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U.S. Commodity Futures Trading Commission v. Forex Liquidity LLC
CASE No. SACV-07-01437 CJC (RNBx)

**The Receiver's Brief Regarding Civil or Criminal Contempt Proceedings
Against Robert Gray**

Filed October 2, 2009

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 9 UNITED STATES DISTRICT COURT
 10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 11 SOUTHERN DIVISION
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13 U.S. COMMODITY FUTURES
 TRADING COMMISSION,

14 Plaintiff,

15 v.

16 FOREX LIQUIDITY LLC,

17 Defendant.
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CASE NO. SACV07-1437 CJC (RNBx)

[Honorable District Court Judge
 Cormac J. Carney]

THE RECEIVER'S BRIEF
 REGARDING CIVIL OR CRIMINAL
 CONTEMPT PROCEEDINGS
 AGAINST ROBERT GRAY

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1 Robb Evans & Associates LLC (the "Receiver"), as receiver for Forex
2 Liquidity, LLC ("FXLQ"), respectfully submits the following brief on the question
3 whether this matter should continue as a civil contempt proceeding against
4 contemnor Robert Gray ("Gray"), or whether the matter should be referred to the
5 United States Attorney for criminal prosecution.¹

6 Having given the question considerable thought, the Receiver respectfully
7 submits that the matter should continue as a civil contempt proceeding. The
8 Receiver's primary goal is to carry out the Court's orders and to recover assets that
9 belong to the receivership estate in order to satisfy the legitimate claims of creditors.
10 The Court's civil contempt order, which has already been entered against Gray, is
11 more likely to accomplish that goal than is a conviction of Gray for criminal
12 contempt. In civil contempt proceedings, "the contemnor is able to purge the
13 contempt and obtain his release by committing an affirmative act, and thus 'carries
14 the keys of his prison in his own pocket.'" *United States v. United Mine Workers*,
15 *330 U.S. 258, 305, 67 S.Ct. 677, 702, 91 L.Ed. 884 (1947)*. The coercive effect of
16 the Court's order holding Gray in contempt should be given more time to work.

17 At the hearing on September 25, 2009, Gray asserted for the first time (and
18 not under oath) that he is unable to return the money that this Court has determined
19 belongs to the estate. The mere assertion of an inability to comply is insufficient.
20 A party seeking civil contempt bears the initial burden of proving by clear and
21 convincing evidence that the alleged contemnor has violated an outstanding court
22 order. *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 970, 984 (11th Cir.
23 1991). However, once a prima facie showing of a violation has been made, the

24 _____
25 ¹ At the status conference on September 25, 2009, the Court granted requests by the
26 Receiver and by plaintiff U.S. Commodity Futures Trading Commission (the
27 "CFTC") to file briefs regarding this issue by October 2, 2009, and granted Gray
28 permission to file his brief regarding the issue by October 9, 2009.

1 burden of production shifts to the contemnor to show that he was unable to comply.
 2 *United States v. Rylander*, 460 U.S. 752, 756-757, 103 S.Ct. 1548, 75 L.Ed.2d 521
 3 (1983). In order to succeed on the inability defense, the contemnor must go beyond
 4 a mere assertion of inability and establish that he has made in good faith *all*
 5 *reasonable efforts* to meet the terms of the court order he is seeking to avoid.
 6 *Commodity Futures Trading Commission v. Wellington Precious Metals, Inc.*, 950
 7 F.2d 1525, 1529 (11th Cir. 1992); *Combs v. Ryan's Coal Company*, 785 F.2d 970,
 8 984 (11th Cir.), *cert. denied*, 479 U.S. 853, 107 S.Ct. 187, L.Ed.2d 120 (1986) ("We
 9 construe this requirement strictly. 'Even if the efforts he did make were
 10 "substantial," "diligent" or "in good faith," . . . the fact that he did not make "all
 11 reasonable efforts" establishes that [respondent] did not sufficiently rebut the . . .
 12 prima facie showing of contempt"). The Court has already determined that the
 13 Receiver carried its initial burden by clear and convincing evidence that Gray has
 14 violated the Court's orders. Gray must now carry his burden by producing
 15 *competent evidence* of inability to comply; mere unsworn assertions are not enough.

16 An inability to comply with a court order is not a defense when the person
 17 charged with contempt is responsible for the inability to comply. *United States v.*
 18 *Asay*, 614 F.2d 655, 660 (9th Cir. 1980); *Power Recovery Systems, Inc., v. Dodge*
 19 *Chemical Company*, 950 F.2d 798, 803 (1st Cir. 1991) ("Granted, a party may
 20 defend contempt and failure to comply on the grounds that compliance was
 21 impossible; self-induced inability, however, does not meet the test"); *Dystar*
 22 *Corporation v. Canto*, 1 F.Supp.2d 48, 55 (D.C. Mass. 1997). The Receiver is
 23 highly skeptical about Gray's assertion of inability to comply and believes that when
 24 his assertion is tested it will become apparent that there is no competent evidence to
 25 support it, or that Gray's alleged inability is self-inflicted. Indeed, the Receiver
 26 believes that Gray simply "deems the detriments of incarceration are outweighed by
 27 the concomitant benefits of holding onto his ill-gotten . . . monies." *See, Commodity*
 28 *Futures Trading Commission v. Wellington Precious Metals, Inc.*, 950 F.2d 1525,

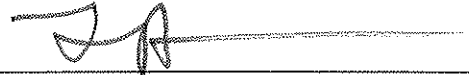
1 1531 (*supra*). It is too early to throw in the towel on civil contempt. The process
2 should be given more time to work.

3 The Receiver therefore respectfully submits that the Court should schedule a
4 full evidentiary hearing (preferably after November 6, 2009) to give Gray an
5 opportunity to carry his burden, with the understanding that the coercive effect of
6 incarceration continues to be an option if he fails to do so.

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8 Dated: October 2, 2009

FRANDZEL ROBINS BLOOM & CSATO, L.C.

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11 By:



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