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8
 9 UNITED STATES DISTRICT COURT
 10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 11 SOUTHERN DIVISION
 12

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]

REPLY MEMORANDUM OF POINTS
 AND AUTHORITIES IN SUPPORT
 OF RENEWED MOTION BY THE
 RECEIVER, ROBB EVANS &
 ASSOCIATES LLC, FOR AN ORDER
 REQUIRING ROBERT GRAY TO
 COMPENSATE THE RECEIVERSHIP
 ESTATE AND PLAINTIFF FOR
 LOSSES CAUSED BY HIS CIVIL
 CONTEMPT

Date: June 28, 2010

Time: 1:30 p.m.

Place: Courtroom 9B

1 Robb Evans & Associates LLC (the "Receiver"), as receiver for Forex
2 Liquidity, LLC ("FXLQ"), respectfully submits its reply memorandum of points and
3 authorities in support of its renewed motion for issuance of an order requiring
4 Robert Gray ("Gray") to reimburse the Receiver for the damages the receivership
5 estate has suffered due to Gray's contempt and violations of the Court's prior orders.

6 I

7 INTRODUCTION

8 After months of delay, Gray has finally retained new counsel. In the
9 opposition (the "Opposition") to the Receiver's motion, Gray and his new attorney
10 have advanced three arguments. First, Gray contends that the relief requested by the
11 Receiver is "inappropriate" because there is no "causal connection" between the
12 compensation the Receiver seeks and Gray's contempt of the Court's previous orders
13 (the "Receivership Orders"). Opposition, pp. 2-4. Second, Gray contends that this
14 Court does not have jurisdiction to make a finding of non-dischargeability.
15 Opposition, pp. 4-8. Finally, Gray asserts that there is no adequate evidentiary basis
16 for the compensation sought by the Receiver. Opposition, pp. 8-10.

17 The Opposition is an affront to the creditors of FXLQ. The Court continued
18 the hearing on the Receiver's motion for almost three months to give Gray and his
19 new attorney time to respond to the motion. Instead of coming forward with a plan
20 to compensate FXLQ's creditors, Gray simply regurgitates the same old argument
21 that he should not have been held in contempt in the first place. Astonishingly, not a
22 shred of evidence is submitted in the Opposition - - just more argument. Gray
23 continues to stonewall any effort to compensate FXLQ's creditors, although he
24 glibly confesses that he bears some blame for "his failure to keep adequate records
25 and, to put the very best face on it, his failure to adequately communicate with those
26 in authority." Opposition, 1:4-6. Short of further incarceration, which the Court
27 has apparently ruled out, the only recourse that remains is to enter judgment against
28 Gray for \$2,725,971.43 and give the Receiver the opportunity to recover what is due

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1 to the creditors of Gray's failed business.

2 II

3 A MONETARY AWARD SHOULD BE ENTERED AGAINST GRAY BASED
 4 ON HIS VIOLATION OF THE RECEIVERSHIP ORDERS

5 Gray does not dispute that civil contempt is an appropriate remedy to
 6 compensate parties pursuing contempt actions for injuries resulting from
 7 contemptuous behavior and that compensatory awards in civil contempt proceedings
 8 should cover actual losses sustained as a result of the contumacy. *United States v.*
 9 *United Mine Workers*, 330 U.S. 258, 303-304, 91 L.Ed. 884, 67 S.Ct. 677 (1947);
 10 *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1147-1148 (9th Cir. 1983). Civil
 11 contempt is therefore appropriate when the relief sought is primarily compensation
 12 for injuries suffered by the party in whose favor the injunction is issued. 11A
 13 Wright, Miller and Kane, *Federal Practice and Procedure*, §2960, p. 369 (West
 14 1995); *Quinter v. Volkswagen of America*, 676 F.2d 969, 975 (3rd Cir. 1982)
 15 (contempt proceedings in which the ultimate object is the enforcement of the rights
 16 and remedies of a litigant are civil contempts); *General Signal Corp. v. Donalco,*
 17 *Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986) (compensatory relief appropriate in civil
 18 contempt proceedings). Such relief often takes the form of a fine in the amount of
 19 the damage sustained by the moving party. *Yanish v. Barber*, 232 F.2d 939, 944 (9th
 20 Cir. 1956).

