

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

COMMODITY FUTURES TRADING  
COMMISSION,

**Plaintiff,**

v.

WALL STREET UNDERGROUND, INC.,  
et al.,

**Defendants.**

**CIVIL ACTION**

**No. 03-2193-CM**

**MEMORANDUM AND ORDER**<sup>1</sup>

This matter comes before the court on plaintiff’s Amended Motion for Appointment of a Receiver (Doc. 125). Plaintiff seeks to modify its Motion for Appointment of a Receiver (Doc. 83) by seeking appointment of a receiver only as to Wall Street Underground, Inc. (“WSU”), rather than to WSU and defendant Nicholas Guarino.

**I. Legal Standard**

The Commodity Exchange Act (the “Act”), 7 U.S.C. § 1 *et seq.*, empowers the district court to enforce compliance with the Act by ordering “such action as is necessary to remove the danger of violation” of the Act. 7 U.S.C. § 13a-1(c). Section 13a-1 grants the district court with broad authority to order relief necessary to enforce the Act, including the appointment of a receiver. *See, e.g., Commodity*

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<sup>1</sup> The court vacates its previous March 17, 2004, Orders (Docs. 134 & 135) so that it may specify the powers and duties of the receiver appointed by this order.

*Futures Trading Comm'n v. Co Petro Mktg. Group*, 680 F. 2d 573, 582-83 (9<sup>th</sup> Cir. 1982) (upholding district court's appointment of a receiver); *Commodity Futures Trading Comm'n v. Muller*, 570 F. 2d 1296, 1300-01 (5<sup>th</sup> Cir. 1978) (upholding district court's injunction preventing defendant from dissipating the funds that he allegedly misappropriated); *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F. 2d 1477, 1480 (10<sup>th</sup> Cir. 1983) (noting the district court's appointment of a receiver).

## **II. Analysis**

Plaintiff requests that the court appoint a receiver in order to ensure that WSU's assets are preserved for the benefit of its allegedly defrauded customers, pending the outcome of this case. In particular, plaintiff asserts that a receiver is necessary to safeguard the assets in an account that allegedly belongs to WSU at Euro Bank in the Grand Cayman Islands. Euro Bank is being liquidated for its illegal money laundering practices, and the Liquidator for Euro Bank has informed plaintiff that it must obtain the assistance of a court-appointed receiver to ensure that the funds are collected and held on behalf of WSU's allegedly defrauded customers.

Defendants Web Fulfillment Centre, Inc. ("WFC") and Frank Asaro have filed a response to plaintiff's motion contending, first, that the court cannot exercise personal jurisdiction over WSU because plaintiff did not properly serve WSU. Specifically, WFC and Asaro assert that plaintiff served WSU's registered agent after WSU was designated a void corporation, and, under Delaware law, a registered agent is not empowered to accept service on behalf of a void corporation.

As plaintiff correctly points out, however, WFC and Asaro have no standing to the appointment of a receiver for WSU. WFC and Asaro have denied any connection between them and WSU; therefore,

WFC and Asaro cannot now claim the necessary injury in fact to contest the present matter. Further, as plaintiff asserts, attorney Brant Laue has never entered an appearance on behalf of WSU, and, consequently, under District of Kansas Local Rule 5.1(b), WFC and Asaro's response has not been properly signed by an attorney of record. The court therefore exercises its authority and grants plaintiff's motion to strike WFC and Asaro's response. *See, e.g., Bracken v. Dixon Indus. Inc.*, 1999 WL 138892, No. 97-1225-DES (D. Kan. Feb. 10, 1999).

Nevertheless, the court has proper personal jurisdiction over WSU. A domestic corporation may be served with process either pursuant to the law of the state in which the district court is located, or pursuant to the law of the state in which service is effectuated. *See* Fed. R. Civ. P. 4(h)(1), 4(e)(1). In Delaware, where plaintiff served defendant's registered agent, a corporation's existence is continued after its dissolution for three years for purposes of bringing suit against the corporation. *See* 8 Del. C. § 278. Further, the Kansas Supreme Court has held that pursuant to Kansas Statute Annotated § 17-6807, which is modeled after 8 Delaware Code Annotated § 278, a plaintiff may properly serve a corporation by serving process upon the corporation's registered agent during the statutorily mandated three-year period. *See Vogel v. Miss. Valley Steel, Inc.*, 229 Kan. 492, 625 P. 2d 1123, 1127-28 (1981). Consequently, the court concludes that its exercise of personal jurisdiction over WSU is appropriate under both Delaware and Kansas law.

The court therefore concludes that appointment of a receiver is necessary in this case to preserve any of WSU's assets that may ultimately provide relief for WSU's allegedly defrauded customers. Particularly in light of the liquidation of Euro Bank, appointment of a receiver is necessary to determine

whether WSU's alleged account at Euro Bank does in fact belong to the corporation, and, if so, to safeguard those assets through the liquidation.

### **III. Order**

**IT IS THEREFORE ORDERED** that plaintiff's Amended Motion for Appointment of a Receiver (Doc. 125) is granted.

Mr. Robb Evans & Associates of Sun Valley, California ("Receiver") is hereby appointed the receiver for WSU and its subsidiaries, successors and assigns, and is hereby authorized, empowered, and directed to:

1. Take immediate possession of all of WSU's assets and all other property of every kind whatsoever and wherever located belonging to or in the possession of WSU, including but not limited to all offices maintained by them, rights of action, books, papers, data processing records, evidences of debt, bank accounts, savings accounts, certificates of deposit, stocks, bonds, debentures and other securities, mortgages, furniture, fixtures, office supplies and equipment, and all real property of WSU wherever situated, and to administer such assets as is required in order to comply with the directions contained in this Order, and to hold all other assets pending further order of this court.
2. Appoint one or more special agents, employ legal counsel, actuaries, accountants, clerks, consultants, and assistants as he deems necessary, and to fix and to pay their reasonable compensation and reasonable expenses thereof, and all reasonable expenses of taking possession of WSU's assets and business, and exercising the power granted by this Order, subject to approval by this court at the time the Receiver accounts to the court for such expenditures and compensation.
3. Engage persons in his direction to assist him in carrying out his duties and responsibilities as Receiver, including, but not limited to, the United States Marshals Service or a private security or investigation firm.

