

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. Commodity Futures Trading
Commission,
Plaintiff-Appellee,

v.
Forex Liquidity, LLC,
Defendant.

Robert Gray,
Applicant for Intervention-Appellant.

No. 08-56165

(C.D. Cal. No. 07cv1437)

Opposition of Appellee Commodity Futures Trading Commission
to Appellant Robert Gray's Emergency Motion to Stay

Terry S. Arbit
General Counsel

Bradford M. Berry
Deputy General Counsel

Nancy R. Page
Assistant General Counsel
COMMODITY FUTURES TRADING
COMM'N
1155 21st Street, N.W.
Washington, D.C. 20581
Telephone: (202) 418-5136
Facsimile: (202) 418-5524
E-mail: npage@cftc.gov

Table of Contents

	<u>Page</u>
Overview	1
Factual and Procedural Background	2
Argument.....	6
I. This Court Lacks Jurisdiction.....	6
II. Appellant Gray’s Request for Grant of Intevenor Status Should Be Denied.....	11
A. Absence of Direct Interest	12
B. Untimely	13
C. Unnecessary to Protect His Interests	15
D. Adequate Representation	15
III. Appellant Gray’s Request to Stay the Distribution Plan’s Implementation Is Without Merit.....	16
Conclusion.....	20

Table of Authorities

Page

Cases

<u>Burks v. Lasker</u> , 441 U.S. 471 (1979)	13
<u>California ex rel. Van De Kamp v. Tahoe Regional Planning Agency</u> , 792 F.2d 779 (9th Cir. 1986)	12, 13
<u>Church of Scientology of Cal. v. United States</u> , 506 U.S. 9 (1992)	9
<u>Dunlavey v. Ariz. Title Ins. & Trust Co. (In re Charlton)</u> , 708 F.2d 1449 (9th Cir. 1983)	10
<u>Golden Gate Restaurant Ass'n v. City and County of San Francisco</u> , 512 F.3d 1112 (9th Cir. 2008)	17
<u>In re Matter of UNR Industries, Inc.</u> , 20 F.3d 766 (7th Cir. 1994).....	10
<u>Lapidus v. Hecht</u> , 232 F.3d 679 (9th Cir. 2002)	13
<u>Nelson v. Anderson</u> , 72 Cal. App. 4th 111, 84 Cal. Rptr.2d 753 (Cal. App. 1999)	13
<u>Northwest Forest Resource Council v. Glickman</u> , 82 F.3d 825 (9th Cir. 1996)	13
<u>Paalink Communications Int'l, Inc. v. The Superior Court of Los Angeles County</u> , 90 Cal. App. 4th 958, 109 Cal.Rptr.2d 436 (Cal. Ct. App. 2001)	13
<u>SEC. v. Capital Consultants, LLC</u> , 397 F.3d 733 (9th Cir. 2005)	9

Statutes

28 U.S.C. § 1292(a)(2)	6, 16
7 U.S.C. § 6f(a)(1)	3
7 U.S.C. § 6f(b)	2
Cal. Corp. Code § 17353.....	13

Rules

17 C.F.R. § 1.17(a)	3
17 C.F.R. § 1.18	3
Cir. R. 27-3(a)	12
Rule 24(a)(2) of the Federal Rules of Civil Procedure	12, 13

Overview

Appellee Commodity Futures Trading Commission (“CFTC”) opposes the Emergency Motion to Stay Proceedings of Appellant Robert Gray (“Emergency Motion”).

The Emergency Motion’s request to stay distribution is moot. On July 14, 2008, the district court both approved the Receiver’s proposed plan, including first interim distributions to some creditors, and denied appellant’s oral motion to stay the plan’s implementation. Appellant waited 11 days to seek emergency relief from this Court, notwithstanding the district court’s instruction to the Receiver to proceed without delay. Between July 14, 2008 and the date of this filing, all aspects of the Receiver’s plan have moved forward. The Receiver has completed distribution and contractual agreements with respect to most of appellant’s preserved objections. For one of appellant’s objections, the Receiver is mid-stream in the process of overseeing transfers of customer accounts and monies. It would be impracticable to unscramble any of these arrangements.

