

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re

CASE NO. 9:08-bk-04360-MGW

ULRICH FELIX ANTON ENGLER,
PRIVATE COMMERCIAL OFFICE, INC.,
and PCO CLIENT MANAGEMENT, INC.,

CHAPTER 7
(Substantively Consolidated)

Debtors.

**NOTICE OF FILING IN SUPPORT OF
TRUSTEE'S MOTION FOR TURNOVER (Doc. 1119)**

NOTICE IS HEREBY GIVEN that ROBERT E. TARDIF, JR. (the "Trustee"), as Chapter 7 Trustee of the substantively consolidated bankruptcy estate of Ulrich Felix Anton Engler, Private Commercial Office, Inc., and PCO Client Management, Inc. (collectively, the "Debtors"), by and through undersigned counsel, has filed a true and correct copy of the attached decision of the German Karlsruhe Higher Regional Court 3rd Criminal Division in support of his Motion for Turnover (concerning Bianca Borowski's \$645,000.00 account balance in Commerzbank AG account number XXXXXX1600) (Doc. 1119).

Respectfully submitted,

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By: /s/ Robert F. Elgidely

Robert F. Elgidely, Esq.
Florida Bar No. 111856

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Notice Of Filing In Support Of Trustee's Motion for Turnover (Doc. 1119)* has been furnished to all creditors and/or interested parties registered on the Court's CM/ECF System, was posted on the website "englerbk.com" in accordance with the Order Granting Trustee's Motion To Establish Certain Notice, Case Management And Administrative Procedures (Doc. 451), and was forwarded by electronic mail to Curtis C. Mechling, Esq. (cmechling@stroock.com), 180 Maiden Lane, New York, NY 10038; Christina Spiller, Esq. and Michael Fruchter, Esq. (Christina.Spiller@commerzbank.com and Michael.Fruchter@commerzbank.com), Commerzbank AG, 225 Liberty Street, New York, NY 10281-1050; Ms. Bianca Borowski, Landsberger Allee 164 10369 Berlin; and German Prosecutor, Ms. Yvonne Durban (Yvonne.Durban@StAMannheim.Justiz.bwl.de), Staatsanwältin, Staatsanwaltschaft Mannheim, L 10, 11-12, 68149 Mannheim, on September 4, 2015.

By: /s/ Robert F. Elgidely
Robert F. Elgidely, Esq.

ATTACHMENT

Official copy

KARLSRUHE HIGHER REGIONAL COURT
[*OBERLANDESGERICHT*]
3rd Criminal Division

3 Ws 327/13
24 KLS 635 Js 29088/12
Ak 7/12

Criminal proceedings against
Ulrich Felix Anton Engler
of Andelfingen
for fraud

re: Immediate appeal [*sofortige Beschwerde*] against
refusal to order compulsory execution in
accordance with section 111g (2) StPO

Decision of 27 November 2013

The immediate appeal against the decision of Mannheim Regional Court, 4th Economic Crimes Division, of 27 June 2013 is rejected as unfounded, with costs.

Grounds:

I.

1. On 4 March 2013, Mannheim Regional Court [*Landgericht*] sentenced Ulrich Felix Anton Engler to a term of imprisonment of eight years and six months for offences including capital investment fraud. The Court found that the convicted defendant had received fraudulently acquired investment funds totalling at least USD 32,466,721.54, paid by the injured parties into accounts held by the investment companies Private Commercial Office Inc. (hereinafter referred to as PCO Inc.) and PCO Client Management Inc. operated by him in Florida. The Regional Court also found that during the period between December 2006 to April 2007, the convicted defendant had wrongfully transferred EUR 474,152.83 from the said PCO Inc. account to an account held with Commerzbank AG (formerly Dresdner Bank AG) by the secondary party, his partner. The Regional Court did not make a confiscation order against the convicted defendant or secondary party in respect of opposing claims of aggrieved parties. The judgment is final and absolute.

By decision of 4 May 2010, Mannheim Local Court [*Amtsgericht*] ordered that, in order to protect the civil claims of the aggrieved parties arising from the offences committed by the defendant, the full amount of the secondary party's claim arising from the Commerzbank AG account be seized in accordance with section 111b (1) and 5 StPO, section 73 (1) sentence 2, and (3) of the German Criminal Procedural Code [*Strafprozessordnung*, StPO], and in a further decision dated 18 May 2010 ordered that such seizure be effected by attachment in accordance with section 111c (3) StPO. By decision of 5 March 2013, the Regional Court ordered that the

seizure effected pursuant to the decision of 4 May 2010 be maintained in accordance with section 111i (3) StPO up to the amount of EUR 474,152.83 for a period of three years.

2. By decision of 29 April 2008, the US Bankruptcy Court, Middle District of Florida, Ft. Myers Division commenced insolvency proceedings against the convicted defendant and the company PCO Inc. operated by him; on 24 June 2008 the court ordered that the two insolvency estates be consolidated. In 2010, the assets of the company PCO Client Management Inc. were also consolidated with retroactive effect to produce a joint insolvency estate for the convicted defendant and the two firms operated by him. The Applicant was appointed as insolvency administrator/trustee.

