

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

COMMODITY FUTURES TRADING  
COMMISSION,

Plaintiff,

Case No. 11-cv-10949

Hon. LAWRENCE P. ZATKOFF

vs.

MICHAEL POTTS,

Defendant.

**COMBINED MOTION AND BRIEF IN SUPPORT OF  
AN ORDER GRANTING COUNSEL'S REQUEST TO WITHDRAW FROM  
REPRESENTATION OF DEFENDANT MICHAEL POTTS**

For the reasons set forth below, the undersigned counsel hereby moves this Honorable Court for an order allowing the undersigned to withdraw from representation of defendant Michael Potts. Pursuant to Local Rule 7.1(a)(1), the undersigned sought and obtained concurrence and/or "no objection" to this motion from all attorneys and pro-se litigants in the instant case, namely – Jason Mahoney, AJ Watson, Kay Griffith Hammond, and Harry Wise.

There has been an irreconcilable breakdown in the attorney-client relationship between the undersigned and Mr. Potts. Moreover, counsel believes that Michigan Rule of Professional Conduct 1.7(b)(2) mandates counsel's withdrawal, and Michigan Rule of Professional Conduct 1.16(b)(6) permits such withdrawal.

On Tuesday, October 25, 2011, the undersigned received an e-mail from Assistant United States Attorney Mark Lytle in Alexandria Virginia, where the government is currently investigating potential criminal charges stemming from the same conduct alleged by plaintiff in the instant case. *See* attached e-mail. AUSA Lytle stated in part, "This is a request for you to preserve all communications between you and Mr. Potts. As a result of Mr. Potts' correspondence, affidavit and attachments discussed below, the government is considering making a request for copies of all such communications between Mr. Potts and previous and current counsel."

AUSA Lytle's e-mail continues, "Attached, for your review is a September 30, 2011 letter from Mr. Potts.... According to the letter, the affidavit and attached documents were sent to various law enforcement agencies. The affidavit references previously protected confidential communications between Mr. Potts and his former lawyer", who happens to be the undersigned attorney. Prior to AUSA Lytle's e-mail, the undersigned did not know that Mr. Potts created and distributed such an "affidavit".

Also on October 25, 2011, the undersigned counsel sent the following text in an e-mail to Mr. Potts' last known e-mail addresses. The undersigned has previously communicated with Mr. Potts in e-mails to these addresses. Counsel's e-mail stated, "Today, I received an e-mail from the U.S. Attorney's Office in Alexandria, VA, containing a copy of your "Affidavit of Criminal Report by Witness & Victim of Criminal Activity", dated 30 September 2011. The allegations in your affidavit have led me to conclude that there has been a complete breakdown in our attorney-client relationship. Therefore, I intend to file a motion to withdraw as your attorney in the CFTC civil matter currently pending here in Michigan." To date, the undersigned has never received a response from Mr. Potts.

Michigan Rule of Professional Conduct 1.16(b)(6) states in relevant part, “a lawyer may withdraw from representing a client... if... other good cause exists.” Moreover, Michigan Rule of Professional Conduct 1.7(b) states in relevant part, “A lawyer shall not represent a client if the representation of that client may be materially limited by... the lawyer’s own interest.” Lastly, “If the lawyer’s own probity is questioned during the representation by accusations... a conflict of interest may be created. It also creates a situation where the client has made it far more difficult for the lawyer to represent the accused without the appearance of impropriety existing, thus constituting ‘good cause for withdrawal’.” Hall Jr., John Wesley, *Professional Responsibility in Criminal Defense Practice*, § 13:26, at page 566 – 67, Thomson/West, 2005.

WHEREFORE, because there has been an irreconcilable breakdown in the attorney-client relationship between the undersigned and Mr. Potts, and because the undersigned counsel believes that Michigan Rule of Professional Conduct 1.7(b)(2) mandates counsel’s withdrawal, and Michigan Rule of Professional Conduct 1.16(b)(6) permits withdrawal for good cause, and such good cause exists, the undersigned respectfully requests that this Honorable Court enter an order permitting counsel to withdraw from any further representation of Mr. Potts in the above-captioned case.

Respectfully Submitted,

/s John Freeman  
JOHN FREEMAN  
Law Office of John Freeman, PLLC  
3150 Livernois, Ste. 270  
Troy, MI 48083  
248-250-9950  
formerfedlawyer@hotmail.com

November 1, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he will file this motion via the ECF system, which will generate an e-mail to the attorneys and pro-se litigants in the above-captioned case. The undersigned further certifies that he will send a copy of this motion to Mr. Potts at his last known e-mail addresses, with a hard copy to follow via U.S. Mail.

/s John Freeman  
JOHN FREEMAN  
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November 1, 2011

## Michael Potts

From: **Lytle, Mark (USAVAE)** (Mark.Lytle@usdoj.gov)  
Sent: Tue 10/25/11 3:21 PM  
To: John Freeman (formerfedlawyer@hotmail.com); dschertler@schertlerlaw.com  
(dschertler@schertlerlaw.com); donorato@schertlerlaw.com (donorato@schertlerlaw.com)  
Cc: Muhlendorf, Kevin (CRM) (Kevin.Muhlendorf@usdoj.gov)  
1 attachment  
2011.0930.Letter Aff from Potts.pdf (735.5 KB)

Gentlemen,

This is a request for you to preserve all communications between you and Mr. Potts. As a result of Mr. Potts' correspondence, affidavit and attachments, discussed below, the government is considering making a request for copies of all such communications between Mr. Potts and previous and current counsel. Thanks in advance for your cooperation.

Attached, for your review is a September 30, 2011 letter from Mr. Potts with an attached affidavit along with other documents. According to the letter, the affidavit and attached documents were sent to various law enforcement agencies. The affidavit references previously protected confidential communications between Mr. Potts and his former lawyer, Mr. John Freeman. See Pars. 10, 26. Additionally, Mr. Potts attached a copy of an August 8, 2011 previously confidential email communication between Mr. Potts and Mr. Freeman.

We view Mr. Potts' decision to selectively disclose certain communications between himself and his lawyer as a waiver of the protections of the attorney client privilege – making all previously privileged communications between Mr. Potts and his lawyers now unprotected.

In the Fourth Circuit, “. . . implied waiver occurs when the party claiming the privilege has made any disclosure of a confidential communication to any individual who is not embraced by the privilege. Such disclosure vitiates the confidentiality that constitutes the essence of the attorney-client privilege.” *White*, 341 F.3d at 336 (quoting *Hawkins v. Stables*, 148 F.3d at 384 n.4). See also, *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1992) (quoting *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (“Any voluntary disclosure (such as an offering brochure or income tax returns) by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter.”).

Thank you for your assistance in this matter. Please feel free to contact me directly, should you have any questions.

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