

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**UNITED STATES COMMODITY
FUTURES TRADING COMMISSION,
Plaintiff,**

v.

**IB CAPITAL FX, LLC (A/K/A IB
CAPITAL FX (NZ) LLP) D/B/A IB
CAPITAL, MICHEL GEURKINK, and
EMADE ECHADI,
Defendants.**

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CAUSE NO. A-12-CV-0862-LY

EMERGENCY MOTION TO STAY OR VACATE TURNOVER ORDER

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Nonparty ING Bank, N.V. (“ING Bank”) moves the Court to (i) stay or vacate the Court’s November 8, 2019 Order Granting Receiver’s Motion for Turnover Order and Supplemental Relief (“Turnover Order”) and (ii) enter a reasonable, expedited schedule for briefing on the Receiver’s Motion for Turnover. ING Bank makes this appearance without prejudice to and expressly without waiver of all rights and defenses, including without limitation defenses based on the lack of personal jurisdiction over ING Bank in the United States District Court for the Western District of Texas.

ARGUMENT

ING Bank requests an opportunity to more thoroughly brief the due process, foreign law, and international comity issues raised by the Turnover Order.

ING Bank first received notice of the Turnover Order by electronic mail from the Receiver at approximately 12:08 a.m. Netherlands time on November 13, 2019 (two days ago). Even though the Receiver has been in discussions with ING Bank about the status of the funds and accounts at

issue and knew that ING Bank had retained outside counsel (Allen & Overy LLP) to assist it with this matter, the Receiver obtained the Turnover Order without notice to ING Bank and without affording ING Bank an opportunity to be heard prior to the Court signing the Turnover Order. The Receiver also failed to set forth any facts establishing a basis for the Court to exercise constitutionally permissive personal jurisdiction.

Given the time difference between the Netherlands and the United States, ING Bank has had less than two days to retain counsel in Texas and respond to the Turnover Order. ING Bank respectfully submits that it should be afforded an opportunity to be heard on whether the Turnover Order relating to funds on deposit with ING Bank in accounts outside the United States is proper.

Under Rule 6(b)(1)(A), this Court may extend the time in which an act may be done “for good cause.” *See* FED. R. CIV. P. 6(B)(1)(A). ING Bank respectfully requests that the Court temporarily stay or extend the deadline for compliance with the Turnover Order and set a briefing schedule under Rule 16(a) for the parties to submit further filings to the Court to address the Turnover Order.¹ ING further requests that, in the interim, the Court exercise its inherent authority to stay or vacate the Turnover Order pending resolution of the outstanding jurisdiction and comity issues raised by this motion.

ING Bank requests that it be afforded the opportunity to brief the following arguments, without prejudice to its right to raise additional arguments:

1. The Court lacks personal jurisdiction over ING Bank. A turnover proceeding under the Texas turnover statute cannot be used to establish personal jurisdiction over a party not already amenable to personal jurisdiction. *Bollore S.A. v. Import Warehouse, Inc.*, 448 F.3d 317, 323–24 (5th Cir. 2006). Here, the Receiver articulates no basis for the Court to exercise personal

¹ The docket suggests that a number of documents were filed by the Receiver under seal in support of the Receiver’s turnover motion. ING Bank has not received copies of those materials, and respectfully requests that the Court direct the Receiver to supply copies of those sealed materials to its counsel.

jurisdiction—general or specific—over nonparty ING Bank. Since ING Bank is incorporated outside of the United States and has its principal place of business outside of the United States, ING Bank is not subject to general personal jurisdiction in any U.S. court. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). Nor has the Receiver put forward any basis upon which the Court may exercise specific personal jurisdiction over ING Bank. *See Walden v. Fiore*, 571 U.S. 277, 283–84 (2014) (holding that specific personal jurisdiction requires a link between the controversy, the party against whom relief is sought, and the forum); *see also In re Deutsche Bank Sec. Inc.*, 2015 WL 4079280, at *6, 9 (Tex. App.—Austin, July 3, 2015, orig. proceeding) (issuing writ of mandamus and concluding trial court abused its discretion by ordering foreign bank to respond to jurisdictional discovery where plaintiff provided no basis for general or specific personal jurisdiction). The Receiver should be required to advance a basis for personal jurisdiction here, and ING Bank should have an opportunity to respond.