3. By letter dated 15 January 2013, the Appellant, insolvency administrator R. E. Tardif Jr., applied for authorisation of compulsory enforcement in accordance with section 111g (2) StPO in respect of the attached claim of the secondary party. The Regional Court rejected this application by decision of 27 June 2013. The Court found that the Appellant had not demonstrated to its satisfaction that he was an aggrieved party within the meaning of section 111g (1) and (2) StPO and had a claim supported by enforceable title against the secondary party. The immediate appeal is directed against this decision. The Appellant founds his appeal on the precedence of insolvency law over securing of property [under criminal law], from which he derives a claim to bring an application within the meaning of section 111g (2) StPO. As insolvency administrator to the convicted defendant and his companies, he argues that represents the interests of all aggrieved parties who, because insolvency law takes precedence, were required to file their claims with the insolvency estate and who are denied access to compulsory enforcement. The Appellant also claims to be an “aggrieved party” in the narrower sense, within the meaning of section 111g (1) and (2) StPO, as he is also insolvency administrator to PCO Inc., which company suffered a loss as a result of the wrongful transfer of funds from the company account to the attached account of the secondary party. On 30 September 2010 the Appellant obtained a default judgment against the secondary party in respect of the attached sum from the US Bankruptcy Court, Middle District of Florida, Tampa Division and also reached a settlement with the secondary party whereby the secondary party agreed that the attached claim would be transferred to the insolvency estate in exchange for which interest would be waived.

The secondary party was given an opportunity to re-state her position. She supports the Appellant’s application. The public prosecutor’s office did not oppose the Appellant’s application for authorisation [of compulsory enforcement], making reference to the precedence of insolvency law over securing of property under criminal law in the context of the appeal proceedings.

II.

The appeal is admissible but is rejected on the merits.

1. The immediate appeal is admissible in accordance with section 111g (2) sentence 2 StPO. It was submitted on 11 July 2013 in due form and in particular in due time. The Regional Court decision of 27 June 2013 under appeal was communicated to the Applicant “for information” only by order of the President dated 28 June 2013; no intention to serve the decision is discernible. The one-week time limit laid down in section 311 (2) StPO thus did not begin to run (section 35 (2) sentence 1 StPO).

2. The Regional Court rightly rejected the application for authorisation of compulsory enforcement on the merits in accordance with section 111g (2) StPO.

a) In proceedings for authorisation of compulsory enforcement in accordance with section 111g StPO in respect of an asset attached in accordance with section 111b et seq. StPO, the only question to be examined is whether the enforceable claim arose from the criminal offence and whether the seizure/attachment was effected on account of it, and whether by virtue of section 111g StPO the creditor belongs to the privileged group of parties aggrieved as a result of the offence at issue (decision of this court of 8 December 2003 – 3 Ws 108/03, *Justiz* [journal] 2004, 521 [headnote]). Neither requirement is satisfied in the case under consideration.

aa) The Appellant's claim does not stem from the criminal offences on the basis of which the seizure in respect of the secondary party was effected. The Appellant relies on the default judgment of 30 September 2010 against the secondary party obtained by it from the US Bankruptcy Court, Middle District of Florida, Tampa Division. This judgment is founded on a successful challenge against the wrongful payments to the secondary party. In addition, the Appellant argues that the criminal offence on which the Appellant's claim is based was a theft under Florida law to the detriment PCO Inc., because the convicted defendant wrongfully transferred monies from the PCO Inc. company account to the secondary party's account.

The criminal offence on which the Appellant founds his application for authorisation [of compulsory enforcement] is not the object of the seizure of 4 May 2010, the attachment order of 18 May 2010, the judgment of 4 March 2013 or the decision of 5 March 2013 maintaining the seizure for a period of three years. The only offences underlying these measures to secure property were those which disadvantaged the investors. The recovery measures were not founded on the criminal offence committed by the convicted defendant to the detriment of PCO Inc. on which the Appellant's default judgment was based, nor was the defendant convicted for such offence. Insofar as the actual circumstances of the transfer of assets was outlined in the aforementioned decisions, this was done for the sole purpose of justifying application of section 73 (3) StGB without the transfer of assets itself becoming an offence establishing grounds for seizure (re transfers as a group of cases under section 73 (3) StGB cf. BGHSt [collection of criminal judgments of the Federal Court of Justice] 45, 235).

bb) The Appellant is moreover not an aggrieved party within the meaning of section 111g (1) and (2) StPO. In this respect the Court can leave open the question of whether the insolvency administrator of an aggrieved party is permitted to make an application in accordance with section 111g (2) StPO (OLG Celle, NJW [journal *Neue Juristische Wochenschrift*] 2007, 3795; KK–Spillecke, StPO [Spillecke, *Karlsruher Kommentar* legal commentary], 7th edn, marginal No. 2 re section 111g; alternative view OLG Frankfurt am Main, NStZ-RR [*Neue Zeitschrift für Strafrecht* legal journey] 2006, 342; Meyer-Goßner, StPO, 56th edn, marginal No 2 re section 111g). In any case, as insolvency administrator to the convicted defendant, the Appellant is not an aggrieved party within the meaning of section 111g StPO. Rather, as insolvency administrator to the convicted defendant, the Appellant does not represent the assets of a party aggrieved as a result of the offence, but the assets that ultimately benefited from the offence.