In his Emergency Motion, appellant Gray also seeks a stay of the denial of his intervention motion. As a logical matter, it is not clear what benefit such a stay would grant him. If appellant is seeking the ultimate relief he might obtain in any appeal (i.e., grant of intervenor status), he has not established why such relief should be provided on an expedited basis. Appellant does not establish any

irreparable injury. The record below demonstrates that although appellant Gray was denied intervention-as-of-right, he was permitted to file objections as a creditor to the plan and his objections were heard and considered by the district court. In any event, the district court correctly denied his motion for intervention. Appellant Gray's request was untimely and he lacked a direct interest in the assets of Forex Liquidity, LLC ("Forex") required for intervention-as-of-right. His status as a shareholder in this California limited liability corporation did not give him a direct ownership of Forex's corporate assets.

Finally, even if this Court had jurisdiction over the matter, appellant Gray cannot establish a likelihood of success on the merits of his request to stay implementation of the ongoing, interim receivership plan. Appellant's Emergency Motion does not address the district court's detailed factual findings concerning his objections; he has failed to carry his burden of persuasion by asserting, without record support, his own version of facts.

Factual and Procedural Background

This case arose from a civil suit filed by the CFTC alleging that Forex Liquidity, LLC's net capitalization was below the required adjusted net capital required by the Commodity Exchange Act (CEA), 7 U.S.C. § 6f(b), and CFTC

Regulation 1.17(a), 17 C.F.R. § 1.17(a).¹ The CFTC's complaint also alleged that Forex failed to maintain required books and records, as required by law. 7 U.S.C. § 6f(a)(1); 17 C.F.R. § 1.18. Docket Entry No. ("R.") 1. The district court on December 14, 2007, issued a restraining order preventing the dissipation, withdrawing, transferring, or other disposition of funds, assets, or other properties. R.7. On January 25, 2008, the district court issued a consent order confirming Robb Evans & Associates, LLC as the Receiver for the assets of Forex and its subsidiaries and affiliates. R.14. Appellant Gray, as the principal shareholder, consented to this order on behalf of Forex. Emergency Motion at p.4. The January 25 consent order provides that all non-parties are stayed from initiating proceedings interfering with the receivership estate pending the disposition of the district court case. See R.14.

After being appointed, the Receiver learned more about the financial affairs of Forex, finding that this limited liability corporation had been run with a "pattern of deceit." The Receiver explained:

Based on the information available at the time of filing the first report, the Receiver concluded that FXLQ [Forex Liquidity, LLC] was undercapitalized from April 2007. As will be described in more detail in this report, the Receiver's additional investigation shows that FXLQ's pattern of deceit

¹ As a futures commission merchant under the CEA, Forex Liquidity, LLC was required to meet certain minimum capital requirements in order to meet its obligations to customers who had deposited funds with the corporation to margin futures trades.

and presenting fraudulent statements dates back to September 2006, just eight months after FXLQ commenced operations.

R.29 at p.1 (June 10, 2008 Report of Receiver's Activities).

In June 2008, appellant Gray moved to intervene in the district court proceedings in his personal capacity and to stay the Receiver's work. He objected in particular to certain agreements the Receiver had negotiated with the company's creditors, vendors, and associates, and he objected to the proposed disposition of certain assets. R.30 (motion to intervene); R.33 (motion to stay proceedings pending ruling on intervention); R.45 (objections to Receiver's proposed interim distribution). He also objected to a few, but not all, aspects of the Receiver's proposed distribution plan. See R.47 at 2 (Receiver summary of and reply to objections).

The district court held a hearing on these motions on July 14, 2008, and denied appellant Gray's intervention, rendering moot appellant Gray's motion for a stay of proceedings pending ruling on the intervention motion. R.59 (attached hereto as Appendix A). Also on July 14, 2008, the district court granted the Receiver's proposal on resolution of the complex financial affairs associated with Forex and its associates. Appendix A. Specifically, the district court approved the sale and assignment of various customer trading accounts to Global Forex Trading ("GFT") and IKON Global Marketing ("IKON"); the proposed compromise of certain claims, including a distribution to Interbank FX,

LLC (“Interbank”); a proposed settlement with Forex Asia International Corporation and Multibank FX International Corporation (collectively, “FX Asia”) of certain legal and financial claims; the sale of Forex’s office equipment and furniture; and the Receiver’s proposed initial distribution of assets and proposed claims filings and allowance procedures. Appendix A; see R.35 (Receiver Notice of Motion summarizing these and other plan details).

