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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff,

v.

FOREX LIQUIDITY LLC,

Defendant.

CASE NO. SACV07-1437 CJC (RNBx)

[Honorable District Court Judge
Cormac J. Carney]

[PROPOSED] ORDER ON RENEWED
MOTION BY THE RECEIVER, ROBB
EVANS & ASSOCIATES LLC, FOR
AN ORDER REQUIRING ROBERT
GRAY TO COMPENSATE THE
RECEIVERSHIP ESTATE FOR
LOSSES CAUSED BY HIS CIVIL
CONTEMPT

Date: October 14, 2010
Time: 9:00 a.m.
Place: Courtroom 9B

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1 I. INTRODUCTION

2 Robb Evans & Associates LLC (the "Receiver") is the Court appointed
3 receiver for defendant Forex Liquidity, LLC ("FXLQ"). Robert Gray ("Gray") is
4 the principal owner of FXLQ. In 2009 this Court found Gray to be in civil contempt
5 based on violations of this Court's orders that he return millions of dollars to the
6 receivership estate.

7 Gray was briefly incarcerated for his contempt of the Court's orders. The
8 Court subsequently determined that further incarceration of Gray was not likely to
9 make the receivership estate whole. However, the Court authorized the Receiver to
10 file a motion for damages to be paid by Gray to reimburse the Receiver and plaintiff
11 U.S. Commodity Futures Trading Commission (the "CFTC") for the damages they
12 suffered due to Gray's violations of the Court's prior orders. The Receiver
13 subsequently moved for an order requiring Gray to reimburse the Receiver for the
14 damages the receivership estate has suffered due to Gray's contempt.¹ For the
15 reasons described below, the Court grants the Receiver's motion and orders that
16 judgment be entered against Gray in the sum of \$2,319,487.01.

17 II. FACTUAL BACKGROUND

18 The Receiver was originally appointed as receiver for FXLQ pursuant to the
19 Court's December 14, 2007, Ex Parte Statutory Restraining Order, and Order to
20 Show Cause Regarding Preliminary Injunction (the "SRO"), and the Court's January
21 25, 2008, Consent Order of Preliminary Injunction (the "PI"), both of which are
22 sometimes hereinafter referred to as the "Receivership Orders." The Receivership
23 Orders provide that the Receiver is to take possession and control of the assets of
24 FXLQ with full powers of an equity receiver. The Receiver has done so and has

25
26 ¹ The CFTC subsequently withdrew its claim for damages. The Receiver's
27 motion is therefore limited to the Receiver's claim for damages to the receivership
28 estate.

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1 filed reports with the Court, which describe in considerable detail the Receiver's
2 efforts to locate and safeguard FXLQ's assets.

3 The Receiver determined that when the Receivership Orders were entered
4 Gray had the ability to return to the receivership estate millions of dollars that
5 belong to FXLQ and that he failed to do so in violation of the orders. The Receiver
6 therefore filed a motion requesting that the Court issue an order to show cause why
7 Gray should not be held in contempt of Court based on his failure to comply with
8 the Court's orders.

9 On July 14, 2009, the Court commenced a two-day evidentiary hearing to
10 determine whether Gray should be held in contempt for violating the Receivership
11 Orders. On July 23, 2009, the Court issued an order (the "Contempt Order")
12 holding Gray in civil contempt.

13 In the Contempt Order, the Court determined that Gray refused to turn over
14 approximately \$7.12 million (the "FXLQ Funds") that belong to FXLQ. The Court
15 found that these funds were held by a San Marino company called Pro Fi, that Gray
16 owned 95% of Pro Fi, and that Gray controlled the FXLQ Funds held by Pro Fi.
17 Contempt Order, 2:12-17. The Court concluded that the FXLQ Funds were indeed
18 assets of FXLQ, that Gray controlled the FXLQ Funds, and that Gray refused to
19 transfer the FXLQ Funds back to FXLQ in clear violation of the Receivership
20 Orders. *Id.* at 2:21-24. The Court therefore found Gray in civil contempt. The
21 Court ordered him to pay the Receiver \$7,127,469, and to deliver to the Receiver all
22 of the books and records of Pro Fi, on or before 9 a.m. on July 28, 2009. *Id.* at
23 13:11-13.

24 Gray failed to comply with the Contempt Order by the July 28, 2009 deadline.
25 The Court conditionally fined Gray \$10,000 per day until he complied with the
26 Contempt Order and ordered Gray to appear on July 30, 2009.

27 Gray appeared at the July 30, 2009 hearing but failed to produce the funds,
28 books or records. The Court then ordered that Gray be remanded to the custody of

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1 the U.S. Marshals and advised Gray that his incarceration would be purged upon
2 compliance with the Contempt Order.

3 On August 10, 2009, Gray appeared during a status conference and promised
4 the Court that if he was released from custody he would do everything in his power
5 to return the funds to the receivership estate. The Court released Gray from custody
6 based on those assurances.

7 On August 24, 2009, the Court held a status conference during which Gray
8 reported that he was unable to obtain the funds, books and records. Gray also
9 represented to the Court that he no longer had access to the approximately \$7.1
10 million.

