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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES COMMODITIES	)	No.: 08-56165
FUTURES TRADING COMMISSION,	)	D.C. No. 8:07-cv-01437-CJC-RNB
	)	
Plaintiff,	)	
	)	REPLY TO CFTC, RECEIVER AND
v.	)	INTERBANK'S OPPOSITIONS TO THE
	)	EMERGENCY MOTION TO STAY
	)	
FOREX LIQUIDITY, L.L.C.,	)	
	)	
Defendant.	)	
	)	
_____	)	
	)	
ROBERT GRAY,	)	
	)	
Intervenor-Appellant	)	
_____	)	

**COMES NOW** the Applicant for Intervention, Robert Gray, (hereinafter referred to as “Gray”), by and through his undersigned counsel, hereby files this Reply to the CFTC, Receivers and Interbank’s Oppositions to the Emergency Motion to Stay and will show unto this Honorable Court as follows:

**I. THE OPPOSITIONS TO THE EMERGENCY STAY ARE NOT WELL TAKEN**

**A. The Emergency Motion is Not Moot**

The CFTC, the Receiver and Interbank all urge this Court to deny the Emergency Stay because it is moot. No law is cited to sustain that proposition. Moreover, the claim of mootness is disingenuous.

There have been no funds actually paid to the retail customers (the ones the trial court and Receiver claimed were foremost in its determinations). The Receiver’s Opposition argues that those funds will be transferred no later than August 8, 2008. (Receiver’s Opposition page 15). The Declaration of Brick Kane, in support of the Opposition to Stay reflects that on July 17, 2008 Interbank was wired \$8,968,357.68 and on July 24, 2008 an additional \$475,411.38 (representing 30% of its commission claim). On July 18, 2008 Hamilton Williams was wired \$1,974,255.68. On that date IKON GM, Inc. FXIM Division was sent \$600,000.00 that was apparently assigned to it after FX Asia entered into a \$600,000.00

settlement with the Receiver. (See Receiver's Declaration Paragraph 13). Two observations should be made in this regard. First, the settlement allowed FX Asia to preserve a claim alleged to be as much as \$45 million that it could assert against Gray for events that were those of FXLQ and, second, allowed the Receiver to say that "if the District Court's approval of the FX Asia settlement agreement were reversed on appeal, no doubt IKON would assert a right of setoff as a defense to any disgorgement demand." This is so solely because the Receiver chose to pay an FX Asia settlement directly to IKON apparently by way of an assignment. This should not be held against Gray. While these funds have been paid, they have been received subject to this appeal. Clearly if Gray succeeds on the merits, those funds will be returned to the Estate.

The customer funds that are to be transferred to IKON in the amount of \$4,392,720.21 and the customer funds to be transferred to GFT in the amount of \$8,966,432.00, a combined total of \$13,359,152.80 "will probably be transferred on Wednesday August 6, 2008 or Thursday August 7, 2008..." (See Kane Declaration, paragraph 14). The Receiver has been holding approximately \$28,500,000.00 since the creation of the Receivership Estate. This makes particularly galling the speed with which the Receiver found it necessary to pay

Interbank when they and the Receiver have failed to reconcile the two and a half million dollar credit due ForexLQ.

Where as in this case, there has been a monumental miscarriage of justice, coupled with a callous abuse of discretion by Receiver and the Court, a stay is vital to protect against further harm.

**B. There Has Been No Finding of Wrong Doing Against ForexLQ, By Any Court.**

Lost in this wish to dissipate Gray's remainder of the assets of ForexLQ is that no Court has ever found that the company or Gray were in violation of any law, rule or regulation at the commencement of the underlying action. The only thing agreed to by Gray or ForexLQ was the entry of the preliminary order. A preliminary order which made no final determinations of fact.

Gray has valid defenses to assert. To deny the Emergency Stay and to permit to evisceration of the assets of ForexLQ will make moot only Gray's due process rights.

**C. The Order Disposing of Assets is Final and Appealable.**

The Receiver is being disingenuous in arguing this is not a final order under 28 U.S.C. § 1291 or an interlocutory one under 28 U.S.C. § 1292 (a). Initially, in denying Gray's Motion to Intervene, as to Gray that Order is in fact, by any

definition final. As to Gray, that ruling, “ends the litigation on the merits and leaves nothing for the Court to do but execute judgment.” SEC v. Capital Consultants, 153 F.2d 1166, 1170 (9<sup>th</sup> Cir. 2006). Moreover, judgment is being executed as we speak. It would be meaningless to argue that the entity stripped of assets has not been resolved with clear finality, at least as to Gray. Moreover, the concerted oppositions of the Receiver, CFTC, Interbank and Forex Asia leave no doubt that in this action, as set forth in the Motion to Intervene, no one was asserting any interest of Grays.

While the case is as the Receiver alleges on-going, he cannot in good faith argue that it involved Gray as a party at all.

Likewise, all of the cases cited by the Receiver establish this to also confer jurisdiction as an interlocutory appeal. There is no doubt that Gray requested the Court to direct the Receiver to achieve appropriate compensation for the “fire sale” he was conducting. It is likewise clear that the Court did not do so, allowing the Receiver to accept \$100,000 for an asset which had a \$1,900.00 offer on the table.<sup>1</sup> Securities and Exchange Commission v. American Principals Holdings, Inc., 817 F.2d 1349 (9<sup>th</sup> Cir. 1987).

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<sup>1</sup>Interbank, in its opposition, concedes the offer but argues it was confidential settlement negotiations. However, the conveying of that offer to Receiver’s counsel by all parties belies that claim.