After being informed of the district court’s intention to issue its July 14, 2008 Order, appellant Gray moved orally for a stay of the entire order “for at least 10 days” in order to seek appellate review. The district court denied this stay request:

I’m going to deny that, Mr. Kenner. I take no offense in that. That is your right. The last thing I want to do is make you go through more fire drills. But based on the record that is before me, I really feel time is of the essence here and I want to keep this deal together, and I want it to go forward because I want these people to start getting their money back, and every day matters.

If you are able to persuade the 9th Circuit to give you the relief, then so be it. And that’s their wisdom and they can do that. But I don’t feel comfortable at this point slowing the Receiver down. I want it to go forward.

Appendix B (R.65, Transcript of July 14, 2008 proceedings) at p.56.

Eleven days after his stay motion was denied by the district court, appellant Gray filed his Emergency Motion on July 25, 2008. In the interim, between July 14 and July 25, no stay was in effect. The Receiver therefore proceeded with the

plan as approved by the district court on July 14, including those aspects of the Receiver's plan that appellant Gray finds objectionable. See Receiver's opposition to Emergency Motion, Declaration of Brick Kane, ¶¶ 13-16.

Argument

I. This Court Lacks Jurisdiction.

This Court lacks jurisdiction. The district court's order approves an interim plan of the court-appointed Receiver, not a final wind-up of affairs. See Appendix A. As appellant Gray's Emergency Motion concedes, he consented to the appointment of the Receiver at the outset of the district court proceedings. Emergency Motion at p.4. He did not pursue an interlocutory appeal contesting the appointment of the Receiver within sixty days of the Receiver's appointment pursuant to 28 U.S.C. § 1292(a)(2), as was his right to do. Having failed to do so, he cannot object now to the appointment of the Receiver. The jurisdictional basis for appellant Gray's interlocutory challenge to the distribution plan's implementation is thus unclear. Even if this Court had jurisdiction to consider such an interlocutory challenge, appellant Gray's appeal is now moot.

On July 14, 2008, the district court approved the Receiver's plan of distribution of funds, contractual arrangements, and other activities, after an extensive amount of work over a period of months. The district court stated that it wanted customers to get their monies back as soon as possible and wanted to "keep this deal together." Appendix A at p.56. Eleven days after the district

court approved the Receiver's proposal, after monies associated with appellant Gray's objections have either been distributed or distribution has been set-in-motion, after releases of liability have issued and other contractual obligations have been performed by the Receiver or his contract counterparts,² appellant moved this Court for an Emergency Stay. By that time, appellant Gray's objections had thus become moot.

Specifically, Appellant Gray's motion to stay is moot because there has already been distributed pursuant to the approved plan with respect to two of the three aspects of the plan which appellant Gray has objected to, and there are at this time ongoing notices and transfers associated with the third aspect of the plan appellant Gray finds objectionable. Appellant's objections were:

- The method of distribution for payment of creditors claims, including the sale of customer trading accounts to GFT and IKON;
- a proposed distribution to Interbank (with Appellant disputing not all of the claim, but a portion of the amount of the Interbank claim concerning swap interest, see R.45; R.16 at p.7); and
- aspects of a proposed settlement of legal claims with FX Asia involving the release of liability for the receivership estate.

R.45 (appellant's objections). Appellant repeats these three objections in his

² The Receiver's reports detail the extensive nature of his work. See R.16; R.29. For example, with respect to appellant Gray's FX Asia objection, the Receiver conducted a three-day deposition of the principal of FX Asia with appellant Gray and his counsel in attendance, and counsel was given the opportunity to ask questions. See R.29 at p.3; Appendix B at 24, 29-30.

Emergency Motion at p.18 (Interbank); p.18-19 (FX Asia); p.19-20 (GFT and IKON distribution). He also raises an additional objection that he presented at oral argument at the July 14 hearing: that FX Asia “extorted” from the Receiver the \$600,000 FX Asia was to be paid (and since has been paid) as settlement of a \$1.2 million claim. Emergency Motion at 19.

