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

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| **UNITED STATES COMMODITY FUTURES TRADING COMMISSION,** | § | |
| **Plaintiff,** | § | |
| | § | |
| **v.** | § | **CAUSE NO. A-12-CV-0862-LY** |
| | § | |
| **IB CAPITAL FX, LLC (A/K/A IB CAPITAL FX (NZ) LLP) D/B/A IB CAPITAL, MICHEL GEURKINK, and EMADE ECHADI,** | § | |
| **Defendants.** | § | |

**REPLY OF ING BANK, N.V. IN SUPPORT OF EMERGENCY MOTION TO STAY OR VACATE TURNOVER ORDER**

The Receiver asserts that it is proper for this Court to exercise personal jurisdiction over ING Bank, N.V. ("ING Bank")—a Dutch banking institution organized under the laws of the Netherlands and headquartered in Amsterdam—in a matter concerning funds held in accounts located in the Netherlands. Such an exercise of jurisdiction is not proper and is squarely at odds with controlling Supreme Court and Fifth Circuit authority. Such an exercise of jurisdiction also would require ING Bank to violate an order of Dutch national prosecutors and expose itself to potential criminal sanctions—a point the Receiver does not contest or address—and would therefore be unreasonable and offensive to international comity.

## I. The Court Lacks Personal Jurisdiction Over ING Bank

The Receiver "has the burden to make a prima facie showing that personal jurisdiction is proper." *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006). To meet that burden, the Receiver must show that ING Bank—a Dutch-organized and headquartered bank—"purposefully availed itself of the benefits and protections of the forum state by establishing minimum contacts with the forum state." *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 431 (5th Cir. 2014) (quotations omitted).[1] The Receiver fails to do so.

There are two types of personal jurisdiction: general and specific. The Receiver concedes that he "is asserting that the court has general jurisdiction over ING, *not specific*." Resp. [#146] at 5 (emphasis added). Thus, the Receiver must show that ING Bank is subject to general, all-purpose jurisdiction in this Court.

Under Supreme Court law, absent exceptional circumstances, a corporation is "at home," and therefore subject to general personal jurisdiction, *only* where it is incorporated or has its principal place of business. *Daimler AG. v. Bauman*, 571 U.S. 117, 127, 137 (2014). After *Daimler*, it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business." *Monkton*, 768 F.3d at 432. Virtually all post-

[1] Contrary to the Receiver's argument, Resp. [#149] at 3–5, ING Bank bears no burden of proof unless the Receiver makes a prima facie jurisdictional showing. *Luv N' Care*, 438 F.3d at 469.

*Daimler* decisions of the Fifth Circuit and the Supreme Court of Texas find that Texas courts lack general jurisdiction over foreign corporations. *See* Ex. 1 (Precedent Addendum).

In this case, there is no dispute that ING Bank is incorporated and has its principal place of business in the Netherlands—not Texas. Opp. Ex. 2 & Ex. 4. As a result of that single and dispositive fact, the Court lacks general, all-purpose jurisdiction over ING Bank. *Daimler*, 571 U.S. at 137. Indeed, plaintiffs in similar cases have repeatedly failed to plead general jurisdiction over non-U.S. banks—even if those banks have business activities in the United States. *See Monkton*, 768 F.3d at 433–34; *Jaffer v. Standard Chartered Bank*, 301 F.R.D. 256, 264–65 (N.D. Tex. 2014).

The Receiver ignores those bedrock principles of constitutional due process. Instead, the Receiver purports to identify a series of insubstantial contacts linking ING Bank to the United States generally and State of Texas more specifically. These contacts fall far short of establishing that ING Bank is subject to general jurisdiction in Texas, and what is more, many of the purported contacts identified by the Receiver are flatly contradicted by the very same documents the Receiver appends to his response:

*First*, the Receiver states that the ING Bank "maintains offices in Houston, New York and Los Angeles." Resp. [#149] at 2. This is wrong. As the Receiver's Exhibit 3 plainly shows, those are offices of ING Financial Services LLC, an indirect and separate U.S. subsidiary of ING Groep N.V. (ING Bank's parent). ING Financial Services is a Delaware organized company that provides investment management services, not banking. *See* Ex. 2; Resp. [#149] Ex. 3. And in any event, the Supreme Court has explicitly rejected the theory that foreign corporations can be subject to general jurisdiction in a U.S. court simply because they have subsidiaries or affiliates in the United States. *Daimler*, 571 U.S. at 136.

*Second*, the Receiver contends that ING's headquarters are located in Dallas, Texas. Resp. [#149] at 2. This too is wrong. The Federal Reserve Board Order (Receiver's Exhibit 2) and the Texas Secretary of State Registry (Receiver's Exhibit 4) clearly reflect that ING Bank is a Dutch national bank headquartered in Amsterdam, the Netherlands.

*Third*, the Receiver makes the naked assertion that ING Bank "has availed itself of the right to conduct banking operations in this state both through the Federal Reserve Board and the Texas Banking Department." Resp. [#149] at 7. This also is wrong. The Receiver's Exhibit 3 plainly states that "ING Bank does not have a banking license in the US and is therefore not permitted conduct banking activities in the US." This is confirmed by the Federal Reserve Board Order, which states that a representative office may not engage in any banking activity. Resp. [#149] Ex. 2 at 2 n.2. And in any event, the mere presence of a representative office in Texas does not give rise to general jurisdiction over ING Bank in the courts of Texas. *See Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014) (Chinese bank not subject to general personal jurisdiction due to presence of branch offices in the forum). Nor does the designation of an agent for service of process suffice. *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1318 (11th Cir. 2018); *Leonard v. USA Petrol. Corp.*, 829 F. Supp. 882, 888-89 (S.D. Tex. 1993).