21 Gray argues, however, that a compensatory award is not appropriate here
 22 because there is no "causal connection between [Gray's] actions and the amount
 23 sought." Opposition, 3:1-3. That issue has already been decided adversely to Gray.
 24 In the contempt order (the "Contempt Order") of July 23, 2009, the Court
 25 determined, based on clear and convincing evidence, that Gray refused to turn over
 26 \$7,127,469 (the "FXLQ Funds") that belonged to FXLQ and *specifically ordered*
 27 *Gray to pay the FXLQ Funds to the Receiver.* Contempt Order, 13:11-13. The
 28 order is based on the following findings by the Court:

1 • The FXLQ funds held by Gray's San Marino company, Pro Fi, were
2 assets of FXLQ. Contempt Order, 11:16-25.

3 • Gray was the 95% owner of Pro Fi and repeatedly represented that he
4 controlled FXLQ's funds held by Pro Fi as assets of FXLQ. Contempt Order, 2:12-
5 17.

6 • Gray controlled Pro Fi when the Receivership Orders were entered.
7 Contempt Order, 12:1-11.

8 • Gray had the power to transfer the FXLQ Funds to the Receiver.
9 Contempt Order, 12:1-11.

10 • Gray failed to return the FXLQ Funds to the Receiver despite his
11 ability to do so. Contempt Order, 12:13-15.

12 • Gray evaded the Receivership Orders and the Receiver's efforts to
13 retrieve assets of the receivership estate. Contempt Order, 12:13-15.

14 • Gray refused to transfer the FXLQ Funds back to FXLQ in clear
15 violation of the Receivership Orders. Contempt Order, 2:21-24.

16 Notwithstanding these findings, Gray contends that the Receiver was required
17 to "demonstrate that there actually existed funds sufficient to cover the alleged
18 shortfall and that [Gray] could have somehow returned those funds to the
19 receivership estate as ordered by the Court," and that the evidence established that
20 "despite his every effort, [Gray] was unable to do so." Opposition Papers, 3:5-9.
21 The findings summarized above utterly refute this argument. The Court has already
22 determined that there *were* sufficient funds to cover the shortfall and that Gray *could*
23 *have returned them* to the receivership estate as required by the Receivership
24 Orders. Gray presented no competent evidence, and the Court certainly made no
25 finding, that Gray was unable to comply with the Receivership Orders "despite his
26 every effort." On the contrary, the record in this matter clearly shows that there
27 would have been more than enough money to satisfy all legitimate creditor claims if
28 Gray had simply returned the FXLQ Funds to the Receiver pursuant to the

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1 Receivership Orders. The only reason why legitimate creditors of FXLQ have not
2 been paid is because Gray refused to comply with the Court's orders.

3 In the Opposition, Gray obliquely claims that the funds the Receiver seeks are
4 "in accounts controlled by others in Panama and Romsford" and that he "has done
5 everything he can to recover those funds." Opposition, 1:24-27. Not a scintilla of
6 evidence is submitted by Gray to support these claims. Indeed, Gray does not even
7 address the point made in the moving papers that he refused to cooperate with the
8 Receiver (i.e., he refused the Receiver's request to execute a power of attorney so
9 that the Receiver could attempt to recover FXLQ's assets and he refused the
10 Receiver's request for a deposition so that he could be questioned about FXLQ's
11 assets). Moreover, it is clear that the Panama and Romsford accounts (both of
12 which were raised by Gray in prior hearings) are red herrings. The Panama and
13 Romsford accounts had nothing to do with the FXLQ Funds that should have been
14 returned to the receivership estate in compliance with the Receivership Orders.¹

15 The actual loss sustained by the receivership estate due to Gray's contumacy
16 is the \$2,725,971.43 shortfall that exists in the estate. The Receiver respectfully
17 submits that the Court should enter an order against Gray, upon which writs of
18 execution may immediately be issued, awarding the sum of \$2,725,971.43 to the
19 Receiver on behalf of the receivership estate.