Yet appellant Gray does not – and cannot – assert that the interim distributions to the FX Asia settlement and Interbank have not already occurred. They occurred even before appellant filed his Emergency Motion. See Receiver opposition to Emergency Motion, Declaration of Brick Kane, ¶ 13 (July 17 and July 18, 2008 wire transfers). Various releases involving proposed settlement with FX Asia’s legal claims have gone into effect. Id. at ¶ 16. The third area of objection – involving transfer of customer accounts for GFT and IKON – is now in progress, with notifications presently going out to customers and money transfers likely commencing at the end of this week (August 1, 2008) or the beginning of next week. See id. at ¶¶ 14-15.³

³ Among the many areas of complexity in the interim distribution plan, there is some relationship between appellant Gray’s IKON objection and his FX Asia objection. The release of liability for FX Asia has been contractually effected, but the completion of transfer of accounts pursuant to settlement with FX Asia objection is ongoing. This last stage turns on IKON notifications to customers and associated bank transfers of funds ongoing this week and next. See generally Receiver’s opposition to Emergency Motion, Declaration of Brick Kane, ¶ 14 (stating that the transfers of these funds is “all but complete”).

Appellant Gray also objects that the sale of Forex’s office furniture would be unnecessary if the Receiver had taken appellant’s advice with respect to the other three objections, Emergency Motion at 6, but this claim is contingent upon appellant Gray’s other objections being sustained. That is, he argues that his counterproposals to the Receiver’s proposed plan would (supposedly) have avoided the need for the sale of the furniture. This objection has also mooted by the execution of the interim distributions.

An appeal must be dismissed as moot when “an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party.” Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (internal quotations omitted). This Court recognizes a closely related doctrine, “equitable mootness,” in which the unwinding of affairs already taken, such as in bankruptcy proceedings and similar distribution proceedings, is a practical impossibility. In SEC. v. Capital Consultants, LLC, 397 F.3d 733 (9th Cir. 2005), the real estate deals entered into by a court-appointed receiver could not, as a practical matter, be unwound. “[A]ttempting at this stage to pool the value of the public securities with the private assets and to recalculate every . . . client’s net loss would be a highly complex undertaking.” Id. at 746 (concluding that principles analogous to the

“equitable mootness” doctrine of bankruptcy court applied).⁴ Similarly, in this case, because resolving the complex financial affairs surrounding FX Asia, Interbank, GFT, and IKON have already been undertaken – in the case of FX Asia and Interbank already accomplished – undoing these transactions would be impracticable. See Receiver’s opposition, Declaration of Brick Kane.

Further, although appellant Gray was denied intervenor status, his objections, as a creditor, to the Receiver’s proposed plan were filed (R.45), responded to in detail (R.47), and were the subject of an extensive hearing on July 14, 2008. They are also discussed at length in the district court’s written order. R.59. Appellant Gray’s objections were not treated by the district court in a rushed fashion. But having found no merit in his objections, the district court acted well within its discretion in subordinating appellant Gray’s desire for further litigation to the important goals of returning customer funds and “keep[ing] this deal together.” R.65, Appendix A at p.56. While informing

⁴ As a court observed in the bankruptcy context, the “significance of an application for a stay lies in the opportunity it affords to hold things in stasis, to prevent reliance on the plan of reorganization while the appeal proceeds. A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization.” In re Matter of UNR Industries, Inc., 20 F.3d 766, 769-770 (7th Cir. 1994). See Dunlavey v. Ariz. Title Ins. & Trust Co. (In re Charlton), 708 F.2d 1449, 1454 (9th Cir. 1983) (“[W]hen, in the absence of a stay of the order of sale, a sale to a ‘good faith purchaser’ has been concluded, -an appellate court cannot undo the sale. Because the court cannot provide meaningful relief to the appellant under those circumstances, any appeal of the order of sale thereby becomes moot”).

appellant Gray's counsel that "The last thing I want to do is make you go through more fire drills," the district court denied the stay with words indicating that he wished the Receiver to act with dispatch for the benefit of Forex creditors. R.65 at p.56 (Appendix B) (" But I don't feel comfortable at this point slowing the Receiver down. I want it to go forward"). Notwithstanding this warning, appellant Gray delayed 11 days before filing his July 25 Emergency Motion in this Court. These eleven days have rendered his challenges to the Receiver's plan moot.