4. Defend, comprise or settle legal actions, wherein WSU or the Receiver is a party, commenced either prior to or subsequent to this Order, with authorization of this Court; except, however, in actions where WSU is a nominal party, as in certain foreclosure actions where the action does not effect a claim against or adversely affect the assets of WSU, the Receiver may file appropriate pleadings in his discretion.
5. Assume control of, and be named as authorized signatory for, all accounts at any bank, brokerage firm, or financial institution wherever situated that has possession, custody or control of any assets or funds of WSU, of any of its subsidiaries or affiliates; provided that the Receiver deems it necessary.
6. Make or authorize such payments and disbursements from the funds and assets taken into control, or thereafter received by the Receiver, and incur, or authorize the incurrence of, such expenses and make, or authorize the making of, such agreements as may be reasonable, necessary and advisable in discharging his duties as Receiver.
7. Have access to and review all mail of WSU (except for mail that appears on its face to be purely personal or attorney-client privileged) received at any office of WSU. All mail addressed to WSU that is opened by the Receiver that, upon inspection, is determined by the Receiver to be personal or attorney-client privileged, shall be promptly delivered to the addressee and the Receiver shall not retain any copy thereof.

**IT IS FURTHER ORDERED** that, in connection with the appointment of the Receiver provided for above:

8. WSU and all of its directors, officers, agents, employees, attorneys, attorneys-in-fact, shareholders, and all other persons who are in custody, possession, or control of any assets, books, records, or other property of WSU shall deliver forthwith upon demand such property, monies, books, and records to the Receiver, and shall forthwith grant to the Receiver authorization to be a signatory as to all accounts at banks, brokerage firms, or financial institutions that have possession, custody, or control of any assets or funds in the name of, or for the benefit of WSU, and shall sign any documents deemed necessary by the Receiver to carry out the terms of this Order.
9. All banks, brokerage firms, financial institutions, and other business entities which have possession, custody or control of any assets, funds, or accounts in the name of, or for the benefit of, WSU shall cooperate expeditiously in the granting of control and authorization as a necessary signatory as to said assets and accounts to the Receiver.
10. WSU and its principals, and their respective officers, agents, employees, attorneys, and attorneys-in-fact, shall cooperate with and assist the Receiver, including, if deemed necessary by the Receiver, appearing for deposition testimony and producing documents,

upon two (2) business days' notice (which may be sent by facsimile), and shall take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere with the Receiver in the conduct of his duties or to interfere in any manner, directly or indirectly, with the custody, possession, management, or control by the Receiver of the funds, assets, promises and choses in action described above.

11. The Receiver, and any counsel whom the Receiver may select, are entitled to reasonable compensation from the assets now held by, or in possession or control of, or which may be received by, WSU; said amount or amounts of compensation shall be commensurate with duties and obligations under the circumstances, subject to approval of the court.
12. During the period of the receivership, all creditors, banks, investors, or others, with actual notice of this Order, are enjoined from filing petitions for relief under the United States Bankruptcy Code without prior permission from this court, or from in any way disturbing the assets or proceeds of the receivership or from prosecuting any action or proceedings which involve the Receiver or which affect the property of WSU.
13. The Receiver is fully authorized to proceed with any filing he may deem appropriate under the Bankruptcy Code as to WSU.
14. Title to all property, real or personal, all contracts, rights of action and all books and records of WSU and its principals, wherever located within or without this state is vested by operation of law in the Receiver.
15. Upon request by the Receiver, any company providing telephonic services to WSU shall provide a reference to calls from the number presently assigned to WSU to any such number designated by the Receiver or perform any other changes necessary to the conduct of the receivership.
16. Any entity furnishing water, electric, telephone, sewage, garbage or trash removal services, or any other form of public utility, to WSU shall maintain such service and transfer any such accounts to the receiver unless instructed to the contrary by the Receiver.
17. The United States Postal Service is directed to provide any information requested by the Receiver regarding WSU, and to handle future deliveries of WSU's mail as directed by the Receiver.
18. No bank, savings and loan association, other financial institution, or any other person or entity shall exercise any form of set-off, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of this court.

19. No bond shall be required in connection with the appointment of the Receiver. Except for an act of intentional misconduct, the Receiver shall not be liable to the WSU for any loss or damage incurred by WSU or by the Receiver's officers, agents or employees, or any other person, by reason of any act performed or omitted to be performed by the Receiver in connection with the discharge of his duties and responsibilities hereunder.
20. Service of this Order shall be sufficient if made by facsimile or overnight courier.
21. In the event that the Receiver discovers that funds of persons who have invested with, or purchased goods or services from, WSU have been transferred to other person or entities, the Receiver is empowered to trace such transfers to determine whether the funds transferred are held in constructive trust for the benefit of defrauded customers.
22. This Court shall retain jurisdiction of this matter for all purposes.

**IT IS FURTHER ORDERED** that plaintiff's motion to strike WFC and Asaro's response is granted.

**IT IS FURTHER ORDERED** that plaintiff's Motion for Appointment of a Receiver (Doc. 83) is denied as moot.

Dated this 18<sup>th</sup> day of March 2004, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
**United States District Judge**