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23 _____
24 ¹ The purported Panama and Romsford accounts apparently had to do with
25 money that was allegedly "social capital" of Pro Fi or money that was transferred
26 out of FXLQ *before* the receiver was appointed. Those funds (if they ever existed)
27 had nothing to do with the FXLQ Funds that were in the Pro Fi account *after* the
28 Receivership Orders were entered and which, as the Court has found, could have
been, and should have been, returned to the receivership estate.

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III

THE COURT SHOULD FIND THAT THE AWARD AGAINST GRAY ARISES
OUT OF HIS FRAUD OR DEFALCATION

As stated in the moving papers, the Receiver is concerned that if this motion is granted, Gray may try to discharge the award by simply filing another bankruptcy case. The Receiver therefore respectfully requests that the Court specifically find that the award against Gray arises out of his fraud or defalcation while he was acting in a fiduciary capacity, within the meaning of 11 U.S.C. 523(a)(4).

Gray claims that that bankruptcy court has exclusive jurisdiction to determine dischargeability of a debt under the Bankruptcy Code. Opposition Papers, 5:20-25. The Receiver is not requesting that this Court make a determination of dischargeability. The Receiver recognizes that if Gray files another bankruptcy case, the bankruptcy judge will have to decide whether the award entered against Gray pursuant to the instant motion is dischargeable. However, collateral estoppel principles would apply in those proceedings at the time the bankruptcy judge would determine whether the award was dischargeable. *In re Varrasso*, 194 B.R. 537, 538 (Bkrcty.D.Mass. 1996); *In re Himowitz*, 162 B.R. 109, 112 (Bkrcty.D.N.J. 1993). A clear expression of this Court's views regarding Gray's misconduct will help prevent the award from being discharged in bankruptcy.

The record and the Court's findings in the Contempt Order demonstrate that the award against Gray arises out of his fraud or defalcation while acting in a fiduciary capacity as an officer and member of FXLQ. A corporate officer's misappropriation of money that belongs to the corporation is a "fraud or defalcation while acting in a fiduciary capacity" within the meaning of 11 U.S.C. 523(a)(4), thereby rendering the officer's debt to the corporation nondischargeable in bankruptcy. *Matter of Moreno*, 892 F.2d 417 (5th Cir. 1990); *In re Alexander*, 166 B.R. 729 (Bkrcty.D.N.M. 1993); *In re Lawson*, 308 B.R. 417 (Bkrcty.D.Neb. 2004).

Gray's misappropriation of FXLQ'S money and his failure to return it as

1 required by the Receivership Orders clearly constitute breaches of his fiduciary
2 duties as a member and officer of FXLQ. Gray's conduct, as found by the Court, fits
3 squarely within the meaning of 11 U.S.C. 523(a)(4). His misappropriation of assets
4 that belong to FXLQ not only violates the Court's prior orders, it also violates his
5 fiduciary obligations to FXLQ.

6 The Receiver therefore respectfully submits that if this motion is granted, the
7 Court should specifically find that the award arises out of Gray's fraud or defalcation
8 while acting in a fiduciary capacity. Such a finding is necessary and appropriate so
9 that any bankruptcy judge who might be asked in the future to determine whether
10 the award should be discharged will have no doubt as to how this Court views
11 Gray's misconduct.

12 IV

13 THE REQUESTED SANCTIONS ARE SUPPORTED BY THE EVIDENCE

14 As stated in the moving papers, the Court denied the Receiver's initial motion,
15 without prejudice, indicating that the motion lacked sufficient evidence to support
16 the damages claimed by the Receiver and plaintiff U.S. Commodity Futures Trading
17 Commission (the "CFTC"), and indicating that such evidence should include a
18 balance sheet for FXLQ. The Receiver has complied with the Court's directions in
19 two respects. First, the CFTC has withdrawn its claim in the initial motion, so back-
20 up documentation regarding the claim is now moot. Second, the Receiver submitted
21 a balance sheet (the "Balance Sheet") for FXLQ as of December 31, 2009, in
22 support of its renewed motion, which describes, to the penny, the shortfall in the
23 receivership estate that would not exist but for Gray's failure to comply with the
24 Receivership Orders. The requested sanctions are therefore adequately supported by
25 the evidence.