At bottom, the Receiver seeks to establish general jurisdiction by (incorrectly) cobbling together a set of general ING-related contacts in the forum. As the Supreme Court bluntly stated in *Daimler*, "[t]hat formulation, we hold, is unacceptably grasping." 571 U.S. at 138. Moreover, this matter does not amount to an "exceptional case" justifying a departure from *Daimler*'s black-letter approach to general jurisdiction. 571 U.S. at 139 n.19. As a "textbook" example of such an "exceptional case," the Supreme Court cited a case involving the temporary relocation of a Philippines company to Ohio due to Japan's wartime occupation of the Philippines. *Id.* at 128–30, 139 n.19. Under those exigent circumstances resulting from war, Ohio was the company's "principal, if temporary, place of business," and therefore, "a surrogate for the place of incorporation or head office." *Id.* at 130 & n.8. There is nothing remotely comparable alleged here.

The Receiver secondarily seeks to rely on the nationwide service of process provision of the Commodity Exchange Act (CEA). That is also incorrect. Courts have been clear that civil claims under the CEA do not apply extraterritorially. *See Prime Int'l Trading, Ltd. v. BP plc*, 937 F.3d 94, 105 (2d Cir. 2019); *Loginovskaya v. Batratchenko*, 764 F.3d 266, 272–74 (2d Cir.

2014). Here, there is no dispute that ING Bank's only connection to this matter is the passive receipt of funds into IB Capital bank accounts maintained in the Netherlands. *See* Consent Order for Permanent Injunction (Oct. 14, 2016) [#24] at ¶ 23; Decl. of Kyong J. Koh (CFTC) (Nov. 17, 2015) [#7] at ¶ 13. Because any conduct attributed to ING Bank occurred outside the United States,[2] the Receiver cannot rely on the provisions of the CEA.

## II. Exercising Jurisdiction Would Be Unreasonable And Offend International Comity

The Court should also decline to exercise personal jurisdiction over ING Bank because the exercise of jurisdiction would be unreasonable given the competing interests of a foreign sovereign. In these circumstances, the Court must "consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction," and exercise "[g]reat care and reserve" in assessing whether exercising personal jurisdiction is reasonable. *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 115 (1987).

As the CFTC and Receiver acknowledge, the accounts at issue have been frozen in the Netherlands by order of the DPPO due to a pending criminal investigation of Defendants Geurkink and Echadi. *See* Mot. Turnover ¶ 7; Ex. 3 (Relief Complaint) ¶¶ 4–6. As a result, under Dutch law, ING Bank is not authorized to transfer the frozen assets to the Receiver, and if it did so, it would face criminal sanctions in the Netherlands. Ex. 4 (Bauduin Decl.) at 4. ING Bank should not be burdened with defending itself in this Court given the clear directives from Dutch prosecutors and the potential criminal consequences that could follow from noncompliance with those directives. Those facts should have "significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114. The Receiver offers no response to this argument.

[2] The Receiver refers to the September 2018 settlement with the Dutch authorities concerning "Know Your Customer" rules, claiming without basis that ING Bank knew its alleged conduct "would be felt around the world." Resp. [#149] at 4. The Dutch proceedings, however, focused on the activities of ING Bank's domestic branch in the Netherlands. In addition, as publicly announced on September 4, 2018, the U.S. Securities and Exchange Commission—which also had been investigating similar conduct—notified ING Groep N.V. (ING Bank's parent) that it did not intend to recommend any enforcement action. *See* Ex. 5 (Sept. 5, 2018 Press Release).

The Court also should decline jurisdiction for international comity reasons. This Court should not put ING Bank in the position of having to violate an order of another sovereign in order to comply with the Turnover Order. *See Daimler*, 571 U.S. at 140–41 (observing that in the "transnational context," expansive exercises of jurisdiction can threaten international comity); *SEC v. Stanford Int'l Bank Ltd.*, 776 F. Supp. 2d 323, 342 (N.D. Tex. 2011) (denying receiver's discovery request where complying with request would have required Swiss bank to violate Swiss law). The Receiver does not respond to this argument, either. The Court should therefore decline to exercise jurisdiction even if the Court determines that jurisdiction exists.

## III. The Texas Turnover Statute Does Not Apply To The Accounts At Issue Because, At Present, The Funds On Deposit Currently Belong To The British Crown

As the CFTC and Receiver acknowledge, under English law, both IB Capital and Maverick have been dissolved and must be restored to the United Kingdom's Registrar of Companies ("ROC") before any release of the funds on deposit with ING Bank can occur. Ex. 3 (Relief Complaint) ¶¶ 10-11, 13. Thus, even if the Court had jurisdiction over ING Bank, there would be no basis for a Turnover Order against ING Bank unless and until the Receiver restores IB Capital and Maverick to the ROC.[3] *See Bollore*, 448 F.3d at 323–24. The Receiver had sufficient notice of these issues years ago, Mot. Stay Ex. B [#143-3], and his delay in addressing them should not be held against ING Bank.

## REQUEST FOR RELIEF

For all of these reasons, the Court should stay or vacate the Turnover Order.

[3] The Receiver argues that the Court can ignore these facts based on *SEC v. Faulkner*, 2018 WL 4382729 (N.D. Tex. Sept. 12, 2018), which he says has "strikingly similar facts" to this case. Resp. [#149] at 9. In *Faulkner*, the court granted in part a receiver's motion to include in the receivership estate the assets of any non-party entity that was (i) controlled by the defendant ***and*** (ii) in possession of assets traceable to the defrauded investors. *Id.* at *5. Unless the Receiver is suggesting that the Defendants control the British Crown, *Faulkner* has no relevance here.

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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 2nd day of December, 2019.

/s/ Austin Krist
Austin Krist