SEC believes that Lauer has diverted at least $263,641 in frozen assets and has hidden millions of dollars worth of assets, including a C-11 Mercedes race car appraised for $5 million.

Lauer responds that the SEC's Application for an Order to Show Cause is nothing more than the agency's attempt to shift focus away from the fact that the SEC lacks any evidence to proceed to trial. Lauer claims that he was not involved in the sale of the Mini Cooper which resulted in a profit of $21,500. Although Lauer admits depositing other checks in Carens' bank account, he states that he did so because his own bank accounts were frozen. With regard to the $11,011 check and the $8,801 check, Lauer argues that these checks were issued after the Asset Freeze Order went into effect, and thus, these proceeds were not covered by the Order. Lauer does not respond to the allegations contained in the SEC's Supplement (DE 727). Instead, Lauer chooses to dispute the facts underlying the original Asset Freeze Order. In doing so, Lauer attempts to challenge the actual Order rather than establish that he has made in good faith all reasonable efforts to meet the terms of the Order.

The Disclosure Statement

Pursuant to Federal Rule of Civil Procedure 26, the SEC requested Lauer's disclosure

[1] The SEC details the facts surrounding the liquidation of the insurance policy. After Sovereign Bank issued Lauer a check for $139,258.23, Lauer endorsed the check to Brisman. One week later, Brisman wrote Lauer a check for the same amount. Lauer and Carens than deposited the check into the Lava Group account ("Carens/Lauer bank account").

statement in January of 2004.[2] Lauer failed to provide the statement. On August 19, 2004, the SEC filed a Motion (DE 470) seeking to compel Lauer to provide the disclosure statement. The District Court ordered Lauer to provide his disclosure statement to the SEC no later than September 22, 2004. (DE 491). However, Lauer failed to meet this deadline. On December 3, 2004, this Court entered an Order (DE 649) requiring Lauer to provide the SEC with his initial disclosure statement within five days. On December 21, 2004, after Lauer failed to meet the Court's deadline, the SEC filed an Application for an Order to Show Cause (DE 677). This Court granted the Application (DE 691) on December 22, 2004. Lauer filed a Motion requesting additional time to file the disclosure statement, and the Court denied his request (DE 709). On January 3, 2005, Lauer filed his disclosure statement (DE 703), one year after it was first requested.

The Court's November 8, 2004 Order

On July 10, 2003, the SEC served its First Set of Interrogatories upon Lauer. On December 10, 2003, the SEC requested that Lauer answer the interrogatories by January 10, 2004. After Lauer failed to do so, the SEC filed a Motion to Compel. The Court entered an Order (DE 184) granting the Motion to Compel and specifically ordered Lauer to provide full and complete responses to the interrogatories no later than March 3, 2004. The SEC stated that Lauer provided wholly inadequate responses to the interrogatories, and thus, the SEC filed a motion to hold Lauer in contempt. On May 10, 2004, the Court issued an Order (DE 332) giving Lauer until May 28, 2004 to serve full and complete responses to the interrogatories. The Court also warned Lauer that if he failed to comply with the Order, the Court would entertain an appropriate motion for sanctions. On June 2, 2004,

[2] Although Lauer eventually provided the disclosure statement, the Court includes a rendition of the SEC's efforts to obtain the disclosure statement as an additional example of Lauer's repeated failures to comply with various court orders.

Lauer filed a Request to Extend Time for a More Comprehensive Response to the SEC's Interrogatories (DE 372). On August 19, 2004, the Court issued an Order (DE 491) extending the deadline to September 22, 2004. On September 22nd, Lauer again filed a Motion to Extend the Amount of Time to respond to the interrogatories. On November 8, 2004, this Court entered an Order (DE 596) requiring Lauer to respond to Plaintiff's interrogatories by no later than November 22, 2004. Lauer failed to follow this Court's instructions. On December 16, 2004, this Court granted the SEC's Application for an Order to Show Cause (DE 675).

Lauer responds that he answered the interrogatories to the best of his ability. However, Lauer admits that he refused to answer interrogatories that he considered irrelevant or too broad. Thus, rather than seeking specific redress from the Court, Lauer chose to ignore certain interrogatories.