II. Appellant Gray's Request for Grant of Intevenor Status Should Be Denied.

In his Emergency Motion, appellant challenges the district court's denial of his motion for intervention below. See District Court Order of July 14, 2008, Appendix A at pp. 3-7.⁵ The district court's well-reasoned analysis should not be disturbed by this Court, much less on expedited review. A reversal of the district court's intervention ruling would reach to an ultimate issue on appeal, even if jurisdiction existed to entertain this interlocutory appeal. In addition, denial of a motion for intervention does not present an "emergency" or irreparable injury, especially in a case where, as further detailed below, appellant played an active

⁵ Because appellant Gray was not a party below and properly appears before this Court not as an Intervenor, but as an "Applicant for Intervention."

role as a creditor in the district court proceedings.⁶

In any event, for the following reasons, the district court’s intervention ruling was correct. The district court did not err in denying appellant Gray’s request for intervention-as-of-right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Appellant’s request failed on each of the four prongs of the test government Rule 24(a)(2) intervention. See California ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 792 F.2d 779, 781 (9th Cir. 1986) (intervenor’s application must be timely; intervenor must assert an interest relating to the property or transaction at issue; intervention must be necessary to protect that interest; and intervenor’s interests must be inadequately represented by other parties).

A. Absence of Direct Interest

As the district court observed, appellant Gray has “failed to show that he possesses an interest relating to the property or transaction which is the subject of the action.” R.59, Appendix A at 5. Appellant Gray is vague on what “rights” he is protecting as “remainderman,” referencing without citation to the record various assets such as “the IBFX asset purchase offer of \$1.9 million.” See Emergency Motion at 6. Appellant Gray does not and cannot assert that he owns any of the Forex property – even the office furniture referenced in his motion. Id.

⁶ Cir. R. 27-3(a) (in an emergency motion movant must certify irreparable harm).

Under established law, Gray does not have a direct interest in the assets of Forex because he chose to do business in the corporate form through a California limited liability corporation. Paalink Communications Int'l, Inc. v. The Superior Court of Los Angeles County, 90 Cal. App. 4th 958, 965, 109 Cal.Rptr.2d 436 (Cal. Ct. App. 2001); Lapidus v. Hecht, 232 F.3d 679, 683 (9th Cir. 2002); Cal. Corp. Code § 17353; see generally Appendix A at pp. 5-6 (district court discussion of California law).⁷ As a shareholder, appellant Gray does not have any direct ownership interest that entitles to him intervention-as-of-right either in his personal capacity or on behalf for Forex Liquidity, LLC.

B. Untimely

The district court also denied appellant Gray's intervention as untimely. Appendix A at 4-5; California ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 792 F.2d at 781 (listing timeliness as a requirement and stating that failure to satisfy any of the four requirements for intervention under Rule 24(a)(2) is sufficient to warrant denial of intervention); Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 836-837 (9th Cir. 1996) (the Court must consider three factors to determine whether an application to intervene is timely: (1) the stage of

⁷ See Nelson v. Anderson, 72 Cal. App. 4th 111, 126-127, 84 Cal. Rptr.2d 753 (Cal. App. 1999) ("Shareholders own neither the property nor the earnings of the corporations" but "only stock," and so that when an injury to the corporation occurs, any action "must be derivative"); Burks v. Lasker, 441 U.S. 471, 478 (1979) (rights relating to corporations and corporate interests are determined by state law, even though the underlying case is brought under a federal statute).

the proceedings; (2) the reason for any delay in moving to intervene; and (3) whether the parties would be prejudiced). For the reasons discussed in detail by the district court, its decision is sound and should not be disturbed by this Court, especially on expedited review.