The fact that the Appellant is also insolvency administrator for PCO Inc. does not alter this. While the Appellant has demonstrated to the satisfaction of the court that PCO Inc. is the victim of a criminal offence committed to its disadvantage, specifically a theft under Florida law by way of transfer of assets, consideration of the insolvency administration of PCO Inc. in such

isolated fashion is out of the question here, given that the US Bankruptcy Court, Middle District of Florida, Ft. Myers Division, opened insolvency proceedings against the convicted defendant and the company operated by him, PCO Inc., together on 29 April 2008 and then in a further decision dated 24 June 2008 ordered the two insolvency estates to be consolidated, whereby the insolvency proceedings relate to the assets of the convicted defendant.

Even if the transfer of assets effected to the detriment of PCO Inc. were to be considered in isolation, the Appellant cannot be considered to be an aggrieved party in respect of the criminal offences on which the seizure was founded. A party aggrieved as a result of a – further – offence committed by the convicted defendant is not an aggrieved party authorised to make an application within the meaning of section 111g (1) and 2 StPO if the protective measure was not effected for his benefit because the criminal proceedings and protective measures were based on other criminal offences committed by the convicted defendant. This was the case here (see II.2.a.aa).

b) The principle of precedence of insolvency law does not alter this outcome here. As argued by the Appellant, seizure under insolvency law must indeed take priority over the securing of property under criminal law (Nürnberg Higher Regional Court, NZI [journal *Neue Zeitschrift für das Recht der Insolvenz und Sanierung* 2013, 552; Saarbrücken Regional Court, NSZ-RR 2004, 274; detailed discussion Hansen, *Die Rückgewinnungshilfe* [Securing of Property under Criminal Law], 2013, p. 193 ff.). In this respect compulsory enforcement on behalf of individual insolvency creditors (section 89 (1) InsO) from the assets of the insolvency debtor is prohibited, which prohibition may – depending on the situation – also result in ineffectiveness of (individual) compulsory enforcement measures in the context of securing of property under criminal law (section 80 (2) sentence 1 InsO). However, the priority of insolvency law can extend no further than the insolvency stay itself. In the case at hand, it is the convicted defendant and the companies operated by him that are insolvent, and not the secondary party. Thus the insolvency stay covers only the assets, belonging to the insolvency estate and otherwise, of the convicted defendant and the companies PCO Inc. and PCO Client Management Inc. operated by him (cf. MüKo-InsO [“*Münchener Kommentar*” InsO commentary] /Breuer, 2nd edn, marginal No. 18 re section 89). This includes the Appellant’s claim against the secondary party – enforceable as a result of the default judgment and forming part of the insolvency estate, but not the secondary party’s claim against Commerzbank AG, which is subject to protective measures and the securing of property under criminal law. The assets of the secondary party – who is not an insolvency debtor herself – are not subject to prohibition of enforcement under insolvency law simply because the secondary party is subject to a claim from the insolvency debtor which does belong to the insolvency estate. Contrary to the view taken by the Applicant, compulsory enforcement on behalf of individual aggrieved parties from the secured claim of the secondary party would not be ineffective here.

To the extent that the Applicant argues that under US insolvency law, the secondary party’s secured claim is also part of the insolvency estate of the convicted defendant and his companies (§ 541 (a) US Bankruptcy Code), the court assumes for systematic reasons that that only the insolvency debtor’s claim against the secondary party, but not the secondary party’s claim against a third party, Commerzbank AG in this instance, can be part of the insolvency estate. Ultimately, however, no decision in this regard is required here. If the automatic stay under US and international insolvency law extended to the secured claim of the secondary party, instead of allowing the Applicant’s request for compulsory enforcement in accordance with section 111g StPO, the court would be required to set aside the seizure and attachment of the claim entirely. This is because there would no longer be room for a protective measure ordered for

the purpose of securing property under criminal law and the associated privileged position if that protective measure could no longer fulfil its role as a “placeholder” for the claims of aggrieved parties by reason of the precedence of insolvency law (Nürnberg Higher Regional Court, NZI 2013, 552; Saarbrücken Regional Court, NStZ-RR 2004, 274).

III.

The order for costs is based on section 473 (1) StPO.

Schwab
Presiding Judge
at the Higher Regional Court

Münkel
Higher Regional Court
Judge

Dr. Klein
Local Court
Judge

Issued
Stratmanns, Court Clerk
as Court Registrar