2. The exercise of personal jurisdiction is unreasonable and offends international comity. As the Receiver acknowledges in his motion, the accounts at issue have been frozen by order of the Dutch Public Prosecutor’s Office (“DPPO”)—the national prosecutor’s office in the Netherlands—due to a pending criminal investigation of Defendants Geurkink and Echadi. *See Mot. Turnover* ¶ 7. That freezing order remains in place. *See Ex. A* (Certified Translation of DPPO’s September 11, 2012 Freezing Order).² As a result, under Dutch law, ING Bank is not authorized to transfer the frozen assets to any third parties, including the Receiver.

To ING Bank’s understanding, one of the objectives of the asset freeze effectuated by the DPPO is to preserve the frozen assets for the purpose of compensating injured persons who have suffered a loss as a result of the Defendants’ alleged conduct. To ING Bank’s understanding, however, the group of injured persons whose interests the DPPO must look after is broader than

² ING Bank has moved to file Exhibit A under seal.

the group of injured persons represented by the Receiver. This is one of the reasons why, as far as ING Bank is aware, the DPPO cannot simply lift the asset freeze and consent to transferring all funds to the Receiver.

The circumstances require the Court to weigh issues of international comity on a developed record prior to ordering any turnover. *See SEC v. Stanford Int'l Bank Ltd.*, 776 F. Supp. 2d 323, 342 (N.D. Tex. 2011) (denying receiver's discovery request and requiring receiver to pursue request through Hague Convention where complying with request would have required Swiss bank to violate Swiss law). In addition, where, as here, the interests of a foreign sovereign are at stake, the Court must "consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction," to assess whether exercising personal jurisdiction is reasonable. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 115 (1987). As the Supreme Court held in *Daimler*, in the "transnational context," expansive exercises of jurisdiction can threaten international comity, and exercising jurisdiction in those circumstances violates the "fair play and substantial justice" criterion. *Daimler*, 571 U.S. at 140–41. ING Bank will show that these considerations requiring due respect for the sovereignty of other nations apply here and weigh heavily against subjecting ING Bank to a turnover order, even if it were subject to personal jurisdiction in this Court.

3. Defendants currently do not have title to the assets subject to the Turnover Order.

The Texas turnover statute can only be used to reach the assets of the parties to the judgment. *Bollore*, 448 F.3d at 322. "A turnover order that issues against a non-party for property not subject to the control of the judgment debtor completely bypasses our system of affording due process. Otherwise, a court could simply order anyone (a bank, an insurance company, or the like) alleged to owe money to a judgment debtor to hand over cash on threat of imprisonment." *Id.* at 323–24.

The sums presently on deposit with ING Bank have ceased to be assets of Defendant IB Capital and nonparty Maverick (Venture) Capital Holding Ltd. (“Maverick”). As ING Bank will show, those companies were dissolved and stricken from the United Kingdom’s Registrar of Companies in 2013. *See* Ex. B (Notices of Dissolution and Dissolution Certificates for IB Capital and Maverick). By operation of English law, as from the moment of the companies’ dissolution, the amounts on deposit in the accounts belong to the British Crown. *See id.* (“Upon dissolution all property and rights vested in, or held in trust for, the company are deemed to be bona vacantia, and accordingly will belong to the crown.”).

The Receiver acknowledges the dissolution of IB Capital and Maverick in his motion, and notes that he has “initiated” the reinstatement process for Defendant IB Capital on October 25, 2019, even though the dissolution of IB Capital and Maverick and the resultant consequences have been public information since 2013. Mot. Turnover ¶¶ 12-13. Presumably, then, the reinstatement process is not complete, which means that under English law IB Capital currently does not have title to the funds on deposit with ING Bank. The Receiver is silent as to the whether any similar process has been started for Maverick, which is not a party to this case and which held, until its deregistration, the majority of the funds that are the subject of the Turnover Order. In this regard, the Receiver’s turnover motion was likely premature, presenting yet another issue that would benefit from full briefing.

REQUEST FOR RELIEF

For these reasons, ING Bank requests that the Court stay or vacate the Turnover Order and set a conference as soon as is convenient for the Court to discuss a reasonable, expedited briefing schedule so that ING Bank may be heard on the issues outlined above.

Dated: November 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record by way of:

- Certified Mail
- Facsimile
- Federal Express
- Hand Delivery
- E-Mail
- E-Service

on this 15th day of November, 2019.

/s/ Austin Krist
Austin Krist