As discussed at length in the district court's order, appellant's explanation of why he waited six months to attempt to intervene was unconvincing. Appendix A at 4. At the hearing, appellant Gray's new counsel ventured a new basis for delay, blaming his client's prior consent on appellant Gray's prior legal counsel: "That was not my watch. I'm sorry that it happened." Appendix B at 48, line 4. Change of counsel does not authorize late intervention. When appellant Gray moved to intervene on June 5, 2008, he was aware that the Receiver was finalizing a proposed plan. R.30 at 3 (June 5, 2008 motion to intervention noting that Receiver shared with him proposed plans, including preliminary estimates of liabilities); R.35 (June 20, 2008 Receiver notice of proposed plan). The Receiver's proposed plan involves a complex set of interrelated financial and legal interests, see R.35, Tab 1, which the district court found provided real and tangible financial benefits to the receivership estate, see Appendix A. The prejudice associated with a late intervention here would be delay in customer funds distribution as well as risk to keeping in place favorable and interrelated set of contractual relationships.

C. Unnecessary to Protect His Interests

Appellant Gray also fails the third of the four requirements for intervention as of right: intervention is not necessary to protect appellant Gray's interests.

Appellant Gray's remaining interests are his property interests as a creditor.

Those he may assert claims as a creditor, as he has done throughout the district court proceedings. See Appendix A at 6-7; see also Appendix B at 24, 31.

D. Adequate Representation

Finally, appellant Gray also cannot establish that his interest as a creditor have not been adequately represented in the district court. As noted above, appellant has actively participated in the district court proceedings with the assistance of counsel. His objections to the Receiver's plan have been considered. There is no evidence that his interests have not been adequately represented.

Appellant Gray represents that district court, at the July 14, 2008 hearing, indicated that the Receiver's decisions were "questionable." Emergency Motion at 20. This characterization of the district court's reasoning is inaccurate, as the complete quotation makes plain:

I, quite frankly, can't say I know, in fact, that the Receiver's decisions are the best decisions. They might not be. But based on the record before me I do think they're reasonable ones.

Appendix B at p. 55, lines 14-17. In fact, the district court expressly found in its

written order that the Receiver's work had been diligent:

[T]he Receiver has worked diligently to asset Forex's financial condition and to protect the public's financial interest. There is no evidence of negligence on the part of the Receiver, must less anything approaching bad faith.

Appendix A at 7.

The district court, having previously referenced "allegations of misconduct," concluded by stating that it did not believe second-guessing of the Receiver by appellant Gray would be useful:

And without it being crystal clear to me that Mr. Gray's concerns – I just don't feel I should give him the opportunity to second-guess what the Receiver is doing in light of the fact it was Mr. Gray who put us in the situation where I had to appoint a Receiver.

Appendix B at p. 55, lines 17-21.

In sum, as the district court made plain, appellant Gray remains as a potential creditor of Forex. He has simply been denied belated intervention as a party. Having chosen to relinquish by consent control of the company to the Receiver, and elected not to pursue a timely interlocutory appeal under 28 U.S.C. § 1292(a)(2), he may not now, with new counsel, revisit that choice.

III. Appellant Gray's Request to Stay the Distribution Plan's Implementation Is Without Merit.

Even if this Court were to find that it had jurisdiction in this matter, appellant Gray's request for a stay of the Receiver's plan should be denied.

In deciding whether to issue a stay pending appeal, this Court considers “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” Golden Gate Restaurant Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008) (citations omitted). All of these factors militate against entry of a stay.

Appellant is not likely to succeed on the merits. Although appellant Gray styles his request a “stay,” he in fact seeks not a stay, but the vacatur of certain portions of the Receiver’s approved plan. See Emergency Motion at 16. His challenge to the district court’s various rulings does not address, let alone challenge with record citation, the district court’s detailed findings.

The district court made specific findings on why, for example, the Receiver’s proposed sale agreements with GFT and IKON were appropriate and sound. See Appendix A at 8-11; id. at 9 (“The Court finds that both the GFT and the IKON Agreements are reasonable and fair transactions that are in the best interest of the receivership estate”); see also Appendix B at 26-27 (noting substantial administrative savings associated with these deals). The district court made similar, detailed findings regarding the Receiver’s proposal to compromise claims with FX Asia and pay liabilities regarding the Interbank resolution. See

Appendix A at 12-14; see also Appendix B at 25, 30. The Emergency Motion does not specifically address these findings. In fact, appellant Gray now asserts that Forex was not undercapitalized when the CFTC filed its complaint, notwithstanding that the Receiver's reports to the Court have made pointed assertions of fraud and deceit in the affairs of Forex over a period of time. E.g., R.29; Appendix A at 15 (finding "the estate does not have sufficient funds to pay its creditors in full"); see Appendix B at 25. Appellant Gray's assertion of contrary facts does not explain why any factual finding of the district court is clearly erroneous.