11 The Receiver and the CFTC subsequently submitted briefs requesting further
12 civil contempt proceedings against Gray, including an evidentiary hearing regarding
13 his alleged inability to comply with the Court's orders. The Court determined that
14 further contempt proceedings would be futile and not in the interests of justice.
15 However, the Court stated that it would entertain a motion by the Receiver for an
16 additional fine to be paid by Gray to reimburse the receivership estate and the CFTC
17 for the damages that have been suffered due to Gray's contempt and violations of the
18 Court's prior orders. *See* Amended Order Re Further Contempt Proceedings dated
19 October 26, 2009, 3:5-9.

20 On January 11, 2010, the Receiver filed a motion pursuant to the Court's
21 October 26, 2009 amended order. Gray filed no papers in opposition to the motion.
22 The Court denied the motion without prejudice on January 27, 2010. The Court
23 indicated in its order that the motion lacked sufficient evidence to support the
24 damages claimed by the Receiver.

25 The Receiver filed a renewed motion and supporting evidence for issuance of
26 an order requiring Gray to reimburse the Receiver for the damages the receivership
27 estate has suffered due to Gray's contempt and violations of the Court's prior orders.
28 The renewed motion was set for hearing on April 5, 2010. Gray filed papers in

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1 opposition to the motion. At Gray's request, the hearing on the motion was
2 continued to June 28, 2010, and was subsequently continued by the Court on its own
3 motion to July 19, 2010.

4 At the hearing on July 19, 2010, the Court determined that a full evidentiary
5 hearing should be conducted. The Court ordered the parties to meet and confer to
6 select a mutually convenient date for the hearing. The hearing was ultimately
7 scheduled for October 14, 2010.

8 At the hearing on October 14, 2010, Brick Kane ("Kane") testified on behalf
9 of the Receiver and submitted documents in support of the Receiver's motion.
10 Among the documents submitted by the Receiver was a balance sheet (the "Balance
11 Sheet") for FXLQ as of August 31, 2010 (Exhibit 1). The Balance Sheet shows that
12 the receivership estate's single asset consists of bank deposits in the sum of
13 \$496,554.58. The Balance Sheet also lists total liabilities of \$2,997,506.81, which
14 consist of estimated future receivership expenses in the sum of \$75,000.00, unpaid
15 receivership expenses in the sum of \$98,315.81 and pre-receivership unpaid claims
16 (the "Approved Creditor Claims") in the sum of \$2,824,191.00. The Approved
17 Creditor Claims are described in greater detail in the Receiver's Exhibit 2 (the
18 "Unpaid Claims Summary") and are supported by back-up documentation set forth
19 in Exhibits 3 through 51, all of which the Receiver relied upon in vetting the claims.

20 C. ANALYSIS

21 Sanctions for civil contempt may be imposed to coerce obedience to a court
22 order, or to compensate the party pursuing the contempt action for injuries resulting
23 from the contemptuous behavior, or both. *United States v. United Mine Workers*,
24 330 U.S. 258, 303-304, 91 L. Ed. 884, 67 S. Ct. 677 (1947); *Shuffler v. Heritage*
25 *Bank*, 720 F.2d 1141, 1147 (9th Cir. 1983). Civil contempt is therefore appropriate
26 when the relief sought is primarily compensation for injuries suffered by the party in
27 whose favor the injunction is issued. 11A Wright, Miller and Kane, *Federal*
28 *Practice and Procedure*, § 2960, p. 369 (West 1995); *Quinter v. Volkswagen of Am.*,

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1 676 F.2d 969, 975 (3rd Cir. 1982) (in civil contempt proceedings the ultimate object
2 is the enforcement of the rights and remedies of a litigant); *Gen. Signal Corp. v.*
3 *Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986) (compensatory relief
4 appropriate in civil contempt proceedings). Such relief often takes the form of a
5 fine in the amount of the damage sustained by the moving party. *Yanish v. Barber*,
6 232 F.2d 939, 944 (9th Cir. 1956).

7 Civil contempt is appropriate when parties or entities fail to turn funds over to
8 a receiver or fail to freeze assets in violation of court orders. In *Federal Trade*
9 *Commission v. Productive Marketing, Inc.*, 136 F. Supp. 2d 1112 (C.D. Cal. 2001),
10 the court found a nonparty in civil contempt for failing to turn over assets to a court-
11 ordered receivership. The court sanctioned that nonparty the costs incurred by its
12 intransigence, and issued a per diem fine that doubled each day the nonparty was out
13 of compliance. *Id.* at 1113. In *SEC v. Current Financial Services, Inc.*, 798 F.
14 Supp. 802, 807-808 (D.D.C. 1992), a district court found several individuals in civil
15 contempt who, in contravention of a court-ordered asset freeze, transferred a
16 company's assets back to its investors.