Further, Lauer attempted to gain an extension of time by claiming that he required copies of certain documents in order to answer the interrogatories. These documents had been lawfully seized by the Receiver. Upon receiving compact discs containing the documents requested, Lauer was dissatisfied because the discs did not contain an index nor a directory. Lauer filed a Motion to Compel an index or directory for the documents contained on the discs. The Court denied Lauer's Motion.[3]

Importantly, Lauer does not assert that he is unable to comply with the Order requiring answers to interrogatories. Instead, Lauer continues to maintain that the scope of the SEC's interrogatories should be limited and narrowed. In doing so, Lauer attempts to challenge the actual

[3] The Court found that no such index nor directory existed prior to the Receiver lawfully seizing the documents in question. The Court refused to order the Receiver to expend the time and resources required to create such an index. Although Lauer believes that the Court has not yet ruled on his Motion to Compel (Lauer's Response to Order to Show Cause, at 4), the Court clearly denied Lauer's Motion. (DE 596).

Order to Show Cause rather than establish that he has made in good faith all reasonable efforts to meet the terms of the Order.

The SEC replies that Lauer has acted in bad faith throughout the discovery process. The SEC urges this Court to view the totality of Lauer's actions, including his steadfast refusal to this day to provide required documents.[4]

The January 5-6, 2005 Deposition

This Court entered three different Orders (DES 690, 696, and 719) requiring Lauer to appear for his duly noticed deposition on January 5-6, 2005. The Court notes that it received Lauer's Emergency Motion for Reconsideration (DE 693) on January 4, 2005. The Court immediately denied the Motion. The Court's Order (DE 696) was immediately docketed, and the Court personally emailed Lauer a copy of the Order to ensure proper notice. In addition, the SEC states that it also served Lauer with a copy of the Order via facsimile and Fed-Ex on January 4, 2005. Further, the Receiver also emailed a copy of the Court's Order to Lauer on January 4, 2005. Despite these numerous efforts, Lauer claims that he did not receive notice of the Court's Order until January 5, 2005. The Court finds this hard to believe. The SEC states that it spoke to Lauer on January 5, 2005 at which time Lauer informed the SEC that he would not appear for the deposition.

In his Response, Lauer reiterates his belief that the Court erred in denying his various motions to cancel the deposition. Lauer again attempts to challenge the actual Order to Show Cause rather than establish that he has made in good faith all reasonable efforts to meet the terms of the Order. Lauer does not assert an inability to comply with the Orders requiring his appearance at the

[4] On February 28, 2005, the Court granted the SEC's Emergency Motion to Compel Lauer to produce documents in response to the first and second requests for production. See DE 827.

depositions.

Civil Contempt Sanctions

It is well settled that "[c]ourts have inherent power to enforce compliance with their lawful orders through civil contempt." Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991) (quoting Shillitani v. United States, 384 U.S. 364, 370 (1966)). In order to hold a person in contempt, the Court must determine whether there is clear and convincing evidence that (1) the allegedly violated order was valid and lawful; (2) the order was clear, definite and unambiguous; and (3) the alleged violator had the ability to comply with the order. McGregor v. Chierico, 206 F.3d 1378 (11th Cir. 2000). Federal Rule of Civil Procedure 37(b)(2) states in pertinent part:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence;
> > (C) An order striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order . . . to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The SEC has met its initial burden of proving, by clear and convincing evidence, that Lauer violated the Asset Freeze Order, the Order requiring a disclosure statement, the Order requiring answers to interrogatories, and the Orders requiring Lauer's appearance at depositions.