The collateral order doctrine is likewise applicable here if needed. But as the order was in fact final to Gray, same does not need to be reargued.

As a policy consideration surely, where as here, Gray is denied the right to intervene, defend, and protect his interests and the Receiver is allowed to dissipate millions of dollars in assets which would devolve to Gray, this matter must be stayed to soberly determine the merit of Gray's position before doing irreparable damage to interests. The Receivership vehicle, despite the best efforts of the Receiver in this case, does not trump the due process clause of the United States Constitution.

**D. Gray's Motion Comports with Applicable Circuit Rules**

Gray's Motion is compliant with FRAP 27(A)(2) and Circuit Rule 27-3(A)(2)(11) he has stated with particularity that he wants this Court to stay any further sales, transfers or dispositions of the assets of ForexLQ pending this Court's ruling on the merits of his appeal. He has requested a stay of the entire effect of the Omnibus Order. Gray requests that this Court issue a Stay forthwith so as to prevent the distribution of the additional \$13,359,152.80. Attached is the Declaration of David Kenner, Esquire which further amplifies the necessity of an immediate stay to at least prevent the Receiver from taking the position that there

would be any right to a set off as a defense to any subsequent disgorgement demand. The Declaration is marked Exhibit 1.

**E. Gray is Likely to Succeed on the Merits**

The only issue the Court should focus on are whether Gray should have been permitted to intervene and whether the Trial Court abused its discretion for allowing the Receiver's plan of distribution to proceed even where the Court and the Receiver admitted that assets were being sold grossly undervalue.<sup>2</sup>

The Motion to Intervene was of right. It was given short shrift by the CFTC and the Court, but the precedents cited in the Motion clearly indicate grievous error.

**F. The Objections by the Receiver and Interbank to the Emergency Motion Were Filed to Actually Render Moot any Relief for Gray.**

The Receiver and Interbank delayed providing counsel for Gray with their objections to render Gray's interlocutory appeal moot. Despite correspondence by email and providing documents in that fashion for several months, the Receiver used surface mail to file its objections to this Motion. The only purpose for this

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<sup>2</sup>GFT in purchasing the accounts of ForexLQ for \$100,000 was paying 10 times less than offered by a party in Court and 19 times less than IBFX. The reason it was permitted was so counsel could look at himself in the mirror when shaving, arguing he had made a deal with GFT. What counsel and Court ignored was that the assets weren't theirs. They were acting as fiduciary custodians. That is a textbook example of abuse of discretion.

could be to delay this reply and effectuate the denial of due process to Gray. This Court should not countenance this activity.

WHEREFORE Robert Gray prays this Court stays any further action of the trial Court's Omnibus Order.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of August, 2008.

KENNER LAW FIRM, APC

A handwritten signature in black ink, appearing to read 'DK', is written over a horizontal line.

David E. Kenner  
Attorney for Proposed Intervenor  
Robert Gray

PROOF OF SERVICE  
STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is:

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15303 Ventura Boulevard, 9<sup>th</sup> Floor  
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818 475 5369 – fax

On August 5, 2008, I served the foregoing document described as REPLY TO CFTC, RECEIVER AND INTERBANK'S OPPOSITIONS TO THE EMERGENCY MOTION TO STAY, on the interested parties by:

SEE ATTACHED SERVICE LIST

      x   BY MAIL - I deposited such envelope in the mail at Los Angeles County, California. The envelope was mailed with postage thereon fully prepaid.

           (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

   x    (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

EXECUTED under penalty of perjury this 5th of August, 2008, at Sherman Oaks, California.

/s/ Brett A. Greenfield  
Brett A. Greenfield, Esq.

LIST OF PARTIES SERVED

Via US Mail (Federal express)

Plaintiff:

Commodity Futures Trading Commission  
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Commodity Futures Trading Commission  
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Third Party Ikon:

Baer & Troff Llp  
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626-793-1094

Creditors:

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949-215-4028

Receiver Robb Evans:

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Creditor Interbank Fx:

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# EXHIBIT 1

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES COMMODITIES	)	No.: 08-56165
FUTURES TRADING COMMISSION,	)	D.C. No. 8:07-cv-01437-CJC-RNB
	)	
Plaintiff,	)	DECLARATION OF DAVID E. KENNER IN
	)	SUPPORT OF REPLY TO CFTC, RECEIVER
v.	)	AND INTERBANK'S OPPOSITIONS TO THE
	)	EMERGENCY MOTION TO STAY
	)	
FOREX LIQUIDITY, L.L.C.,	)	
	)	
Defendant.	)	
	)	
_____	)	
	)	
ROBERT GRAY,	)	
	)	
Intervenor-Appellant	)	
_____	)	

**DECLARATION OF DAVID E. KENNER**

1. I am a citizen of the United States and a resident of the State of California.

I am over the age of 21.

2. I am an attorney duly licensed to practice before this honorable Court.

3. The Receiver in this above captioned matter has filed a declaration in which he sets forth that \$13,359,152.80 will probably be transferred on Wednesday August 6, 2008 or Thursday August 7, 2008. Such distribution, unless stayed today will further prejudice Robert Gray's position and make it exponentially more difficult to disgorge this money following a favorable ruling on his appeal.

4. It is therefore urgent that this stay be ordered forthwith for at least long enough to allow the Court more time to consider this matter.

I declare under pain and penalty of perjury the foregoing to be true and correct.

Dated: August 5, 2008

  
David E. Kenner