17 Compensatory awards in civil contempt proceedings should cover actual
18 losses sustained as a result of the contumacy. *Shuffler*, 720 F.2d at 1148; *Perfect Fit*
19 *Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 810 (2nd Cir. 1981). For example,
20 in *Select Creations, Inc. v. Paliapito America, Inc.*, 906 F. Supp. 1251 (D.C. Wis.
21 1995), the plaintiff in a civil contempt proceeding was entitled to damages
22 consisting of the amount of funds that were sent to the defendant's "front
23 companies" at the defendant's direction in violation of the court's order.

24 A compensatory award against Gray is appropriate here. The Court has
25 already determined, based on clear and convincing evidence, that the FXLQ Funds
26 held by Pro Fi were assets of FXLQ. Contempt Order, 11:16-25. The Court also
27 determined that Gray controlled Pro Fi when the Receivership Orders were entered
28 and that Gray certainly had the power to transfer the FXLQ Funds to the Receiver.

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1 Contempt Order, 12:1-11. The Court specifically found that Gray failed to return
2 the FXLQ Funds to the Receiver despite his ability to do so, and that he evaded the
3 Receivership Orders and the Receiver's efforts to retrieve assets of the receivership
4 estate. Contempt Order, 12:13-15.

5 Kane's testimony and the documentary evidence submitted by the Receiver at
6 the hearing on October 14, 2010, satisfy the Court that the Balance Sheet is
7 trustworthy and that it accurately describes the financial condition of the
8 receivership estate as of August 31, 2010. The Balance Sheet shows that liabilities
9 exceed assets by \$2,500,952.23. The Court will adjust this number by omitting two
10 contingent claims from the Approved Creditor Claims on the Balance Sheet (i.e., the
11 claims of American Express (Exhibit 5) and Bloomberg L.P. (Exhibit 7)). This
12 adjustment reduces the Approved Creditor Claims to \$2,642,725.78 and
13 correspondingly reduces the shortfall in the receivership estate to \$2,319,487.01.

14 It is significant that Gray did not object to the pre-receivership unpaid claims
15 even though he had an opportunity to do so more than two years ago. In June 2008,
16 the Receiver filed a motion for various orders, including an order approving the
17 Receiver's proposed initial distribution and proposed claims filings and allowance
18 procedures (the "Distribution Plan"). The Receiver submitted a declaration by Kane
19 in support of the Distribution Plan. Exhibit 5 to that declaration set forth
20 "commissions and rebates" and "pre-receivership invoices," which, with minor
21 exceptions, are the same Approved Creditor Claims set forth in the Balance Sheet
22 and the Unpaid Claims Summary.

23 On July 30, 2008, Gray filed Objections to and Motion to Stay and Abate
24 Receiver's Distribution Plan (the "Gray Objections"). Gray objected to only one of
25 the Approved Creditor Claims set forth on Exhibit 5 to the Kane declaration (Gray's
26 sole objection pertained to the Receiver's proposed compromise of a claim by Forex
27 Asia International Corporation ("Forex Asia") for unpaid commissions and rebates
28 in the sum of \$1,216,579.95; the Court overruled Gray's objection and approved the

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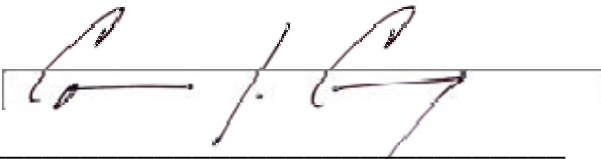
1 compromise of that claim). Indeed, with the exception of the Forex Asia claim and
2 the claim of an institutional customer (which was not part of the Approved Creditor
3 Claims), Gray actually urged the Court to order payment of all other claims. Gray
4 Objections, 19:15-16.

5 On July 14, 2008, the Court entered an order that, among other things,
6 approved the Receiver's Distribution Plan and authorized a 30% distribution on the
7 Approved Creditor Claim. See July 14, 2008 Order (1) Denying Robert Gray's
8 Request for Intervention; (2) Denying Robert Gray's Motion for Extension of Time;
9 (3) Denying Robert Gray's Motion to Stay; (4) Denying Robert Gray's Motion to
10 Quash; and (5) Granting the Receiver's Motion for Orders Approving Sale of
11 Accounts, Sale of Office Equipment, Initial Distribution and Proposed Claims
12 Filings Procedures and Limited Notice Procedures, 14:10-15:26. Thus, most of the
13 remaining liabilities of the receivership estate consist of the 70% that is still due and
14 unpaid on the Approved Creditor Claims. Those claims have been vetted by the
15 Receiver and approved by the Court without objection by Gray.

16 If Gray had timely returned the FXLQ Funds to the Receiver, there would
17 have been sufficient funds to satisfy all legitimate claims in full. The only reason
18 why legitimate creditors of FXLQ have not been paid in full is because Gray has not
19 complied with the Receivership Orders. Thus, the actual loss sustained by the
20 receivership estate due to Gray's contumacy is the \$2,319,487.01 shortfall that exists
21 in the receivership estate.

22 The Receiver's motion is therefore granted. Judgment shall be entered against
23 Robert Gray in the sum of \$2,319,487.01.

24
25 Dated: November 19, 2010



CORMAC J. CARNEY

UNITED STATES DISTRICT JUDGE

28