The SEC having made this prima facie showing, the burden of production shifts to Lauer to defend his failure on the grounds that he was unable to comply with the Orders. CFTC v. Wellington

Precious Metals, Inc., 950 F.2d 1525, 1529 (11th Cir. 1992) (citing United States v. Rylander, 460 U.S. 752, 757 (1983). However, in order to satisfy this burden, Lauer must offer proof beyond a "mere assertion of inability" and introduce specific evidence to support his claim. Citronelle-Mobile Gathering, Inc., 943 F.2d at 1301 (quoting United States v. Hayes, 722 F.2d 723, 725 (11th Cir. 1984)). Lauer can only meet this burden by demonstrating that he has "made in good faith all reasonable efforts to comply." Citronelle-Mobile Gathering, Inc., 943 F.2d at 1301 (quoting United States v. Ryan, 402 U.S. 530, 534 (1971)). If and only if Lauer can make this showing, the burden then shifts back to the SEC to prove Lauer's ability to comply with the various Orders.[5]

Rather than claiming that he is unable to comply with the directives, Lauer instead attempts to challenge the legal or factual basis underlying the various Orders to Show Cause. However, it is well settled that a contemnor cannot ask the Court to reconsider the legal or factual basis of the Order at issue. See Maggio v. Zeitz, 333 U.S. 56, 69 (1948). Lauer cannot excuse his defiance of this Court's Orders by simply stating that, in his opinion, the Orders were unlawful. Lauer asks this Court "to consider [his] *pro se* status which [] militates for a degree of leniency." [6] However, as Judge Zloch noted in his February 25, 2004 Order, "*pro se* litigants, such as Lauer, are not excused from compliance with orders, relevant case law and the rules of court, including the Federal Rules of Civil Procedure." (citing Moon v. Newsome, 863 F.2d 835, 838 (11th Cir. 1989)). DE 184. The fact remains that Lauer blatantly ignored this Court's specific Orders, and he cannot offer any evidence of his inability to comply with said Orders.

Before the District Court can hold Lauer in contempt, "[d]ue process requires that the court

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[5] "The party seeking the contempt citation retains the ultimate burden of proof . . ." CFTC, 950 F.2d at 1529 (quoting In re Battaglia, 653 F.2d 419, 423 (9th Cir. 1981)).

[6] Lauer's Response to Order to Show Cause, at 7.

inform the alleged contemnor of the contemptuous conduct, and provide a hearing in which the alleged contemnor may explain why the court should not make a contempt finding." Citronelle-Mobile Gathering, Inc., 943 F.2d at 1304 (quoting Mercer v. Mitchell, 908 F.2d 763, 766 (11th Cir. 1990)).

Recommendation

The record clearly demonstrates that Respondent Lauer has acted in bad faith, failed to take part in the discovery process, and repeatedly violated Court Orders. After considering the totality of Lauer's conduct, it is hereby

RECOMMENDED that the District Court GRANT the Respondent's Motion for Court Hearing Addressing Issues Raised in Plaintiff's Contempt and Sanctions Seeking Campaign Against Respondent (DE 802), filed on February 15, 2005.

RECOMMENDED that if the District Court holds Lauer in civil contempt, the Court should impose the following sanctions upon Respondent, Michael Lauer:

1. Incarcerate Lauer until such time that Lauer fully complies with all outstanding Court Orders;
2. Require Lauer to pay a daily monetary fine in the amount of $1000.00 until such time that Lauer complies with all outstanding Court Orders;
3. Require Lauer to reimburse the SEC for costs incurred in seeking the above-listed Orders to Show Cause. The SEC is instructed to submit a schedule of its attorneys' fees and costs within twenty days of the conclusion of the contempt proceeding;
4. Require Lauer to reimburse the SEC for travel costs and expenses incurred in traveling to New York for the January 5-6, 2005 depositions. The SEC is instructed to submit a schedule of its attorneys' fees and costs within twenty days of the

conclusion of the contempt proceedings.

Any party may serve and file written objections to this Report and Recommendation with the Honorable Kenneth A. Marra, within ten (10) days after being served with a copy. See 28 U.S.C. § 636(b)(1)(C). Failure to file timely objections may limit the scope of appellate review of factual findings contained herein. See United States v. Warren, 687 F.2d 347, 348 (11th Cir.1982) cert. denied, 460 U.S. 1087 (1983).

DONE and RECOMMENDED in Chambers at Fort Pierce in the Southern District of Florida, this 28 day of March 2005.

ANN E. VITUNAC
Chief United States Magistrate Judge

Copies to:
Honorable Kenneth A. Marra
Michael Lauer, *pro se*
Christopher Martin, Esq.
Kevin Eckhardt, Esq., shall serve a copy of this Order upon all parties in interest who are not already listed above