26 Gray complains that the Balance Sheet lacks specificity. Opposition Papers,
27 9:14-20. But providing every back-up piece of paper for each entry in the Balance
28 Sheet is unnecessary and would defeat the purpose of summarizing such information

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1 in the form of a balance sheet. The current financial condition of FXLQ is not a
2 complicated matter because FXLQ is no longer an operating business. Its only asset
3 is cash in the bank of \$499,407.88. Its principal liabilities are approved creditor
4 claims that have been vetted through the claims administration procedures
5 previously approved by the Court. The only other liabilities are current expenses of
6 \$48,086.57 (which Gray does not question) and projected expenses of \$350,000 that
7 will likely be incurred in wrapping up the receivership estate.² The Balance Sheet is
8 therefore a full and complete description of FXLQ's financial condition.

9 Gray also asserts that the Balance Sheet is deficient because the declaration of
10 Brick Kane (the "Kane Declaration") does not describe "who specifically did the
11 legwork and reviewed the laundry list of document categories to determine the
12 accuracy of amounts indicated on the balance sheet" (Opposition Papers, 9:17-20),
13 and does not state the Mr. Kane "personally reviewed the underlying documents nor
14 are the underlying documents provided to the Court as evidence of the shortfall"
15 (Opposition Papers, 10:4-6). However, a witness attesting to a business record need
16 not have personal knowledge concerning the contents or creation of the record, or
17 have participated in creation of the record, or even know who recorded the
18 information. *Resolution Trust Corporation v. Easton*, 17 F.3d 1126, 1132 (8th Cir.
19 1994). Indeed, the authenticating witness need not personally attest to the accuracy
20 of the information contained in the records. *Wilson v. Zapata Offshore Company*,
21 939 F.2d 260, 272 (5th Cir. 1991). The Kane Declaration adequately authenticates

22 _____
23 ² Although Gray questions the reserve of \$350,000, he does not contend it is
24 unreasonable or explain why a reserve in that amount is not warranted. Moreover, if
25 the Court were to believe the reserve is too high, the Court could set its own reserve
26 and adjust the damages accordingly. Indeed, even if the Court were to believe that
27 none of the reserve should be part of a damage award against Gray, the Court could
28 simply deduct the Receiver's reserve of \$350,000 from the \$2,725,971.43 requested
by the Receiver and enter a judgment against Gray for \$2,375,971.43

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1 the Balance Sheet and meets the requirements of Federal Rules of Evidence, Rule
2 806. Gray's objections to the Balance Sheet should therefore be overruled.³

3 V


4 CONCLUSION

5 For the reasons described above and in the moving papers, the Receiver
6 respectfully submits that its motion should be granted. Gray should be ordered to
7 pay the sum of \$2,725,971.43 to the Receiver on behalf of the receivership estate.
8 The order should provide that writs of execution may immediately issue to enforce
9 the award. In addition, the Receiver respectfully requests that the Court enter a
10 specific finding that the awards arise out of Gray's fraud or defalcation while acting
11 in a fiduciary capacity within the meaning of 11 U.S.C. 523(a)(4).

12
13 Dated: June 14, 2010

FRANDZEL ROBINS BLOOM & CSATO, L.C.

14
15
16 By:



17 THOMAS S. ARTHUR
18 Attorneys for ROBB EVANS &
19 ASSOCIATES LLC

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21 ³ Gray's request for a continuance should also be denied. He requests the
22 opportunity to take the Receiver's deposition and to examine "all of the books and
23 records of the receivership estate, to either verify or refute the amount of damages
24 claimed. Opposition, 11:6-10. This is an open-ended ploy to delay these
25 proceedings indefinitely and to run up expenses to the estate to the further detriment
26 of the creditors. The Court has already ordered Gray to pay the FXLQ Funds to the
27 Receiver based on the Court's findings in the Contempt Order. The creditors' claims
28 have already been vetted through the claims administration process. Gray does not
question the current expenses of \$48,086.57 and the Court can make its own
assessment of the Receiver's projected expenses of \$350,000 to wrap up the
receivership estate. There is no legitimate reason for a continuance.

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