Appellant Gray also has failed to establish that he will suffer irreparable injury absent expedited relief. Appellant Gray retains his role as creditor in the Receiver's claims process. Appellant Gray's assertion that his membership interest in Forex is his personal property is correct, Emergency Motion at 14, but, as even the treatise he quotes notes, "A member . . . has no interest in specific limited liability company property . . . ," id. (citation omitted). Having chosen to do business in the corporate form, the only legally cognizable property interest for which appellant Gray has a personal claim is his creditor interest in Forex.⁸

⁸ Appellant Gray has never asserted before the district court that any of the property – including monies – held by Forex were his personal funds: the funds of this corporation belong to the corporation, and the disposition of these assets, as all other affairs of the corporation, has been governed and fixed through the

The last two factors – whether issuance of the stay will substantially injure the other parties interested in the proceeding, and where the public interest lies – strongly militate in favor of denying appellant’s request to disturb the ongoing execution of the details of the Receiver’s plan, including monetary distributions. As the district court’s decision details, before commencement of receivership, Forex had nearly 4000 accounts with customers around the world, including 2900 in the People’s Republic of China. Appendix A at 8. Brokers, pre-receivership vendors, and the like are all receiving payment. Receiver’s opposition to Emergency Motion, Declaration of Brick Kane, ¶ 13 (over \$12 million already distributed). The international nature of the set of agreements the Receiver has now entered into, with associated complexities such as the cost of recovering funds transferred overseas, counsels strongly in favor of not disturbing the plan’s execution. See generally id. In accepting the Receiver’s proposed plan, the district court has set in process a plan under which all customers are receiving 100 percent of funds owed them and other creditors are receiving an interim pro-rata distribution of 30 percent of their claims in this initial distribution. Such reasonable and diligent work by the Receiver is in the interest of other creditors and the public.

(cont’d)

Receiver’s stewardship with district court oversight since the time of the Receiver’s appointment.

Conclusion

The Emergency Motion should be denied.

Respectfully submitted,

Terry S. Arbit
General Counsel

Bradford M. Berry
Deputy General Counsel



Nancy R. Page
Assistant General Counsel
Commodity Futures Trading Comm'n
Office of the General Counsel
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Telephone: (202) 418-5136
Facsimile: (202) 418-5524
E-mail: npage@cftc.gov

Dated: July 31, 2008

CERTIFICATE OF SERVICE

I, Nancy R. Page, hereby certify a copy of the above Opposition to Emergency Stay was sent on July 31, 2008, by overnight express service, to the parties listed below, including Mr. Kenner, with an additional courtesy copy by email to Mr. Kenner on the evening of July 31, 2008:

David E. Kenner 15303 Ventura Blvd., 9th Floor Sherman Oaks, CA 91403	Jeffrey W. Griffith, Esq. Counsel for Creditors 842 Baywood Drive Newport Beach, CA 92660-7147
Kent A. Kawakami Office of the U.S. Attorney Suite 7516 300 North Los Angeles Street Los Angeles, CA 90012	Alan J. Droste Counsel for Forex Asia King Parret & Droste 450 Newport Center Drive, Suite 500 Newport Beach, CA 926660
Receiver Robb Evans attn: Brick Kane Frاندzel Robins Bloom & Csato 6500 Wilshire Blvd., 17th Floor Los Angeles, CA 90048-4920 (323) -852-1000	Josh O'Donnell, Esq. Counsel for Interbank FX Kirkland & Ellis 777 South Figueroa Street Suite 3400 Los Angeles, CA 90017-5800



Nancy R. Page
Assistant General Counsel
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Telephone: (202) 418-5136
Facsimile: (202) 418-5524
E-mail: npage@cftc.gov